

Does Your Vote Really Count?

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Introduction

Does a candidate in any Virginia congressional or state legislative district have an unfair advantage because of the way the district lines are drawn? Do district boundaries treat a portion of the voters unfairly? Is there a better way to accomplish redistricting in Virginia?

This is the first of a two-part study to review the current LWVVA positions on reapportionment and redistricting. This paper provides background information and a history of legal challenges associated with the topic. The second part will lead to a consensus of what if any position changes should be made.

More than two centuries ago, when asked what kind of government had just been created during the 1787 Constitutional Convention, Benjamin Franklin replied, "A republic, if you can keep it!" The founding fathers meant to strike a balance between the credo of the Declaration of Independence (power of the people) and the restraining tendencies of a representative government (republic) established by the Constitution and its later amendments. Key to their deliberations was the question of representation.¹

Suffrage is elementary to representation. The states initially determined who was eligible to vote. Changes evolved over many generations. When the first Virginia state constitution was written in 1776, only wealthy male landowners could vote. Male freeholders then followed.² The Fifteenth Amendment in 1870 granted the vote to black men while the Nineteenth Amendment in 1920 gave the vote to women.

"Something has changed. Voter preferences are becoming more and more predictable. There is a problem when the turnover in the United States House of Representatives is lower than it was in the Soviet Politburo."

Nathaniel Persily, an election law expert at the University of Pennsylvania Law School, quoted in a February 7, 2005, *New York Times* article by Adam Nagourney

Redistricting is currently the hot topic in the area of suffrage in the United States, helped along by the publicity generated by Governor Arnold Schwarzenegger, who asked, "What kind of a democracy is that?" when apprised of the lack of competitiveness in California's 2000 election for all congressional and state representatives.³ Considerable attention was generated by the 2003 Texas redistricting that

resulted in the creation of new Republican seats in Congress by pairing Democratic incumbents in the newly created districts, thus eliminating half of them from contention. The nationwide lack of competitive districts and resulting low turnover in recent congressional elections suggest possible flaws in the redistricting process.

Reapportionment versus Redistricting

Both reapportionment and redistricting affect the design of political subdivisions. Reapportionment addresses the population of each political district. For example, the Virginia House of Delegates consists of 100 districts and each district should contain approximately the same population. Therefore, the population of Virginia is divided by 100 to determine the average population of each delegate district. Likewise, the Virginia Senate has 40 seats so the total population is divided by 40 to determine the average population per senate district.

Redistricting is the act of determining the boundaries of each political district. This is a very partisan political process in nearly every state and local jurisdiction because elected officials approve the redistricting plans following each decennial census. The current Code of Virginia stipulates that the General Assembly has the power to redistrict at all levels—United States, state, and local. Although numerous bills to amend the redistricting process have been introduced in the Virginia legislature, none has passed.

According to the Constitution of Virginia, Article II, Section 6, members of the U.S. House of Representatives and the Virginia Senate and House of Delegates "shall be elected from electoral districts established by the General Assembly. *Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. [italics added]* The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 [per 2004 revision] and every ten years thereafter."

Voters in 2004 approved a revision of Article II of the Constitution so that "a member in office at the time that a decennial redistricting law is enacted shall complete his term of office and shall continue to represent the district from which he was elected for the duration of such term of office" so long as he resides in the original district. The previous wording of this section resulted in the anomaly of the 39th Senate District and its incumbent representing rural southwest

Virginia being transplanted to Northern Virginia in 2001 following reapportionment and redistricting. This gave Senator Madison Marye an entirely new Northern Virginia constituency. After a year, Senator Marye resigned his office and a special election was held in the new Northern Virginia district. Another similar situation was that of Senator Emily Couric of the 25th Senate District.

The Code of Virginia, §30-263, establishes the Joint Reapportionment Committee in the legislative branch, consisting of five members of the Committee on Privileges and Elections of the House of Delegates and three members of the Committee on Privileges and Elections of the Senate, appointed by the committee chairmen. The purpose of the Joint Committee is to supervise activities required for the tabulation of population for the census and the timely reception of precinct population data for reapportionment, “and (to) perform such other duties and responsibilities and exercise such supervision as may promote the orderly redistricting of congressional, state legislative, and local election districts.” In effect, the Joint Committee submits to the House and Senate for approval redistricting plans it supports. Therefore, the majority party, in effect, draws the new political district boundaries.

The Supreme Court’s Role in Redistricting

For more than a century after adoption of the Constitution, Congress and the courts paid little attention to reapportionment and redistricting. The major concerns of Congress with regard to congressional representation were the size of the House of Representatives and the method of allocating seats. Although Congress enacted a few laws on reapportionment during this period, little attention was paid to their enforcement and most were eventually dropped. Decisions on how to draw lines for congressional and state legislative districts were generally left to the states.

In the absence of congressional or judicial oversight, many states did not bother to redistrict to reflect changes in population. This resulted in glaring population deviations in both congressional districts and state legislative districts. A 1960 National Municipal League survey found that in every legislative house in every state, the largest district contained more than twice as many people as the smallest district.⁴ Typically, rural districts were over-represented and urban districts were under-represented.

The United States Supreme Court (the Court) was reluctant to intervene in what it considered a matter best left to political remedies. As late as 1946, the Court decided to stay out of what Justice Frankfurter called the “political thicket” (*Colegrove v. Greene*). The Illinois legislature had failed for more than a generation to revise its congressional districts to reflect great changes in the distribution of its population. In

its decision in the case, the Court stated that the Constitution conferred upon Congress exclusive authority to secure fair representation and decided that the issue was of “a peculiarly political nature and therefore not meet for judicial determination.”

The Court Steps In

The hands-off stance of the Court ended in 1962 with its ruling in *Baker v. Carr* that the federal courts had the power to review the apportionment of state legislatures—that apportionment challenges were *justiciable* (capable of being decided by legal principles or by a court of justice) in the federal courts under the equal protection clause of the Fourteenth Amendment. This decision was followed in 1964 by a decision that “as nearly as practicable, one man’s vote in a congressional election is to be worth as much as another’s.” (*Westberry v. Sanders*). Shortly after, in *Reynolds v. Sims*, the Court applied the “one person, one vote” standard to state legislative bodies.

The Court's redistricting decisions of the 1960s generated heated opposition and resulted in attempts to enact the Dirksen amendment to the Constitution, which would have allowed one house of each state legislature to be apportioned on factors other than population. The League was one of the groups opposing the amendment which, after nearly achieving success, eventually lost support.

Over the next several decades, the Court moved toward a strict mathematical equality for congressional districts, while allowing a bit more leeway for state legislative districts. Probably one of the largest state district population deviations allowed by the Court came in a Virginia case decided in 1973. In *Mahan v. Howell*, it found that a 16.4 percent deviation between the largest and smallest of Virginia House of Delegates districts was constitutional since it did not have to meet the more stringent congressional standards and since deviations from the equal population principle were valid if based on considerations of a “rational state policy.” In this instance, Virginia’s consideration was respect for political subdivision boundaries.

In 1983, the Court in *Karcher v. Daggett* struck down a congressional districting plan having a disparity of less than 0.7 percent. The Court said that district plans with even small population deviations could be challenged if any other plan with smaller deviations had been proposed, unless the state could show that the larger deviations were necessary to achieve some legitimate state interest. Since that decision, and probably helped along by modern computers, more than half of the congressional plans drawn during the 1990s had an overall deviation that rounded to 0.0 percent.⁵

The Court now interprets the equal protection clause of the Fourteenth Amendment to require state legislative districts that are *substantially* equal in population. In a 1993 decision, it held that a plan with an overall deviation of less than 10 percent is “prima facie” valid (*Voinovich v. Quilter*). In a paper prepared by Mary Spain, senior attorney in the Virginia Division of Legislative Services, prior to the 2001 redistricting, she states that “case law suggests that state legislatures should draw state legislative district plans with the goal of substantial population equality among districts and a less than +5 percent to –5 percent deviation range.”⁶ However, there is no “magic number”—no allowable percentage deviation—which will protect a redistricting plan from legal challenge. The National Conference of State Legislatures (NCSL), in its publication, “Redistricting Law 2000,” stated:

“States should not assume that any legislative districting plan having less than a 10 percent overall range is safe from successful challenge. Even if the Court is prepared to allow the states some leeway from redistricting perfection, now that the basic law of population equity is well established, it is unlikely that the justices would be unduly hesitant to strike down a plan having an overall range of less than 10 percent if a challenger were to succeed in raising a suspicion that the plan was not a good faith effort overall or that there was something suspect about the districts involved.”⁷

The Rise of “Traditional Districting Principles”

Some recent cases have proven the NCSL point, usually when the redistricting plan has not taken account of what have come to be described as “legitimate districting principles.” As early as the 1983 *Karcher v. Daggett* case, the Court had indicated that a number of consistently applied legislative policies might justify some variances in population between congressional districts, including avoiding a contest between incumbents.⁸ In case law since the 1993 decision in *Shaw v. Reno*, the existence of a number of traditional redistricting criteria has been further recognized, and states need to show that racial considerations in developing a districting plan did not predominate and that real consideration was given to other criteria. In the North Carolina *Shaw v. Reno* case, the Court observed that the redistricting plan in question was racially neutral on its face, but so bizarre that it was unexplainable on grounds other than race.⁹ Several years later, in *Bush v. Vera* (1996), Justice O’Connor’s advice to states referred several times to “traditional districting criteria.”

In her paper prepared for the Virginia General Assembly in December 2000, Mary Spain reported: “*Courts have recognized a number of traditional criteria: population equality; compactness; contiguity; avoiding splits of political subdivisions and precincts; preserving communities of*

interest; preserving the basic shape of existing districts; protecting incumbents and avoiding the pairing of incumbents; political fairness or competitiveness; and voter convenience and effective administration of elections.”¹⁰

“If you drove down the interstate with both car doors open, you’d kill most of the people in the district.”

From Justice Sandra Day O’Connor’s written opinion in the *Shaw v. Reno* case (N. Carolina)

Current Hot Issues in Redistricting

Two other redistricting issues have evolved and generated extensive publicity during the past several years: redistricting more than once a decade and political gerrymandering.

How often should lines be changed? There have been several cases addressing the question of whether states could adopt more than one redistricting plan during a decade. The situation has arisen when the party in power in a state legislature changes after the decennial redistricting has occurred, and the new majority adopts a revised plan favoring the election of additional congressional and state representatives from its party. In 2004, the Court declined to review a Colorado Supreme Court decision that overturned a post-2002 legislative redistricting plan.

However, the Court returned to the lower court for further consideration a challenge to the highly publicized and infamous Texas 2003 congressional redistricting plan that was enacted after the Republicans took control of that state’s legislature. In this case, *Sessions v. Perry*, the remand to the lower court was not specifically directed at the “more than once a decade” question. Rather, it asked the lower court to reconsider the case in view of its ruling in *Vieth v. Jubelirer* (see below). In June 2005, the lower court again rejected the constitutional challenge to the Texas district map—a step that is most likely to send the case back to the Supreme Court. Regardless of the Texas legal action, the language of the Virginia Constitution clearly requires the General Assembly to adopt only one redistricting plan in each ten-year period.

Partisan Political Gerrymandering. A 1986 Court decision in an Indiana case, *Davis v. Bandemer*, opened the door for the first time to challenges of redistricting plans because they reflected political gerrymandering. Justice Byron White, writing for the Court, stated that a redistricting scheme could be unconstitutional if it caused “continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.” However, for more than a decade thereafter, no legislative redistricting plan challenged on this basis was

overturned because the lower courts required challengers to meet difficult or impossible burdens of proof. However, opponents of political gerrymandering hoped to overcome these obstacles and take advantage of the *Davis v. Bandemer* decision when they challenged the Pennsylvania congressional plan that was adopted after the 2000 census and reapportionment caused the state to lose two districts.

The questions presented in the Pennsylvania case, *Vieth v. Jubelirer*, were whether (a) voters affiliated with a political party can sue to block implementation of a congressional redistricting plan by claiming that it was manipulated for purely political reasons; (b) the state violated the equal protection clause by disregarding neutral redistricting principles in order to achieve an advantage for one political party; and (c) the state exceeded its power under Article I of the Constitution by drawing districts to ensure that a minority party will consistently win a super majority of the congressional seats. In its April 2004 decision, the Court decided not to intervene because it said that no appropriate judicial solution could be found. Justice Scalia, for a four-member plurality, wrote that the Court should declare all claims relating to political gerrymandering *nonjusticiable*. In effect, they would overrule *Davis v. Bandemer*, believing that no judicially discernible and manageable standards for adjudicating claims of political gerrymandering exist. Although he concurred with the decision, Justice Kennedy said that the Court should rule narrowly in the case; although no appropriate judicial solution could be found in this specific case, it should not give up on finding one eventually. The dissenters in the case proposed different standards for adjudicating political gerrymandering claims, and Justice Breyer suggested that their proposals could serve to stimulate further discussion that might result in a majority agreeing on a standard in some future case.^{11, 12}

The term “gerrymander” dates back to 1812 when Massachusetts Governor Elbridge Gerry had a hand in the Massachusetts legislature’s redrawing of legislative district lines. The redistricting benefited the Jeffersonian Republican Party candidates. Reporters noted that the new district looked like a salamander; one retorted that the district really looked like a “gerrymander,” a term that stuck.

Effects of Gerrymandering on Elections

The impact of gerrymandering during redistricting can be measured in several ways. One popular measure is the number of competitive seats. A competitive or *marginal* seat is typically considered as one decided within a 55 to 45 percent

margin of the vote.¹³ The average number of marginal House seats has continued to decline since David Mayhew published his work on the “vanishing marginals” in 1974. During the following 25 years, the average marginal rate fell to a historically low 58 (just 13 percent of all House seats). In 2004, the number dropped even further, down to 27 marginal races, or 6 percent of House seats.¹⁴

One result of partisan gerrymandering is that elections are effectively determined during the primary season because the minority party rarely can mount a serious challenge against such a strong numerical partisan situation in the general election.

Incumbency advantage is a well-established political reality. Yet, recent redistricting has raised the art of incumbency protection to new highs (or lows, if you believe in contested elections). As Thomas Mann notes, the 2002 general elections set a new record, with only four House incumbents losing to challengers.¹⁵ By 2004, only seven House incumbents lost to challengers.

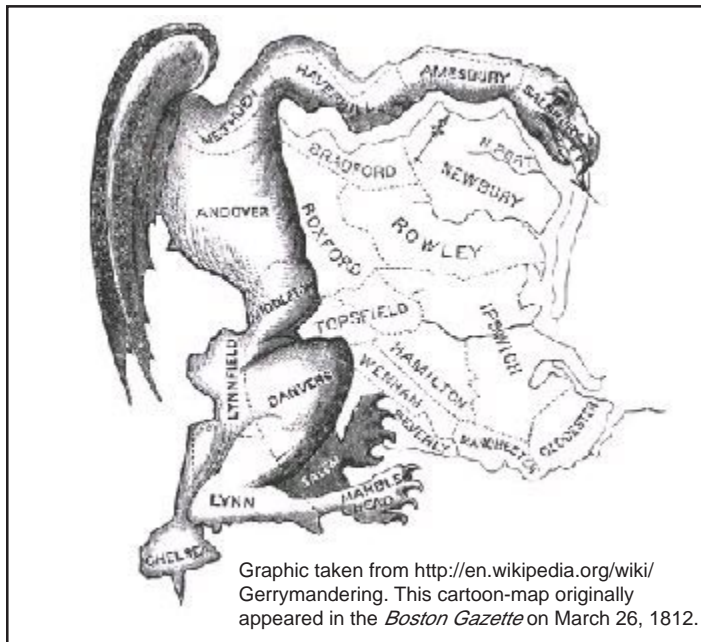
The ultimate safe seat is one which is not even contested by the opposition party. Remarkably, the 2002 elections included 80 such races.¹⁶ In other words, 18 percent of House incumbents ran unopposed in the general elections.

Typically, the first elections following redistricting feature a substantial number of retirements. The 1972, 1982, and 1992 elections (the first post-redistricting elections of their respective decades) featured an average of 48 retirements. Only 35 members retired in 2002.

The impact of partisan gerrymandering is not limited to the electoral realm. Indeed, many point to gerrymandering as the leading catalyst in the increasing polarization in the House. As Sam Hirsch, counsel for appellants in *Vieth v. Jubelirer*, notes, “With little reason to fear voters, representatives increasingly cater to party insiders and donors, rather than to the political center where most Americans reside. Bipartisan compromise around moderate policies takes a backseat to party loyalty, resulting in historic levels of polarization. And further polarization only fuels the bitterness that promotes more gerrymandering.”¹⁷

The 2003 Virginia general elections for the House of Delegates and State Senate shared many similarities with the national-level findings. The number of competitive seats (races won with 55 percent of the vote or less) was four of 40 in the Senate and nine of 100 in the House of Delegates. The number of Delegates seats without a major party opponent was 69, meaning that more than two-thirds of the Delegates did not face *any* major party opposition, not even a token candidate.¹⁸ If one includes Independent and Green Party candidates, the number of unopposed races falls to 64, which ties a modern

"Gerrymandering allows politicians to turn the tables. They decide which voters they will represent. Voters no longer make the picks."
Richmond Times Dispatch editorial, April 11, 2005



record set in 1987.¹⁹ The overall level of legislative turnover (including defeats, retirements, and deaths) was quite low. Between the House and Senate's 140 seats, just 15 had new occupants after the 2003 election. That mark falls below 14 of the 20 modern legislative elections, according to Larry Sabato.²⁰

The Impact of the Voting Rights Act²¹

No discussion of redistricting in Virginia can be complete without considering the Voting Rights Act (VRA) since Virginia is still subject to Section 5 of the Act. The Justice Department must pre-clear Virginia's redistricting laws, e.g., changes in the boundaries of legislative districts.

Most of the early reapportionment cases, including those addressing "one person, one vote," were based on the **14th Amendment** to the Constitution. Then came a series of events involving discrimination against blacks in voting and other areas. It was also during this period that gerrymandering, annexations, and other manipulated electorates occurred. Other political structural changes also diminished equal voting rights for minorities.

On August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act into law. The VRA basically guaranteed the enforcement of the rights protected by the **15th Amendment** to the Constitution by prohibiting literacy tests and racial discrimination in all aspects of voting, including redistricting and reapportionment. In 1966, the Supreme Court

upheld the constitutionality of the VRA in the case of *South Carolina v. Katzenbach*.

Section 2 of the VRA is a permanent provision that applies to all states and prohibits any state from imposing a voting qualification that results in the denial or abridgment of the right to vote on account of race, color, or status as a member of a language minority group. The VRA also has temporary provisions that were originally due to expire in 1970 but were extended in 1970, 1975, and 1982. These are scheduled to expire in 2007 if Congress does not further extend them. These temporary provisions apply primarily to southern states, including Virginia, which had fewer than half of eligible voters registered to vote.

For example, Section 5 of the VRA requires pre-clearance by the Department of Justice (or the District Court of the District of Columbia) of any change in voting regulations, including redistricting and reapportionment. These requirements place very tight timelines on Virginia because of its House election cycle in odd-numbered years. Even if the temporary provisions were to expire in 2007, however, they can be reinstated by court order if discrimination ensues. Pursuant to Section 4 of the VRA, a few jurisdictions, including the City of Fairfax, have "bailed out" from coverage by showing a ten-year record of compliance with the Act and meeting defined requirements.

Factors which can be taken into consideration in assessing a proposed redistricting plan under the VRA would include historical background; specific sequence of events leading to the plan; departures from normal procedural sequence; legislative history of the plan, especially statements by legislators; the plan's retrogressive effect if any; and the likelihood of diluting voting power of minorities.²²

"The Voting Rights Act of 1965 is considered to be the most effective civil rights statute enacted by the U.S. Congress."

U.S. Department of Justice, Civil Rights Division,
 Voting Section, www.usdoj.gov/crt/voting, June 2005

The Department of Justice regulations contain additional factors.²³ They include the extent to which reasonable and legitimate justifications explain the new plan; the extent to which available alternative plans were considered; the extent to which the state followed pre-established, objective guidelines and procedures; the extent to which the state afforded minority group members the opportunity to participate; the extent to which the state took concerns of a minority into account; and the extent to which the plan departs from objective redistricting criteria, ignores other relevant factors such as compactness and contiguity or displays configuration that disregards available natural or artificial boundaries.

Courts have determined that states are **not** required to ignore race altogether as long as it does not “subordinate” traditional race-neutral principles (*Thornburg v. Gingles*, 1986; *Miller v. Johnson*, 1995; and *Shaw v. Reno*, 1993). These traditional districting principles generally include compactness, contiguity, respect for political subdivisions, respect for communities of interest, and protection of incumbents.²⁴ The last principle and other political factors have been recognized by the Supreme Court as legitimate (*Shaw v. Reno*, 1993). After the Texas experience, it is unclear whether the protection of incumbents will remain an endorsed principle.²⁵

Redistricting Commissions

A quarter of the states have reformed redistricting in an attempt to decrease the political tugs by incumbents to gerrymander, but Virginia is not one of them. A small but increasing number of states have set up redistricting commissions to make the hard decisions about where lines for voting districts should

be drawn. The composition of the commissions varies from a small group of top elected officials to a group with no elected officials. Obviously not all states that set up commissions had less partisan line-drawing in mind.

According to the National Conference of State Legislatures, 12 states give “first and final authority for state legislative redistricting to a group other than the legislature” with three states (Alaska, Idaho, and Arizona) using commissions for the first time in 2000.²⁶

The remaining nine include Arkansas, Colorado, Hawaii, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Several other states have advisory commissions (Maine and Vermont) and backup commissions (Connecticut, Illinois, Mississippi, Oklahoma, and Texas.)

The following chart indicates the composition of several state legislative redistricting commissions:

Arizona	The commission on appellate court appointees creates a pool of 25 nominees, ten from each of the two largest parties and five not from either of the two largest parties. The highest ranking officer of the house appoints one from the pool, then the minority leader of the house appoints one, then the highest ranking officer of the senate appoints one, then the minority leader of the senate appoints one. These four appoint a fifth from the pool, not a member of any party already represented on the commission, as chair. If the four deadlock, the commission on appellate court appointments appoints the chair.
Arkansas	Commission consists of the governor, secretary of state, and the attorney general.
Colorado	Legislature selects four (speaker of the House; House minority leader; Senate majority and minority leaders; or their delegates). Governor selects three. Judiciary selects four. Maximum of four from the legislature. Each congressional district must have at least one person, but no more than four people representing it on the commission. At least one member must live west of the Continental Divide.
New Jersey	The chairs of the two major parties each select five members. If these ten members cannot develop a plan in the allotted time, the chief justice of the state Supreme Court will appoint an 11 th member.
Vermont	Chief justice appoints the chair; governor appoints one member from each political party that received 25 percent of the vote in the last gubernatorial election; those parties each select one. Secretary of state is secretary of the board but does not vote. No commissioner may be a member or employee of the legislature.

Congressional Redistricting Commissions

Only six states give first and final authority for drawing the lines for **congressional** races to a commission: Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington. Indiana has set up a backup commission if the legislature fails to produce a plan.²⁷ The states that use congressional redistricting commissions use the same process as for legislative commissions with one exception. In New Jersey, unlike the commission for the state legislature, the commission is made up of the President of the Senate, speaker of the General Assembly, Senate minority leader, House minority leader, and two members appointed by the chairs of the two

largest political parties. Seven of these members may vote to appoint the 13th, independent member, to serve as chair. Otherwise, the state Supreme Court selects the independent chair, choosing between the two candidates who received the most votes on the commission’s last ballot.²⁸

The Iowa Way

Iowa, the one state whose redistricting track record is often held up as the least influenced by partisan politics, accomplishes this by having the lines drawn by a Legislative Service Bureau. The bureau crafts a plan under some strict guidelines, including prohibitions against drawing lines “to

favor any political party, an incumbent legislator or member of Congress, or any other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group.”²⁹ This body is instructed not to consult addresses of incumbents, partisan affiliations, “previous election results, and demographic data other than population head counts not otherwise required by federal law.” Iowa establishes a temporary Redistricting Advisory Commission composed of two non-office holders selected by each majority and minority party with a fifth selected by the group to serve as chairperson. Its job is to provide advice and guidance to the Bureau and to act as liaison to the public. It must hold three public hearings throughout the state. The state legislature then has three chances to approve plans submitted by the Bureau with only corrective amendments allowed. After a third unsuccessful try the Iowa Supreme Court takes over the process.

The California Proposal

Governor Arnold Schwarzenegger has been promoting a redistricting commission made up entirely of a panel of retired judges. Schwarzenegger says that the current process (redistricting by legislature) has created a polarized legislature and made compromise impossible as each side plays to its hard-core supporters.³⁰ The California LWV has offered to endorse this plan if the provision requiring immediate redistricting after the plan is accepted is removed.³¹ A commission made up entirely of retired judges would be unique among the states.

No Guarantees

Simply setting up a redistricting commission does not guarantee that the process will be less partisan or that the commission’s plan can fend off a court challenge. The makeup of the commission is an obvious factor in eliminating the partisan element. Another factor is the state-mandated guidelines for redistricting. For example, the five person redistricting board in Arizona must use as one of its criteria “making the districts competitive if at all possible.”³² This particular criterion is rare among state guidelines and makes Arizona one of the few states so far that sees non-competitive elections as a problem worth attempting to fix by means of a carefully crafted redistricting commission.

Conclusion

This first part of the study has laid the groundwork for understanding the history and the legal challenges related to reapportionment and redistricting. Part II of the study will look at the past and future of redistricting in Virginia. League members will then determine what changes, if any, they feel should be made to the LWVVA positions on reapportionment and redistricting.

Footnotes and Endnotes

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