



## Montana Legislative Services Division

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### Legal Services Office

TO: Districting and Apportionment Commission

FROM: K. Virginia Aldrich, Staff Attorney

RE: Litigation Background and Districting and Apportionment Criteria

DATE: May 31, 2020 [REVISED June 12, 2020]

This memorandum was prepared as background information for the Districting and Apportionment Commission (Commission), and it does not represent any opinion or action on the part of the Commission.

#### I. Introduction and Important Deadlines

The U.S. Constitution provides that an "actual Enumeration" of the population must be made every ten years under provisions set by Congress.<sup>1</sup> Under federal law, the Secretary of Commerce is commanded to "take a decennial census of population as of the first day of April" every ten years.<sup>2</sup> Thus, April 1, 2020, is officially designated Census Day, the date that determines who is counted and where each person is counted. As a result, seats in the U.S. House of Representatives are apportioned to the states based on the census, and the federal government uses census numbers to help allocate federal funds.

By law, the U.S. Census Bureau must complete and report the total population count by state to the U.S. President within nine months after Census Day.<sup>3</sup> Within a week of the opening of the 117th Congress<sup>4</sup>, the President must transmit to Congress a statement showing the total population in each state and the number of congressional representatives to which each state is entitled.<sup>5</sup> P.L. 94-171 redistricting data must be reported to the "Governor of the State involved and the officers or public bodies having responsibility for legislative apportionment or districting of such State" within one year after the census date. This data consists of the small area census data necessary for legislative redistricting.

Due to the COVID-19 pandemic, the U.S. Census Bureau has requested relief from these statutory deadlines. The Census Bureau has requested additional time to deliver final apportionment counts to the President and additional time to deliver the small area census data to the states. If this request is granted by Congress, the Census Bureau has stated that it would deliver apportionment counts to the

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<sup>1</sup> [U.S. Const. art. I, § 2.](#)

<sup>2</sup> [13 U.S.C. § 141\(a\).](#)

<sup>3</sup> [13 U.S.C. § 141\(b\).](#)

<sup>4</sup> The 117th United States Congress is currently scheduled to convene on January 3, 2021, but Congress may designate another day. [U.S. Const. amend. XX, § 2.](#)

<sup>5</sup> [2 U.S.C. § 2a\(b\).](#)

President by April 30, 2021, and redistricting data would be delivered to each state no later than July 31, 2021.<sup>6</sup>

The Districting and Apportionment Commission (Commission) is created under Article V, section 14, of the Montana Constitution, and the Commission has the responsibility to "prepare a plan for redistricting and reapportioning<sup>7</sup> the state into legislative districts and a plan for redistricting the state into congressional districts."<sup>8</sup>

Once redistricting data is delivered to the states by the U.S. Census Bureau, the Montana Constitution requires that the Commission file its final plan for congressional districts with the Secretary of State "[w]ithin 90 days after the official final decennial census figures are

**Article V, Section 14. Districting and apportionment.**

....

(3) Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.

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<sup>6</sup> [U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham Statement on 2020 Census Operational Adjustments Due to COVID-19, Census Bureau Press Release, April 13, 2020.](#)

<sup>7</sup> Even in the Constitutional Convention, there was some confusion about whether the Legislature or the Commission would set the size of the Legislature. See Montana Constitutional Convention 1971-1972, Verbatim Transcript, Vol. V., 1595, 1612-1613. In section [5-1-101\(2\)](#), MCA, the Legislature has asserted its authority to determine the number of districts in the legislative session before the Census. However, a 1973 Attorney General's opinion states that "with the adoption of the new constitution, the people of Montana divested the legislature of all power concerning apportionment of the legislature, except for the power of recommendation . . . . [T]he reapportionment commission is the only agency empowered by the constitution to determine the size of the legislative houses and their geographical makeup. . . . The commission is, however, bound by the constitutional limitations of 40 to 50 senators and 80 to 100 representatives." [35 A.G. Op. 12 \(1973\)](#). The power of the Commission to determine the size of the legislative houses and the geographical makeup of the congressional and legislative districts is "subject only to the restrictions of the Constitution." *Id.* Further, upon submission of the plans, "all previous statutory provisions in conflict with that plan are, in effect, repealed." *Id.* A subsequent legal opinion by the Director of Legal Services of the Montana Legislature disputed some portions of the Attorney General's opinion, including the conclusion that the Commission is not the sole body that may determine the size of the Legislature. "Determination of Size of Legislature", Gregory J. Petesch, June 1989. As noted in Petesch's memo, section [2-15-501\(7\)](#), MCA, provides that in the case of conflicting opinions by the Attorney General and an attorney retained by the state, "the attorney general's opinion is controlling unless overruled by a state district court or the supreme court." In addition, in a 2004 case concerning the reassignment of holdover senators to districts by the Legislature, a unanimous Montana Supreme Court stated that "[b]y granting redistricting authority to the Commission under Article V, Section 14, the Constitution denied the Legislature any latitude to invoke its plenary powers." [Wheat v. Brown, 2004 MT 33, ¶35, 320 Mont. 15, 25, 85 P.3d 765, 771](#). The same reasoning potentially may apply to apportionment. In any event, if the Commission contemplates reapportioning the number of legislative districts, there are several provisions of the Montana Constitution to consider, including Article V, section 2, concerning the size of the Legislature, Article V, section 3, concerning the election and terms of senators, and Article V, section 14(1), concerning the composition of legislative districts. A reduction in the size of the Legislature may raise questions about compliance with Article V, section 3, of the Montana Constitution because of inherent problems resulting from the terms of holdover Senators. Specifically, that provision requires that a senator's term is four years, and one-half of the senators must be elected every two years. *But see* Montana Constitutional Convention 1971-1972, Verbatim Transcript, Vol. V., 1568-1569. Attempts to reduce the size of the Legislature may reduce a senator's term or cause an unequal number of senators to be elected. The Legislature cannot be enlarged because it is currently at the maximum number of senators and representatives specified in the Montana Constitution. [Mont. Const. art. V, § 2](#).

<sup>8</sup> [Mont. Const. art. V, § 14](#).

available."<sup>9</sup> However, before it may file its final congressional redistricting plan, the Commission must hold "at least one public hearing on it."<sup>10</sup> When it files its plan with the Secretary of State, by historical practice and the recommendation of the Attorney General, the Commission should submit the plan with a cover letter signed by each Commission member to the Secretary of State for filing to signify that the Commission "duly and regularly adopted" the final plan.<sup>11</sup>

Legislative redistricting is subject to separate deadlines. Before it submits its legislative redistricting plan to the Legislature, the Commission must hold "at least one public hearing on the plan at the state capitol."<sup>12</sup> The Commission is required to submit its plan for legislative districts to the Legislature "at the first regular session after its appointment or after the census figures are available."<sup>13</sup> By statute, the Commission is instructed to submit its legislative redistricting plan to the Legislature "by the 10th legislative day"<sup>14</sup>. The Montana Constitution requires the Legislature to return the plan to the Commission with its recommendations "[w]ithin 30 days after submission."<sup>15</sup> However, the Legislature "has only the authority to recommend, not to adopt, alter or amend" the plan.<sup>16</sup>

**Article V, Section 14. Districting and apportionment.**  
.....  
(4) The commission shall submit its plan for legislative districts to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan for legislative districts with the secretary of state and it shall become law.  
(5) Upon filing both plans, the commission is then dissolved.

Within "30 days thereafter," the Commission must file its final legislative redistricting plan with the Secretary of State.<sup>17</sup>

After both plans are filed, the Commission is dissolved.<sup>18</sup>

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<sup>9</sup> [Mont. Const. art. V, § 14\(3\)](#).

<sup>10</sup> Section [5-1-108\(1\)](#), MCA.

<sup>11</sup> [35 A.G. Op. 50](#) (1973).

<sup>12</sup> Section [5-1-108\(2\)](#), MCA.

<sup>13</sup> [Mont. Const. art. V, § 14\(4\)](#). This phrase has historically and judicially been understood to mean that the designated session "is either that *following* the appointment of the Commission or that *following* the availability of census figures, whichever is later" (emphasis added). *St. ex rel. Greely v. Mont. Districting & Apportionment Commn.*, First Jud. Dist., No. 46873 (Aug. 12, 1981). In 1999, Legislative Services Division prepared a memo on the availability of an expedited schedule, which is available [here](#). In addition, the Constitutional Convention specifically discussed requiring that the Commission submit the plan at the first *regular* session, rather than a special session.

<sup>14</sup> Section [5-1-109](#), MCA. Pursuant to section [5-2-103](#), MCA, the Legislature will convene on January 2, 2023. The 10th legislative day is currently projected to be Friday, January 13, 2023.

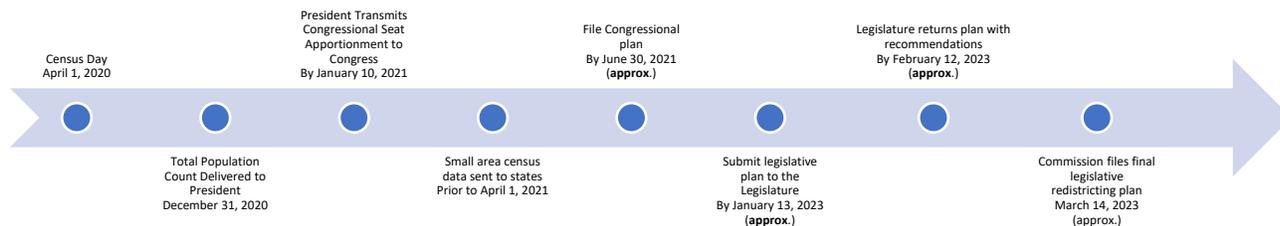
<sup>15</sup> [Mont. Const. art. V, § 14](#).

<sup>16</sup> [35 A.G. Op. 12](#) (1973).

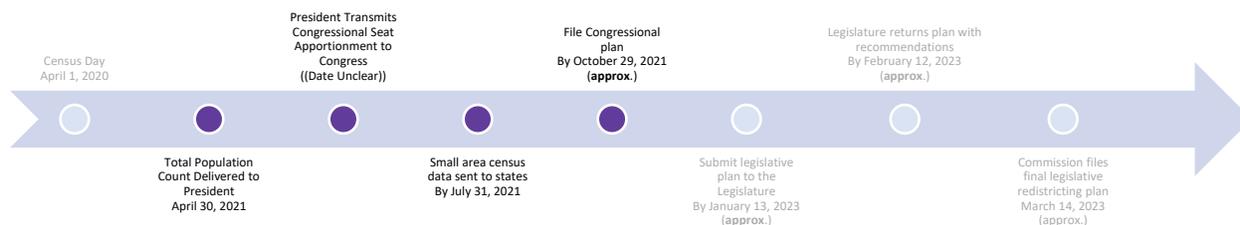
<sup>17</sup> [Mont. Const. art. V, § 14](#).

<sup>18</sup> [Mont. Const. art. V, § 14\(5\)](#); Section [5-1-111\(3\)](#), MCA.

## Current Timeline with approximate dates



## Changes to timeline if Congress grants current census extension request with approximate dates



If Congress grants the request by the Census Bureau to delay the delivery of Census data to the states due the COVID-19 pandemic, the Commission's constitutional deadline for submitting the congressional plan will fall approximately 120 days (depending on when the data is received) later than it would have otherwise because it is calculated from the date that the data is received. Assuming no further delays beyond the one already requested of Congress, there will not be an impact to the regular timeline for legislative redistricting.

## II. Recent History Regarding Districting in Montana<sup>19</sup>

### A. The Constitutional Convention and Early Legal Questions

Each decade since the Constitutional Convention has brought new hurdles and legal questions concerning redistricting in Montana. Following is a brief history of recent redistricting in Montana along with the associated legal challenges.

In 1972 during the Constitutional Convention, Delegate Skari outlined the history of redistricting in Montana:

The Montana experience was that in 1965 the Legislature was unable to reapportion. About a dozen bills were introduced, and not a single one was accepted. Consequently, it fell to the federal District Court to reapportion the state. In 1971, the Legislature drew up one plan which was invalid because of a 37 percent variance [among Senate districts]. After working through the regular session [and] one special session, the Legislature finally came up with the [1970's] plan in the second special session, which

<sup>19</sup> For a discussion of early Montana reapportionment and redistricting, see Ellis Waldron, [100 Years of Reapportionment in Montana](#), 28 Mont. L. Rev. 1 (1966).

the court allowed to stand for the election of [the Constitutional] Convention [delegates].<sup>20</sup>

The Constitutional Convention adopted a new section in the 1972 Constitution creating the Districting and Apportionment Commission, and the new section specified that previous multimember legislative districts<sup>21</sup> would be single-member legislative districts that were compact and contiguous. Five years earlier, Congress had passed legislation specifying that congressional seats must be elected from single-member districts.<sup>22</sup>

In the transition period after the adoption of the new state constitution, the first Commission was appointed in 1973 and adopted its legislative plan in early 1974.<sup>23</sup>

The new state constitution had provided for annual sessions, but in 1974, Montana voters also adopted a constitutional amendment to return to biennial sessions. Because both reapportionment plans could not be completed until after legislative review of the plans, the adoption of biennial sessions had unanticipated consequences on the redistricting cycle. As a result, the Districting and Apportionment Commission requested a legislative bill draft that would amend the Constitution to accelerate congressional redistricting within 90 days after receiving the official final decennial census figures, to specify that only the legislative district plan would be submitted to the legislature, to clarify that there were separate plans for congressional and legislative seats, and to state that the Commission would be dissolved upon the filing of both plans.<sup>24</sup> This proposal was placed on the ballot by the Legislature, and in 1984,<sup>25</sup> it was adopted by the people of Montana.<sup>26</sup>

Additionally, early questions arose about whether the Legislature could change the size of the legislative bodies after the final plan was adopted, an ability that could render a reapportionment plan ineffective. See n. 7, *supra*, for a discussion concerning this issue.

As a result of the 1990 census, Montana lost one of its two congressional seats, leaving it with one lone congressional seat. Montana filed suit, challenging the constitutionality of the congressional apportionment method, but ultimately, the state did not prevail,<sup>27</sup> and it has had only one congressional seat since then. However, data trends suggest Montana may gain a second congressional seat as a result of the 2020 apportionment.<sup>28</sup>

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<sup>20</sup> Montana Constitutional Convention 1971-1972, Verbatim Transcript, Vol. IV., 682. *See also Herweg v. Thirty Ninth Legislative Assembly*, 246 F. Supp 454 (D. Mont. 1965) and *Wold v. Anderson*, 327 F. Supp. 1342 (D. Mont. 1971).

<sup>21</sup> *See Wold v. Anderson*, 335 F. Supp. 952 (D. Mont. 1971).

<sup>22</sup> [2 U.S.C. § 2c](#).

<sup>23</sup> Report and Recommendations of the Montana Districting and Apportionment Commission: A Report to the Forty-Eighth Legislature, Montana Legislative Council (December 1982).

<sup>24</sup> C-14 (1984); Ch. 421, L. 1983. The full text of the present section may be found here:

[https://leg.mt.gov/bills/mca/title\\_0000/article\\_0050/part\\_0010/section\\_0140/0000-0050-0010-0140.html](https://leg.mt.gov/bills/mca/title_0000/article_0050/part_0010/section_0140/0000-0050-0010-0140.html)

<sup>25</sup> Ch. 441, L. 1983.

<sup>26</sup> 1972-Current Historical Constitutional Initiatives and Constitutional Amendments, Montana Secretary of State, 4, <https://sosmt.gov/Portals/142/Elections/Documents/Constitutional-Ballot-Issues-1972-Current.pdf?dt=1523475015122>.

<sup>27</sup> *U.S. Dept. of Commerce v. Mont.*, 503 U.S. 442 (1992); *Mont. v. Dept. of Commerce*, 775 F. Supp. 1358 (D. Mont. 1991).

<sup>28</sup> "Political Power Set to Continue Shift to Southern States, Data Show," Wall Street Journal, <https://www.wsj.com/articles/sunbelt-set-to-gain-congressional-seats-data-show-11577723599>; "Montana Poised

## B. Holdover Senators

In 1980, there was a controversy as to whether senators should be held over after redistricting or whether their terms of office would be shortened.<sup>29</sup> These senators who have 2 years remaining in their term of office at the time of redistricting are known as "holdover senators". The Commission did not assign holdover senators in its draft plan.

In response to a Senate request for an opinion on the issue, the Attorney General issued an opinion finding that the Constitution provides that senators are elected to a four-year term, and there was no legal authority to shorten or change a senator's term after reapportionment.<sup>30</sup> In making this determination, the Attorney General found that the assignment of holdover senators was the responsibility of the Commission and that "[t]he Commission has the inherent authority under the Montana Constitution Article V, section 14 to do what is necessary to implement a plan that complies with the State's law."<sup>31</sup> The 1983 Senate criticized the Commission for its failure to assign the holdover senators in the draft plan.<sup>32</sup>

During the next cycle in the 1990's, the Commission included assignments for holdover senators, and the plan became law.<sup>33</sup>

In 2003, after receiving the legislative plan from the Commission for comment, the Legislature passed section 5-1-116, MCA.<sup>34</sup> That section required the Legislature, rather than the Commission, to assign holdover senators to districts under the new plan for the remainder of their terms. The section specifically prohibited the Commission from assigning holdover senators to districts.<sup>35</sup> Then the 2003 Legislature passed another bill to repeal the transition section of the Districting and Apportionment Plan of 2003 which had assigned holdover senators to new districts.<sup>36</sup> In addition, the 2003 Legislature adopted a joint resolution assigning holdover senators to districts.<sup>37</sup>

Three holdover senators whose assigned districts differed between the Commission's assignments and the Legislature's assignments challenged the Legislature's authority to assign holdover senators.<sup>38</sup> The state District Court held that the two legislative bills and the joint resolution attempting to assign holdover senators were unconstitutional and of no force and effect, and the Secretary of State was ordered to give effect to the plan filed by the Commission, including the assignment of holdover senators.<sup>39</sup>

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to Get Second House Seat Post-Census: Report," The Hill, <https://thehill.com/homenews/news/476278-montana-poised-to-get-second-house-seat-post-census-report>.

<sup>29</sup> *Wheat v. Brown*, 2004 MT 33, ¶25.

<sup>30</sup> [40 A.G. Op. 2 \(1983\)](#).

<sup>31</sup> *Id.*

<sup>32</sup> *Wheat*, 2004 MT 33, ¶25.

<sup>33</sup> *Id.* at ¶26.

<sup>34</sup> [Ch. 4, L. 2003](#). This section was repealed in 2005. [Ch. 357, L. 2005](#).

<sup>35</sup> *Id.*

<sup>36</sup> [Ch. 278, L. 2003](#).

<sup>37</sup> [SJ 23 \(2003\)](#).

<sup>38</sup> *Wheat v. Brown*, 2003 ML 3963 (Mont. Dist. 2003).

<sup>39</sup> *Id.* at ¶27-28.

On appeal, the Montana Supreme Court affirmed the District Court.<sup>40</sup> The Montana Supreme Court quoted the Constitutional Convention which provided that the Commission, after having been appointed, would "*in effect, bypass the Legislature from this point on*" (emphasis in original).<sup>41</sup> The Supreme Court found that the Constitutional Convention "assigned the task of redistricting to the Commission - an independent autonomous entity - and limited the Legislature's role to that of making 'recommendations.'"<sup>42</sup> The Supreme Court discussed the arguments made by the defendants, but noted that it did not need to "address the specifics of the [statutory criteria for assigning holdovers] since the issue presented is not whether the specific criteria are appropriate or well-intentioned. Rather, the more fundamental constitutional issue is whether the Legislature can inject itself into the redistricting process through the adoption of *any* criteria pertaining to holdovers" (emphasis in original).<sup>43</sup> Further, it found that "Article V, Section 14's mandate that the Commission effect redistricting is self-executing . . . . By granting redistricting authority to the Commission under Article V, Section 14, the Constitution denied the Legislature any latitude to invoke its plenary powers [with respect to assigning holdover senators]."<sup>44</sup>

Consequently, the unanimous Supreme Court affirmed the District Court's holding that all three legislative enactments were unconstitutional and of no force or effect.<sup>45</sup>

### C. Vote Dilution

Following the 1990s redistricting cycle, American Indian plaintiffs brought suit against the state, contending that the 1992 legislative redistricting plan diluted the voting strength of American Indians in violation of § 2 of the Voting Rights Act.<sup>46</sup> The District Court found that plaintiffs fulfilled two of the three threshold conditions (also known as *Gingles* factors, discussed later in section III(B)(1), *infra*), showing that the population of American Indians on the Blackfeet and Flathead Indian reservations was sufficiently large and geographically compact to constitute a majority in both an additional House district and an additional Senate district and that the American Indians were politically cohesive in the challenged districts.<sup>47</sup> However, the District Court found that white majority voters did not usually vote to defeat the preferred candidate of the Indian voters, failing the third threshold factor.<sup>48</sup>

On appeal, the Ninth Circuit found that in this determination, the District Court erroneously relied, in part, on the electoral success of Indian candidates in majority-Indian House districts when it concluded

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<sup>40</sup> *Wheat v. Brown*, [2004 MT 33](#).

<sup>41</sup> *Id.* at ¶21 (citations omitted).

<sup>42</sup> *Id.* at ¶23.

<sup>43</sup> *Id.* at ¶29.

<sup>44</sup> *Id.* at ¶35.

<sup>45</sup> *Id.* at ¶36.

<sup>46</sup> *Old Person v. Cooney*, 230 F. 3d 1113 (9th Cir. 2000). At the District Court level, the plaintiffs alleged vote dilution in two separate geographic areas involving eight House districts, four in the northwest part of the state (plaintiffs offered the "Blackfeet-Flathead Plan as an alternative to these House districts) and four in the northeast (plaintiffs offered the "Rocky Boy-Fort Belknap-Fort Peck Plan" as an alternative to these House districts). *Id.* at 1119. The District Court rejected the claim of voting dilution, and the plaintiffs appealed only with respect to the four House districts in the northwest part of the state. *Id.*

<sup>47</sup> *Id.* at 1121.

<sup>48</sup> *Id.* at 1122.

that white bloc voting in majority-white House districts was legally insignificant.<sup>49</sup> Consequently, the Ninth Circuit found that the third threshold factor had been satisfied.<sup>50</sup>

If the threshold factors have been satisfied, courts look at a number of nonexhaustive factors to determine, based on the totality of the circumstances, whether the minority group has been denied an equal opportunity to participate in the political process and elect representatives of their choice. The District Court had found some of the factors favored finding a § 2 violation including a history of discrimination by the federal and state governments, lower socioeconomic status which hindered the ability of Indians to participate fully in the political process, evidence of racially polarized elections, and in some elections, subtle or overt racial appeals.<sup>51</sup> The District Court also found that some of the factors did not favor such a finding, including that the state did not have unreasonably large districts, voting practices that enhanced the opportunity for discrimination among Indian voters, or a candidate slating process, state officials were generally responsive to the needs of American Indians, the policies underlying the creation of existing district boundaries were not tenuous, and the number of American Indians elected to the state legislature was "roughly proportional" to their share of the voting age population in Montana.<sup>52</sup>

Ultimately, the District Court found that based on the totality of the circumstances, the 1992 redistricting plan did not impermissibly impair the ability of American Indians to elect their preferred representatives.<sup>53</sup>

However, the Ninth Circuit found that the District Court erred in its analysis of one of the most important factors, proportionality.<sup>54</sup> The Ninth Circuit found that although the 1992 plan for House districts might reflect rough proportionality, the Senate and combined House and Senate legislature figures did "not permit a finding of proportionality."<sup>55</sup> Because this error "may have affected the district court's ultimate finding that, in light of the totality of circumstances, there was no dilution of American Indian voting strength," and because the "case is sufficiently close that we cannot know whether or not the district court would have found dilution if it had correctly assessed the factor of proportionality", the Ninth Circuit reversed and remanded the judgment for further proceedings to determine whether vote dilution had occurred.<sup>56</sup>

In the original proceedings, the plaintiffs also claimed, based on Districting and Apportionment Commission member statements at Commission hearings and meetings, that the Commission members acted with a discriminatory purpose in violation of § 2 of the Voting Rights Act when they adopted the 1992 legislative redistricting plan.<sup>57</sup> The Ninth Circuit "recognize[d] that some of the Commissioners' comments were inflammatory" but affirmed the District Court's opinion that there was no

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<sup>49</sup> *Id.* at 1117, 1127.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1129.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1128.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1130. Under the plaintiffs' plan, the proposed majority Indian House district would be adjacent to a reconfigured, existing majority-Indian House district. These would be combined to create a majority-Indian Senate district. *Id.* at 1121.

<sup>56</sup> *Id.* at 1130.

<sup>57</sup> *Id.* at 1117.

discriminatory purpose in the adoption of the plan, finding that the Commission did not deviate from its criteria, the plan increased majority-Indian districts, and the plan did not burden Indians more than whites.<sup>58</sup>

In its discussion on appeal, the Ninth Circuit had drawn attention to the fact that the original trial court had considered the question of proportionality within the entire state, rather than in a geographic subset such as the districts challenged at trial, but because the parties had not objected to the scope, it did not decide whether the entire state was the proper frame of reference for a proportionality finding.<sup>59</sup> When the case returned to the district court level to correctly assess the factor of proportionality, the District Court held that statewide proportionality was not determinative of the narrow vote dilution issue in the challenged districts, but rather each district "requires sufficient evidence that district-wide proportionality is lacking".<sup>60</sup> Although admitting that on a statewide basis, proportionality was lacking, in looking at the "relevant geographic subset", the court found that there was satisfactory proportionality.<sup>61</sup>

Nevertheless, because the presence or absence of proportionality was only one factor under the totality of the circumstances, the trial court also reexamined the totality of the circumstances, but it narrowed its focus to the districts in which the "four remaining Plaintiffs reside and have standing to sue."<sup>62</sup> In doing so, it examined at least one subsequent election which supported the court's finding "that proportional representations of American Indians exist in the four legislative districts at issue".<sup>63</sup> The District Court did not disturb any of the prior trial court's findings, and it concluded that plaintiffs had not met their burden of establishing vote dilution in the relevant districts, noting that "the fact that of the four districts [two Senate and two House districts] at issue, both House Districts and one Senate District are already represented by Indian-preferred candidates strongly suggests that American Indians have an equal opportunity to elect candidates of their choice in the particular districts in which Plaintiffs in this action have standing to sue."<sup>64</sup>

The District Court also addressed a new issue raised by the state, which argued that even if the court were to find vote dilution existed, it could not find a violation of § 2 of the Voting Rights Act unless it determined that a constitutionally acceptable remedy existed.<sup>65</sup> When the case returned to district court, six years had passed since the original trial, and the 1998 and 2000 elections and 2000 federal decennial census had occurred.<sup>66</sup> "To a degree," the District Court wrote, "these events are relevant to this Court's vote dilution inquiry; more particularly to the question of whether a viable remedy is available to correct the effect of any vote dilution pending the completion of the work of the 2000 Montana Districting and Apportionment Commission."<sup>67</sup> The District Court concluded that because the 2002 election cycle then in process would be disturbed and because the Districting and Apportionment

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<sup>58</sup> *Id.* at 1130-1131.

<sup>59</sup> *Old Person v. Brown*, 182 F. Supp. 2d 1002 (2002), 1009.

<sup>60</sup> *Id.* at 1011.

<sup>61</sup> *Id.* at 1011-1012.

<sup>62</sup> *Id.* at 1012, 1015.

<sup>63</sup> *Id.* at 1014.

<sup>64</sup> *Id.* at 1015-1016.

<sup>65</sup> *Id.* at 1016.

<sup>66</sup> *Id.* at 1008.

<sup>67</sup> *Id.* at 1009.

Commission was proceeding with its work after the 2000 decennial census, "any action by this Court to compel partial redistricting would impair" the legitimate state electoral policy which allowed the Commission to accomplish its task in a comprehensive and coherent fashion.<sup>68</sup> The District Court went on to hold that:

without regard to whether the availability of a constitutionally acceptable remedy is deemed an essential element of a § 2 claim, given the particular circumstances of this case, it is an appropriate factor to be weighed in the § 2 totality of circumstances inquiry. Having done so, and for the reasons discussed above, the Court finds that this is the "unusual case" in which a viable short-term remedy is not available. The Court's conclusion in this regard is reinforced by the very real prospect that comprehensive and long-term relief designed to address vote dilution throughout the State of Montana is in the offing within a year under the auspices of the Montana Districting and Apportionment Commission, and further by the Court's finding that no vote dilution has been demonstrated in the particular legislative Districts at issue.

The case was again appealed to the Ninth Circuit.<sup>69</sup>

The Ninth Circuit addressed the District Court's holding that the plaintiff's claims failed, even if they showed vote dilution, because there was no adequate remedy for the alleged Voting Rights Act violation. The Ninth Circuit reversed the District Court's holding, concluding that barring valid claims because of disruption to the election process would defeat the purpose of the Voting Rights Act, even if the only practical effect would be declaratory relief after elections were held.<sup>70</sup>

In addition, the Ninth Circuit once again addressed proportionality, finding that "limiting the frame of reference to the plaintiffs' legislative districts would allow for an inaccurate proportionality calculus that may interfere with the goals of the Voting Rights Act."<sup>71</sup> The Ninth Circuit held that limiting a frame of reference to certain legislative districts was impermissibly narrow, and instead of considering the number of Indian-preferred candidates who had been elected, the District Court should have considered the Indians' share of majority-minority districts, a share that was not proportional.<sup>72</sup> Thus, the Ninth Circuit found, "the proportionality factor weighs in favor of a finding of vote dilution."<sup>73</sup>

Although the proportionality analysis was erroneous, because it was only one factor in the overall assessment, the Ninth Circuit had to face "the ultimate question as to whether our disagreement on proportionality analysis requires reversal." Because the ultimate legal question of whether vote dilution has occurred is to be treated as factual and reviewed for clear error rather than *de novo*, the Ninth Circuit stated:

This is one of those not unusual cases where our decision is controlled by the proper standard of review. On one side of the scale lies a history of official discrimination, the presence of racially polarized elections, the presence of socioeconomic factors limiting Indians' political participation, the use of racial appeals in elections, and

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<sup>68</sup> *Id.* at 1019.

<sup>69</sup> *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002), 105.

<sup>70</sup> *Id.* at 1051.

<sup>71</sup> *Id.* at 1045.

<sup>72</sup> *Id.* at 1045-1046.

<sup>73</sup> *Id.* at 1046.

disproportionality. On the other side of the scale we see the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and officials' responsiveness to Native Americans' needs. We have fully considered the legal issues presented and the detailed factual record with which the district court grappled. We cannot say that the district court's determination that there was no vote dilution, considered in the totality of circumstances, was clearly erroneous.<sup>74</sup>

#### D. Redistricting Criteria and the Constitutional Authority of the Commission

During the 2000 round of redistricting, the Commission submitted its legislative plan to the Legislature, but the plan proved contentious. The Legislature sent its recommendations back to the Commission, requesting that the Commission reconvene and adopt a new plan.<sup>75</sup> The Legislature also passed a bill, signed by the Governor on the same day the recommendations were returned to the Commission, that enacted statutory redistricting criteria.<sup>76</sup> The criteria included constitutionally mandated requirements under [Article V, section 14\(1\)](#), (specifically, that districts be compact and contiguous and that districts be as equal as is practicable).<sup>77</sup> In addition to restating constitutional requirements, the bill provided a legislative definition for the "as equal as practicable" population standard for legislative districts.<sup>78</sup> The bill, [HB 309](#), provided that "as equal as practicable" means "within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census."<sup>79</sup>

In addition to creating the new section, the bill amended what had previously been a statutory restatement of [Article V, section 14](#)'s constitutional requirements concerning the filing of the plans. The bill inserted language prohibiting the Secretary of State from accepting a plan that did not comply with the new 1% relative deviation criteria, and it made the dissolution of the Commission contingent upon acceptance of the plan by the Secretary of State.<sup>80</sup>

##### Ch. 3, L. 2003 (HB 309) provided:

**Section 1. Redistricting criteria.** (1) In the drawing of legislative districts, the districting and apportionment commission shall comply with the following criteria: (a) the districts must be compact and contiguous; and (b) the districts must be as equal as practicable. (2) For the purposes of this section, "as equal as practicable" means within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census.

##### Ch. 3, L. 2003 (HB 309) provided:

##### 5-1-111. Final plan -- dissolution of commission.

...

(2) Within 30 days after receiving the legislative redistricting plan and the legislature's recommendations, the commission shall file its final legislative redistricting plan with the secretary of state ~~and it shall become law. The secretary of state may not accept any plan that does not comply with the criteria in [section 1].~~ Upon acceptance of a plan by the secretary of state, the plan is considered filed and becomes law.

(3) Upon the acceptance and filing of both plans, the commission ~~shall be~~ is dissolved."

<sup>74</sup> *Id.* at 1050.

<sup>75</sup> [HR 3 \(2003\)](#), [SR 2 \(2003\)](#).

<sup>76</sup> *Brown v. Mont. Districting and Apportionment Commn.*, 2003 ML 1896 (Mont. Dist. 2003).

<sup>77</sup> [Ch. 3, L. 2003](#).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

The day after the Legislature sent its recommendations back to the Commission, the Commission considered the resolutions, but it ultimately adopted its original plan.<sup>81</sup> Subsequently, the Commission attempted to file the plan, but the Secretary of State refused to file it.<sup>82</sup>

The Secretary of State brought suit in *Brown v. Montana Districting and Apportionment Commission*,<sup>83</sup> arguing that the Legislature, using its plenary power, could implement Article V, section 14, by providing a definition for the Montana constitutional requirement that legislative districts "be as nearly equal in population as is practicable."

The District Court disagreed, finding that the constitutional provision was unambiguous and self-executing; in other words, the provision could be "given effect without the aid of the legislature and there [was] nothing to indicate that the legislation [was] contemplated in order to render it operative."<sup>84</sup> The District Court noted that the Commission had the responsibility to designate legislative districts, "and in doing so, to exercise its own discretion and expertise in determining the equal as practicable factor."<sup>85</sup>

Because the Constitution does not contemplate the Secretary of State exercising discretion in filing or refusing to file the plan, the District Court further found that the Legislature's attempt to convert the Secretary of State's ministerial involvement to discretionary was unconstitutional.<sup>86</sup> As a result of [HB 309](#)'s impermissible conflict with Article V, section 14, the District Court declared the bill void and found that the Montana Constitution "does not authorize the legislature to interfere with the redistricting process beyond the express authority given to it in Article V, Section 14."<sup>87</sup>

It is important to understand the background of *Brown* because during the 2003 session, the Legislature passed *another* bill concerning redistricting criteria, [SB 429](#).<sup>88</sup> [HB 309](#), the bill challenged in *Brown*, was technically codified *together* with [SB 429](#) at section [5-1-115](#), MCA, although the entirety of the section's content appeared independently in [SB 429](#).

In a nutshell, [SB 429](#) reused the definition of "as equal as practicable" which appeared in [HB 309](#) and which was challenged and overturned in *Brown*. In addition to this definition, [SB 429](#) expanded upon how constitutional criteria should be prioritized, interpreted, and defined. The bill also added additional restrictions, including requiring that districts cannot be drawn for the purposes of favoring a political party or incumbent and placing prohibitions on considering certain partisan data.

After the 2003 session ended, in July 2003 the *Brown* case was decided. [SB 429](#) was likely not challenged in the same action because it was passed late in the session.

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<sup>81</sup> *Brown*, 2003 ML 1896, ¶12.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at ¶14 (citations omitted).

<sup>85</sup> *Id.* at ¶15.

<sup>86</sup> *Id.* at ¶¶23-24.

<sup>87</sup> *Id.* at ¶30.

<sup>88</sup> [Ch. 546, L. 2003](#).

It is well settled law that a statute is presumed constitutional, and the challenging party has the burden of establishing the statute's unconstitutionality.<sup>89</sup> Only the portion of section 5-1-115, MCA, concerning the definition of "as equal as practicable" has been declared void by the courts.<sup>90</sup>

Having said that, the issues inherent in section 5-1-115, MCA, are overwhelmingly similar to the issues decided in *Brown*, which is one of several judicial cases and Attorney General's opinions that have found that the Legislature's redistricting power is limited by Article V, section 14.<sup>91</sup>

Although most of the statute has not been voided by the courts, during the 2010 round, the Commission did not address the status of the statute. In an article for the Montana Law Review, the Chairman of the last Commission, retired Supreme Court Justice Jim Regnier, and Caitlin Boland Aarab wrote "[a]lthough the constitutionality of § 5–1–115 has not been litigated, its requirements are largely ignored and the Montana Supreme Court would likely find it unconstitutional for the

**5-1-115. Redistricting criteria.** (1) Subject to federal law, legislative and congressional districts must be established on the basis of population.

(2) In the development of legislative districts, a plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:

(a) The districts must be as equal as practicable, **meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census.** The relative deviation may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act.

(b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.

(c) The districts must be contiguous, meaning that the district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that prevent transportation within a district may not be considered contiguous.

(d) The districts must be compact, meaning that the compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act.

(3) A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress. The following data or information may not be considered in the development of a plan:

(a) addresses of incumbent legislators or members of congress;

(b) political affiliations of registered voters;

(c) partisan political voter lists; or

(d) previous election results, unless required as a remedy by a court.

<sup>89</sup> *Wheat v. Brown*, [2004 MT 33](#), ¶15 (citations omitted).

<sup>90</sup> However, in *Willems v. State*, plaintiffs alleged that the Commission's actions were in violation of 5-1-115(3)(a) concerning the consideration of an incumbent legislator's address and 5-1-115(3)(d) concerning the consideration of previous election results. Upon stipulation of the plaintiffs, the court dismissed those claims. *Willems v. St.*, No. ADV-2013-509, slip op. (Mont. Dist. Dec. 6, 2013).

<sup>91</sup> See, e.g. [Wheat, 2004 MT 33, ¶35](#), (holding that the power to assign holdover senators is an inherent part of the redistricting process and because the Constitution granted redistricting authority to the Commission, it denied the Legislature "any latitude to invoke its plenary powers"); *Brown*, 2003 ML 1896 (holding that because the constitutional provision is self-executing and because the Legislature is not authorized "to interfere with the redistricting process beyond the express authority given to it in Article V, Section 14" an attempt to define "as equal as practicable" for purposes of redistricting was unconstitutional; [40 A.G. Op. 2 \(1983\)](#) (finding that the

same reasons the First Judicial District Court found House Bill 309 unconstitutional."<sup>92</sup>

If the Commission chooses to use the criteria in 5-1-115, MCA, no conflict with the statute exists. However, if the Commission decides to adopt alternative or conflicting criteria, it may decide to request an Attorney General's opinion. The Attorney General is required to give an opinion in writing, without fee, to "to the legislature or either house of the legislature, to any state officer, board, or commission . . . when required upon any question of law relating to their respective offices . . . . If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion is controlling unless overruled by a state district court or the supreme court."<sup>93</sup>

The Commission can also request a legislative bill to repeal the statute,<sup>94</sup> although it would need to identify a legislative sponsor to introduce the bill.

Either of these methods could help clarify the legal status of the statute for the Commission, the Legislature, and the public.

### E. Right to Know & Right of Participation

In 2013, plaintiffs brought a lawsuit regarding a last-minute amendment made by the Commission concerning placement of particular holdover senators.<sup>95</sup> Plaintiffs argued that the Commission's one-on-one discussions concerning the amendment should have been observed by the public, contending that the "Right to Know" under Article II, section 9, of the Montana Constitution includes the right to observe governmental deliberations that occur when a majority of the members communicate one-on-one among themselves (known as a "constructive quorum" or "walking quorum"). Although noting that the open meetings laws under the Montana Constitution must be liberally construed, the Montana Supreme Court declined to adopt the constructive quorum rule on the facts before it because there was no evidence that a majority of the commissioners reached an agreement concerning the amendment prior to the meeting or that a decision was made outside of the meeting.

**Article II, Section 9. Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

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Commission has the inherent authority under the Constitution "to do what is necessary to implement a plan that complies with the State's laws" which includes designating holdover senators to the new districts); [35 A.G. Op. 12 \(1973\)](#) (finding that the Constitution denies the Legislature the ability to change the size of the Legislature after redistricting and providing that when the Commission submits its plan "that plan will become law and all previous legislative enactments [relating to the size of the legislative houses] must be, in effect, repealed").

<sup>92</sup> Caitlin Boland Aarab and the Honorable Jim Regnier, [Mapping the Treasure State: What States Can Learn From Redistricting in Montana](#), 76 Mont. L. Rev. 257, 265 (2015).

<sup>93</sup> Section [2-15-501\(7\)](#), MCA.

<sup>94</sup> The Commission has previously requested at least one bill draft, a Constitutional amendment, C-14 (1984), Ch. 421, L. 1983. The full text of the present section may be found here: [https://leg.mt.gov/bills/mca/title\\_0000/article\\_0050/part\\_0010/section\\_0140/0000-0050-0010-0140.html](https://leg.mt.gov/bills/mca/title_0000/article_0050/part_0010/section_0140/0000-0050-0010-0140.html)

<sup>95</sup> *Willems v. St.*, [2014 MT 82](#).

Although the Commission took public comment at the meeting, the plaintiffs also argued that the holdover amendment, made at the Commission's final meeting before submitting the plan, violated the public's right to participate because the Commission failed to provide adequate notice of the amendment and effectively denied the public the right to submit written comments on it.<sup>96</sup> However, Article II, section 8, unlike the broader application of Article II, section 9, *only* applies to "governmental agencies." Because the Legislature has defined governmental agency to exclude the Legislature, the Montana Supreme Court held that the Commission was part of the legislative branch and exempt from the requirements of Article II, section 8, and the statutes promulgating the right of participation.

**Article II, Section 8. Right of participation.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Although Article II, section 8, does not apply to the Commission under this holding, the 2020 Commission has adopted its own public participation guidelines.<sup>97</sup> The Commission must ensure that it carefully follows its own operating procedures, as amended.

Further, the plaintiffs claimed that their right of suffrage was violated because the assignment of a holdover to Senate District 15 meant that the electorate would have to wait 6 years between Senate elections, but the Supreme Court found that "the shuffling of legislators is a necessary byproduct of the redistricting process when senators serve staggered four-year terms," and the requested remedy of striking the holdover amendment would merely shift the purported violation to another set of voters.<sup>98</sup>

### III. Legal Criteria

The Constitution of the United States requires that districts be equally populated, although there is a different standard of population equality that is applied to congressional districts and legislative districts. Additional federal requirements provide that in drawing districts, the state may not purposefully discriminate between individuals on the basis of race or impose a practice that results in the denial or abridgment of a citizen's right to vote on account of race, color, or status as a member of a language minority group.

In addition to federal requirements, the Montana Constitution requires that legislative districts be compact and contiguous. Each of these requirements will be discussed, in turn, below. Statutory law also provides standards for redistricting, as discussed previously.<sup>99</sup>

During the 2020 cycle, the Commission should ensure that it separately adopts criteria for congressional and legislative districts. In addition to the legal requirements contained in this memo, the Commission in its discretion may choose to adopt additional criteria. If the

**Article V, Section 14. Districting and apportionment.** (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.  
. . . .

<sup>96</sup> *Id.* at ¶28.

<sup>97</sup> "[Operating Procedures of the 2020 Montana Districting and Apportionment Commission](#)," Revised Feb. 19, 2020.

<sup>98</sup> *Willems v. St.*, [2014 MT 82](#), ¶34.

<sup>99</sup> See section II(D), *supra*.

Commission does so, it should weigh how it will balance or prioritize particular criteria beyond the legal constraints outlined in this memo. Regardless of the specific criteria the Commission adopts, the Commission must vigilantly ensure that criteria are consistently applied to each district.

## A. Equal Population<sup>100</sup>

### 1. Congressional Districts

Article I, section 2, of the United States Constitution requires that members of the House of Representatives be chosen "by the People of the several States. . . ." In *Wesberry v. Sanders*, the United States Supreme Court held that this phrase meant "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's . . . . To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention."<sup>101</sup> This has become known as the "one person, one vote" principle.

Shortly after *Wesberry* was decided, plaintiffs challenged Montana's two congressional seats under Article I, section 2.<sup>102</sup> At statehood, Montana had one congressional representative, but it gained a second seat following the 1910 census.<sup>103</sup> Until 1917, these were at-large seats.<sup>104</sup> From 1917 until the legal challenge in 1965, the Legislature had failed to revise the congressional boundaries even though state law at the time required the Legislature to reapportion seats after every state census made every five years and after the federal census "according to ratios fixed by law".<sup>105</sup> The deviation between the two congressional districts at the time was 18.7%.<sup>106</sup> The federal district court held that this violated Article I, section 2, of the U.S. Constitution, and it reapportioned the congressional districts by transferring seven counties from one congressional district to the other.<sup>107</sup>

In interpreting the "one person, one vote" principle, the U.S. Supreme Court has stated that "[s]tates must draw congressional districts with populations as close to perfect equality as possible."<sup>108</sup> For instance, in 1983, the U.S. Supreme Court struck down a New Jersey plan containing 14 congressional districts that, on average, deviated from the ideal-sized district by .1384% (approximately 726 people).<sup>109</sup> The Supreme Court has made clear that there is not a fixed population variance it would consider as *de minimus*, and it has stated that the "as nearly as practicable" standard:

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<sup>100</sup> See also section [5-1-115](#), MCA, and the discussion of related case law at section II(D), *supra*.

<sup>101</sup> 376 U.S. 1 (1964), 7-8

<sup>102</sup> *Roberts v. Babcock*, 246 F. Supp. 396 (D. Mont. 1965).

<sup>103</sup> Congressional Districts, Email of Susan Fox (Feb. 23, 2017).

<sup>104</sup> *Id.*

<sup>105</sup> *Roberts*, 246 F. Supp. 396, 398.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 398-399.

<sup>108</sup> *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

<sup>109</sup> *Karcher v. Daggett*, 462 U.S. 725 (1983), 730-731.

is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case . . . . [It] requires that the State make a good faith effort to achieve precise mathematical equality . . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small. . . . Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown"<sup>110</sup>

Thus, in drawing congressional districts, the Commission must make a good-faith effort to achieve population equality for each congressional district within the state, and it must ensure that any variance between congressional districts is necessary to achieve a legitimate state objective.<sup>111</sup>

What might a legitimate state objective be? The Supreme Court has stated that *consistently applied*, nondiscriminative legislative policies might justify small, acceptable variances in the population of congressional districts, such as making districts compact, not splitting political subdivisions, preserving the cores of prior districts, minimizing population shifts between districts, and avoiding contests between incumbent representatives.<sup>112</sup> Such legislative policies must be applied in a systematic manner to all congressional districts rather than in an *ad hoc* manner, and they may not result in unacceptably large variances.<sup>113</sup>

## 2. Legislative Districts: The 10% Standard

The principle of population equality in state legislative districts is not governed by the same standard as congressional districts. As mentioned, above, Congressional districts are subject to the strict standards of Article I, section 2, of the United States Constitution. Legislative districts, on the other hand are subject to a different standard established under the Equal Protection Clause of the 14th Amendment.

In *Reynolds v. Sims*, the U.S. Supreme Court held that the Equal Protection Clause required both houses of a bicameral legislature to be apportioned on a population basis.<sup>114</sup> There, the U.S. Supreme Court restated the phrase taken from *Wesberry* that votes must be equalized, "as nearly as is practicable," but

In a challenge under Article I, section 2, if plaintiffs can establish that population differences could have been practicably avoided, the burden shifts to the state to prove that population deviations in its plan were necessary to achieve some legitimate state objective. In doing so, the state may not rely on general assertions, but it must show with some specificity that a particular objective required the specific deviations in its plan. Furthermore, the burden is a flexible one, depending on the size of the deviation, the importance of the state's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might vindicate those interests but approximate population equality more closely. The Supreme Court has stated that it is willing to defer to state legislative policies "so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Tennant v. Jefferson County Comm.*, 567 U.S. 758 (2012), 760, citing *Karcher v. Daggett*, 462 U.S. 725 (1983), 740.

<sup>110</sup> *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), 530-531 (citations omitted).

<sup>111</sup> *Karcher*, 462 U.S. 725, 730-731.

<sup>112</sup> *Id.* at 741; *Tennant v. Jefferson County Comm.*, 567 U.S. 758 (2012), 764.

<sup>113</sup> *Id.* at 741. See also *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), 535 (discussing accuracy required for population shifts).

<sup>114</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

recognized that "some distinctions may well be made between congressional and state legislative representation."<sup>115</sup>

Montana has also recognized the importance of this phrase denoting the one person, one vote principle, placing it directly in the Montana Constitution and requiring that "[a]ll districts shall be as nearly equal in population as is practicable."<sup>116</sup> Because the Montana Supreme Court has not interpreted this phrase, it is not clear whether it is more stringent than the population equality standard interpreted by the U.S. Supreme Court to legislative districts, described below.<sup>117</sup>

The U.S. Supreme Court has held that "[w]hile mathematical nicety is not a constitutional requisite", the "overriding objective must be substantial equality of population among various districts."<sup>118</sup> This requires "that a state make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable [because] it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters."<sup>119</sup>

Since *Reynolds v. Sims*, the Court has continued to refine the requirements of the Equal Protection Clause for legislative districts.

Specifically, a plan where the maximum population deviation between the largest and smallest district is more than 10% creates a *prima facie* case of discrimination and is presumptively impermissible.<sup>120</sup> Nevertheless, the state may offer a justification for the deviations by showing rational state policy considerations that cannot be achieved with plans of lower deviations.<sup>121</sup> The U.S. Supreme Court has stated that "when drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness and contiguity."<sup>122</sup> In *Mahan v. Howell*, Virginia established legislative districts with a roughly maximum

In a challenge to a legislative district plan under the Equal Protection Clause, if a legislative plan has a maximum deviation of more than 10%, it is presumptively impermissible. However, the state may rebut this presumption by showing that it implemented a rational state policy that could not be achieved with plans of lower deviations.

If a legislative plan has a maximum deviation of less than 10%, it is presumptively valid. However, this presumption is also rebuttable. In this scenario, if the plaintiffs establish that illegitimate factors predominated in the redistricting process, the plan can still violate the Equal Protection Clause

<sup>115</sup> *Reynolds*, 377 U.S. 533, 577-578.

<sup>116</sup> [Mont. Const. art. V, § 14](#)(1). The Constitutional Convention did not substantively discuss the meaning and extent of this phrase, although some delegates referred to the "one man, one vote" standard in passing." *See e.g.* Montana Constitutional Convention 1971-1972, Verbatim Transcript, Vol. IV., 694.

<sup>117</sup> Note that "practicable" is defined as "capable of being put into practice or of being done or accomplished." Miriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/practicable>. This is a different standard from "practical." Something may be practicable but not practical, making practicable a more stringent standard. *See also* section [5-1-115](#), MCA, and the discussion of related case law at section II(D), *supra*.

<sup>118</sup> *Reynolds*, 377 U.S. 533, 569, 579.

<sup>119</sup> *Brown v. Thomson*, 462 U.S. 835 (1983), 842 (citing *Reynolds*, 377 U.S. 533, 577).

<sup>120</sup> *Id.* at 850; *Evenwel*, 136 S. Ct. 1120, 1124.

<sup>121</sup> *See, e.g. Voinovich v. Quilter*, 507 U.S. 146 (1993).

<sup>122</sup> *Evenwel*, 136 S. Ct. 1120, 1124; *Cox v. Larios*, 542 U.S. 947 (2004), 949.

variation of 16% to preserve the integrity of subdivision lines, but the Supreme Court cautioned that the percentage "may well approach tolerable limits."<sup>123</sup>

In Montana, in 1983, plaintiffs in Gallatin County brought a suit in federal court against the Commission's legislative plan where the total deviation was 10.94% between house districts and 10.18% between senate districts.<sup>124</sup> The Commission adopted the following criteria: (1) that, insofar as possible, consideration should be given to existing governmental boundaries; (2) that geographic boundaries must be respected, unless such boundaries should impede voting; (3) that communities of interest be considered as they relate to a particular area; (4) that existing district boundaries be given consideration wherever practical; and (5) that the Commission stay within a plus or minus 5% deviation from the ideal.<sup>125</sup> The federal District Court found that the deviation was justified because the Commission had considered legitimate state objectives.<sup>126</sup> Further, the criteria that the Commission had considered were not inflexible, but rather they were "considerations only" and that "the criteria as they existed within a district and as they existed between districts had to be balanced in arriving at a plan embracing the entire State."<sup>127</sup> Because "the adoption of any feasible plan would have to some extent departed from the objectives set by the criteria," the District Court found that the Commission made a good-faith effort to balance all of the legitimate State objectives and upheld the plan.<sup>128</sup>

Where the maximum deviation between the largest and smallest district is less than 10%, a legislative map "presumptively complies with the one-person, one-vote rule."<sup>129</sup> However, because the overriding objective of districting must be "substantial equality of population", deviations from substantial population equality are "permissible only if 'incident to the effectuation of a rational state policy.'"<sup>130</sup> Therefore, if plaintiffs can prove that impermissible factors predominated in the redistricting process such as regional protectionism or the selective protection of incumbents (protection of incumbent facilitated in a way that is not consistent and neutral), the map may still be declared constitutionally infirm.<sup>131</sup>

The Legislature has also adopted a statutory provision concerning population deviation which was challenged and overturned in *Brown v. Montana Districting and Apportionment Commission*.<sup>132</sup> See the sidebar for the relevant statutory text, and see section II(D), *supra*, for a discussion of related case law.

**5-1-115. Redistricting criteria.** (1) Subject to federal law, legislative and congressional districts must be established on the basis of population.  
(2) In the development of legislative districts, a plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:  
(a) The districts must be as equal as practicable, **meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census.** The relative deviation may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act.

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<sup>123</sup> 410 U.S. 315, 329.

<sup>124</sup> *McBride v. Mahoney*, 573 F. Supp. 913 (D. Mont. 1983), 914.

<sup>125</sup> *Id.* at 915.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 916.

<sup>128</sup> *Id.* at 917.

<sup>129</sup> *Evenwell*, 136 S. Ct. 1120, 1124.

<sup>130</sup> *Larios*, 542 U.S. 947, 949 (citing *Reynolds*, 377 U.S. 533, 579).

<sup>131</sup> *Larios*, 542 U.S. 947.

<sup>132</sup> 2003 ML 1896 (Mont. 20th Dist. 2003).

### 3. Population Base Metrics

States almost universally use total population<sup>133</sup> as the metric for calculating compliance with "one person, one vote" requirements. Are there other population bases a state could use to comply with these requirements?

There are competing theories of representation that underly attempts to use different population metrics. A representational equality theory is based on the premise that a legislator represents all the residents of a district, regardless of their age or state citizenship, and the political body to which the legislator belongs affects all the residents of a district.<sup>134</sup> Thus, all individuals should be treated equally when districts are drawn. The competing theory, electoral equality, is based on the premise that a subset of the total population of a district, *i.e.* potentially eligible voters, should be equalized so that there is voting equality between districts.<sup>135</sup> These theories have been around for decades. For instance, it is clear that the apportionment of congressional seats as enshrined in the U.S. Constitution was based on representational equality.<sup>136</sup> More recently, there have been questions about whether legislative districts should be subject to electoral quality rather than representation equality.<sup>137</sup> Therefore, it is important here, once again, to draw a distinction between congressional and legislative districts.

As discussed above, equal population for congressional districts is based on Article I, section 2, of the U.S. Constitution. The 14th Amendment to the United States Constitution requires that United States Representatives be apportioned among the states "counting the whole number of persons in each state", in other words using total population. While this section specifies that "apportionment" (the act of proportionally dividing congressional seats) among the states is based on total population, it does not specifically address redistricting (the setting of boundaries by states to the seats apportioned to them). While the apportionment of seats to the states is calculated based on total population by the language of the 14th Amendment, there is not an explicit ruling limiting the redrawing of boundaries for representational districts to total population; although the U.S. Supreme Court has questioned "whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2."<sup>138</sup> Nevertheless, given the historical background of Article I, section 2, the 14th Amendment, district court decisions, and related U.S. Supreme Court commentary,<sup>139</sup> an attempt to use a population

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<sup>133</sup> The Census counts the "usual residents" of a state. "Usual residence" is defined by the Census as "the place where a person lives and sleeps most of the time." 83 Fed. Reg. 5526 (2/8/2018). It is not necessarily the same as the person's voting residence, their legal residence, or where they prefer to be counted. *Id.* The usual residents of a state make up "total population" for the purposes of this memo.

<sup>134</sup> "Issues Affecting the Apportionment Base," Bob Heath, Testimony Before the Texas Senate Committee on Redistricting, Oct. 29, 2019.

<sup>135</sup> *Id.*

<sup>136</sup> See note 58, *supra*.

<sup>137</sup> *Evenwel*, 136 S. Ct. 1120. In *Evenwel*, Texas voters challenged the state's use of total population for drawing legislative districts, arguing that it produced unequal voter-eligible populations. The Court found that pursuant to constitutional history, judicial decisions, and longstanding practice, a state may comply with the one-person, one-vote principle by designing its legislative districts based on total population. The court did "not resolve whether . . . States may draw districts to equalize voter-eligible population rather than total population." *Id.* at 1133.

<sup>138</sup> *Kirkpatrick*, 394 U.S. 526, 534.

<sup>139</sup> See discussion of historical background concerning Article I, section 2, and historical debates concerning section 2 of the Fourteenth Amendment in *Evenwel*, 136 S. Ct. 1120, 1127-1129. There, in addition to tracing the historical debates rejecting legal voter population as an apportionment base for the U.S. House of Representatives, the

base other than total population (or a population which approximates total population) for drawing congressional districts is unlikely to survive a legal challenge.

Because legislative districts are subject to the Equal Protection Clause of the 14th Amendment rather than Article I, section 2, there is latitude to use population metrics other than total population. In 1966, the U.S. Supreme Court noted that "the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which [the] substantial population equivalency is to be measured."<sup>140</sup>

After statehood, Hawaii apportioned its legislative representative districts according to registered voter population pursuant to its state constitution.<sup>141</sup> The 1950 constitutional convention in Hawaii chose registered voters as an approximation of both citizen and total population because total population did not necessarily comport with traditional local boundaries and citizen population had been difficult to administer because statistics were not readily available.<sup>142</sup> After *Reynolds v. Sims*, Hawaii faced a challenge to its plan for legislative districts which included multimember districts based partially on geographic principles among the state's islands and representative districts based on registered voters.<sup>143</sup> As part of a multiprong challenge, plaintiffs questioned the distribution of seats according to registered voters.<sup>144</sup> Because of a large military presence, many of whom claim residency in other states and do not vote in Hawaiian elections, the U.S. Supreme Court stated that "Hawaii's special population problems might well have led it to conclude that state citizen population rather than total population should be the basis for comparison."<sup>145</sup> The Supreme Court noted that it did not suggest that a state must include "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."<sup>146</sup>

While the Equal Protection Clause did not necessarily forbid other population bases, Hawaii's use of *registered* voters depended on the particular extent of political activity of each individual making it "susceptible to improper influences" and highly dependent on potentially "sudden and substantial" fluctuations in the number of registered voters.<sup>147</sup> Drawing attention to this distinction, the Court held that Hawaii's apportionment "satisf[ied] the Equal Protection Clause *only* because on this record it was found to have produced a distribution of legislators not substantially different from that which would

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Court pointed to *Wesberry's* conclusion that there "is no excuse for ignoring our Constitution's plain objective of making equal representation of *equal numbers of people* the fundamental goal for the House of Representatives. *Evenwel*, 136 S. Ct. 1120, 1129 (emphasis in original, citations omitted). See also *Travis v. King*, 552 F. Supp. 554 (D. Haw. 1982), 571 ("we hold that pursuant to article I, § 2 of the Constitution states must depend on total federal census figures to apportion congressional districts within their boundaries").

<sup>140</sup> *Burns v. Richardson*, 384 U.S. 73 (1966), 91.

<sup>141</sup> *Id.* at 77.

<sup>142</sup> *Id.* at 93.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 93.

<sup>146</sup> *Id.* at 92.

<sup>147</sup> *Id.* at 92-93.

have resulted from the use of a permissible population basis" (emphasis added).<sup>148</sup> In doing so, the Court cautioned that "[w]e are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."<sup>149</sup>

A three-judge court later struck down a subsequent Hawaiian apportionment plan based on registered voters because of insufficient justifications for disparities in allocation.<sup>150</sup> Since 1992, the Hawaiian constitution has required that the population be apportioned on the basis of permanent residents (state citizens) for legislative districts, excluding nonresident students and nonresident military personnel and their family members, rather than registered voters.<sup>151</sup>

Should the Commission consider using another population base for legislative seats during this cycle, it should bear in mind that the Montana Constitution requires that "[a]ll districts shall be as nearly *equal in population* as is practicable" (emphasis added).<sup>152</sup> Although in the federal judicial context from which this phrase originates, as traced above, indicates that there is some room for additional population metrics at the legislative level, the Montana Supreme Court has not construed whether "population" in Article V, section 14(1), requires total population or may include other acceptable population bases.

The Montana Supreme Court applies the same rules of construction for the Constitution that are applied to statutory law, interpreting the Constitution by viewing the "plain meaning of the words used and applying their usual and ordinary meaning."<sup>153</sup> The "intent of the framers of the Constitution is controlling and that intent must first be determined from the plain language of the words used."<sup>154</sup> Indeed, the Court's responsibility is "[n]ot to insert what has been omitted or to omit what has been inserted."<sup>155</sup> Merriam-Webster's dictionary defines "population" as "the whole number of people or inhabitants in a country or region."<sup>156</sup> Thus, the Montana Supreme Court may construe this phrase to require total population to be equalized for legislative districts, rather than using a subset of the population, such as eligible voter population.

#### 4. Reallocations and Exclusions from the Population Base

In a developing area of law, states have not necessarily been precluded from adjusting congressional and legislative data to correct perceived flaws, but there may be differences in the latitude between congressional and legislative districts for reallocating or excluding populations. While these concepts have not yet been developed in case law, one way of thinking of exclusions is to consider that they may

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 96.

<sup>150</sup> *Travis*, 552 F. Supp. 554.

<sup>151</sup> *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013), *aff'd*, 571 U.S. 1161 (2014). Hawaii uses total population for its federal congressional districts. *Id.* at 1079, 1093.

<sup>152</sup> [Mont. Const. art. V, § 14\(1\)](#).

<sup>153</sup> *Cross v. Van Dyke*, 2014 MT 193 citing *In re M.N.*, 2011 MT 245, ¶27.

<sup>154</sup> *Id.* at ¶10 citing *St. ex. rel. Racicot v. Dist. Ct.*, 243 Mont. 379 (1990), 384.

<sup>155</sup> *City of Missoula v. Cox*, 2008 MT 364, ¶11.

<sup>156</sup> Merriam-Webster Dictionary, <https://www.merriam-webster.com/>. *But see* section 1-2-106, MCA, "Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law . . . are to be construed according to such peculiar and appropriate meaning or definition."

be related to the choice of a population base other than total population while reallocations merely adjust the location of individuals *within* the statewide population.

With respect to congressional districts, Maryland adjusted its 2010 Census data for congressional districts to reallocate prisoners from their place of incarceration to their last-known residence before incarceration.<sup>157</sup> The Maryland federal District Court, affirmed without comment by the U.S. Supreme Court, found that the use of adjusted census data was not barred, citing *Karcher* and *Kirkpatrick* for the premise that "[i]f a State does attempt to use a measure other than total population or to 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner."<sup>158</sup> Because of the potential legal difficulties with adjusting congressional data, states have generally not adjusted populations for congressional districts, and it is not yet clear how far a state may adjust data for congressional districts to correct "perceived flaws."

With respect to legislative districts, states have also adjusted data by reallocating prisoners. In the last cycle, New York<sup>159</sup> and Maryland adjusted their legislative data to reallocate prisoners. Several additional states have passed laws to reallocate prisoners during the 2020 cycle.<sup>160</sup>

In the 2010 cycle, Hawaii and Kansas extracted nonresident students and military personnel from their legislative data. Since that time, Kansas eliminated its extraction of students and military personnel under a legislative referendum passed in 2019.<sup>161</sup>

Hawaii successfully defended its nonresident military and student extractions against a court challenge where the record indicated the state extracted all nonpermanent populations that existed in sufficient numbers to affect the apportionment of districts about which it could obtain relevant, reliable data using a rational method of extraction.<sup>162</sup> However, if the exclusion had been "carried out with an eye to invidiously targeting only certain nonresident groups, it would raise serious constitutional concerns."<sup>163</sup>

In sum, if the Commission implements any adjustments to the census data, it must use accurate and reliable data in a systematic approach using clear guidelines<sup>164</sup>. The U.S. Supreme Court has been clear

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<sup>157</sup> *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), 893, aff'd, 133 S. Ct. 29 (2012).

<sup>158</sup> *Id.* at 894, citing *Karcher*, 462 U.S. 725, 732 n. 4, and *Kirkpatrick*, 394 U.S. 526, 534-535.

<sup>159</sup> The New York law withstood a legal challenge brought under the New York Constitution. *Little v. N.Y. St. Task Force on Demographic Research and Reapportionment*, No. 2310-2011, slip op. (N.Y. Sup Ct. Dec. 1, 2011).

<sup>160</sup> "Reallocating Incarcerated Persons for Redistricting," National Conference of State Legislatures, <https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx>.

<sup>161</sup> "Kansas Voters Approve Amendment to Eliminate Unusual Redistricting Practices," Jurist, <https://www.jurist.org/news/2019/11/kansas-voters-approve-amendment-to-eliminate-unusual-redistricting-practices/>.

<sup>162</sup> *Kostick*, 960 F. Supp. 2d 1074, 1090. Some of the difficulties in extracting populations depends on determining the individual locations for census purposes and the level of certainty about nonpermanent status. *See id.* Active duty military were not automatically excluded by Hawaii, and the extraction tracked residency requirements under Hawaiian law. *Id.* at 1087. Students were extracted on the basis of the payment of nonresident tuition or a home address outside of Hawaii and included students at both state and private collegiate institutions. For further information on the methods used by Hawaii, see *Kostick* at 1095-1098.

<sup>163</sup> *Id.* at 1093-1094 (citations omitted).

<sup>164</sup> *See*, e.g. *Reallocating Incarcerated Persons for Redistricting*, NCSL, <https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx>.

that systematic, consistent policies must govern any attempt to correct census data.<sup>165</sup> Extractions may ultimately prove more problematic, but if they are used, they cannot unreasonably discriminate among nonresident groups<sup>166</sup>, and they must be free of any taint of arbitrariness or invidious discrimination against minority groups or the military<sup>167</sup>.

## B. Prohibition of Racial Discrimination

Federal constitutional and statutory law prohibit racial discrimination in the drawing of districts. This may happen in a variety of forms -- including "packing" minority voters into a district to minimize the districts they control, splitting minority voters between districts to dilute the strength of their votes ("cracking"), or purposefully drawing districts using race as the predominant factor without sufficient justification. The following sections discuss these federal law requirements that apply to both congressional and legislative districts, including how these principles interact with each other.

### 1. Minority Vote Dilution

Following the U.S. Civil War, the 15th Amendment to the U.S. Constitution was ratified, providing that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." However, the Amendment proved largely ineffective, so in 1965, Congress pass the Voting Rights Act of 1965<sup>168</sup> to enforce the 15th Amendment.<sup>169</sup>

Section 2<sup>170</sup> of the Voting Rights Act of 1965 (VRA) applies to Montana and its political subdivisions.<sup>171</sup> This section prohibits any state or political subdivision from imposing any voting qualification, standard, practice, or procedure

#### Amendment XV to the U.S. Constitution.

##### Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

##### Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

<sup>165</sup> *Karcher*, 462 U.S. 732, n. 4, and *Kirkpatrick*, 394 U.S. 526, 534-535.

<sup>166</sup> See *Carrington v. Rash*, 380 U.S. 89, 95 (1965), holding that although a state may impose reasonable residence requirements for voting, it may not deny the ballot to a bona fide resident merely because he is a member of the armed services.

<sup>167</sup> See *Kostick*, 960 F. Supp. 2d 1074, 1095.

<sup>168</sup> People often refer to the original sections of the Voting Rights Act of 1965. [This](#) is the original bill as enacted in 1965. However, the Act and amendments to the Act are now codified at [52 U.S.C. 10301, et seq.](#); [52 U.S.C. 10501, et seq.](#); and [52 U.S.C. 10701, et seq.](#)

<sup>169</sup> *S.C. v. Katzenbach*, 383 U.S. 301 (1966), 310-312.

<sup>170</sup> Other sections of the VRA include: § 4(a), which eliminates literacy tests and similar voting qualifications, and § 4(b), which contains a coverage formula determining which jurisdictions would be subject to § 5. Section 4(b) was declared unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013). Section 5 of the VRA requires changes by covered jurisdictions defined in § 4(b) to be precleared by the Attorney General or the federal court in the District of Columbia, and it was rendered ineffective due to the *Shelby County* holding that invalidated the preclearance coverage formula. However, if Congress enacted a new preclearance formula, this section may be used in the future. Nevertheless, Montana was not a jurisdiction subject to preclearance. Section 3(c) has similar provisions to § 5, except that it is initiated by court order after finding violations of the Fifteenth Amendment.

<sup>171</sup> Big Horn, Blaine, Flathead, Lake, Glacier, Pondera, Rosebud, and Roosevelt Counties have been involved with Voting Rights Act litigation. See *Wandering Medicine v. McCulloch*, 2014 U.S. Dist. LEXIS 183736 (D. Mont. 2014); *Old Person v. Brown*, 312 F.3d 1036 (9th Cir. 2002); *United State v. Blaine County*, 363 F.3d 897 (9th Cir. 2003); *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986); *Jackson v. Bd. of Trustees*, 2014 U.S. Dist. LEXIS 49830 (D. Mont. 2014); *U.S. v. Roosevelt Co.*, 2000 U.S. Dist. LEXIS 23974 (D. Mont. 2000).

that results in the denial or abridgment of any US citizen's right to vote on account of race, color, or membership in a language minority group.<sup>172</sup> The abridgment of the right to vote includes a racial or language group having "less opportunity than other members of the electorate . . . to participate in the electoral process and to elect representatives of their choice."<sup>173</sup> In essence, a § 2 claim is that "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequity in the opportunities [between majority and minority voters] to elect their preferred representatives."<sup>174</sup> Thus, the VRA recognizes that in addition to absolute prohibitions on casting ballots, the right to vote can be affected by a dilution of a minority's voting power.<sup>175</sup>

The largest racial minority in Montana is its American Indian population,<sup>176</sup> and there have been challenges concerning American Indian vote dilution in Montana legislative districts, county districts, and school districts.<sup>177</sup>

Judicial determination of whether there is a violation of § 2 of the Voting Rights Act is a two-step process. First, plaintiffs must prove the existence of three threshold conditions. These were first identified in a case, *Thornburg v. Gingles*,<sup>178</sup> and they are known colloquially as *Gingles* preconditions, factors, or requirements. First, plaintiffs must show that "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>179</sup> Second, plaintiffs must show that "the minority group . . . is politically cohesive," and third, plaintiffs must show that the "majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances . . . usually to defeat the minority's preferred candidate."<sup>180</sup> These three factors are necessary to show that the minority group has the potential to elect a representative of its own choice in a possible district but racially polarized voting prevents it from doing so in the district as actually drawn because it has been submerged in a larger majority voting population.<sup>181</sup>

If all three of these factors are present, courts proceed to the second step. A violation of § 2 may be found if, as a result of the challenged practice or structure:

based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its

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<sup>172</sup> [52 U.S.C. § 10301](#).

<sup>173</sup> *Id.*

<sup>174</sup> *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

<sup>175</sup> *Allen v. St. Bd. of Elections*, 393 U.S. 544, 569 (1969) (citations omitted).

<sup>176</sup> [Montana Population Estimates](#), US Census Bureau (2019).

<sup>177</sup> See section II(c), *supra*. See also *Old Person*, 312 F.3d 1036; *Blaine County*, 363 F.3d 897; *Windy Boy*, 647 F. Supp. 1002; *Jackson*, 2014 U.S. Dist. LEXIS 49830; *Roosevelt Co.*, 2000 U.S. Dist. LEXIS 23974.

<sup>178</sup> 478 U.S. 30 (1986), 50-51.

<sup>179</sup> *Thornburg*, 478 U.S. 30, 50. In *Bartlett v. Strickland*, the Supreme Court rejected claims that a group's ability to influence elections was cognizable under § 2, requiring the plaintiffs to show that they were sufficiently numerous, e.g. more than 50% of the voting age population, to create a majority in a compact single-member district. 556 U.S. 1 (2009). Further, note that "compactness" for purposes § 2 means the compactness of the minority group whose vote is being diluted. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), 433. This is different than the compactness of district lines, which is a traditional redistricting described at section III(C), *infra*.

<sup>180</sup> *Thornburg*, 478 U.S. 30, 51.

<sup>181</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .<sup>182</sup>

To assess the "totality of the circumstances," the courts have looked to factors suggested by the Senate Committee on the Judiciary report that accompanied 1982 amendments to the VRA and subsequent case law.<sup>183</sup> These factors include:

- the history of voting-related discrimination in the state or political subdivision
- the extent to which voting in the elections of the state or political subdivision is racially polarized
- the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group
- the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, that hinder their ability to participate effectively in the political process
- the use of overt or subtle racial appeals in political campaigns
- the extent to which members of the minority group have been elected to public office in the jurisdiction
- whether elected officials are unresponsive to the particularized needs of the members of the minority group
- whether the policy underlying the use of the contested practice or structure is tenuous
- whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area

This is necessarily an analysis that is highly dependent on district-by-district facts. In *Thornburg v. Gingles*, the U.S. Supreme Court noted that:

Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election . . . . Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.<sup>184</sup>

*Thornburg v. Gingles* further made clear that racially polarized voting does not refer to voting patterns for which the principle cause is race of the candidate.<sup>185</sup> Because causation is irrelevant to a § 2 inquiry, racially polarized voting simply refers to the situation where different races vote in blocs for different

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<sup>182</sup> [52 U.S.C. § 10301](#).

<sup>183</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), 426 (citations omitted).

<sup>184</sup> *Thornburg*, 478 U.S. 30, 57

<sup>185</sup> *Id.* at 62-68.

candidates.<sup>186</sup> Similarly, the cause of the majority bloc voting is likewise unimportant under this analysis.<sup>187</sup>

The Court noted that proof that some minority candidates have been elected does not foreclose a § 2 claim, but if the minority candidates enjoyed sustained success, the success is evidence of persistent proportional representation, and persistent proportional representation is inconsistent with the claim that a minority's ability to be able to elect representatives of their choice is not equal to that of the majority.<sup>188</sup>

Ultimately, § 2 of the VRA is an important tool that prevents the unconstitutional vote dilution of minorities, but if a state invokes the VRA to justify race-based districting, it must show that it had "good reasons" to think it would transgress the Act if it did not draw a race-based district.<sup>189</sup> Otherwise, it will be in violation of the Equal Protection Clause, discussed in the next section.

## 2. Discrimination and Racial Gerrymandering

The Equal Protection Clause of the 14th Amendment to the U.S. Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>190</sup> This clause protects against the purposeful discrimination between individuals on the basis of race. Thus, in the absence of sufficient justification, a state cannot intentionally assign citizens to a district on the basis of race or use race as the predominant factor in drawing district lines.<sup>191</sup>

A racial gerrymander is the "deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes."<sup>192</sup> A districting plan may be evaluated for a racial gerrymander if it distinguishes between citizens because of race or if it is so bizarre, even if it on its face it is race neutral, that it is unexplainable on grounds other than race.<sup>193</sup> The shape of the district is relevant only because it may be circumstantial evidence that race and not other districting principles was the dominant rationale in drawing the district's lines.<sup>194</sup>

In a racial gerrymandering claim, the plaintiff must prove that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (emphasis added).<sup>195</sup> This entails showing that other objective factors, such as traditional race-neutral redistricting criteria,<sup>196</sup> were subordinated to race.<sup>197</sup> A plaintiff may prove this through direct evidence of legislative intent, circumstantial evidence including a district's shape and

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 70-74.

<sup>188</sup> *Id.* at 75, 77.

<sup>189</sup> *Cooper*, 137 S. Ct. 1455, 1464.

<sup>190</sup> [U.S. Const. amend. XIV, § 1.](#)

<sup>191</sup> *Cooper*, 137 S. Ct. 1455, 1463; *Abbott v. Perez*, 138 S. Ct. 2305 (2018), 2314 (citation omitted).

<sup>192</sup> *Shaw v. Reno*, 509 U.S. 630 (1993), 640.

<sup>193</sup> *Id.* at 644.

<sup>194</sup> *Miller v. Johnson*, 515 U.S. 900 (1995), 913.

<sup>195</sup> *Cooper*, 137 S. Ct. 1455, 1463 (citing *Miller*, 515 U.S. 900, 916).

<sup>196</sup> See section III(D), *infra*, for a list of traditional redistricting criteria.

<sup>197</sup> *Cooper*, 137 S. Ct. 1455, 1464.

demographics, or both.<sup>198</sup> A racial gerrymandering claim applies to individual districts, taken on a case-by-case basis, not the state as a whole.<sup>199</sup>

This does not mean that the Commission must be race-blind when drawing districts, but it does mean that race cannot be the dominant or controlling factor. The Supreme Court has explained:

Redistricting differs from other kinds of state decisionmaking in that [the decision-making body] always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . [A] reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivision . . . . Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.<sup>200</sup>

If racial considerations predominated over other factors, the design of the district is subject to strict scrutiny, a difficult legal burden.<sup>201</sup> To uphold the design of the district, the burden shifts from the plaintiff to the state to prove that 'its race-based sorting of voters serves a "compelling interest" and is "narrowly tailored" to that end.'<sup>202</sup>

Because the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a decision-making body attempting to produce a lawful districting plan is vulnerable to "competing hazards of liability."<sup>203</sup> The Supreme Court has said that "'[i]n an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest . . . and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA."<sup>204</sup>

Consequently, one compelling interest is compliance with the VRA, as amended.<sup>205</sup> However, compliance with the VRA does not justify race-based districting "where the challenged district was not

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<sup>198</sup> *Id.*

<sup>199</sup> *Ala. Leg. Black Caucus v. Ala.*, 135 S. Ct. 1257 (2015), 1270.

<sup>200</sup> *Shaw*, 509 U.S. 630, 646-647.

<sup>201</sup> *Cooper*, 137 S. Ct. 1455, 1464.

<sup>202</sup> *Id.*

<sup>203</sup> *Abbott*, 138 S. Ct. 2305, 2315 (citing *Bush v. Vera*, 517 U.S. 952 (1996), 977).

<sup>204</sup> *Id.* (citations omitted).

<sup>205</sup> *Id.*

reasonably necessary under a constitutional reading and application of those laws.<sup>206</sup> This requires the state to have a "strong basis in evidence" for the conclusion that it must draw a race-based district to comply with the VRA.<sup>207</sup> This requires an assessment of the three *Gingles* preconditions and the totality of the circumstances test for minority vote dilution described in section III(B)(1), *supra*. Merely trying to avoid meritless litigation under the VRA is not a compelling interest.<sup>208</sup>

Another compelling interest is in remedying past or present discrimination, but it must be identified with some specificity before using "race-conscious relief" and there must be a "strong basis in evidence" to conclude that remedial action was necessary before embarking on an affirmative-action program.<sup>209</sup> Further, "an effort to alleviate the effects of societal discrimination is not a compelling interest", nor is a generalized assertion of past discrimination in a particular region or industry adequate.<sup>210</sup>

The Commission must be very careful as it draws districts, bearing in mind the federal protections against discrimination for all districts and ensuring that it does not discriminate against racial or language minorities. In sum, on the one hand, the Commission must be conscious of race to ensure electoral districts do not dilute minority votes, but on the other hand, race cannot be the predominant consideration when drawing districts except in the limited circumstances described above.

### C. Compactness & Contiguity

The Montana Constitution requires that legislative districts "shall consist of compact and contiguous territory." Compactness and contiguity are formal and relatively objective criteria that look to the geographic shape and characteristics of individual districts.

Compactness<sup>211</sup>, in geographic terms, means "occupying a small volume by reason of efficient use of space."<sup>212</sup> Because there are varying standards for compactness,<sup>213</sup> compactness is often determined by using a general appearance or "eyeball" test.<sup>214</sup>

Contiguity, on the other hand, means that all parts of the district be connected or touching in one unbroken sequence.

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<sup>206</sup> *Miller*, 515 U.S. 900, 921.

<sup>207</sup> *Shaw v. Hunt*, 517 U.S. 899 (1996), 915.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 909-910.

<sup>210</sup> *Id.*

<sup>211</sup> Do not confuse the geographic term "compact" used here with the term used in the evaluation of federal section 2 claims under the Voting Rights Act (concerning whether race predominated in the drawing of lines). Under a section 2 claim, "compactness" refers to the compactness of the minority group whose vote is being diluted rather than the compactness of district lines. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433.

<sup>212</sup> Merriam-Webster dictionary, <https://www.merriam-webster.com/dictionary/compactness>.

<sup>213</sup> Hofeller, Thomas B., *Compactness in the Redistricting Process*, <https://www.ncsl.org/documents/redistricting/Compactness-March-2010Hofeller.pdf> (2010).

<sup>214</sup> *Bush*, 517 U.S. 952, 960.

The Legislature has also provided statutory requirements concerning compactness and contiguity in section [5-1-115](#), MCA. See the sidebar for the statute's text and section II(D), *supra*, for a discussion of case law related to the criteria statute.

In evaluating compactness and contiguity, courts have also evaluated the functional aspects of the district, including ease of travel and communication in a district.<sup>215</sup>

Consequently, as the Commission draws proposed districts, it should attempt to ensure physical and functional compactness and contiguity by monitoring the shape, geography, road systems, and other physical aspects of the districts.

#### **D. Other Traditional Redistricting Criteria**

The preceding portions of this memo discussed federal and state legal requirements for districts, but there are numerous ways to draw district boundaries, and these can have dramatic political consequences.

In addition to the criteria required under federal and state law, many states, including previous Montana Commissions on Districting and Apportionment, have adopted additional criteria<sup>216</sup> to help consistently guide their decision-making throughout the districting process. These are generally long-standing traditional redistricting principles. From a practical perspective, these principles help to draw lines, but in a legal challenge, applying consistent, race-neutral criteria demonstrates to courts that decision-makers have not drawn boundaries with impermissible motives.

Traditional redistricting principles that have been judicially recognized on the federal level as permissible criteria include compactness,<sup>217</sup> contiguity,<sup>218</sup> preservation of counties and other political

#### **5-1-115. Redistricting criteria.**

...

(2)

...

(c) The districts must be contiguous, meaning that the district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that prevent transportation within a district may not be considered contiguous.

(d) The districts must be compact, meaning that the compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act.

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<sup>215</sup> See *e.g. Wilkins v. West*, 264 Va. 447, 464 (Va. 2002).

<sup>216</sup> Past congressional criteria adopted by the Montana Commission may be found in Appendix A. For ease of reading, the original document is available at <https://leg.mt.gov/content/Districting/2020/Topics/Legal/congressional-criteria-june-2020.pdf>. Past legislative district criteria may be found in Appendix B. For ease of reading, the original document is available at <https://leg.mt.gov/content/Districting/2020/Topics/Legal/history-districting-criteria-2020-version-january-2020.pdf>

<sup>217</sup> *Shaw*, 509 U.S. 630, 647.

<sup>218</sup> *Id.*

subdivisions,<sup>219</sup> preservation of communities of interest,<sup>220</sup> preservation of cores of prior districts,<sup>221</sup> and protection of incumbents.<sup>222</sup>

Previous commissions have chosen to adopt additional criteria such as following geographic boundaries (to the extent possible, drawing districts along geographic boundaries, such as mountain divides, ridge lines, creeks, rivers, or roads), following lines of political units (to the extent possible, drawing districts to follow the boundaries of counties, cities, towns, school districts, Indian reservations, precincts, and other political subdivisions),<sup>223</sup> consideration of communities of interest (consideration of populations where residents have common interests, often defined by geography, socioeconomic status, and economic activity), consideration of existing district boundaries where practical (existing districts may provide a starting point for the Commission's work to determine population variance from the ideal district population but existing districts may not comply with redistricting criteria because of updated population data), and a maximum deviation from the ideal district. Each of these criteria was found to be a legitimate state objective by the Montana federal district court in *McBride v. Mahoney*.<sup>224</sup>

Preserving political subdivisions was the subject of one portion of the criteria statute adopted by the Legislature at section [5-1-115](#), MCA. See the sidebar for the statute's text and section II(D), *supra*, for a discussion of case law related to the criteria statute.

In 1990, the Commission also adopted the criteria of "political fairness" so that districts could not be drawn for the purpose of favoring a political party or defeating an incumbent legislator.<sup>225</sup> This is also reflected in the

**5-1-115. Redistricting criteria.**

- ...
- (2)
- ...
- (b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.
- ...
- (3) A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress. The following data or information may not be considered in the development of a plan:
- (a) addresses of incumbent legislators or members of congress;
  - (b) political affiliations of registered voters;
  - (c) partisan political voter lists; or
  - (d) previous election results, unless required as a remedy by a court.

<sup>219</sup> *Id.*

<sup>220</sup> *Miller*, 515 U.S. 900, 916 (1995); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997). However, if communities of interest align racial boundaries, they may not be used to circumvent rules against racial gerrymandering. See *Bush*, 517 U.S. 952. Further, communities of interest must be considered at the time the plan is made, not as a post-hoc justification. *Id.*

<sup>221</sup> *Karcher*, 462 U.S. 725, 740.

<sup>222</sup> *Id.*

<sup>223</sup> See also section [5-1-115](#), MCA, and the discussion of related case law at section II(D), *supra*.

<sup>224</sup> 573 F. Supp. 913 (D. Mont. 1983).

<sup>225</sup> See Appendix B. In addition, numerous partisan gerrymandering (the practice of setting district boundaries to favor a particular political party) claims have been brought in various courts, but the Supreme Court has held that these are nonjusticiable political questions beyond the reach of the federal court. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). In response, litigants are now turning to state courts using state constitutional grounds to try to find workable legal standards to adjudicate partisan gerrymandering claims. See, e.g. *League of Women Voters of Pa. v. Commonwealth of Pa.*, No. 159 MM 2017, slip op. (Pa. Feb. 7, 2018); *N.C. v. Common Cause*, 18 CVS 014001 (N.C. Super. Sept. 3, 2019).

redistricting criteria statute adopted by the Legislature, section [5-1-115\(3\)](#), MCA. See the sidebar for the statute's text and section II(D), *supra*, for a discussion of case law related to the criteria statute.

The criteria mentioned here are not an exhaustive list, and additional criteria, as long as they are race-neutral, may also be considered.<sup>226</sup>

### **E. Prioritizing Criteria**

Although federal and state constitutional requirements must be strictly applied, how can the Commission navigate the inevitable conflicts between criteria? The criteria adopted by the Commission will inevitably present conflicts, and these conflicts will require the Commission to make policy choices.

Some states choose to explicitly prioritize their criteria to help clarify the state's priorities, restrict policymaker choices, and reduce legal challenges.<sup>227</sup> The criteria statute adopted by the Legislature, section [5-1-1115](#), MCA, discussed previous at section II(D), *supra*, specifically ranks criteria. However, prioritizing criteria also limits the Commission's flexibility to accommodate criteria ranked "less important."

In a 1983 lawsuit, plaintiffs alleged that the Commission did not follow its own criteria. The Court said, "[i]t is clear from the wording of the criteria and the Commission discussions that [the criteria] were considerations only and that the conflicts between the criteria as they existed within a district and as they existed between districts had to be balanced in arriving at a plan embracing the entire State."<sup>228</sup> In that case, the Commission had been presented with conflicts between its adopted criteria, and it had to make choices between criteria. The federal District Court found that "the adoption of any feasible plan would have to some extent departed from the objectives set by the criteria. It was the function of the Commission to interpret its own criteria -- to decide, for instance, what constituted a community of interest and then, looking at not just one county but all counties potentially affected, to balance the interests involved and arrive at a conclusion."<sup>229</sup>

Thus, the Commission should consider whether it wishes to balance criteria, as it has historically done, or to prioritize criteria. This choice should clearly be reflected on the record. Any prioritized criteria must be applied consistently. If the Commission chooses to balance criteria, it must make a good-faith effort to consider and balance all of the criteria it adopts, and it should diligently ensure that the record reflects these considerations.

### **IV. Defending the Plans**

As seen in the history since the Constitutional Convention, redistricting is often accompanied by litigation, though the legal issues have varied from plan criteria to open meeting laws. In this litigious environment, it is imperative that the Commission diligently follow federal and state constitutional law, engage in an open and public process, and ensure that a well preserved and carefully documented record reflects not only the Commission's decisions but the deliberations concerning *why* the Commission has made substantive decisions with regard to each district. Importantly, federal courts

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<sup>226</sup> For new criteria recently being used by states, see "Emerging Criteria," *Redistricting 2020*, 80-82, National Conference of State Legislatures (2019).

<sup>227</sup> *Id.* at 82.

<sup>228</sup> *McBride*, 573 F. Supp. at 916.

<sup>229</sup> *Id.* at 917.

defer to state judicial determinations *and* state political determinations on redistricting, including districting criteria, as long as they are consistent with federal requirements.<sup>230</sup> Thus, commissioners must ensure that they make an adequate record of their decision-making process to ensure that the Commission's plans are upheld in any subsequent litigation at the state or federal level.

In the event that litigation is brought against the Commission, the Attorney General would be requested to represent the Commission at the district court level. Although the Attorney General has no statutory duty to do so, the Attorney General may represent the Commission at the district court level. If the Attorney General declines to represent the Commission, Legislative Services Division would contract with the Agency Legal Services Bureau to provide litigation services.

However, after the plans are filed, the Commission is dissolved.<sup>231</sup> Thus, a legal suit would routinely name the Secretary of State, the entity with which the plan is filed. In this case, the Secretary of State would determine the entity to defend itself, although the Attorney General may still represent the state's interests.

In any event, unlike at the district court level, at the Montana Supreme Court, the Attorney General is statutorily required to "defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest."<sup>232</sup>

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<sup>230</sup> Daniel Hayes Lowenstein, Richard L. Hasan, and Daniel R. Tokaji, *Election Law Cases and Materials*, 107 (5th ed., Carolina Academic Press 2012) (citing *Scott v. Germano*, 381 U.S. 407 (1965) and *Grove v. Emison*, 507 U.S. 25 (1993), 32-37)).

<sup>231</sup> [Mont. Const. art. V, § 14\(5\)](#).

<sup>232</sup> Section [2-15-501](#)(1), MCA.

# APPENDIX A

For ease of reading, you may open the original document at:

<https://leg.mt.gov/content/Districting/2020/Topics/Legal/congressional-criteria-june-2020.pdf>



## History of Congressional Districting Criteria in Montana: 1974 to 2010

Commission Year	Number of Districts	Mandatory Criteria	Discretionary Criteria	Counties Split?	Other Notes
1974	2	None <sup>1</sup>	None <sup>1</sup>	None	The 1974 Commission the districts adopted in 1965 by a federal court
1980	2	✓ To "achieve the minimum amount of deviation in congressional districts"	None	None	<u>Absolute range:</u> - 47 to +47 <u>Overall Absolute Range:</u> 94 <u>Relative Range:</u> -.01% to +.01% <u>Overall Relative Range:</u> .02%
1990	1	None	None	N/A	
2000	1	✓ Population equality	<ul style="list-style-type: none"> <li>✓ Following the lines of political units</li> <li>✓ Following geographic boundaries</li> <li>✓ Keeping communities of interest intact</li> </ul>	N/A	Adopted November 16, 2000 <sup>2</sup>
2010	1	✓ Population equality	None	N/A	Adopted May 28, 2010 <sup>3</sup>

### Notes

1. The 1974 Commission report does not mention commissioners discussing or adopting criteria. It states: "The Commission has made no changes in the existing Congressional districts since they already comply with the law."
2. November 16, 2000, meeting minutes: [https://leg.mt.gov/content/committees/interim/2001\\_2002/dist\\_apport/nov16min.pdf](https://leg.mt.gov/content/committees/interim/2001_2002/dist_apport/nov16min.pdf)
3. Congressional and Legislative Redistricting Criteria: <https://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Other-Documents/1124RWFA-corrected-criteria-updated-2011.pdf>

# APPENDIX B

For ease of reading, you may open the original document at:

<https://leg.mt.gov/content/Districting/2020/Topics/Legal/history-districting-criteria-2020-version-january-2020.pdf>

## HISTORY OF STATE LEGISLATIVE DISTRICTING CRITERIA IN MONTANA, 1974 – 2010

Commission Year	Starting Point	Mandatory Criteria	Discretionary Criteria	Ideal HD Size	# of Counties Below Ideal	Range of Deviation	Mean Deviation	Other Notes
1974	<p>Commission recommended using "the periphery of the state" because the various borders limit the options for districts</p> <p>"First districts drawn were rural and toward the boundaries of the state"</p> <p>"Last districts drawn were urban and well within the state"</p> <p>Started in NE corner<sup>1</sup></p>	<ul style="list-style-type: none"> <li>"Substantial equality" of population/one man one vote</li> </ul>	<ul style="list-style-type: none"> <li>Keeping counties intact</li> <li>Maintaining communities of interest</li> <li>Considering on "a case by case basis" the following factors: "geography, trade areas, county lines, minorities, economic interests, rural-urban interest, district homogeneity"</li> </ul>	6,944	32 <sup>2</sup>	<p><b>HD:</b></p> <p>Overall: 15.48%</p> <p>Max: +7.83%</p> <p>Min: -7.65%</p> <p><b>SD:</b></p> <p>Overall: 13.08%</p> <p>Max: +6.33%</p> <p>Min: -6.75%</p>	<p><b>HD:</b> ± 3.43%</p> <p><b>SD:</b> ± 2.94%</p>	<p>The Commission originally directed staff to split existing multi-member districts into single-member districts that had no more than a 10.9 percent deviation. This approach was abandoned after it created more problems than it solved.</p>
1980	<p>The Commission's report suggested starting in the rural, border areas, as had been done by the 1974 Commission.</p> <p>Started in NW corner<sup>3</sup></p>	<ul style="list-style-type: none"> <li>Population equality, which the commission established as an overall relative range of 10% or ± 5% from ideal average district population</li> <li>Compactness</li> <li>Contiguity</li> </ul>	<ul style="list-style-type: none"> <li>Consideration of existing governmental lines</li> <li>Respect for geographic boundaries, especially the Continental Divide and the Missouri River</li> <li>Consideration to existing legislative district boundaries, when practical</li> <li>Senate district boundaries to follow congressional district division when possible</li> <li>Consider communities of interest and defined communities of interest</li> </ul>	7,866.9		<p><b>HD:</b></p> <p>Overall: 10.94%</p> <p>Max: +5.78%</p> <p>Min: -5.16%</p> <p><b>SD:</b></p> <p>Overall: 10.18%</p> <p>Max: +5.14%</p> <p>Min: -5.04%</p>		<p>Commission abandoned criterion to have senate district boundaries follow congressional district boundary: impractical and "did not serve in the effectuation of a rational state policy."</p> <p>Discretionary criteria not prioritized.</p> <p>Included 6 House and 3 Senate districts in excess of the ± 5% deviation (upheld by a federal District Court in <u>McBride v. Mahoney</u>.<sup>4</sup>)</p>

Commission Year	Starting Point	Mandatory Criteria	Discretionary Criteria	Ideal HD Size	# of Counties Below Ideal	Range of Deviation	Mean Deviation	Other Notes
1990	Northwest corner of the state with the end point in Yellowstone County	<ul style="list-style-type: none"> <li>• Compactness and contiguity</li> <li>• Population equality</li> <li>• Maximum population deviation - relative population deviation from ideal population for an individual district may not exceed <math>\pm 5\%</math></li> <li>• Final results of the 1990 census must be used to form plan</li> <li>• Protection of minority rights (may not dilute voting strength of racial or language minorities, compliance with section 2 of VRA)</li> </ul>	<ul style="list-style-type: none"> <li>• Consideration to local government boundaries</li> <li>• Consideration when practical to existing voting precinct lines</li> <li>• Consideration when practical to school district lines</li> <li>• Preserve communities of interest when possible</li> <li>• Respect geographical boundaries to the extent possible</li> <li>• Consideration to existing districts when practical</li> <li>• Political fairness, ie, districts may not be drawn for the purpose of favoring a political party or defeating an incumbent legislator</li> </ul>	7,990.65	31*	<b>HD:</b> Overall: 9.96% Max: +4.99% Min: -4.97%	<b>HD:</b> $\pm 2.6\%$	Discretionary criteria were not prioritized.  Staff used ARC/INFO software from ESRI
2000	Glacier County (and adjacent Flathead and Lake Counties, as necessary), then proceeded in clockwise motion around the state	<ul style="list-style-type: none"> <li>• Population equality and maximum population deviation (+/- 5%)</li> <li>• Compact, contiguous districts</li> <li>• Protection of minority voting rights and compliance with VRA</li> <li>• Race cannot be the predominant factor to which traditional redistricting criteria are subordinated</li> </ul>	<ul style="list-style-type: none"> <li>• Following lines of political units</li> <li>• Following geographic boundaries</li> <li>• Keeping communities of interest intact</li> </ul>	9,022	31**	<b>HD:</b> Overall: 9.85% Max: 4.98% Min: -4.88%  <b>SD:</b> Overall: Max: Min:	<b>HD:</b> $\pm 3.5\%$	Held 16 public hearings, including mandatory one in Helena.  Staff used autoBound software from Citygate.

Commission Year	Starting Point	Mandatory Criteria	Discretionary Criteria	Ideal HD Size	# of Counties Below Ideal	Range of Deviation	Mean Deviation	Other Notes
2010	The Commission chose a statewide approach, taking public comment on 5 maps before adopting 100 House Districts.	<ul style="list-style-type: none"> <li>Population equality and maximum population deviation (+/- 3%)</li> <li>Compact, contiguous districts</li> <li>Protection of minority voting rights and compliance with VRA</li> <li>Race cannot be the predominant factor to which traditional redistricting criteria are subordinated</li> </ul>	<ul style="list-style-type: none"> <li>Following lines of political units</li> <li>Following geographic boundaries</li> <li>Keeping communities of interest intact</li> </ul>	9,894	36	<b>HD:</b> Overall: 5.44% Max: +2.45% Min: -2.99%  <b>SD:</b> Max: +2.28% Min: -2.98%	<b>HD:</b> ± 0.91% <b>SD:</b> ± 0.76%	Held 3 public hearings on districting criteria selection prior to the availability of Census figures  Staff used Maptitude software from Caliper  Commission held 17 public hearings on plans, including the mandatory one in Helena  Discretionary criteria were not prioritized

Last updated 6/5/2019

<sup>1</sup> Susan Fox, Operational Guidelines for Congressional and Legislative Redistricting, Legislative Services Division, November 2000, available from: [http://leg.mt.gov/content/publications/committees/interim/2001\\_2002/dist\\_apport/susan.pdf](http://leg.mt.gov/content/publications/committees/interim/2001_2002/dist_apport/susan.pdf), last accessed Jan. 26, 2010.

<sup>2</sup> Gregory Petesch, The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), 64 Mont. L. Rev. 23 (2003).

<sup>3</sup> Susan Fox, Operational Guidelines for Congressional and Legislative Redistricting, Legislative Services Division, November 2000, available from: [http://leg.mt.gov/content/publications/committees/interim/2001\\_2002/dist\\_apport/susan.pdf](http://leg.mt.gov/content/publications/committees/interim/2001_2002/dist_apport/susan.pdf), last accessed Jan. 26, 2010.

<sup>4</sup> Report of the Montana Districting and Apportionment Commission, December 1992, page 15.

<sup>5</sup> Montana Counties and County Seats 1990 Census of Population, U.S. Bureau of the Census, March 1993.

<sup>6</sup> Gregory Petesch, The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), 64 Mont. L. Rev. 23 (2003).