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Thomas L. Brunell

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THE ONE PERSON, ONE VOTE STANDARD IN REDISTRICTING: THE USES AND ABUSES OF POPULATION DEVIATIONS IN LEGISLATIVE REDISTRICTING

Thomas L. Brunell[†]

ABSTRACT

Since the Redistricting Revolution of the 1960s, which began with a series of Supreme Court decisions that forced states to draw equally populated districts for the United States House and state legislative chambers, the standards for congressional and legislative districts have evolved differently over time. Today's standards call for virtually no population deviations for congressional districts, though legislative districts can typically deviate up to 10 percent. In practice this means that districts can vary by as much as 5 percent above and below the ideal population within a state. Based on a review of data from forty-seven states after the 2000 redistricting cycle, this Article demonstrates that these population deviations are a simple tool for those that redraw electoral boundaries to create a partisan gerrymander. If one party controls the redistricting process, districts from the opposite party are typically overpopulated and districts favoring the party in control are usually underpopulated. Based on this phenomenon, this Article argues that courts ought to abolish the "10 percent" rule.

[†] Professor, School of Economic, Political and Policy Sciences, The University of Texas at Dallas.

INTRODUCTION

Following the 2010 Census, each state used data from the results of the decennial headcount to redraw state legislative and, in those states with more than one district, congressional electoral boundaries. This process is time consuming, expensive, susceptible to litigation, and vitally important for many politicians. Most voters are unaware that redistricting is taking place and they are even less likely to know if and how it affected the voting districts where they reside. Remapping electoral boundaries provides politicians an opportunity to affect the distribution of seats within their own state and to improve individual members' chances of being reelected. This Article's focus is one important aspect of redistricting: the extent to which those in charge of redistricting use population deviations across districts in state legislative redistricting.

Modern redistricting revolves around a handful of accepted criteria or principles, most of which are not consistently enforced. Compactness, or the shape of districts, is one principle that is not heavily enforced.[1] Protecting communities of interest is a rather amorphous criterion that can mean virtually anything when it comes time to litigate a map, but at its most basic level, it means preserving other political boundaries, such as county and municipal lines.[2] Contiguity, which requires that all parts of a district be connected, however, is strictly required and enforced.[3] Another criterion that courts routinely enforce is that of one person, one vote ("OPOV"), which mandates that districts within a state be nearly equal in population.[4]

In this Article, I review the relevant case law pertaining to the OPOV standards and explain the differences between congressional and state legislative standards for OPOV. Then, I examine how the more relaxed approach to state legislative districts is used primarily for political purposes. And, lastly, I argue that courts ought to require

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[1] Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 531 (1993) (claiming that "redistricting bodies do not take compactness into account any more when it is legally required, and that courts have not been willing to enforce such requirements in ways that affect outcomes").

[2] *See, e.g.*, Bone Shirt v. Hazeltine, 387 F. Supp. 2d 1035, 1042 (D.S.D. 2005) (noting that South Dakota's redistricting communities of interest are protected through "compact and contiguous districts, respect for geographical and political boundaries, and protection of minority voting rights consistent with the United States Constitution").

[3] *See* Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Parisian Gerrymandering*, 78 U. CHI. L. REV. 553, 580–81 (2011) (noting that contiguity is required but can also be easily satisfied).

[4] Karcher v. Daggett, 462 U.S. 725, 730–31 (1983).

all representative districts to abide by the very strictest of standards: equal population.[5]

I. THE LEGAL HISTORY AND LANDSCAPE[6]

In *Baker v. Carr*,[7] the Supreme Court finally stepped into the "political thicket" of redistricting and addressed legislative malapportionment, or the creation of districts with dramatic population variances within the same state. In a series of famous cases in the 1960s, the Court decided that the Equal Protection Clause of the Constitution served as grounds to strike down legislative redistricting maps that had egregious population deviations with a single state.[8] In the early 1960s, for example, the average state Senate district in California was comprised of just under 400,000 people.[9] The standard deviation for state Senate districts at the same time was over 900,000 people, indicating a large variance in the population of these electoral districts.[10] The variance stemmed, in large part, because Los Angeles County, the most heavily populated county in the state, had just one seat prior to the Supreme Court's insistence on population equality.[11] After the OPOV decisions, however, Los Angeles County was represented by 14.5 people in the state Senate.[12]

The idea behind the *Baker v. Carr* and related decisions is straightforward: If one voter lives in a district with 50,000 people and another voter in the same state lives in a district that only had 5,000 people, then the voters in the second district cast a far more powerful and important vote than their fellow citizens in the first district.

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[5] This is a similar proposal to outcome-based regulation. *See generally* Michael P. McDonald, *Regulating Redistricting*, 40 PS: POL. SCI. & POL. 675, 677 (2007) (reviewing outcome-based regulations); Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 755 (2004) (advocating for temporal limitations to the redistricting process).

[6] For an in-depth look at the court cases including some hints about what the Justices were faced with at the time and a history of congressional and state legislative reactions, see STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 160–82 (2008).

[7] 369 U.S. 186 (1962).

[8] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause required state legislative districts to be apportioned on a population basis); *cf.* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that Article I, Section 2 of the United States Constitution required congressional districts to abide by the OPOV rule).

[9] Glendon Schubert, To the Editor, *Malapportionment Remeasured*, 58 AM. POL. SCI. REV. 966, 967 tbl.II (1964).

[10] *Id.*

[11] Bruce W. Robeck, *Legislative Partisanship, Constituency and Malapportionment: The Case of California*, 66 AM. POL. SCI. REV. 1246, 1248 (1972).

[12] *Id.*

Legislatures represent people, the Court recognized, not land, trees, or square mileage.[13]

Baker concerned the redistricting process in Tennessee. In the 1960s, the Tennessee constitution required the state legislature to redraw legislative districts after each decennial census.[14] Despite this requirement, the state's legislative district lines remained static between 1901 and 1960.[15] Because the population growth during this time was, by and large, in the state's urban areas, these stagnant district lines led to vastly underrepresented urban areas.[16] The plaintiffs for the case included citizens from Memphis, Knoxville, and Nashville—the major urban areas of the state. In a lengthy opinion, Justice Brennan, writing for the majority, carefully considered justiciability, jurisdiction, and standing.[17] In the process of finding no bar to the plaintiff's claim, he disposed of *Colegrove v. Green*,[18] a case in which the court refused to intercede in redistricting related matters.[19]

Other related and equally important redistricting decisions followed shortly after *Baker*. In 1963, the Court heard *Gray v. Sanders*,[20] which involved a Georgia law that required votes in primary elections for statewide offices to be tallied using a county-unit system.[21] The Supreme Court ruled that this system violated the Equal Protection Clause because the weight of a vote was not equal, but rather depended on the size of the county in which a voter resided.[22]

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[13] *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres.").

[14] *Baker v. Carr*, 369 U.S. 186, 188–90 (1962) (noting the requirements of the Tennessee Constitution).

[15] *Id.* at 191 ("In the more than 60 years since that [1901] action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.").

[16] *See id.* at 255–58 (Clark, J., concurring) (illustrating disparities).

[17] *See id.* at 204–237 (explaining the rationales behind the Court's disposal of those issues).

[18] 328 U.S. 549 (1946).

[19] *Baker*, 369 U.S. at 203, 206, 209, 249–50.

[20] 372 U.S. 368 (1963).

[21] Here is a description of the system in place from the syllabus:

Counties with populations not exceeding 15,000, two units; an additional unit for the next 5,000 persons; an additional unit for the next 10,000; an additional unit for each of the next two brackets of 15,000; and, thereafter, two more units for each increase of 30,000. All candidates for statewide office were required to receive a majority of the county-unit votes to be entitled to nomination in the first primary. The practical effect of this system is that the vote of each citizen counts for less and less as the population of his county increases, and a combination of the units from the counties having the smallest population gives counties having one-third of the total population of the State a clear majority of county votes.

Id. at 368.

[22] *Id.* at 379.

At this time, many states mimicked the federal legislature by apportioning the two state legislative chambers on different basis. For instance, in 1962 the Alabama legislature proposed an amendment to the state constitution which would have apportioned the state senate by county—each of the sixty-seven counties would get one senator.[23] Though this is analogous to the United States Senate, the Court held that "State[s] [must] make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[24] Thus, the court killed the "federal analogy" for having even one chamber of the state legislature being apportioned according to something other than equal population.

While a majority of the Justices clearly saw a need to equalize the population across districts within a state, they were also clear that they did not think that perfect population equality was required:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[25]

This is the language that led us down the road of permissible deviations from strict population equality for state legislative districts.

A year later, in *Wesberry v. Sanders*,[26] the Court ruled that states must draw districts for the U.S. House of Representatives so that the population in each district is nearly as equal as possible because each person's vote in a state ought to be weighted equally.[27] Unlike those cases involving state apportionment procedures, the Court based congressional OPOV standards on Article I, section 2 of the Constitution, which requires that states receive seats in the House "according to their respective Numbers."[28] Over time, the federal judiciary has interpreted this as requiring nearly absolute equality.[29] But since the justification for legislative district equality comes from the Equal Protection Clause, "judicial deference to state interests and

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[23] Reynolds v. Sims, 377 U.S. 533, 543–44 (1964).

[24] *Id.* at 577.

[25] *Id.* at 579.

[26] 376 U.S. 1 (1964).

[27] *See id.* at 7–8 ("We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

[28] U.S. CONST. art. I, § 2, cl. 3.

[29] *Wesberry*, 376 U.S. at 7–8.

practical necessity" is required.[30] Thus, there is a distinction between the level of equality required based on the office for which the state legislature is drawing the lines.

Later, the Court in *Karcher v. Daggett*[31] established a two-step test with respect to population equality for congressional districts. Under the *Karcher* test, a court must first assess whether the state could have reduced or eliminated the population differences with a good faith effort.[32] Then, if the challengers "can establish that the population differences were not the result of a good-faith effort to achieve equality, the State . . . bear[s] the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal."[33]

Courts have found that small population deviations across congressional districts pass muster when the state demonstrates a compelling governmental interest to justify these deviations from OPOV.[34] Courts sometimes, however, find that very small deviations are sufficient to force a change in the map. For instance, the 2000 congressional redistricting plan in Pennsylvania had a deviation of just nineteen people, but the people that drew the plan had no compelling explanation for why these deviations existed.[35] They simply decided that the nineteen-person deviation was close enough, and the district court found that this explanation failed to meet the second part of the *Karcher* test.[36]

The court's decision, at first blush, seems ridiculous. After all, census data are not perfect.[37] And, even with perfect data, when this litigation reached federal court over a year after the 2000 Census's completion, the demography of Pennsylvania had surely changed enough to make the court's decision to throw out the map because of a nineteen-person deviation absurd. Despite these flaws, the equal population standard is still the correct approach as it is the only deviation that is not arbitrary, and it precludes mapmakers from playing fast and loose with deviations across districts to extract more seats for one party.

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[30] Stephanie Cirkovich, Note, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 CARDOZO L. REV. 1823, 1832 (2010).

[31] 462 U.S. 725 (1983).

[32] *Id.* at 730.

[33] *Id.* at 731.

[34] *See* J. GERALD HERBERT ET AL., THE REALIST'S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS 10–11 (2000) (giving some examples).

[35] Vieth v. Pennsylvania, 195 F. Supp. 2d 672, 675, 678 (2002).

[36] *Id.* at 676, 678.

[37] *See* Benjamin J. Razi, Comment, *Census Politics Revisited: What to Do When the Government Can't Count?*, 48 AM. U. L. REV. 1101, 1105–1111 (1999) (describing various flaws with census methodology and its negative effect on the accuracy of census data).

Since state legislative districts are not held to absolute equality, the standards across time and across courts have been much more flexible than OPOV standards for congressional districts. Until recently, it was commonly believed that deviations for legislative districts of up to 10 percent were acceptable without any justification whatsoever. In effect, there existed a "safe harbor."[38] Courts even permitted deviations above ten percent if the state could show a legitimate, longstanding, and consistently applied policy. There are numerous examples where deviations upwards of 20 percent were acceptable.[39]

In *Cox v. Larios*,[40] the Supreme Court summarily affirmed a three judge panel's decision holding Georgia's 2001 redistricting plan unconstitutional based on OPOV.[41] The Georgia Democrats attempted to push the "10 percent rule" to the extreme: the plan underpopulated nearly all of the heavily Democratic inner-city districts by 5 percent and overpopulated all predominantly Republican rural and suburban districts by 5 percent.[42] *Cox* upset the commonly assumed notion that 10 percent deviations fall within an effective constitutional safe harbor. The decision also created uncertainty about what level of population deviation is allowed.

With all the talk about "one person, one vote" in redistricting one might mistakenly believe that districts are in fact equal. But this is definitely not the case. The deviations are obviously dramatically smaller than they were before *Baker v. Carr* and its progeny, but many states still do not adhere to the OPOV principle and the legal landscape remains murky. One commentator summed it up nicely:

> While on its face this [drawing equipopulous districts] is a straightforward and easily administrable endeavor, the Supreme Court has saddled the one person, one vote doctrine with several vulnerabilities, including loose, uneven standards that apply to different types of apportionment cases, insurmountable burdens of proof, and equivocation about the Court's own ability to adjudicate redistricting claims because of the partisanship that permeates the redistricting process.[43]

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[38] For instance, reviewing a case from New Jersey, Sam Hirsch noted that "[t]he total population deviation was less than 7.9%—well within the 10% limit tolerated by the Federal Constitution's 'one person, one vote' doctrine." Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 11 (2002).

[39] *See* HERBERT ET AL., *supra* note 34, at 10–11 (giving some examples).

[40] 542 U.S. 947 (2004).

[41] Larios v. Cox, 300 F. Supp. 2d 1320, 1341 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

[42] *Id.* at 947–48 (Stevens, J., concurring).

[43] Cirkovich, *supra* note 30, at 1825.

II. ARBITRARINESS

In thinking about crafting standards for allowable population deviations across representative districts the typical reaction is usually something along the lines of "equal population is silly, so let's allow for some amount of deviations across districts." While there is a certain amount of commonsense logic behind this line of reasoning,[44] after all the data from the census is not correct to begin with and they become less correct with each passing day, but the problem is in deciding what standard to use for the amount of allowable deviation. Should it be 1 percent? 10 percent? No more than 1,000 people? If we choose one of these benchmarks, say 10 percent, then what happens when the plan is nineteen people *over* the 10 percent limit? We are right back where we started—striking down a plan for a deviation that is statistically equivalent to zero.

A zero population deviation standard, even though it strikes most people as facially ridiculous, has the appealing property of being the *only* standard that is not arbitrary. All districts across the state have the same number of people in them. The standard is easy to understand, and implementing it is not overly burdensome on the people redrawing the lines. There should be no exceptions to this rule, because if the door is left open, then map drawers will constantly seek, and judges will invariably grant, variances from the rule.

III. PARTISANSHIP

Another major problem with setting a standard for allowable deviations is that, whatever the level, the mapmakers are likely going to utilize the variance for partisan purposes. This is one of the easiest tools to use in the gerrymandering toolkit. If the Democrats are in control, then Democratic-leaning districts will be underpopulated (5 percent below the ideal population of a district) and Republican districts will tend to be overpopulated (5 percent above the ideal population). This allows the Democrats to squeeze extra seats out of the map for their side. Suffice it to say, when the Republicans are in control one can fully expect the opposite scenario to take place.

Stephanie Cirkovich makes a similar argument—"The Court has allowed states to deviate from this good faith attempt by 10 percent, and its willingness to tolerate partisanship in the objective one person, one vote arena has muddied . . . the line between legislative and judicial functions."[45] She concludes with a recommendation that the

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[44] *See supra* text accompanying note 37.

[45] Cirkovich, *supra* note 30, at 1857–58.

Court revisit these standards, and abolish the 10 percent rule altogether.[46]

Georgia legislative redistricting from the 2000 round serves as an excellent example for how partisans can exploit population deviations and how the judicial system can respond to this type of gerrymandering.[47] The Democrats controlled the state government in 2001,[48] which means they were able to draw the lines for legislative and congressional districts without Republican input. At this time the Republicans were winning a majority of the votes in Georgia state legislative elections; however, they were not winning a majority of the seats.[49] Using a variety of methods, including population deviations, the Democrats sought to solidify their control of state government. One method they used was to more efficiently spread Democratic loyalists across more districts. This meant taking districts with overwhelming majorities of African Americans and making them more "lean" by reducing the proportion of African Americans from over 60 percent to a proportion closer to 50 percent. This allowed the Democrats to use their votes more efficiently and increase the likelihood that they could win more seats in the elections that followed the remap.[50] Crafty line drawing also allowed the Democrats to pit dozens of Republican members of the legislature in head to head contests, which resulted in a loss of eighteen Republican members of the state legislature.[51] Finally, the Democrats fully exploited the 10 percent population deviation allowance by systematically underpopulating Democratic leaning districts and overpopulating Republican leaning districts.[52]

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[46] *See id.* at 1826 (aruging that "courts should eliminate the ten percent rule altogether and require states to strive for minimal deviation from one person, one vote").

[47] *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1341 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (holding unconstitutional Georgia's redistricting plan that had a 9.98 percent population deviation). Throughout this Article, the term gerrymandering means when one party draws district lines in order to have the effect of introducing a bias in seats that favors their party, at the expense of the other party. While this particular set of facts has the Democrats gerrymandering the Republicans out of seats in Georgia, the Republicans are equally adept at creative redistricting for partisan purposes.

[48] CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 157 (2010).

[49] *Id.*

[50] This also makes Democrats more vulnerable, however, as in any type of gerrymander.

[51] BULLOCK, *supra* note 48, at 160.

[52] *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1341 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (holding unconstitutional Georgia's redistricting plan that had a 9.98 percent population deviation).

IV. SHOULD "COMPELLING STATE INTERESTS" BE TAKEN INTO CONSIDERATION?

Many states have drawn districts, even congressional districts, which exhibit less than perfectly equal population distributions. Sometimes courts frown upon this tactic, but other times courts have blessed these maps because there was a "compelling state interest" in drawing the district lines the way that they did.[53] And often times, as David Butler and Bruce Cain note, the criteria used in districting are often times in tension with one another.[54] If we insist on strict population equality, then preserving "communities of interest" becomes more difficult. One example is Iowa where the districts had a deviation of 134 people or 0.02 percent deviation from ideal population.[55] Clearly the deviations are very small, but federal courts have forced states to redraw maps with smaller deviations (Pennsylvania example above).[56] In Iowa, however, the mapmakers did not split any counties in the plan, so in this instance small deviations are offset by another competing criterion.[57]

While the population deviations in Iowa were relatively small, it is not obvious that preserving county boundaries is a "democratic good" that ought to be weighed more heavily than equalizing the power of votes among individuals. Were the people of Iowa better represented because the counties were not split? Did any of these alleged gains make up for the fact that some voters cast ballots that counted for more than some of their fellow Iowans? Keeping all the counties whole, as they did in Iowa, seems a bit more like a neat parlor trick rather than a basis for districting that enhances representation. We should take OPOV seriously because it makes sense from both a legal and political perspective.

The current allowable levels of population deviation limit state legislatures' ability to keep communities of interest whole. The court may approve a 10 percent range of deviation, typically 5 percent over and 5 percent under the ideal population.[58] Thus, if the ideal district contains 100,000 people, the deviation allows one to draw districts in

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[53] *See* HERBERT ET AL., *supra* note 34, at 10–11 (giving some examples)

[54] DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 65–90 (1992).

[55] BULLOCK, *supra* note 48, at 40.

[56] *See* text accompany notes 36–37 (discussing the 2000 Pennsylvania redistricting plan, which had a deviation of nineteen people and was held unconstitutional).

[57] BULLOCK, *supra* note 48, at 40.

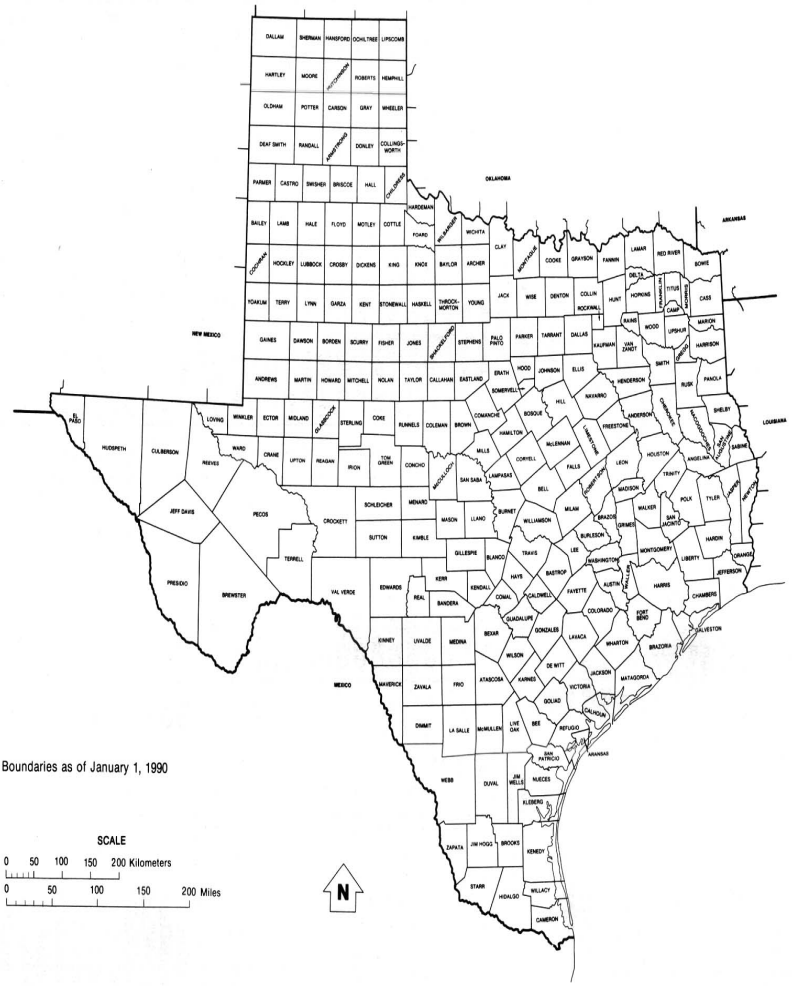
[58] *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1325–26 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004) (noting that "incumbents in all areas of the state sought to limit the expansion of their districts to what was considered legally necessary, i.e., a population deviation of ± 5%").

the range of 95,000 people to 105,000 people. This does give some added flexibility in terms of being able to include whole cities or counties, but the flexibility is really quite small. If a plan drew all the districts at 100,000 people, then, theoretically, the only additional communities of interest that would be preserved under the 10 percent allowance are those that are larger than 100,000 people but smaller than 105,001 people.

There exists no evidence, however, supporting the notion that a city or county is always better off when they are kept whole in a single district relative to being put into two or more districts. Having multiple representatives could prove valuable, though the trade-off is the pieces of the city or county may be but a small fraction of the total population of the districts. Often the slippery notion of "communities of interest" boils down to preserving existing political boundaries, like county or municipal lines. These boundaries, like all geographic boundaries are man-made constructs, most of which have virtually no modern political justifications.

Figure 1 depicts the state of Texas with all of its 254 county boundaries. Undoubtedly there are some interesting stories to be told for why some of these boundaries exist, but clearly the lines were drawn with an eye toward compactness. All of the rectangular counties in the Texas panhandle are good examples—why was the state cut into neat squares? One hears, possibly apocryphal, stories that counties were drawn this way so that every resident of a county was no more than a single day's horse ride away from the county seat. What is clear though is that county lines were not drawn to encapsulate existing communities of interest. Therefore, it is not clear why we should care today about these boundaries when drawing legislative districts. County lines were drawn arbitrarily many years ago, so letting ancient decisions dictate what a modern electoral district ought to look like is misguided.

Figure 1. Map of Texas with County Boundaries



V. DATA & HYPOTHESES

There are several key pieces of information needed for this study. First, I gathered population data of each state legislative district for lower chambers in all fifty states after the 2000 round of redistricting.[59] Next, the results of legislative elections across the country in the first post-redistricting election were compiled. These

[59] The unit of analysis in this Article is the state legislative district. This is important inasmuch as some states use multimember districts ("MMD"). Some, like North Dakota have forty-seven districts, all of which elect two legislators. Others, like Georgia, use a mixture of single member districts and different sized MMD's.

data are used to code partisanship of each district. While, it would be preferable to use some ex-ante piece of information to determine which party is favored in each district, like presidential or statewide election data broken down by the new districts, gathering this data for each state is impossible. Most, but certainly not all, districts perform the way in which one would expect prior to the election, so using these data is a reasonable alternative. Lastly, the information regarding who controlled the districting process in each state was gathered. This information came from Michael McDonald's 2004 article *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*.[60]

Population data were downloaded from the U.S. Census Bureau website.[61] They have population figures by state legislative districts for each state in the country. Unfortunately, the data for some states is unusable. For instance, Hawaii and Kansas both adjust the census totals, taking out military personnel and university students for instance, so these data were gathered by calling the elections office in the respective states.[62]

The theory guiding this research is quite simple—we expect that when one party controls the mechanism for redistricting it will use that power to its advantage. So, if the Republicans control the state legislature and the governor's office and the state government handles redistricting, then the plan should favor the Republicans. In this case that means districts that lean Republican should be systematically underpopulated relative to those districts that lean Democratic. When the Democrats control, their districts will have fewer people compared to Republican districts. This allows a party to save their voters for other districts and waste voters from the other party.

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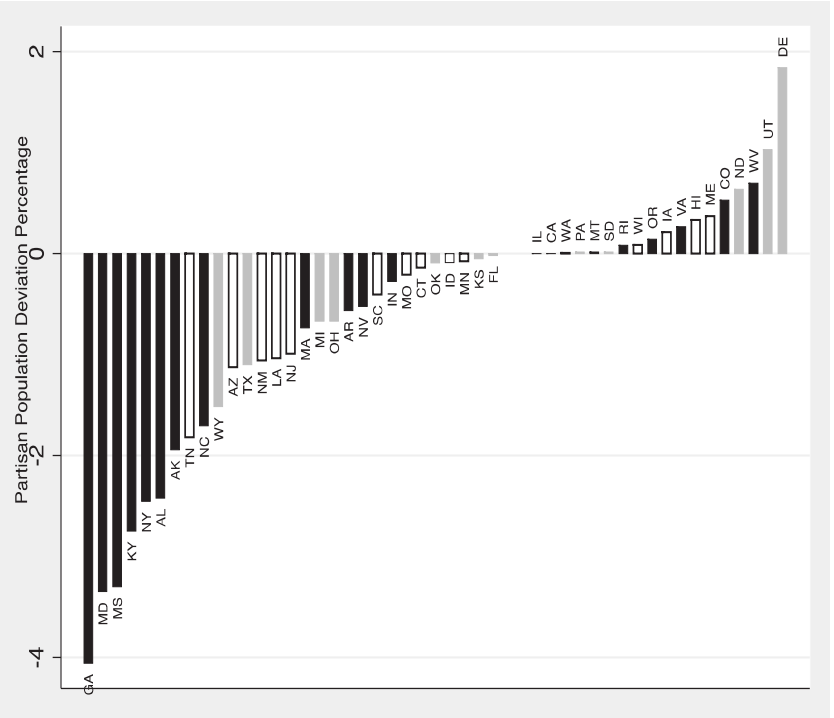
[60] This information came from Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 STATE POL. & POL'Y Q. 371, 371–90 (2004). Minor adjustments were made to McDonald's codes. Several states were coded as "Divided Legislature," indicating one party controlled each of the chambers. In these instances, we did further research to see whether the chambers would be drawn by the controlling party. We found evidence in several states to indicate this. The lower chambers in New York and Nevada were drawn to favor the Democrats; the lower chamber in Delaware was drawn to favor the Republicans. News accounts and data from these states confirm the revised codes. Thus, while McDonald's codes are correct, in just looking at a single chamber the revised codes are more appropriate.

[61] *Data Access Tools*, U.S. CENSUS BUREAU, http://www.census.gov/main/www/access.html (last revised Mar. 26, 2012).

[62] The data for the following states was changed based on data gathered by the author directly from the offices of each of the states—Kansas, Hawaii, Pennsylvania, and Delaware. Three states have been dropped from the analysis in this Article—Nebraska because it is unicameral and Vermont and New Hampshire because merging population data and election outcomes was impossible.

Figure 2. The Impact of Partisan Control of Redistricting on State Legislative Population Deviations Circa 2002[63]



VI. RESULTS

Figure 2 plots the partisan population deviations of forty-seven states. To construct this figure each legislative seat in every state is coded as either Democrat or Republican, based on which party won the seat in the 2002 election (third party victories were dropped). Next, the average population of Republican districts is subtracted from the average population of Democratic districts, and the resultant is divided by the ideal population for districts in each state. This creates a percentage difference with negative numbers indicating that

[63] Black bars indicate Democrats controlled the redistricting process; grey bars indicate Republicans controlled the process; white bars indicate the process was either controlled by both parties, a commission, or drawn by a court (using the codes from McDonald *supra* note 60 with some previously noted exceptions). The graph depicts the percentage deviations that favor one party or the other with negative numbers indicating Democrat controlled districts were, on average, underpopulated, and positive numbers indicating that Republican controlled districts were, on average, underpopulated.

Democratic districts are advantaged because they have systematically fewer people in their districts relative to Republican districts, and positive numbers indicating a Republican advantage.

Since most of the bars are negative, the data indicate that that Democrats do much better around the country in terms of winning elections in districts that are underpopulated. Moreover, when the Republicans are advantaged, the average population differences are relatively small. The three Republican controlled states that used this tool to the greatest effect are Delaware, Utah, and North Dakota. There are two states, West Virginia and Colorado, where the process was Democratically controlled, yet the population deviations favored the Republicans. On the other side, seven of the top nine states that favor Democrats were drawn by Democrats. The most egregious partisan deviations that favor Democrats were drawn in states where the Democrats controlled the process. Georgia continues to be an exemplar insofar as the state's plan used this tool more effectively than any other state. Maryland, Mississippi, New York, and Alabama also have high deviations that favor the Democrats. The states that were not controlled directly by partisans tend to have smaller population deviations indicating that on this dimension of partisan gerrymandering we ought to expect less partisan outcomes when the process is controlled by courts, commissions, or the power is shared by both parties.

There are a handful of states where the population deviations are essentially zero—California, Florida, Illinois, Kansas, Montana, Pennsylvania, South Dakota, and Washington. While some states, such as Florida, Pennsylvania, South Dakota, and Washington (among others), have state constitutional language that requires that legislative districts be drawn with population "as equal as practicable" this is not a strict one person, one vote requirement. Those that draw the lines are required to stay within federal guidelines (i.e., the 10 percent limit), but are not required to draw districts that have exactly the same number of people in them.

Table 1. The Impact of Partisan Redistricting Control on Partisan Population Deviations in State Legislative Districts, 2002[64]

Redistricting Authority	-0.595**
	(.199)
Constant	-0.539**
	(.164)
N	47
R^2	.17

Going beyond graphical representations of the data, we can also see whether there are systematic differences in the deviations based on who controls the redistricting process. Table 1 presents the results of a bivariate regression that demonstrates the relationship between partisan control and partisan population deviations. The coefficient is negative and significant, as we would expect. Democrats tend to underpopulate districts won by Democrats and Republicans underpopulate districts won by Republicans. The Republicans did not take advantage of this tool as much as the Democrats did in 2000. The average percent difference for Democratically controlled states is -1.19, indicating the districts won by Democrats tend to be underpopulated. For the Republicans the average is -0.18, indicating that, on average, they draw districts that also favor the Democrats by overpopulating Republican controlled districts, though not nearly as much as the Democrats did. The average for the other states (courts, commissions, or divided control) is -0.40.

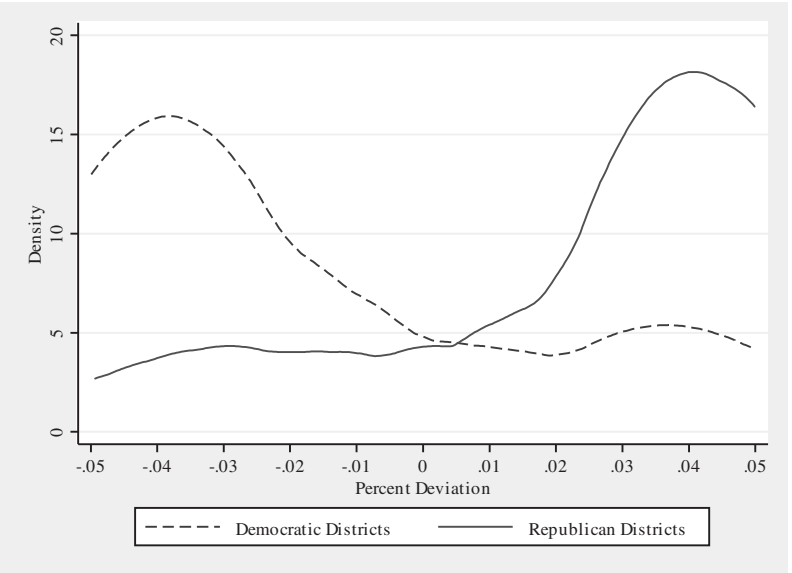
Looking at data for just one decade is not sufficient to make conclusions about long term systematic biases in this aspect of redistricting, but we can conclude that, at least for the 2000 round of redistricting, the data demonstrate that the "10 percent rule" that allows for modest population deviations is used in many states for partisan purposes and the Democrats were the beneficiaries of these deviations more often than the Republicans.

It is also important to not just look at the average deviations in a state, but to examine these deviations to further investigate how, and to what extent, a party might be using deviations for partisan purposes. The exemplar for using population deviations for partisan gerrymandering continues to be Georgia in 2002. Figure 3 depicts the

[64] * p<.05, ** p<.01. Entries are unstandardized regression coefficients with standard errors in parentheses. The dependent variable is the percent deviations pictured in Figure 2. The redistricting authority takes on values of -1 if the Republican Party controlled the process; 1 if the Democrats controlled the process; 0 if districting was done by a court, a commission, or divided partisan control.

population deviations by party for the 2002 lower chamber of the Georgia state legislature.

Figure 3. Population Deviation in the Georgia State Legislature[65]



It is plainly evident what is intended, the Democratic distribution has almost no overpopulated districts, and the Republican distribution has almost no underpopulated districts. There is a systematic bias introduced by utilizing population deviations in this way. The average population in Republican districts is 46,568 and only 44,710 in Democratic districts. So for each GOP-leaning district the mapmakers put in nearly 2,000 extra people, which wastes those votes in the sense that they cannot be used in a neighboring district to increase the share of Republican voters.

[65] This graph depicts the distribution of deviations from the ideal population in the state legislative districts for the Georgia lower chamber circa 2002.

Figure 4. Population Deviations in Iowa State Legislature[66]

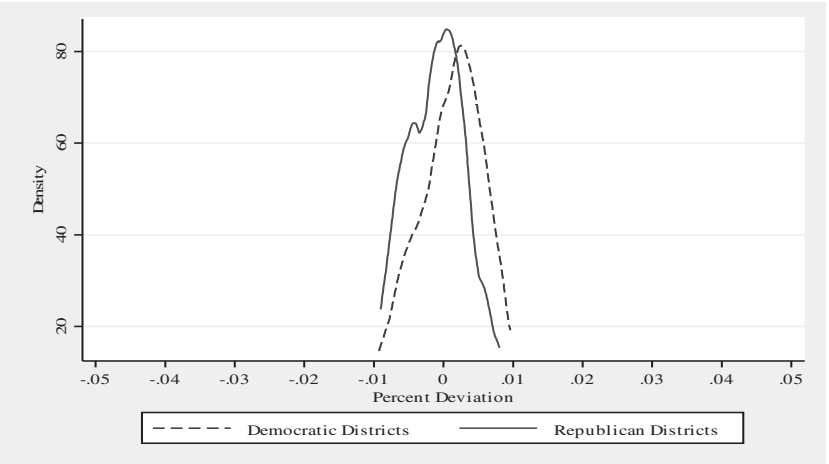


Figure 4 depicts the percent deviations for the lower chamber of the Iowa state legislature. First, it is important to note that the Iowa remappers restricted deviations to no more than plus or minus one percent, which necessarily restricts the total amount of bias that can be introduced through unbalanced, partisan districts. More importantly, the modal category is near zero for both parties and there is some balance on either side. The Republican distribution is slightly to the left (toward districts that are underpopulated), but overall there is very little difference to speak of and no real systematic bias that favors one party or the other. Iowa mapmakers did utilize the ability to deviate from ideal population in districts, but they did not take full advantage of the range of deviations, which kept the districts closer to the ideal population. Unfortunately, many states do not take the same balanced approach that Iowa did in the last round of redistricting.

[66] This graph depicts the distribution of deviations from the ideal population in the state legislative districts for the Iowa lower chamber circa 2002.

Figure 5. Population Deviations in Utah State Legislature[67]

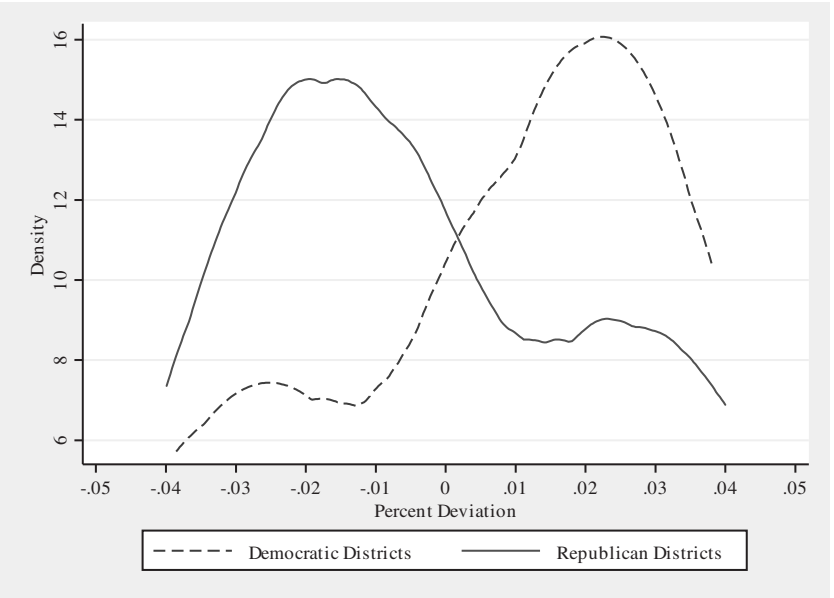


Figure 5 depicts the distribution of population by party from the state of Utah. This is the state with the most clearly partisan map created by Republicans in terms of the use of population deviations. It looks a great deal like the distributions from Georgia just with the Republicans as the beneficiaries of the underpopulated districts. The line drawers did not quite exploit this loophole to the extent that they did in Georgia, but it is still clear what is occurring—more Republican districts are made possible by using completely legal population deviations.

CONCLUSION

State legislative redistricting has been subject to more lax standards than congressional redistricting in terms of the extent to which districts within a state must be equally populous. Until recently, most observers assumed a 10 percent deviation was acceptable without any justification from the state. *Cox*, however, has made it clear that naked partisanship is not a justifiable reason to systematically underpopulate some districts and overpopulate

[67] This graph depicts the distribution of deviations from the ideal population in the state legislative districts for the Utah lower chamber circa 2002.

others.[68] *Cox*, however, is likely not going to stop mapmakers from manipulating population deviations. So while it may be safe to expect fewer maps testing the outer limits of the 10 percent rule, the critical component is not to flaunt the gerrymander publicly.

That using population deviation is a simple and effective method for a party to gerrymander its way into a few extra seats that it might not otherwise control if districts were drawn to more exacting OPOV standards is clear. Indeed, the major parties do take advantage of this exception and often for partisan purposes. The data from the 2000 round of redistricting show that the Democrats tend to fare better than their GOP counterparts, meaning that Democratic candidates won more seats from underpopulated districts than Republican candidates did. The data also show, however, that many states did not use this tool for partisan purposes. And while *Cox* provides some protection against this type of gerrymandering, we can easily dispense with this tool altogether by requiring perfect population equality.

A modern twist on the OPOV theory is to not try to equalize districts on the total number of people, but on, for instance, the number of citizens that are voting age population or even the number of actual voters. The most oft cited person in this controversy is Judge Alex Kozinski, who in his dissent in *Garza v. County of Los Angeles*[69] outlined the difference between the principle of equality of representation and the principle of electoral equality.[70] The former flows with the current state of affairs in which all people, regardless of age, race, citizenship, etc. are weighted equally in drawing districts.[71] Judge Kozinski argues for the electoral equality principle in which votes are weighted equally.[72] So, for example, Hispanic districts with large proportions of non-citizens are, as currently drawn, far too small because the number of eligible or actual voters in these kinds of districts is far fewer in number than other districts with fewer non-citizens. Similarly, there are parts of the country with higher birth rates that may have larger populations of citizens that are not of legal voting age. Moreover districts vary widely in terms of turnout. There is a well-known "turnout bias" in which those districts that Republicans win tend to have higher turnout than Democratic

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[68] *See supra* notes 40–42 and accompanying text for discussion of *Cox*.

[69] 918 F.2d 763 (9th Cir. 1990).

[70] *Id.* at 778–88 (Kozinski, J., dissenting).

[71] *See id.* at 781 ("Apportionment by raw population embodies the principle of equal representation; it assures that all persons living within a district-whether eligible to vote or not-have roughly equal representation in the governing body.").

[72] *See id.* at 782 ("The principle of electoral equality assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives.").

districts, so the Democrats win more seats with fewer overall votes.[73] But currently we district strictly on the basis of total population as counted in the decennial Census.

As we finish yet another round of redistricting across the country, this seems like an appropriate time to reflect on whether population deviations in legislative redistricting ought to be scrutinized more carefully.[74] The typical justifications for these deviations usually amount to the preservation of existing communities of interest. This slippery concept usually involved pre-existing political boundaries—counties, municipalities, and the like. I argue that weighting each citizen's vote equally is a more important concept in terms of representation, than preserving communities of interest.

Eliminating population deviations for all electoral districts will not completely eradicate partisan gerrymandering, to be sure, because "population equality guarantees almost no form of fairness beyond numerical equality of population."[75] Insisting that mapmakers strictly adhere to OPOV, however, eliminates a tool that can be used to extract partisan advantages with relative ease. Further, equal population across districts is very important, particularly in light of how badly malapportioned districts were before the "redistricting revolution" of the 1960's. A strict OPOV standard also reaffirms the important principle that underlies those early court decisions—that all votes should be equally weighted. In sum, none of the alleged benefits of allowing population differences across districts outweighs the costs of unequally weighted votes. This could result in a marginal increase in the number of cities and counties being split, but equalizing voting power of individuals is a greater democratic value than keeping cities and counties intact within a district.

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[73] Bernard Grofman, William Koetzle, & Thomas Brunell, *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 ELECTORAL STUD. 457, 466 (1997).

[74] Reconsidering the appropriateness of drawing "competitive districts" is also in order. *See generally* THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA (2008) (offering a critique of the goal of creating competitive districts via the redistricting process); JUSTICE BUCHLER, HIRING AND FIRING PUBLIC OFFICIALS: RETHINKING THE PURPOSE OF ELECTIONS (2011) (same).

[75] Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 553 (1994).