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**Redistricting Bodies and Redistricting
Reform in the U.S.: Where Are We Now and
the Way Forward**

Diplomová práce

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Abstrakt

Překreslování volebních okrsků, klasické či účelové zvané gerrymandering, je součástí amerického politického systému od samotného vzniku Spojených států. V poslední době se tento fenomén dostal do centra pozornosti odborníků, médií i voličů. Kritici gerrymandering považují za velký problém, který podle nich omezuje politickou soutěž, přispívá k nefunkčnosti volených institucí a celkově narušuje demokratickou povahu amerického politického systému. Zákonodárci, kterým je svěřena pravomoc překreslovat volební okrsky, jsou obviňováni z toho, že volební proces „postavili na hlavu“, protože voličům nedovolují vybrat si svého kandidáta, nýbrž umožňují samotným kandidátům vybírat si své voliče. Překreslování volebních okrsků se v současnosti řídí určitými pravidly, z nichž nejvýznamnějšími jsou rovnost populace a zastoupení menšin. Spolu s dalšími zásadami slouží k omezení volnosti orgánů zodpovědných za překreslování, jimiž jsou nejčastěji státní zákonodárné sbory. Kvůli kritice, které v poslední době zákonodárné sbory čelí, byly vytvořeny různé komise s odlišnými pravomocemi a funkcemi. Nezávislé překreslovací komise, jejichž členové nejsou spojeni s politikou, schvalují nové plány bez zásahu zákonodárných sborů a představují dosavadní vrchol reformních snah. Mezi nejdiskutovanější části jakéhokoliv reformního návrhu patří vliv stranictví a politická soutěž. Reformátoři zatím zápolí s hledáním odpovědi na otázky, jaké jsou ideální složení a pravomoci komisí zodpovědných za překreslování a jakými principy by se jejich členové měli řídit. Cílem této diplomové práce je analyzovat platná pravidla překreslování a orgány za něj zodpovědné. Zároveň autor práce poukáže na neexistenci všeobecně přijímaného reformního návrhu a na úskalí, kterým jakákoliv reformní snaha musí čelit.

Abstract

While drawing electoral districts and its special type called gerrymandering (redistricting with a certain purpose in mind) has been present in American politics since the founding of the United States, it has recently received a lot of attention and criticism. Gerrymandering has been accused of ruining electoral competition, contributing to the gridlock in Congress, and hampering the spirit of American democracy. Moreover, legislators responsible for redistricting are frowned upon for choosing their own voters and thus ruining the purpose of the electoral process. Redistricting currently follows certain principles, the most important of which and the only two recognized at the federal level are population equality and minority representation. These principles were designed to limit the redistricting bodies when drawing districts. State legislatures remain the most common redistricting institution. However, for the criticism that they face various redistricting commissions with different powers were established. The current trend in the redistricting reform is to delegate the redistricting power to independent commissions which can adopt a redistricting plan without the consent of a legislature and whose members have no connections to politics. Competition and partisanship are the two most discussed phenomena that accompany any redistricting reform. The reform community currently struggles to find a perfect composition of a redistricting commission, and also the principles that such a commission should be obliged to follow. The objective of this thesis is to analyze the redistricting principles and redistricting bodies that currently exist, point out the non-existence of a redistricting reform proposal that would not be criticized, and to show the problems any redistricting reform has to deal with.

Klíčová slova

Spojené státy americké, překreslování volebních okrsků, gerrymandering, nezávislé komise, zásady překreslování, reforma překreslování, politická soutěž

Keywords

United States, redistricting, gerrymandering, independent commissions, redistricting principles, redistricting reform, political competition

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Prohlášení

1. Prohlašuji, že jsem předkládanou práci zpracoval samostatně a použil jen uvedené prameny a literaturu.
2. Prohlašuji, že práce nebyla využita k získání jiného titulu.
3. Souhlasím s tím, aby práce byla zpřístupněna pro studijní a výzkumné účely.

V Praze dne 13. května 2014

Pavel Šára

Poděkování

Na tomto místě bych rád poděkoval PhDr. Janu Bečkovi, Ph.D. za pomoc při vytváření této diplomové práce.

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V čem se oproti původními zadání změnil cíl práce?
Cíle práce zůstávají stejné. Zprvce práce stručně představí historický vývoj redistrictingu a jeho současné principy. Zadruhé práce rozebere aktuální odlišné mechanismy rozhodování o překreslování a upozorní na jejich klady a zápory a možnosti reformy.

Jaké změny nastaly v časovém, teritoriálním a věcném vymezení tématu?
Práce se bude zabývat redistrictingem na území Spojených států amerických. Věcné ani časové vymezení se nemění.

Jak se proměnila struktura práce (vyjádřete stručným obsahem)?
Struktura práce se neliší od té navržené v projektu. První část se zaměří na vývoj redistrictingu a jeho principů na základě politických změn a rozhodnutí Nejvyššího soudu a na aktuální principy překreslování. Druhá část představí různé orgány, které v současnosti o překreslování rozhodují, se zaměřením na jejich pozitiva a negativní stránky. Závěrečná část se zaměří na diskusi o nutnosti reformy redistrictingu, negativní důsledky jeho současné podoby a na různé alternativy navrhovaných změn. Zároveň nabídne analýzu toho, jaké dopady by implementace těchto změn měla.

Jakým vývojem prošla metodologická koncepce práce?
Metodologická koncepce práce vývojem neprošla.

Které nové prameny a sekundární literatura byly zpracovány a jak tato skutečnost ovlivnila celek práce?

Bickerstaff, Steve. Lines in the Sand: Congressional Redistricting and the Downfall of Tom Delay (Austin: University of Texas Press, 2007).

Brunell, Thomas L. Redistricting and Representation: Why Competitive Elections Are Bad for America (New York: Routledge, 2008).

Bullock, Charles S. Redistricting: The Most Political Activity in America (Lanham, Md.: Rowman & Littlefield Publishers, 2010).

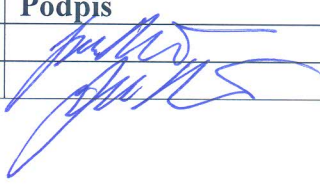
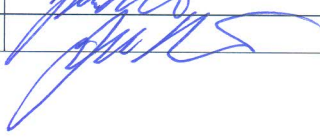
Gerken, Heather K. "Getting from Here to There in Redistricting Reform," Duke Journal of Constitutional Law & Public Policy 5, No. 1 (2010): 1–15.

Webster, Gerald R. "Reflections on Current Criteria to Evaluate Redistricting Plans," Political Geography 32, (January 2013): 3–14.

Zpracování nových pramenů a sekundární literatury práci jako celek neovlivnilo.

Charakterizujte základní proměny práce v době od zadání projektu do odevzdání tezí a pokuste se vyhodnotit, jaký pokrok na práci jste během semestru zaznamenali (v bodech):
V průběhu semestru byly lokalizovány nové zdroje a zároveň byla ověřena dostupnost zdrojů identifikovaných v projektu. Po bližším studiu některých zdrojů bylo potvrzeno, že navrhovanou strukturu a obsah práce zatím není potřeba měnit, protože jsou vyhovující.

Podpis studenta a datum:

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Content

INTRODUCTION	2
OVERVIEW OF SOURCES	6
1. HISTORICAL BACKGROUND AND THE CURRENT PRINCIPLES.....	7
1.1. REDISTRICTING AND ITS IMPORTANCE.....	7
1.2. REDISTRICTING IN THE HISTORICAL PERSPECTIVE	9
1.3. CURRENT PRINCIPLES.....	12
2. THE REDISTRICTING BODIES AND THE MAKING OF A REDISTRICTING PROCESS ...	20
2.1. LEGISLATURES	21
2.2. ADVISORY COMMISSIONS	23
2.3. POLITICAL COMMISSIONS	23
2.4. INDEPENDENT COMMISSIONS	24
2.5. BACKUP COMMISSIONS	26
2.6. GENERAL REMARKS ABOUT THE COMMISSIONS	26
2.7. SPECIAL CASES	27
2.8. ROLE OF THE COURTS	28
3. CRITICISM AND THE REDISTRICTING REFORM	29
3.1. WHAT IS WRONG WITH THE CURRENT STATE OF REDISTRICTING?	29
3.2. REFORM PROPOSALS AND THEIR OBJECTIVES	35
3.3. HOW TO MOVE FORWARD WITH THE REDISTRICTING REFORM?	39
CONCLUSION	41
SOUHRN	45
SOURCES.....	46

Introduction

Redistricting and gerrymandering are killing electoral competition, hampering American democracy, and contributing to the current non-functioning of the political system. These are just examples of the claims that have recently appeared in many American newspapers,¹ and also an indication of how the American public views redistricting.

Redistricting has been present since the founding of the United States of America and has always significantly affected the country's politics. However, two periods in the US history have received more attention than others – the Redistricting Revolution of the 1960s when the population equality and minority representation were established as the two most important principles that have to be followed when drawing new maps, and in the 21st century when redistricting became a part of the wider discussion about the increased polarization of American legislators, electorate and legislative bodies, the gridlock in Congress and the inability to pass any legislation at the federal level.

Map drawers were portrayed as people who can basically draw any map that suits their interests but certain established principles, despite not being perfect and sometime causing more controversy than agreement, have substantially limited the freedom of map drawers. Moreover, the redistricting principles are sometimes regarded as the best protection against extreme partisan gerrymanders. Are the boundaries posed by the traditional redistricting principles sufficient to provide for a redistricting process that would be accepted as fair?

Redistricting bodies, especially state legislatures that draw new redistricting plans in the majority of the states, have faced severe criticism as legislators are seen as picking their own voters and thus destroying the electoral process. The current redistricting reform proposals focus on taking the authority to draw new districts away from the legislators and delegating it to more independent bodies. Nevertheless, the independent redistricting bodies that already have the redistricting authority in some

1 Jon Husted, "Gerrymandering Kills Competition, Creates Dysfunction," *The News Tribune*, February 9, 2014, <http://www.thenewstribune.com/2014/02/09/3036593/gerrymandering-kills-competition.html> (accessed May 4, 2014). Chunka Mui, "To End Gridlock, Start by Ending Gerrymandering," *Forbes*, December 9, 2011, <http://www.forbes.com/sites/chunkamui/2011/12/09/to-end-gridlock-end-gerrymandering/> (accessed May 4, 2014). Chris Cillizza, "Did Republican Gerrymandering Cause the Government Shutdown?" *The Washington Post*, October 9, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/09/did-republican-gerrymandering-cause-the-government-shutdown/> (accessed May 4, 2014).

states are not perfect either and some of the plans that they approved caused as much controversy as the plans implemented by the legislators themselves since the composition of a redistricting body translates directly into the redistricting plan it draws. Do we accept that it is the legislators themselves who draw new maps or should we strive for independent bodies? What rules should they respect and what should be their ideal composition?

Many frown upon the current redistricting process for drawing districts that are not competitive and in which the result of an election is predetermined by redistricting. However, it is up to any redistricting body and every person evaluating the redistricting plan to decide what general principles such as competition, fairness and partisanship to adhere to and what objectives to follow. Should competition, which might leave a significant group of voters dissatisfied but would create an image of fair choice for everyone, be the main principle that the map drawers follow?

The topic of redistricting, various redistricting bodies that are in charge of the process, and their possible reform was chosen because it is, especially recently, one of the most discussed topics of American politics. Even though experts strive to prove that redistricting cannot be blamed for everything, and they have been quite successful in doing that so far, redistricting is criticized by the public and the media for distorting the American political system. Despite the fact that many reform proposals are put forward to improve the existing redistricting bodies, promote competition, and above all take away the authority to draw new maps from legislators, it is not clear what kind of reform would actually be helpful and significantly change the current state of affairs. Besides that there is no consensus on what goals such a reform should promote.

This thesis has two objectives. First, it will introduce and evaluate the current redistricting principles and their historical evolution, and show how they are applied nowadays. Second, the shortcomings and benefits of the current redistricting bodies and various reform proposals will be analyzed. The aim is to analyze the deficiencies of the redistricting process as it works nowadays, examine the most-discussed reform proposals and point out whether and how the current situation would change if certain modifications were implemented.

Various methodological approaches will be used in this thesis based on the analysis of secondary sources. A descriptive and analytical method will dominate in the first chapter that will introduce the current principles. A comparative method will be utilized in the second chapter where the current modalities of redistricting will be

analyzed and compared. In the final chapter the author will work with the analytical and comparative methods to look at the aspects of the current process that are being criticized, and the reform proposals.

Geographically, this thesis deals with the United States of America and particularly with the individual states of the Union. The time span is not limited, but the major emphasis is put on the events following the Redistricting Revolution of the 1960s and the current situation, especially the 21st century, when redistricting came under the spotlight once again.

The author will argue that the main problem of the proposed reforms is the lack of consensus on what aspects of the current redistricting process the reforms should improve. While some criticize the lack of competitive districts, incumbency protection and high reelection rates and therefore propose more competitive districts, others point out the democratic deficits of the current process, doubt the benefits of competition, and press for implementation of independent redistricting commissions in all states.

The problem is that the same people may simultaneously call for independent redistricting commissions in which plans are adopted on extraordinary majority basis, less partisan bias, and more competition. However, these are opposing goals as the independent redistricting commissions based on extraordinary majority voting usually adopt bipartisan plans that do not increase competition. Therefore it is necessary to keep in mind what certain compositions of redistricting bodies lead up to, and come to an agreement what objectives should the redistricting bodies pursue.

The first part of this thesis will provide not only an introduction that will show that redistricting is an issue worth attention, but also a historical overview of redistricting with a focus on the Redistricting Revolution of the 1960s and the origins of the current principles. Moreover, the seven “traditional redistricting principles” that have been recognized by the Supreme Court will be briefly introduced and evaluated. The purpose of this chapter is to show the standards by which the redistricting bodies are limited, and stricter or loosened application of which might serve as a basis for a possible redistricting reform.

The second chapter will be dedicated to the current modalities of the redistricting bodies and the redistricting process. A typology of the redistricting bodies will be created in this chapter based on the independence of the redistricting organs and the influence of politicians in the redistricting process. Besides that, the shortcomings and benefits of the particular redistricting institutions will be pointed out. The role of the

courts in the process will also be presented as the court involvement is an inseparable part of redistricting the map drawers have to take into account.

In the third part the author will look at partisan gerrymandering and competition, the two aspects of the current system that are being heavily criticized. Various reform alternatives attempting to modify the current redistricting process will also be introduced and analyzed. The core of this part is to point out the ambiguity of competition and partisanship, and evaluate whether the implementation of the reform proposals would have real implications and what problems and additional sources of dispute it may cause.

The author deems it necessary to clarify some of the terms that will be widely used in this thesis. The term redistricting refers to drawing the district lines within a state. In the current practice, the districts are generally redrawn following the decennial census² in order to comply with the federal and state laws, above all with the requirement of population equality. Gerrymandering is a special type of redistricting that gives “an unfair or disproportionate advantage to a particular political group or party”.³ Partisan gerrymander gives advantage to one of the parties at expense of the other. Bipartisan or incumbent protection gerrymandering protects the current incumbents and tries to keep the status quo.

A distinction should be made between congressional redistricting and state legislative redistricting. All states draw the district lines for their legislative district and many of them have taken power away from the legislatures because of the conflict of interest that is created when legislators choose the voters of their own districts. Congressional redistricting refers to drawing districts from which representatives to Congress are elected. While congressmen do not directly draw lines of their own districts, they use their influence to affect the redistricting process and get the desired outcome.⁴

The author is aware of the complexity of the process and as Jonathan Winburn correctly states, “redistricting is fifty separate processes with no two exactly the same”,⁵

2 The census is administered by the United States Census Bureau and takes place in the whole country every ten years. The next census will be held in 2020.

3 Laughlin McDonald, “The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering,” *Harvard Journal on Legislation* 46, No. 1 (Winter 2009): 245.

4 Michael P. McDonald, “United States Redistricting: A Comparative Look at the 50 States,” in *Redistricting in Comparative Perspective*, eds. Lisa Handley and Bernard Grofman (Oxford, New York: Oxford University Press, 2008): 57.

5 Jonathan Winburn, *The Realities of Redistricting: Following the Rules and Limiting Gerrymandering in State Legislative Redistricting* (Lanham: Lexington Books, 2008): 20.

given the unique conditions in each state concerning party support, history or population composition. Despite the uniqueness of each redistricting process some general conclusions can be derived from the analysis of the process, the criticism it faces, and comparison of the redistricting bodies.

Overview of Sources

The books and articles used for this thesis can be divided into two basic groups. The majority of the sources look at redistricting from a historical perspective and map the current principles of redistricting. Authors of these books and articles follow the historical evolution of the principles, evaluate their importance and discuss their role in the redistricting process. The authors analyzing the benefits and problems of the redistricting principles mostly arrive at similar conclusions as the existing principles and their use do not cause much controversy.

One of the books that provides a complex analysis of the evolution of the current principles, evaluates how these principles are applied nowadays, and discusses whether they can be potentially improved is *Redistricting: The Most Political Activity in America* by Charles S. Bullock. *Party Lines: Competition, Partisanship, and Congressional Redistricting* edited by Thomas E. Mann and Bruce E. Cain argues that competition has been reduced because of redistricting, offers an overview of the evolution of the redistricting debate, and analyzes the consequences for the state of American democracy.

Erik J. Engstrom's *Partisan Gerrymandering and the Construction of American Democracy* focuses on the impact of gerrymandering before the Redistricting Revolution of the 1960s as this period is overlooked in most studies. The aim of Engstrom's work is to show how gerrymandering has influenced politics and prove that its impact has not been marginal. Engstrom shows that while most scholars arrive at the conclusion that redistricting does not have a significant influence over American politics, the analysis of redistricting before the implementation of redistricting principles suggests its great influence over the elections as map drawers and legislators could basically draw any plan they liked.

The second group of sources deals with the different redistricting bodies and decision-making processes in the individual states. These authors offer their views on the role of legislatures and independent commissions and in some cases propose their own plans for a redistricting body or a redistricting system that would improve the

current situation. As each of them puts emphasis on different aspect of the redistricting process and as not all of them have the same objectives in mind, an array of proposals and opinions is put forward. A key article summarizing the current modalities of redistricting is Bruce E. Cain's *Redistricting Commissions: A Better Political Buffer* that offers a typology of the current redistricting bodies based on the involvement of politicians in the redistricting process and on the ability of the redistricting institution to implement a redistricting plan.

A proposal, which might be considered unusual in the current discourse but which is also shared by other authors, is introduced in *Redistricting and Representation: Why Competitive Elections Are Bad for America* by Thomas L. Brunell who claims that no redistricting reform is necessary. According to Brunell, the districts should be packed with supporters of one party as much as possible. He proves that losing makes voters unhappy and therefore competition should not be valued and praised, but avoided, if possible.

A detailed overview of the current state of affairs is provided by Justin Levitt, especially in his *A Citizen's Guide to Redistricting*. Justin Levitt also runs a website called *All About Redistricting: Professor Justin Levitt's Guide to Drawing the Electoral Lines* where the most up-to-date information about the state of redistricting in individual states such as the composition of commissions or the litigations that are dealt with by the courts is offered to interested scholars and to the public.

1. Historical Background and the Current Principles

1.1. Redistricting and Its Importance

First, few words should be dedicated to the American voting system. Congressional and state elections in the United States are based on the system of single-member districts. This system always rewards the winning (majority) party with a bigger share of seats than what would correspond to its share of votes. One of the crucial features of the single-member electoral system is that a proportion of votes, which might be less or more significant, is inevitably wasted and thus leaves the voters not voting for the winning candidate without representation of their choice.⁶

⁶ Thomas L. Brunell, *Redistricting and Representation: Why Competitive Elections Are Bad for America* (New York: Routledge, 2008): 78.

Redistricting or drawing the districts lines determines how votes translate into seats. Through a purposeful drawing of a map some voting groups can be marginalized while others can be made more important. Redistricting also influences how certain interests of certain voting groups can affect policy outputs. In the words of Bernard Grofman and Lisa Handley, “how lines get drawn fundamentally affects the nature of political representation – and thus who gets what, when”.⁷ The historical example of African Americans shows that groups which are repeatedly underrepresented have very limited prospects for setting the agenda they would like to see be debated and implemented.⁸ In the American system minority groups had a very limited access to the policy debate before the changes brought about by the Redistricting Revolution.

When politicians with a redistricting authority draw new district maps, they must balance between two main objectives. The first one is their individual reelection. The second aim is to ensure the maximum number of seats for their party. These principles may often clash. While in the 19th century the dominant objective was to capture as many seats for a party as possible, in the 20th century these two principles became more balanced, the incumbent protection gained much more importance and the electoral process was turned into a more candidate-centered issue.⁹

The redistricting power is granted to the states by the US Constitution. States have the right to decide who has the responsibility to draw districts. Historically, state legislatures have been the most common redistricting body but the current practice tends to delegate the responsibility to commissions and take away the power from the legislators. The way redistricting is conducted is constrained by a variety of principles that limit the freedom of map drawers to draw district lines.¹⁰ The redistricting principles are examined in detail in the two following sections. It has to be noted that just two of them (population equality and minority representation) are required by federal law; the other principles might be a part of the state law, but these rules differ in each state and sometimes certain principles are traditionally followed even though they are not explicitly required by the state constitutions, statutes or laws.

7 Lisa Handley and Bernard Grofman, “Introduction: Redistricting in Comparative Perspective,” in *Redistricting in Comparative Perspective*, eds. Lisa Handley and Bernard Grofman (Oxford, New York: Oxford University Press, 2008): 3–8.

8 The underrepresentation of African Americans was not caused only by redistricting but also by other factors such as social exclusion, voting rules, discrimination, and others.

9 Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* (Ann Arbor: University of Michigan Press, 2013): 8.

10 Richard Forgette and Glenn Platt, “Redistricting Principles and Incumbency Protection in the U.S. Congress,” *Political Geography* 24, No. 8 (November 2005): 944.

1.2. Redistricting in the Historical Perspective

Despite the fact that redistricting practices are as old as the United States itself, serious debate about redistricting principles and its effects on political representation came after World War II and especially in the 1960s when the Supreme Court decided to step into the political thicket and rule on issues concerning the redistricting process. The application of the new rules based on the decisions of the Supreme Court and the new legislation completely modified the way redistricting had been done for decades. It forced the states to redraw their districts at least once a decade following certain principles entrenched in federal and state law. This change became to be known as the Redistricting Revolution.

Erik J. Engstrom shows that gerrymandering was widely used even before the Redistricting Revolution. The term gerrymandering also comes from the early years of the United States. In 1812 the governor of Massachusetts Elbridge Gerry created a salamander-shaped district to benefit his own party. The term gerrymander is thus derived from his name and from the shape of the infamous district. The impacts of redistricting on the American political scene were even more significant before the changes of the 1960s because of the non-existence of legal barriers. Before the implementation of strict rules (above all the one person, one vote principle),¹¹ redistricting occurred infrequently and some of the districts were not redrawn for decades in spite of the population shifts.¹² This state inaction in not modifying the existing districts despite population disparities among the districts that benefited the party in power is labeled as a “silent gerrymander”. When new seats were allocated to the state after reapportionment,¹³ they might have been distributed via adding new districts or the state could opt to call a statewide (at large) election to fill in these new seats.¹⁴

The debate about the equality of representation began after World War II and most of the authors investigating redistricting focus on this period. Due to the decades of silent gerrymanders, some districts were a hundred times more populous than

11 The name commonly used for the requirement of population equality which is derived from the idea that all votes should have an equal value.

12 Charles S. Bullock, *Redistricting: The Most Political Activity in America* (Lanham, Md.: Rowman & Littlefield Publishers, 2010): 8.

13 Reapportionment is the division of Congress seats among individual states. The principle of population equality is also used, however, each state is granted at least one seat.

14 Engstrom, *Partisan Gerrymandering*, 72.

others.¹⁵ While the Constitution links directly the representation to population as it provides for reapportionment of congressional seats among states depending on their population, this link did not translate into having an equal population per congressional seat.¹⁶ The Supreme Court led by Justice Felix Frankfurter, an advocate of judicial restraint, declined to rule on the issue in 1946 in *Colegrove v. Green* explaining that the Supreme Court could not enter into a political thicket because it lacked jurisdiction over the challenged issue.¹⁷

The situation changed in 1962 when in *Baker v. Carr*¹⁸ the Supreme Court cited the Equal Protection Clause of the 14th Amendment to guarantee the right of approximately equally weighted votes for voters regardless of where they lived. In line with this decision the states were required to draw more equal districts. This decision originally applied only to state legislative districts. One of the crucial aspects of this decision, the consequences of which are apparent and discussed until today, is that the Supreme Court did not specify how much difference in the district population would be tolerated. Facing the necessity to redraw districts based on the population, the individual states began to employ the federal analogy of having one chamber that reflected population and the other based on other things such as geography or historical borders. Nevertheless, the Supreme Court ended this practice when it ruled that “people, not land or trees or pastures, vote”.¹⁹ This ruling changed the practice only in state legislatures since the US Senate remains until today the only political body to which the one person, one vote principle does not apply.

The inequality of population of the congressional districts was debated in front of the Supreme Court in 1964. In *Wesberry v. Sanders*²⁰ the Supreme Court used Article 1, Section 2 of the US Constitution to demand population equality in congressional districts within individual states. In this case the Equal Protection Clause could not be used as it does not apply to voters' rights vis-à-vis congressional elections, an issue at federal level. Since *Wesberry v. Sanders* the states tend to redraw their districts after a decennial census even though the population changes continuously. Nonetheless, states

15 One of the most eye-catching examples is that of Los Angeles. The whole city constituted one voting district which had 422 times as many people as the smallest district in California.

16 Bullock, *Redistricting: The Most Political Activity*, 26.

17 Charles S. Bullock, “Redistricting: Racial and Partisan Issues Past and Present,” in *Law and Election Politics: The Rules of the Game*, ed. Matthew J. Streb (New York: Routledge, 2013): 232.

18 *Baker v. Carr* – 369 U.S. 186 (1962), Justia US Supreme Court, <http://supreme.justia.com/cases/federal/us/369/186/case.html> (accessed May 5, 2014).

19 Bullock, *Redistricting: The Most Political Activity*, 34.

20 *Wesberry v. Sanders* – 376 U.S. 1 (1964), Justia US Supreme Court, <http://supreme.justia.com/cases/federal/us/376/1/> (accessed May 5, 2014).

such as Texas or Georgia opted for mid-decade redistricting despite their plans being valid and approved. This caused a heated debate and accusations of partisan gerrymandering, especially in the case of redistricting in Texas in 2003 that was heavily criticized and challenged at the Supreme Court. Yet, no constitutionally illegal intent was found and the mid-decade redistricting was upheld as legal.²¹

The requirement of population equality was not the only part of the Redistricting Revolution. The heated racial situation in the American society brought about changes in the position of African Americans. The new laws, among them the Voting Rights Act of 1965,²² were supposed to bring the practice of racial discrimination of the African American population to an end, especially in the South. This new legislation affected redistricting as districts formed by a majority of minority voters were to be drawn according to Section 2 of the Voting Rights Act. This practice has received the name of affirmative action gerrymandering.

Section 5 of the Voting Rights Act then established federal oversight over the problematic districts in the South with a history of minority discrimination. The pre-clearance is granted when no retrogressive purpose or effect that would backslide the minority voting power is identified.²³ The introduction of minority representatives to the state legislatures and to Congress connected to the transfer of power from rural areas to urban centers as a result of population equality also significantly affected the issues that were dealt with and the overall political situation in the United States.

In 1967, Congress ended the decades-long practice of at large election that was used to disadvantage the minority population with passing a law that required single-member congressional districts. The minority groups succeeded in proving that the electorate voted along racial lines in the at large elections.²⁴ This practice prevented them from electing their candidate of choice. Therefore after the decennial census of 1970 the districts were for the first time drawn respecting the one person, one vote principle and all representatives were elected in single-member districts.

The onset of computer technology also substantially influenced the redistricting process. While in the old days redistricters had to draw maps on paper, the use of

21 Justin Levitt and Michael P. McDonald, "Taking the Re Out of Redistricting: State Constitutional Provisions on Redistricting Times," *Georgetown Law Journal* 95, (2007): 1249.

22 Voting Rights Act (1965), <http://www.ourdocuments.gov/doc.php?doc=100&page=transcript> (accessed May 4, 2014).

23 Thomas E. Mann and Bruce E. Cain, eds. *Party Lines: Competition, Partisanship, and Congressional Redistricting* (Washington, D.C.: Brookings Institution Press, 2005): 85.

24 Bullock, "Redistricting: Racial and Partisan Issues," 237.

computer technology allowed them to become more precise. Various data sets providing detailed information about every voting precinct began to be available and used. As a result, map drawers could group together voters with much more precision than before, allowing them to predict almost exact voting results based on the socioeconomic situation of the voter, their voting history, as well as other information. The onset of the accusations that voters can no longer affect the elections as they are carefully chosen to fit to the district maps created by the redistricting bodies also falls into this period. While this is generally considered to be true, it is important to keep in mind that any redistricting plan “is only as reliable as the voters it seeks to place in the district”.²⁵

The increased availability of redistricting software, its lower price, and the publication of useful data on the websites of each state also opened the redistricting process to wider participation of various political actors and general public. However, the high expectations associated with computer technology that could possibly do all the work instead of the map makers did not materialize.²⁶

1.3. Current Principles

Population equality

The instrumental principle that has been followed by the states since the Redistricting Revolution of the 1960s is the requirement of population equality, popularly known as the one person, one vote principle. Population equality, established for state legislative districts in 1962 and for congressional districts in 1964, has the highest priority and constrains all of the other redistricting principles. Since the Supreme Court did not indicate how much deviation from the ideal population would be tolerated, this rule had to be cleared with additional court decisions and challenges in which the Supreme Court successively required smaller and smaller variations in district population.²⁷ It began to be widely accepted that population deviation in congressional districts should be practically zero or the lowest possible. The rule that no congressional redistricting plan should include districts with population deviation higher than one percent has been successfully implemented since *Karcher v. Daggett* in 1983.²⁸

25 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 82.

26 Ibidem, 53–54, 62.

27 Bullock, *Redistricting: The Most Political Activity*, 36.

28 David Lublin, “Race and Redistricting in the United States: An Overview,” in *Redistricting in Comparative Perspective*, eds. Lisa Handley and Bernard Grofman (Oxford, New York: Oxford University Press, 2008): 143.

For legislative districts within the state the accepted rule stated that the difference between the most and the least populous districts should not exceed 10 percent of the ideal population²⁹ of the state district. The belief that any deviation within the 10 percent of the population of the ideal district will be upheld was broken in 2004 by the Supreme Court in *Larios v. Cox* when the total population deviation of 9.98 percent in Georgia's legislative districts was struck down as violating the Equal Protection Clause.³⁰ On the other hand, it is important to note that deviations from the ideal population can potentially be accepted if a legitimate policy justification such as keeping the communities of interest intact is provided.³¹

Thomas L. Brunell shows that the population deviations allowed in legislative districts are used for partisan purposes as the opposition districts tend to be overpopulated to waste the votes for the minority party while the districts of the majority party are usually underpopulated.³² The partisan gerrymanders and the one person, one vote principle come together when partisan plans are challenged at the Supreme Court because clear partisan gerrymanders cannot be struck down for their extreme partisanship. Thus when they have been challenged, the one person, one vote principle has been used to strike them down in case a plan with less population deviation, which at the same time seemed less biased, was offered instead.³³

The requirement of zero population deviation has since its establishment created a heated discussion about its logic and practical sense. One of the arguments against strict equality is that while it is required among districts within a particular state, the population deviations among congressional districts that are not located in one state are significant.³⁴ These differences cause one to doubt the practical significance of the one person, one vote principle. The decennial census according to which the size of the ideal district of a state is determined also has certain problematic characteristics that should be borne in mind.

29 The ideal population of a district is determined when the number of people living in the state is divided by the number of districts the state is supposed to have.

30 Stephanie Cirkovich, "Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote," *Cardozo Law Review* 31, No. 5 (2010):1839–1841.

31 Gerald J. Hebert and Marina K. Jenkins, "The Need for State Redistricting Reform to Rein in Partisan Gerrymandering," *Yale Law & Policy Review* 29, No. 2 (Spring 2011): 549.

32 Thomas L. Brunell, "The One Person, One Vote Standard in Redistricting: The Uses and Abuses of Population Deviations in Legislative Redistricting," *Case Western Reserve Law Review* 62, No. 4 (Summer 2012): 1064.

33 Hebert and Jenkins, "The Need for State Redistricting Reform," 550.

34 Ronald Keith Gaddie, Justin J. Wert and Charles S. Bullock III, "Seats, Votes, Citizens, and the One Person, One Vote Problem," *Stanford Law & Policy Review* 23, No. 2 (2012): 433. The most populated district is currently located in Montana (994,416 people) and the least populated in Rhode Island (527,624 people).

It is practically impossible to count the total number of people that live in a state because some of them do not hand in the forms (some just forget while some groups of people, especially illegal migrants, choose not to as they are afraid of legal consequences). There is also a problem with counting prisoners, college students, military personnel serving abroad, and others.³⁵ Apart from that, the number of people changes between the census and the time when the districts are drawn. While the number of people might be theoretically equal, the number of people that are eligible to vote differs as some districts have a significant number of young people or illegal migrants. Voter turnout represents another variable that has to be taken into account as it greatly affects the number of actual voters in individual districts. Minority voters tend not to have high participatory rates, especially in comparison with white middle class voters.³⁶

Even though the one person, one vote principle that serves as a fundamental base for modern district drawing can be criticized from various points of view, the requirement of strict population equality based on the number of people counted in the census is still the best possible method of determining the size of individual voting districts. The fact that all votes do not have equal weight has to be accepted as reality. Calls to ease the standard and tolerate minor population deviations should not be answered since if a small difference of few percent was allowed, the states would likely take it as a permission to have that much deviation. If other variables were also taken into account, the situation would become chaotic and above all would have political implications that could be also viewed as providing partisan advantages.³⁷ Furthermore, variables such as voter turnout or the number of eligible voters might change even quicker than the number of people counted during the census.

Minority representation

The Voting Rights Act of 1965 and its later updated versions created the requirement of minority representation, the second most important principle that has to be followed when drawing a district. The Voting Rights Act represented “an unprecedented intervention of the federal government in what had been exclusively a state responsibility”³⁸ as the states always had sole authority over drawing their districts

35 Bullock, *Redistricting: The Most Political Activity*, 185.

36 Ibidem, 42.

37 Brunell, “The One Person, One Vote Standard in Redistricting,” 1062–1064.

38 Bullock, *Redistricting: The Most Political Activity*, 53.

and determining the principles that should be followed when producing a redistricting plan. The aim of the Voting Rights Act was to increase minority representation and remedy historic discrimination.³⁹

The rules for majority-minority districts were formally constituted in *Thornburg v. Gingles* ruled in 1986. The so-called Gingles criteria state that the minority group must be large enough to form a majority in the district and at the same time must be geographically compact. Moreover, it is necessary to show evidence that the minority group has been voted against (a phenomenon known as polarized voting).⁴⁰

The majority-minority districts became a practice that dominated the political scene because the rule went that as many majority-minority districts as possible were to be drawn. This practice was put to an end in 1993 when the Supreme Court ruled in *Shaw v. Reno* that race could not serve as the predominant factor when drawing a district.⁴¹ This decision was labeled as “a judicial backlash against majority-minority districts”⁴² by the civil rights community. However, it did not have great practical consequences as was feared. Since party affiliation strongly correlates with race, map drawers can claim that partisan interests were the dominant factor when drawing districts that could appear to be drawn on the basis of race.

The creation of majority-minority districts has been criticized for reinforcing racial stereotypes, practically separating the minority population from the rest and thus creating racial gerrymanders. Moreover, the requirement to draw majority-minority districts also limits the map drawers' ability to draw potentially competitive districts.⁴³ As long as the minority representation requirement remains in force, competition cannot be forced upon the map drawers as the majority-minority districts are uncompetitive and in most of the cases provide safe Democratic seats.⁴⁴ As a result, safe Republican districts are created around the majority-minority districts.

A vigorous discussion has taken place regarding the proportion of the population in a district that would ensure the election of a minority representative. As David Lublin

39 Emily Barasch, “The Twisted History of Gerrymandering in American Politics,” *The Atlantic*, September 19, 2012, <http://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/> (accessed March 27, 2014).

40 Bullock, *Redistricting: The Most Political Activity*, 69.

41 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 14.

42 Benjamin E. Griffith, *America Votes!: A Guide to Modern Election Law and Voting Rights* (Chicago: American Bar Association, 2012): 155.

43 Winburn, *The Realities of Redistricting*, 19.

44 Even though not all minorities tend to vote for Democrats (for example the Cubans in Florida), the vast majority of the majority-minority districts have been composed of African Americans and Hispanic groups voting for Democrats.

observes, “the search for an exact percentage that can be applied everywhere is misguided because the percentage minority required for the election of a minority-preferred candidate varies by jurisdiction and office”.⁴⁵ This results in a problematic situation as some type of guidance is necessary, otherwise the minority representation could be threatened. At the same time the threshold could be criticized for being set too low or too high.

Originally, districts with an overwhelming majority of minority voters were drawn but these days opportunity districts, in which just the right percentage of minority voters is placed in order to have an equal chance of electing their candidate of choice, became a crucial part of the redistricting process. Influence districts have also become a part of the process to assure minority representation. In these districts the minority does not form a majority of the voters but should be able to elect its preferred candidate if the candidate attracts enough crossover voters. Minority-coalition districts in which two or more minority groups constitute a majority are a new phenomenon as many districts ceased to be dominated by African Americans and are constituted by members of various minority groups. It remains to be seen whether this idea of minority coalitions translates into practice .

Contiguity

Contiguity has been historically the least disputed principle. To consider a district contiguous it is necessary that a person can possibly move from one place inside the district to another place within the district's borders without having to leave the district.⁴⁶ When districts used to correspond with the borders of individual counties, contiguity was not an issue. Due to the necessity of equally populous districts after the Redistricting Revolution, map drawers have begun to employ various strategies of drawing districts disregarding the traditional lines. As a result, contiguity of some districts was eventually questioned. The problematic strategies include using water bodies to connect two areas within a district, especially when the areas around a body of water are not included in a district and the water body is used just as an empty space to connect the two areas. The concept of contiguity has also been stretched because of the use of touch-point contiguity that some claim represents a violation of the concept.⁴⁷

45 Lublin, “Race and Redistricting in the United States,” 147.

46 Theodore S. Arrington, “Redistricting in the U.S.: A Review of Scholarship and Plan for Future Research,” *Forum* 8, No. 2 (2010): 18.

47 Bullock, *The Most Political Activity*, 88.

Compactness

Compactness of a district represents a principle that has been heavily discussed. The main reason behind this discussion lies in the lack of consensus as to the definition of compactness. The missing agreement on measuring compactness leads to the non-existence of its legal definition and to disputes about which districts should be considered compact. As Theodore S. Arrington admits, “there is no standard that can tell us whether the districts in a plan are compact enough”.⁴⁸

Scholars have proposed various methods how to measure compactness. One of the methods to measure compactness of a district, which determines the dispersion score of a district, is to draw a circle around the district that completely surrounds it. This allows us to see how much of the area of a district is included in the circle. The premise here is that a circle is the ideal shape of a district because it is the most compact one. Another method does not focus on the share of area within a circle but on the share of population within a circle that is included in a district.⁴⁹ The problem of the various methods which examine compactness of a district is that they produce different results. While a district might be considered compact according to one of the methods, it might score poorly when measured by another method. Because of the non-existence of a consensus, there are no official limits that would prohibit the map drawers from drawing districts that score poorly on any of the compactness measures. The individual states might require their districts to be compact but as none of the methods to determine compactness is enshrined in the law, only an eye-ball test is applied when deciding whether a district complies with the criterion of compactness.

The common knowledge goes that drawing compact districts decreases the possibilities of voter picking for the map drawers. The main problem is that an eye-pleasing district does not necessarily have to be a district that conforms to all of the existing norms. On the other hand, a district that would not score well using the proposed compactness criteria can be a district that respects all the existing principles. After the Redistricting Revolution, strangely shaped districts became a reality because of the minority representation requirement and the necessity to find a sufficient amount of voters to fill the majority-minority districts. To sum up, the partisan and demographic composition of a district plays more important role than its shape.⁵⁰

48 Arrington, “Redistricting in the U.S.: A Review of Scholarship,” 18.

49 Other methods that might be used to measure compactness and examples of districts that scored poorly could be consulted in Bullock, *Redistricting: The Most Political Activity*, 90–96.

50 Brunell, *Redistricting and Representation: Why Competitive Elections Are Bad*, 3.

Geographical units

The practice of respecting geographical units was followed almost unanimously until the Redistricting Revolution. Districts used to share the same borders with old counties, which led to huge disparities in population between districts as urban districts grew much faster than the rural ones. Therefore respecting the one person, one vote principle required states to create more districts within a single county whose population was larger than the ideal population of a district and to not respect the geographical borders. Violating county lines has become a widely used practice, above all in partisan and racial gerrymandering.

Few states currently require their map drawers to respect county borders. The proponents of this principle emphasize that when the map drawers are limited by the existing geographical units, they cannot create partisan gerrymanders. Moreover, some consider the local jurisdiction to form communities of interest.⁵¹ This might be true in rural counties but could be hardly proven in cities and urban areas. The critics ask what sense there is in letting the map drawers' decisions be dictated by borders that were arbitrarily created centuries ago. The geographical units are a man-made construct that served their purpose in the period of their creation, and in the today's world they do not have any reasonable justification.⁵²

Incumbent protection

Even though incumbent protection has been recognized as one of the traditional principles of redistricting, and some states even require their map drawers to protect the incumbents of both parties, creating bipartisan gerrymanders or incumbent-protection plans also represents one of the points of criticism of the current redistricting practice because it reduces competition. It must be noted that when legislatures draw districts, incumbency is almost always taken into account because it is the incumbents themselves who approve the districting plans.⁵³

High reelection rates are facing a severe criticism but incumbency is also seen positively by some. If an incumbent is reelected, it may result in many advantages for a district as incumbents already possess a lot of experience and may obtain more important positions in the congressional representation from which the people in the district may potentially benefit. Furthermore, senior members of Congress have a better

51 Arrington, "Redistricting in the U.S.: A Review of Scholarship," 19.

52 Brunell, "The One Person, One Vote Standard in Redistricting," 1067.

53 Bullock, *Redistricting: The Most Political Activity*, 101.

chance of securing money or pork barrels for their districts and also have greater prospects of occupying leadership positions in Congress.⁵⁴

Preservation of the communities of interest

While the Supreme Court ruled that preserving the communities of interest is one of the legitimate principles that any redistricting plan should respect, a discussion has followed concerning the definition of a community of interest and the significance of its preservation in a redistricting plan.

One of the main problems of the notion of communities of interest is its problematic definition which decreases its utility for drawing or evaluating districts. Despite the non-existence of an agreement on how to define a community of interest, its preservation can be used as an explanation of population deviations. In this case the communities have to be well-defined and it must be shown that their preservation “necessitates insubstantial district population inequalities”.⁵⁵ The real-life communities of interest include areas with similar ethnic, cultural, demographic or geographic characteristics. It always depends on the ability of the person or group that strives to define them to show that a certain area should be preserved because it contains a community of interest.

From the point of view of those who call for increasing competition, the preservation of the communities of interest is an ambiguous topic. As voters living in a community that is defined as a community of interest generally share certain characteristics that make them favor one party over the other, a community of interest usually serves as a homogenous block voting for a particular party. This should lead to effective representation as the representative of such a community should know clearly what interests he is expected to represent.⁵⁶

On the other hand, those criticizing the lack of competition would rather divide the existing communities of interest and put together opposed communities of interest in order to create districts with more heterogeneity to provide for more competition.⁵⁷ The problem is that the weaker community of interest would not be able to elect its

54 Gerald R. Webster, “Reflections on Current Criteria to Evaluate Redistricting Plans,” *Political Geography* 32, (January 2013): 11.

55 Russell C. Weaver, “Gerrymandering Politics Out of the Redistricting Process: Toward a Planning Revolution in Redrawing Local Legislative Boundaries,” *Berkeley Planning Journal* 25, No. 1 (2012): 104.

56 Arrington, “Redistricting in the U.S.: A Review of Scholarship,” 6.

57 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 25.

candidate of choice if the more populous community of interest voted together for a different candidate.

Preservation of the cores of prior districts

The preservation of the core of a previously existing district is one of the most important prerequisites for the reelection of an incumbent. If an incumbent's home is removed from the district, he or she has a very limited chance of getting reelected.⁵⁸ Dividing or removing a core of prior district or putting two incumbents together to one district is a very useful tactic for the opposition that wants to ensure the defeat of an incumbent. Keeping the district intact as much as possible is one of the key prerequisites for a successful reelection of an incumbent as he or she can make use of the relationship he or she has established with the constituents. A large number of new constituents with whom the incumbent has not built a relationship can disrupt the reelection prospects.⁵⁹ In this case the incumbent has to rely on party loyalty of the voters which could be weaker than their loyalty to a particular candidate.

2. The Redistricting Bodies and the Making of a Redistricting Process

Who draws the new districts and actually implements the new redistricting plan are crucial parts of the redistricting process that directly influence the representation a particular state will have in Congress and the composition of both chambers in state legislatures. This chapter examines the various redistricting bodies that currently exist in the United States. An emphasis will be put on the features of the redistricting plans they produce as the composition of a redistricting body that draws the maps corresponds with the composition of the representation that is elected in these districts.

Using the typology of Bruce E. Cain the redistricting bodies can be distinguished by the possession or non-possession of an autonomous power⁶⁰ to enact redistricting plans, and by the connections with the politicians the members of the redistricting body have.⁶¹ The legislatures constitute a body with the lowest independence score as it is the legislators themselves who implement the redistricting plans. On the other side of the

58 Brunell, *Redistricting and Representation: Why Competitive Elections Are Bad*, 69.

59 Antoine Yoshinaka and Chad Murphy, "The Paradox of Redistricting: How Partisan Mapmakers Foster Competition but Disrupt Representation," *Political Research Quarterly* 64, No. 2 (June 2011): 439.

60 Autonomous in this case is understood as not needing the consent of a legislature to enact a redistricting plan.

spectrum we can position commissions that have the sole authority to implement new maps without the need of consent of the legislature. Concerning the criterion of existing connections with the politicians, legislatures can be found on one end and on the other end we can place independent commissions whose members are thoroughly vetted and have no apparent prior connections to politics. Commissions are sometimes labeled as belonging to a broader category named after the first state where such a commission was in force. Commissions that have sole authority to implement a redistricting plan are based on a model implemented in Ohio; the backup commissions are inspired by Texas.⁶²

2.1. Legislatures

Legislatures are still the dominant bodies that currently decide about redistricting in 42 states in the case of congressional districts (also counting the states that currently have just one district but their redistricting plans would be approved by a legislature if they had more than one district) and in 37 states in legislative districts for state legislatures.⁶³ It must be noted that seven states (Wyoming, Vermont, Nevada, Arkansas, South Dakota, Delaware and Montana) have only one congressional district and therefore do not have a redistricting body in force for drawing maps of congressional districts. As can be observed, fewer states allow their state legislators to decide about their legislative districts as a direct conflict of interest is seen in this practice and led to satiric comments describing the nature of the American elections as a process where the voters are chosen by the legislators and not the other way around.⁶⁴ The new redistricting plans are treated by the legislatures in the same manner as any other legislative bill and thus have to be approved by both chambers and signed by the governor to become law.

The type of plan that is produced by a legislature depends on the division of power in a state. Therefore the success in the last legislative election before the census that determines which party will be in charge of the implementation of new redistricting plans is crucial and might significantly affect the future of a party for the next decade. The first scenario, and the ideal situation for a state majority party, occurs when it

61 Bruce E. Cain, "Redistricting Commissions: A Better Political Buffer?" *The Yale Law Journal* 121, No. 7 (May 2012): 1818–1819.

62 McDonald, "United States Redistricting: A Comparative Look at the 50 States," 58.

63 The current map of the United States with the bodies responsible for redistricting in individual states can be found here <http://redistricting.ils.edu/who.php>.

64 Hebert and Jenkins, "The Need for State Redistricting Reform," 544.

controls both chambers of the state legislature and also the governorship. In this case a legislature tends to implement a partisan gerrymander which is advantageous to the majority party. The concerns of the minority party do not have to be taken into account as the majority party has the sole authority to approve a redistricting plan.⁶⁵

Some states (currently only Maine and Connecticut) require plans to be approved by an extraordinary majority of two-thirds of the votes in each chamber. If the majority party does not have enough seats in the legislature to conform to the extraordinary majority requirement, the situation is similar to the divided government scenario as incumbent protection plans not hurting any of the parties are likely to be adopted. The compromise plan reduces the competition between the parties and facilitates the reelection of the incumbents as it does not crack the partisan base and might transfer some additional voters affiliated with the party from neighboring districts to make the districts even more homogeneous.⁶⁶

Besides the unified government, various forms of divided government can possibly occur. In most of the states the governor holds veto power over the decision of the legislature. In some states this veto can be overridden by two-thirds of the votes of both legislative chambers. Therefore in a situation when a party has a veto-proof majority in the legislature and the governor is from a different party, the result is usually the same as in the first scenario examined here because the majority party can implement a plan that serves its interests without obstructions by the minority party.

The second scenario comes into play when the government is divided. This in practice means that both chambers of the legislature are controlled by the same party which does not hold the veto proof majority to override the vote of a governor that is from a different party. A similar scenario comes about when one chamber of the legislature is controlled by one party and the other chamber of the legislature is controlled by a different party. In this case a partisan plan cannot be approved because it would not get sufficient support from both chambers of the legislature.

According to a well-established practice, the majority party in each chamber is allowed to draw a redistricting plan for its chamber.⁶⁷ The plans produced in this manner usually result in incumbent protection gerrymanders as the fact that the plan has to be approved by the other chamber where the other party holds a majority has to be taken

65 McDonald, "United States Redistricting: A Comparative Look at the 50 States," 57.

66 Bullock, *Redistricting: The Most Political Activity*, 123.

67 Michael P. McDonald, "A Comparative Analysis of Redistricting Institutions in the United States, 2001-02," *State Politics and Policy Quarterly* 4, No. 4 (Winter 2004): 379.

into account when drawing the maps. While the minority party can block the most partisan plans when it controls at least one chamber or the governorship, the drawback of accepting an incumbent protection plan is that the minority party is likely condemned to its minority status for another decade.⁶⁸

2.2. Advisory Commissions

The purpose of the advisory commissions is to propose a plan that conforms to all the legal requirements to the legislature for approval. As with other legislation, the redistricting plans are not drawn personally by all legislators but by an appropriate legislative committee. However, in the states that employ advisory commissions, non-legislators can formally participate in the map-drawing process before the redistricting plan is presented to the legislature.⁶⁹ The plan produced by the advisory commission does not have to be implemented but its members are appointed by the legislative leadership and thus the proposed plans are usually favorable to the majority party's interests.

The advisory commissions are not praised by the reform community as the plans they propose still need to get approval from the legislature in order to be implemented which reduces the practical significance of such a commission.⁷⁰ Concerning the criterion of independence, the plans created by the advisory commissions are no different from the maps drawn directly by the legislators and their unique difference is the possibility of non-legislators to participate in the map-drawing process.

2.3. Political Commissions

Political commissions are bodies composed of various political officials that are chosen according to the state statutes or constitutions. The members of these commissions are elected officials themselves or people that these elected officials nominate and thereby the implications of a redistricting plan implemented by such a body are almost identical to a plan that a legislature would implement.⁷¹ The composition of the particular political commission varies from state to state. While in some states certain officials such as the attorney general, the secretary of state, or the

68 McDonald, "A Comparative Analysis of Redistricting Institutions," 390.

69 Justin Levitt, "Who Draws the Lines?" All About Redistricting, <http://redistricting.ils.edu/who.php> (accessed March 27, 2014).

70 Cain, "Redistricting Commissions: A Better Political Buffer?" 1814.

71 Justin Levitt, "A Citizen's Guide to Redistricting," Brennan Center for Justice at New York University School of Law, 2010 Edition, 25.

governor form the commissions, in other states the majority and minority leaders, the governor or the justices of the state supreme court nominate the members of a commissions.

The political commissions have certain advantages for which they are praised. Firstly, even though the members of these commissions are still politicians, the possibility to discuss the redistricting plans in a smaller setting provides for more flexibility, political exchanges, avoidance of unnecessary discussions, and less complicated adoption of a plan.⁷² Secondly, as the members of these commissions are elected officials who are at least in theory accountable to the voters, they can be possibly punished for a redistricting plan in the next election round.

On the other hand, the features that are by some regarded as positive can also be viewed as purely negative and in the opinion of the author the negatives outweigh the advantages. The closed setting and back-room deals that are seen as facilitating the decision-making process go against the spirit of more openness and greater involvement of other actors in the redistricting process. Apart from that, the existence of political commissions does not improve the current redistricting process. Moreover, the accountability of the members of political commissions is highly questionable as they, or the elected officials they represent, are likely to be running for reelection in the safest districts where the probability of removing the incumbents from their positions is very low.⁷³

2.4. Independent Commissions

Independent commissions have been considered the basis and the key aspect of any redistricting reform and are currently seen as the culmination of a reform effort and also as the objective that has a real chance of being achieved. Yet, they should not be regarded as a universal cure for the redistricting problems as certain features of the independent commissions are also problematic. The principal idea of the independent commissions is that their members are completely isolated from the political concerns and do not have a direct interest in the outcome of the legislative plan because they are not the ones striving for reelection.⁷⁴ Therefore they should be more likely to draw less biased maps that would respect the sovereignty of the electorate.

72 McDonald, "United States Redistricting: A Comparative Look at the 50 States," 67.

73 Steven F. Huefner, "Don't Just Make Redistricters More Accountable to the People, Make Them the People," *Duke Journal of Constitutional Law & Public Policy* 5, (2010): 55.

74 Bullock, *Redistricting: The Most Political Activity*, 132.

The impossibility of holding the commission's members accountable is one of the drawbacks criticized by voters.⁷⁵ As the commissioners are not connected to the electorate and their incentives are very different from those of the legislators, they can possibly draw plans which would lead to the dissatisfaction of the voters. The problem is that they cannot be punished for their conduct or for the results of their work.⁷⁶

The current trend is to choose members that have certain qualifications, are thoroughly vetted and have as little connection with the elected officials as possible. People considered for commission membership cannot have a history of involvement in politics, cannot be paid lobbyists, cannot be public officials or employees, and after serving on a commission they cannot accept any public function or run for election at least for a few years.⁷⁷ In some states, state officials are granted the authority to choose a commission member and can basically choose anyone who fulfills the given criteria. But in some states a pool of candidates for the seat of a commissioner is created and the future commission members can only be chosen from this group of people. Some states also require geographical diversity when choosing the commission members; they have to come from various districts or geographical units within the state.

Most of the commissions are composed of voters registered with a party and also with a couple of members that present themselves as independent. The problem is that the independence of a voter and a future commission member is highly questionable as most of the independents usually vote disproportionately for one party.⁷⁸ Thus if the tie breaking member of a commission is supposedly independent and his role is to break the partisan deadlock, a perception of a hidden bias can be created and the party whose interests are affected negatively by the decision can criticize the fairness of the process.

Commissions may tend to create plans that are very different from what a legislature would adopt as their members do not have any institutional ties to the existing parties and do not have to respect the spirit of arrangements between the parties. Experts often observe that when the redistricting authority is transferred to an independent redistricting commission, polarization is reduced.⁷⁹ However, it applies only to states with a certain composition of a commission, above all to the ones where a commission is likely to implement a compromise plan.

75 Huefner, "Don't Just Make Redistricters More Accountable," 39.

76 Brunell, *Redistricting: Why Competitive Elections Are Bad*, 116.

77 McDonald, "A Comparative Analysis," 384.

78 Cain, "Redistricting Commissions: A Better Political Buffer?" 1832.

79 James DeVault, "Political Polarization, Congressional Redistricting, and Trade Liberalization," *Public Choice* 157, No. 1/2 (October 2013): 221.

2.5. Backup Commissions

Backup commissions enter the redistricting process when a legislature is not able to reach a consensus on a new redistricting plan. A certain deadline is usually set for the legislators to approve a plan and if they do not succeed in doing so, the task is transferred to the commission. The composition of the backup commissions differs from state to state. For example, in Oregon the secretary of state is granted the sole authority to approve a redistricting plan as a backup commissioner. On the other hand, in Texas or Mississippi, a commission composed of various state officials is created to approve a redistricting plan. The make-up of this commission might affect the calculations of the legislators. Whether they see the possibility of transferring the decision-making to the commission as something they would benefit from or something that would not serve their interest, influences the final decision of the legislators to approve or turn down a proposed redistricting plan.

2.6. General Remarks about the Commissions

The composition of a commission is a crucial factor that is common to all types of commissions previously discussed because “commissions usually produce redistricting plans that reflect their structure and rules”.⁸⁰ We can distinguish between commissions with an even number of members or with an odd number of members. The commissions with an even number of members tend to require their members to approve plans with an extraordinary majority support. The result is an encouragement of bipartisanship and the adoption of an incumbent protection plan or a deadlock that has to be resolved by the intervention of a court.⁸¹

On the other hand, the way the commissions with an odd number of members work is that an even number of members is usually nominated by the political parties and the tie breaking member is then chosen by the members of the commission. If the commissioners nominated by the parties are unable to agree on the tie breaking member, the authority to appoint the last member is transferred to the state supreme court. The appointment of a tie breaking member can easily give one party control over the commission and an arguably partisan plan can be implemented by a bipartisan commission as if the legislature with one party control was in charge of the redistricting

80 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 100.

81 Arrington, “Redistricting in the U.S.: A Review of Scholarship,” 14.

process. This can be especially problematic when the appointed tie breaking member favors the minority party. In this case a situation which goes against the well-known practice that gives the majority party the power to draw a plan occurs. If the tie breaking member favors the minority party, a plan that advantages the minority party and might go against the will of the majority of the voters in the state may be enacted.⁸²

To sum up, it is important to keep in mind that “not all commissions necessarily take away the partisanship from the process”.⁸³ Therefore an ample discussion has been taking place about an ideal commission structure which would reduce the options for implementing a clearly partisan plan. This debate has not been concluded with any satisfactory results as it is affected by the personal view of every expert.

2.7. Special Cases

Iowa's redistricting process often serves as an example that is admired and presented as something other states should be inspired by. Iowa does not rely on a commission to draw its maps but employs a Legislative Service Agency which is a permanent body composed of career bureaucrats.⁸⁴ The Legislative Service Agency cannot be regarded as an independent commission as it does not possess the sole power to implement a redistricting plan but it proposes three plans to the legislature for a vote. If none of the plans presented one by one are approved by the legislature, the legislators could themselves alter the last plan. However, the legislature has never exercised this right as it always approved a plan designed by the Legislative Service Agency.

Iowa's system is often pointed out because it produces competitive districts. Nevertheless, critics claim that because of the unique composition of Iowa's population, geographical characteristics and lack of minority voters, competitive districts would be drawn anyways even if other redistricting bodies were in charge of the process.⁸⁵ Moreover, the race-blind approach cannot be used in states with a substantial percentage of minority populations where districts have to be drawn in accordance with the Voting Rights Act.

82 McDonald, “A Comparative Analysis,” 382.

83 Winburn, *The Realities of Redistricting*, 22.

84 Cain, “Redistricting Commissions: A Better Political Buffer?” 1814.

85 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 27.

2.8. Role of the Courts

In addition to the examination of the existing redistricting bodies, the role of the courts should also be introduced as the courts represent an actor that might be actively involved in the redistricting process and the members of the redistricting bodies keep in mind its role when drawing new maps. The judges must step in when a state legislature or a commission does not reach a deal on the new redistricting plan. To conform to the requirement of population equality, the court must produce its own redistricting map according to which the next election is held.⁸⁶ Courts tend to modify the last existing plan just slightly rather than coming up with a brand new one as they do not have a capacity to come up with a completely new redistricting plan on their own.⁸⁷ If the state redistricting body is dissatisfied with the plan produced by the court, it can subsequently replace it with its own if a sufficient number of votes rally behind the proposal.

Moreover, some states currently require the court to review the proposed redistricting plans before they are approved.⁸⁸ Courts can also meddle with the redistricting plans when the minority party confronts the approved districting plan for breaching any of the legally binding principles. The judicial means is the only way to question and possibly modify a redistricting plan once it was approved, and represents the only option for the minority party to appeal against a partisan plan. As openly partisan plans are more likely to be reviewed by the courts, the majority party should strive to follow all binding rules strictly, otherwise the plan can be contested and struck down despite the toothlessness of a standard to identify and strike down a partisan gerrymander.⁸⁹

On the other hand, courts can also be used for partisan purposes. Generally, the plans produced by the courts tend to be fairer to both parties. However, a party can expect a plan from which it could benefit if the judges were nominated by this same party or the judges have the party to thank for their current position.⁹⁰ The risk of not approving a plan in the redistricting body and letting the courts decide instead might not always pay off. Letting such a plan that actually does not fulfill the party's expectations

86 Levitt and McDonald, "Taking the Re Out of Redistricting," 1254.

87 Hebert and Jenkins, "The Need for State Redistricting Reform," 550.

88 Bullock, *Redistricting: The Most Political Activity*, 10.

89 Winburn, *The Realities of Redistricting*, 27.

90 Mark Jonathan McKenzie, "The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts," *Political Research Quarterly* 65, No. 4 (December 2012): 799.

be created is an example of excessive risk or underestimation of certain facts that has been given the name “dummymander”.⁹¹

3. Criticism and the Redistricting Reform

The previous chapter examined the redistricting bodies that currently exist and also the types of plans that these redistricting bodies, limited by the principles introduced in the first chapter, tend to produce. The aim of the following chapter is to analyze the criticism associated with the redistricting process and above all with the plans it produces. Besides that, the reform proposals whose objective is to correct for the deficiencies of the existing system will be introduced and examined.

3.1. What Is Wrong with the Current State of Redistricting?

Partisan gerrymandering has become a buzzword of the American redistricting process and represents the most discussed aspect of the current redistricting. Gerald J. Hebert and Marina K. Jenkins argue that while in the past the voters sought quantitative equality in the form of equal representation which was ensured by the population equality requirement that was implemented in the 1960s, nowadays the main task of the voters and the reform community should be to seek qualitative equality or fair representation which is hampered by the partisan gerrymanders.⁹² Richard Forgette and Glenn Platt go even further and claim that excessive partisan gerrymanders that produce severe electoral bias could be challenged at the Supreme Court for violating the Equal Protection Clause of the 14th Amendment because they consign electoral groups to minority status based solely on their political views.⁹³

Partisan gerrymandering is not a problem from which all of the states would suffer. The reason is that some states, especially the smaller ones, are virtually homogenous, with few differences in the political views of their population. Partisan gerrymandering necessitates favorable conditions in order to be applied as well as party members that are willing to follow a unified party line. Big heterogeneous states that offer various possibilities as to how districts could be drawn for partisan purposes provide an ideal ground for partisan gerrymandering.⁹⁴

91 Bullock, *Redistricting: The Most Political Activity*, 120.

92 Hebert and Jenkins, “The Need for State Redistricting Reform,” 546.

93 Forgette and Platt, “Redistricting Principles and Incumbency Protection,” 935.

94 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 100.

As was stated in the previous chapter, partisan gerrymanders are usually a product of the redistricting process led by a state legislature controlled by one party or by a commission that does not adopt a bipartisan plan but clearly favors one party over the other due to its composition. Recently, the control of state government has tended to be divided. Therefore there are just a few states where partisan gerrymanders can be successfully applied.⁹⁵

Basically any redistricting plan can be called partisan and biased as there is always a group of voters or politicians whose interests are harmed by the adopted plan and who can be seen as the losers of the redistricting process. There is another group that benefits from the approved plan and these can be labeled the winners of the redistricting game.⁹⁶ While it is obvious that some interests are always taken into account less than others, it is important to determine what kind of map-drawing is too excessive in promoting interests of a certain group. The main issue connected to partisan gerrymandering is the non-existence of a standard applicable in practice that could be used to identify it and distinguish it from a normal use of partisanship.

The Supreme Court has examined challenges against partisan gerrymandering and even developed a standard to determine whether a redistricting plan could be seen as a partisan gerrymander, however, this standard was set too high and cannot be applied in reality. The *Davis v. Bandemer* decision of 1986 has ever since been pointed out as one of the worst decisions of the Supreme Court in its history as it did not offer much prospect of redress and provided a false invitation for plaintiffs to challenge redistricting plans on partisan grounds.⁹⁷

According to the Bandemer standards, the plaintiff must prove that the approved plan has a discriminatory intent and that his party also suffers from a discriminatory effect of such a plan. Discriminatory effect is understood as exclusion of the party from governmental structures. The minority of the court claimed that partisan gerrymandering was not justiciable which in practice has proven to be so as courts found it very difficult to apply Bandemer standards. As Laughlin McDonald notes, any major party in the United States that has access to media, campaign financing and that is represented at least at some level of the political system, cannot prove the discriminatory effect of a partisan plan.⁹⁸

95 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 24.

96 Justin Buchler, "The Inevitability of Gerrymandering: Winners and Losers under Alternative Approaches to Redistricting," *Duke Journal of Constitutional Law & Public Policy* 5, (2010): 18–19.

97 Bullock, *Redistricting: The Most Political Activity*, 131.

98 McDonald, "The Looming 2010 Census," 249.

In 2004, the Supreme Court once again had to make a decision on the issue of partisan gerrymandering in *Vieth v. Jubelirer*. Because of the non-applicability of the Bandemer standards, it was widely expected that the Court would come up with different criteria to identify partisan gerrymanders or that it would rule out the possibility that it could strike down a plan for being a partisan gerrymander.

The expectations were not fulfilled as no criteria to identify partisan gerrymandering emerged but at the same time the door was left open for them to be defined in the future. Therefore if a party seeks to strike down clearly partisan plans, it has to raise other issues such as population inequality or diminishing minority influence on the basis of which the plan could be eliminated. The courts have proven to be willing to strike down such redistricting plans that resulted in extreme partisan gerrymanders on the basis of equal population when a plan with less population deviation was available.⁹⁹

Nathaniel Persily laments that the Supreme Court allows the majority party to discriminate against the opposition and has not “embraced an anti-trust model of politics wherein its role would be to regulate the cartel-like behavior of entrenched parties or incumbents who try to insulate themselves from competition and make elections meaningless”¹⁰⁰ as it did in other instances in order to regulate monopolistic behavior. In the current situation the success of a clearly partisan plan depends only on the ability of a redistricting body to draw a plan that conforms to all federal and state requirements as such a plan is virtually untouchable by the courts.

The problem of defining usable legal criteria according to which a partisan gerrymander could be identified is the non-existence of a standard that would be generally accepted by the scholars and experts. In the past, there were attempts to show that strangely shaped districts were a result of partisan gerrymandering but it was proven that the shape of a district does not correspond with it being or not being a partisan gerrymander.

The symmetry standard has received the approval of being a method of identification of a partisan gerrymander. According to Laughlin McDonald, the symmetry standard “requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage”.¹⁰¹ The level of asymmetry is sometimes also called partisan bias, but there is no accepted

99 Arrington, “Redistricting in the U.S.: A Review of Scholarship,” 550.

100 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 80.

101 McDonald, “The Looming 2010 Census,” 265.

value of the partisan bias that would suggest whether a partisan plan represents an excessively partisan gerrymander or traditional use of partisanship.

It is important to keep in mind that some experts refuse the notion that in the case of congressional elections partisan gerrymandering has significant effects on the composition of Congress as they claim that gains created by partisan gerrymandering in one state are made less important by gains of the other party due to its partisan gerrymanders in other states.¹⁰² But the author deems this type of generalizing incorrect as the circumstances in each election cycle and in each state are very specific. Therefore one or two extra partisan gerrymanders by one of the parties might in the end significantly affect the situation in Congress.

Partisan gerrymandering is often blamed for being one of the main causes of the increasing polarization of Congress and state legislatures as candidates in safe districts do not have to appeal to the moderate voters and seek support only from their partisan base. However, the trend has been almost identical in the US Senate whose districts are not subject to redistricting. Thus as long as the polarization in the Senate remains similar to Congress, partisan gerrymandering or even redistricting cannot be identified as the core cause of polarized legislative bodies.¹⁰³

The lack of competition is another aspect of the current redistricting process that has been widely discussed and that is strongly connected to the problem of partisan gerrymandering. Sam Hirsch called the 2000 round of redistricting the most incumbent-friendly in history because it created the lowest number of competitive districts.¹⁰⁴ Competitive districts are standardly defined by the difference in the gains of the two major parties in consecutive elections; both congressional and presidential elections are taken into account. Whether the lack of competition is actually a bad thing, is the crucial issue, as some experts strive to prove that competition is not what should be valued and promoted.

Common knowledge indicates that competition should be fostered because “its absence is an indication that something is amiss with the democracy”.¹⁰⁵ Competition is also supposed to create moderate legislators as opposed to extreme legislators who get elected in safe districts with no competition, and to increase responsiveness of the

102 “A Federal Administrative Approach to Redistricting Reform,” *Harvard Law Review* 121, No. 7 (May 2008): 1847.

103 John N. Friedman and Richard T. Holden, “The Rising Incumbent Reelection Rate: What’s Gerrymandering Got to Do With It?” *Journal of Politics* 71, No. 2 (April 2009): 594.

104 Bullock, *Redistricting: The Most Political Activity*, 127.

105 Brunell, *Redistricting and Representation: Why Competitive Elections Are Bad*, 6.

elected representatives to the changes in the preferences of the electorate.¹⁰⁶ This view is shared by the public and the newspapers, however, few scholars have proven that these assumptions about competitive elections are not valid as no ideological or partisan differences were found between representatives elected in competitive districts and those who faced no serious competition in their district. These scholars offer various explanations in order to show that competition is actually undesirable.

Thomas L. Brunell argues that competition creates dissatisfied voters whose interests are not well-represented. The closer the race on the Election Day, the more disappointed voters are left in the district which makes it harder for an elected official to represent the interests of the people in a district.¹⁰⁷ On the other hand, if a district is packed with voters of the same party whose political views are very similar, the task of representation for the winner of the election is much easier. Nevertheless, districts can never be made perfectly homogeneous and the voters who vote for the minority party in a district packed with supporters of the majority party are condemned to permanent losing with no prospect of change.¹⁰⁸

It has been proven that the voters whose candidate of choice does not get elected generally show more dissatisfaction with the work of the legislators as well as with the political situation in the country as a whole, and show distrust in the government.¹⁰⁹ But due to the advantages that incumbents enjoy in the current political system, it is rather impossible to set up an election that would be competitive even if the district was highly competitive.¹¹⁰ The advantages of the incumbents, overall political situation in the country, quality of the candidates and their performance in the past election cycle are also factors that play part in the voters' decision on the Election Day.

It is also important to note that striving for competitive districts can result in the creation of strangely shaped districts as “voters tend to reside in non-competitive patterns”.¹¹¹ Furthermore, while districts might be made competitive following a decennial census, the situation might radically change in the following years as voters move around, young people reach the voting age, and people's opinions and partisan preferences change.

106 Nicholas R. Seabrook, “The Limits of Partisan Gerrymandering: Looking Ahead to the 2010 Congressional Redistricting Cycle,” *Forum* 8, No. 2 (2010): 1.

107 Huefner, “Don't Just Make Redistricters More Accountable,” 48.

108 Buchler, “The Inevitability of Gerrymandering: Winners and Losers,” 35.

109 Thomas L. Brunell and Harold D. Clarke, “Who Wants Electoral Competition and Who Wants to Win?” *Political Research Quarterly* 65, No. 1 (March 2012): 125.

110 Levitt, “A Citizen's Guide to Redistricting,” 63.

111 Huefner, “Don't Just Make Redistricters More Accountable,” 49.

One argument that supports electoral competition is that competitive districts at least create an image that every voter has a fair chance that a candidate of his choice could get elected and that the contest for every seat is open.¹¹² The absence of competition can discourage voters from participation in elections and it leads to a general sense of indifference and disinterest. On the other hand, promoting competition does not always lead to fairness as in uncompetitive states, where districts are made artificially more competitive; districts are formed with a larger proportion of the minority party voters than what would be expected due to the overall statewide strength of the minority party.¹¹³ This might create an unfair advantage for the minority party if it normally had no chance of electing a candidate of its choice.

Authors promoting electoral competition claim that bipartisan plans take away the critical function of elections to remove legislators from the office.¹¹⁴ In this case party primaries, which could also serve as an effective mechanism to oust the candidates with whom the voters are dissatisfied, are not taken into account. Having an uncompetitive general election in a district has to transfer the attention of the voters to the primaries as they serve as the only opportunity to change the representative of a state. Nevertheless, primaries do not seem like a working mechanism that could fulfill the role of ousting incumbents instead of the general election because for example “beating a sitting senator in a primary is hard: since 1946 it has been done just 46 times in 968 attempts – a 5% success rate”.¹¹⁵ Therefore it seems like primaries cannot be relied on when striving to decrease the high reelection rate of incumbents and promote changes in the election process.

The adoption of partisan gerrymanders and the lack of competition are often considered two sides of the same coin. However, partisan gerrymandering usually leads to more competitive districts and it is the incumbent protection plans that result in highly uncompetitive districts. When employing partisan gerrymanders, map drawers strive to increase the number of seats that a party wins. In order to do that, their goal is to win as many districts as possible by slight margins and not to waste the votes of their party's voters. This strategy should thus result in the surge in the number of competitive

112 Buchler, “The Inevitability of Gerrymandering: Winners and Losers,” 30.

113 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 26.

114 “A Federal Administration Approach,” 1844.

115 “The Mid-Term Elections: Can the Republicans win the Senate?” *The Economist*, March 15, 2014, <http://www.economist.com/news/united-states/21599004-if-they-do-barack-obama-will-have-tough-final-two-years-can-republicans-win> (accessed March 27, 2014).

districts as voters from safe districts are removed and added to districts previously held by the other party.

3.2. Reform Proposals and Their Objectives

The reform community and scholars interested in the topic have proposed various suggestions and plans to improve the redistricting process, eliminate its current deficiencies, and protect the interests of the voters. The principal idea is to take the decision-making authority away from the legislators and transfer the responsibility for map-drawing to anyone else but elected officials. In agreement with Jonathan Winburn it must be unfortunately noted that there is no body that would be absolutely impartial and would not “draw lines without some form of self-interest entering into the process”,¹¹⁶ no matter if it is the independent commissioners, judges, citizens, or others.

While some experts expressed the desire to take politics out of redistricting, this cannot be achieved because redistricting is inherently a political process.¹¹⁷ Therefore reform proposals directed at least at taking politicians out of the process have received the most attention and altogether with some other plans will be discussed in this section. The author sees the crucial problem of the reform proposals and also in the criticism of the current process in the lack of agreement on the objectives of the redistricting reform and also in the contradictory claims regarding competition and the partisan plans on one hand and the incumbency protection plans on the other.

Those criticizing redistricting are split on the issue of what kind of redistricting plans they wish to be adopted. The general trend is to transfer the decision-making authority to independent redistricting commissions but no agreement exists on the composition of these commissions. And as was stated earlier, the composition of a redistricting body translates directly to the type of a plan that it is likely to approve. As no consensus exists on whether competition is an asset that should be promoted or whether it is actually not so important and should not be valued, it is also impossible to arrive at conclusion whether it is the bipartisan, partisan plans or plans with no clear evidence of partisanship that should be the objective of the reform community. Competition clearly has its advantages and disadvantages and it depends on the point of view of a particular person and his or her individual values. In actuality some states such as New Jersey have openly identified incumbent protection as one of the objectives

¹¹⁶ Winburn, *The Realities of Redistricting*, 208.

¹¹⁷ Brunell, *Redistricting and Representation: Why Competitive Elections Are Bad*, 3.

of the redistricting process while other states require their map drawers to create competitive plans without the situation of the incumbents taken into account.¹¹⁸

Various authors note that the current redistricting principles that to some extent limit the map drawers pose the most effective restraint on the redistricting bodies and should protect the voters from extreme partisan gerrymanders. However, it is impossible to quantify how much constraint they actually pose.¹¹⁹ Gerrymandering can be to some extent limited but partisanship still remains a part of the process. The principal problem is the non-existence of an agreement on the use of the traditional redistricting principles that are recognized by the Supreme Court. Some principles such as compactness lack an accepted definition and others are defined rather vaguely which results in less certainty than ambiguity in their application. The inability to come up with workable definitions might make one doubt whether the politicians even have the desire to do so.

Not all of the principles can be applied equally at the same time and therefore the map drawers must always regard some of them more important which makes them give less attention to the other principles. A general agreement, at least by the scholars, on the definition, techniques to evaluate the fulfillment of the individual criteria, and importance that should be given to the particular traditional redistricting principles, would be useful and “would aid mapmakers and the judiciary in making judgment about challenged districts and plans”.¹²⁰

Blind redistricting or map-drawing without using the election data that are normally available to the map drawers is another reform proposal that has been discussed but this idea would not move forward the redistricting process in any way. The problem is that the data that would still be available to the map drawers would provide information that is useful enough so they would still be able to determine the desired composition of a district.¹²¹ They could, for example, use details about the socioeconomic situation of the citizens. Moreover, blind redistricting could not be used in states with significant minority populations as the map drawers in these states have to adhere to the Voting Rights Act and could not draw districts without having access to data specifying racial and language composition of the area. All in all, blind redistricting

118 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 105.

119 Winburn, *The Realities of Redistricting*, 39.

120 Webster, “Reflections on Current Criteria,” 12.

121 Huefner, “Don’t Just Make Redistricters More Accountable,” 46.

could fool the voters into thinking that the districts are drawn in a different way with less partisanship in play while the reality would remain unchanged.¹²²

More involvement of the public and expert communities is another proposal that has become a part of the discussion about the redistricting reform. Various ideas suggesting how to achieve more public involvement have appeared. One of these ideas proposes that all meetings during the redistricting process should be open to the public and that non-members of the redistricting body should have the authority to jump into the discussion about the redistricting plans. The problem is the regulation of such meetings and also the uncertainty as to whether their comments and suggestions would be taken into account by the legislators or members of the commissions.

Thanks to the wider availability of computer technology, another form of public participation is the direct submission of redistricting plans to the redistricting body that is currently allowed in some states.¹²³ Given the complexity of the criteria that the map drawers have to necessarily follow, it is hard to imagine that ordinary citizens would be the ones submitting redistricting plans. In the end, it is still the experts or people paid by certain interests that would be drawing these plans and thus their objectives, and neutrality also should be questioned. Nevertheless, submitting plans is a step in the right direction as some of the more neutral plans could compete with the approved plan and point out their bias.

Heather K. Gerken puts forward a proposal that a model redistricting commission should be set up in every state.¹²⁴ The task of this commission would be to draw a redistricting plan following all the relevant principles that are in force in the particular state. The objective of this proposal is that such a plan would be drawn without partisan bias and therefore would be fairer to the voters. If the plan created by the politicians or the redistricting commissions was confronted with this neutral plan, the voters could make their own judgments about the plan produced by the official redistricting body. The plan proposed by the model commission could also be used in litigation and the court could utilize it as a basis for its plan in case no agreement was reached by the redistricting body. When compared to plans submitted to the redistricting body by interested individuals, the plans proposed by the official model commission

122 Sam Hirsch, "A Proposal for Redistricting Reform: A Model State Constitutional Amendment," American Mathematical Society's Special Session on "The Redistricting Problem", January 8, 2009, 7.

123 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 7.

124 Heather K. Gerken, "Getting from Here to There in Redistricting Reform," *Duke Journal of Constitutional Law & Public Policy* 5, No. 1 (2010): 6–12.

should be treated more seriously. The composition of the model commission and also the neutrality or fairness of such a plan still remains an issue. It was already mentioned that no plan is in its nature neutral and there are always groups of redistricting winners and losers created by each approved plan.

Computers were once regarded as the ideal solution for the redistricting process as it was expected that using the up-to-date technology would lead to computer-created plans that would be absolutely neutral and the problem of partisanship would thus be solved. Nevertheless, the computers failed to fulfill these expectations as until present day no software is able to work with more than one algorithm.¹²⁵ Computers are thus irrelevant for practical considerations as they can only divide districts perfectly following the equal population criterion but fail to take into account the requirement of minority representation and other principles.

The independent redistricting commissions are regarded as the most viable solution to the redistricting problem since they completely remove legislators from the process.¹²⁶ In spite of this, they still have to be considered as an imperfect option because they leave many sources of dispute unresolved. The discussion about their most appropriate composition has already been mentioned and it must be noted that no general agreement exists on the best composition pattern. This stems from the variety of objectives that the independent redistricting commissions should fulfill. The composition of any existing commission is imperfect. If the commission relies on an extraordinary majority to approve a plan, a bipartisan plan is produced, but if it elects a tie breaking member, he or she usually becomes the most important vote and shifts the partisan balance of a commission to one side or the other.

The debate about the independent redistricting commissions centers not only on their composition but also on other aspects of their existence. One of the most discussed issues is the staff the commission members work with. The problem is that the members of legal and technical staffs are usually party members and both parties might not be equally represented.¹²⁷ It is ironic that commission members must be properly vetted and their partisanship plays an important role but the people that they work with and who also exercise influence over the redistricting plans are not controlled or chosen in an impartial matter.

125 Mann and Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting*, 55.

126 Winburn, *The Realities of Redistricting*, 206.

127 Cain, "Redistricting Commissions: A Better Political Buffer?" 1834.

Another problem stems from financing these commissions. They usually get funds for a limited period of time to draw a new map. If such a map is successfully challenged at court and the commission has to draw a new one, it becomes problematic as the legislators have to provide additional funding and might use their power of the purse to influence the redistricting plan and interfere in the operations of a commission.¹²⁸

Another plan that captured the attention of the author is the call for commissions that would not draw their own redistricting plans but instead would choose the most appropriate one from a pool of plans proposed to them. The plans could be drawn by legislators, experts, scholars, individuals paid by one of the parties but also by the model redistricting commissions as proposed earlier. The task of the commission would be to vote on the plans based on certain neutral criteria that would not favor particular strategic and self-interested goals.¹²⁹ The problems stem from the necessity of defining and approving such criteria and also from the composition of such a commission. Any plan approved by such a commission could be seen as a gerrymander unless a generally accepted set of criteria is developed to judge and compare the plans and unless a commission make-up and voting rules of the commission are agreed upon. Thus the discussion about such criteria and the composition of the ideal commission is what the reform community should focus on.

3.3. How to Move forward with the Redistricting Reform?

When analyzing the various reform proposals, it must also be taken into account how the move toward new modalities of redistricting and changes in redistricting bodies could practically be achieved. The implementation of independent redistricting commissions that is currently considered as the acceptable solution to the controversy caused by the legislators drawing their own districts has been steady but slow. Currently there are independent redistricting commissions for congressional districts only in four states and in five states the independent commission draw districts for state legislatures.¹³⁰

The crucial point is also the procedure that should be the most viable for reaching the change of authority to draw districts. Popular initiatives in individual states

128 Cain, "Redistricting Commissions: A Better Political Buffer?" 1835.

129 Winburn, *The Realities of Redistricting*, 211.

130 Justin Levitt, "Who Draws the Lines?"

have long been regarded as the most promising method of adopting the change of authority but recent experience shows that some initiatives have failed to reach their objective of taking the power away from elected officials as they were not approved in the referendum.¹³¹

Experts generally agree that reform implemented at the state level has the highest prospects for success as the constitutional way or a federal law seem rather improbable.¹³² In the referenda, more than the content of the reform itself, the positive stance of the legislators and the majority party in a state have proven to be instrumental for an adoption of a redistricting reform.¹³³ This results in an ironic situation when the success of the measure still depends on the approval of the majority party even though it does not go through a state legislature. In the end, the motions of transferring the redistricting authority from state legislatures dealt with in referenda do not seem to be very different from a regular legislation.¹³⁴

The support of elected officials is very hard to obtain for various reasons. Above all it is the legislators and other elected officials who benefit from the current state of affairs and they therefore have no incentives to change the current status quo that brought them where they are unless they conclude that they would profit from the changes.¹³⁵ Legislators prefer predictable environments and any change in authority, in extreme cases an absolute loss of control of the redistricting process, brings about a sense of uncertainty. As Heather K. Gerken notes, “until we figure out how to change current political incentives, we are unlikely to make much headway in districting reform”.¹³⁶

The debate about electoral competition is also intertwined with the incentives of the legislators and elected officials who might serve as commission members. They prefer predictable election results and therefore competitive districts in which the electoral fate of the candidates could not be predicted with an almost absolute certainty are not in their interest.¹³⁷ Competition will suffer as long as legislators and party

131 For example the voters in Ohio opposed the measure in 2005.

132 DeVault, “Political Polarization, Congressional Redistricting, and Trade Liberalization,” 555.

133 Huefner, “Don’t Just Make Redistricters More Accountable,” 60.

134 Nicholas Stephanopoulos, “Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail,” *Journal of Law & Politics* 23, No. 331 (2007): 388.

135 Caroline J. Tolbert, Daniel A. Smith and John C. Green, “Strategic Voting and Legislative Redistricting Reform: District and Statewide Representational Winners and Losers,” *Political Research Quarterly* 62, No. 1 (March 2009): 92. John Tanner, Randall Ford and Caning Dinkier IV, “Drawing Voters Back into the Electoral Process: Why and How,” *Stanford Law & Policy Review* 23, No. 2 (2012): 343.

136 Gerken, “Getting From Here to There,” 2.

137 Bullock, *Redistricting: The Most Political Activity*, 126.

interests are in charge of the redistricting process because competitive districts do not offer any benefits. Russell C. Weaver concludes that “redistricting institutions across the US continue to be dominated by individual actors whose self-interested behavior potentially leads to politically uncompetitive outcomes”.¹³⁸

Conclusion

Drawing legislative districts has been an inseparable part of American politics from the very beginning of the country's history. Unnoticed by scholars for many decades, the entire process was completely changed in the 1960s during the so-called Redistricting Revolution. Debate about minority representation and about redistricting principles has since been present in the American political discourse. The problem of redistricting and gerrymandering came under the spotlight once again in the 21st century as it began to be seen as one of the principal causes of the political polarization. Moreover, it also came under fire in the wider discussion about the non-functioning political system and the debate about what should be done about it.

Redistricting or the way maps are drawn is a phenomenon whose consequences are crucial for the political system and also for the representation of voters and their interests. Drawing maps with a particular intent can potentially hurt certain voting groups and prevent their interests from being heard. It can also provide disproportional advantage to one of the parties and thus affect politics at particular level.

Redistricting significantly affected the American political scene from its very beginning. Not being limited by any regulation that came about during the Redistricting Revolution and later, legislators were free to follow their interests and redistricted very often with the desire to hurt the other party in mind. Districts were becoming largely unequal in population as parties usually did not redraw the maps as long as they were benefiting from the status quo. The Redistricting Revolution put an end to this practice.

The requirement of population equality made the states redraw their maps for state legislatures and congressional districts at least once a decade. The requirement of population equality is the most important redistricting principle that has to be followed to date. According to the new legislation dealing with the situation of the minorities in the American society, the discrimination of minorities was brought to a standstill as

¹³⁸ Weaver, “Gerrymandering Politics Out of the Redistricting Process,” 116.

minority representation became the second most important redistricting principle only to population equality.

There are other principles that the map drawers have to adhere to but which are entrenched in the state statutes and constitutions, and their application might differ state by state. Contiguity or the accessibility of every point in a district from any different point in a district without having to leave a district has been applied without problems. On the other hand, compactness is a principle that lacks a widely accepted definition and therefore its application has created more ambiguity than certainty.

Other principles (geographical units, incumbent protection, and preservation of the cores of the previous districts and of communities of interest) are very ambiguous and have created discussion among scholars. The value of respecting them is sometimes questionable and is strongly connected to the problem of electoral competition.

The objective of these traditional redistricting principles is to limit the ability of map drawers to produce districting plans that would clearly serve their interests and would be harmful to the voters. The type of a plan that is put forward and implemented depends on the type of redistricting body that has the authority to approve the new map of districts for a particular state. State legislatures are still the most common redistricting body. Redistricting plans in this case are treated as any other piece of legislation and have to be approved by both chambers and the governor.

If the state legislature and governorship is controlled by the same party, a partisan plan is probably drawn. If the control of the state government is divided, then the research shows that each chamber produces its own plan which is likely to protect the incumbents as it has to be approved by the other chamber led by the other party. If the legislature fails to agree upon a plan, the court has to come in and change the map in order to comply with the relevant redistricting principles.

The current trend of redistricting is to delegate the responsibility for drawing new maps to commissions. Nevertheless, from the existing types of commissions the independent redistricting commissions are the only ones that bring any real change into the redistricting process. Advisory commissions do not have a mandate to implement the redistricting plan and their only task is to produce a plan that is later discussed and potentially modified by the legislators. The backup commissions come into play only when the legislators fail to adopt a plan. The make-up of political commissions varies from state to state but they are composed of elected officials or people nominated by them and therefore not much different from the legislatures.

The members of the independent commissions are selected by a procedure that aims to eliminate everyone who has a connection to politicians or politics in general. The composition of an independent commission depends on the individual state and with the voting rules by which a plan is approved it represents the most discussed part of the notion of independent commissions. An extraordinary majority might be required to approve a plan in which case a compromised plan is likely to be approved. If a tie breaking member is selected to serve as a deciding vote, rumors of hidden bias and accusations of partisanship are likely to appear and discredit the redistricting process. The composition of a commission is the most important factor that applies to the commissions of any type. Nevertheless, the debate about the ideal composition of a commission does not have a solution that would be satisfactory to everyone and which would not result in cries of dissatisfaction.

Partisan gerrymanders have been hard to identify as they cannot be told apart by their shape. They are generally judged by the symmetry standard according to which both parties in an ideal situation should gain the same number of seats for the same share of the votes. The courts do not offer any viable possibility to challenge partisan gerrymandering as the Supreme Court has not provided a clear guidance on what could be considered partisan gerrymander. On the other hand, it was willing to strike down plans that were considered clear partisan gerrymanders because of the lack of population equality or minority representation.

The analysis of benefits and disadvantages of electoral competition has been done many times but no clear answers have been provided. Competition is considered to be a necessary part of any democratic system as ineffective representatives can only be replaced in competitive districts. As presented by the media, competition provides for moderate representatives and is the only way to ensure that voters remain interested in politics. However, research has not found evidence supporting these claims as any correlation between the competitiveness of a district and the political ideas of a representative elected from the same district has not been identified. Competition is seen as a negative aspect of the redistricting process as it results in many voters assuming the position of electoral losers. These people tend to be more dissatisfied with the work of the elected bodies and with politics as a whole. The task of the representative is much more difficult when he or she does not represent a homogeneous district.

Current proposals of redistricting reform focus on taking politicians out of the process and at the same time limiting the members of the redistricting bodies as much as possible. Independent redistricting commissions seem to be the most viable option, but not a perfect one. Certain make-up of independent commissions results in the implementation of clearly partisan plans. The selection process of its members, staffing and financing are also issues to be debated in the future. Other approaches to redistricting reform such as computer-based plans have not succeeded as the technology has not gone so far as to be able to draw a plan that would adhere to the existing redistricting principles.

Blind redistricting would only blind the voters as redistricting bodies would still be able to predict with high certainty the composition of the districts. Greater public involvement could become part of a redistricting reform but it is necessary to provide a clear guidance to the interested public. Independent redistricting commissions that only vote on plans provided by others seem like an idea that could become the leading one in the approaches to redistricting reform. This idea must be developed and analyzed as it has not received much attention thus far. It suffers from the same negative aspects as independent commissions as its composition could be frowned upon, and its members would have to follow certain neutral criteria which would have to be clearly defined.

To conclude, the debate about electoral competition has, according to the author, been instrumental for the debate about redistricting. The stance one takes in this debate influences one's view on redistricting and on the objectives that the redistricting bodies should follow whether that would be more competition or more incumbent protection plans that satisfy the interests of both parties. The objective was to show that the demands of the reform community do not follow a single line and cannot be accomplished all at the same time as they sometimes might be contradictory. Therefore it is necessary to give preference to some of the objectives which will create opposition from the proponents of the other aims. Independent redistricting commissions currently seem to be the most viable option but it is necessary to deal with the criticism they face and start a discussion about other options such as independent commissions not drawing the plans themselves but only voting on plans proposed to them. All of the involved actors have to admit that the goal of independent redistricting commissions without partisan bias and producing highly competitive plans is unachievable and should therefore review the redistricting process once again to demand realistic objectives and changes.

Souhrn

Problematika překreslování volebních okrsků a jejího vlivu na volené orgány a stav americké demokracie se v poslední době stala součástí širší diskuse o funkčnosti amerického politického systému a o jeho nedostatcích. Zákonodárné sbory, které jsou ve většině států zodpovědné za překreslování volebních okrsků, se staly terčem kritiky a reformních snah, jejichž aktuálním cílem je odebrání rozhodovacích pravomocí zákonodárcům. Cílem této práce je poukázat na neexistenci reformních návrhů, které by byly všeobecně akceptovány, a na problémy, se kterými se každá reformní snaha musí vyrovnat.

V první kapitole byla stručně představena historie překreslování ve Spojených státech. Hlavní důraz byl kladen na změny, které proběhly v 60. letech 20. století, tedy v období dnes označovaném za tzv. překreslovací revoluci. Dále byly analyzovány aktuálně platné překreslovací principy, poukázáno bylo zejména na jejich oficiální definici a problematičnost jejich aplikace. Nejvýznamnější principy představují rovnost populace a zastoupení menšin, jediné dva principy ukotvené ve federálních zákonech. Respektování dalších principů je záležitostí jednotlivých států. Ti, jež jsou zodpovědní za překreslování, čelí problému nejasné definice některých principů, např. kompaktnosti či zájmových skupin, která vede k jejich nesnadné aplikaci.

Druhá kapitola byla věnována orgánům, které jsou v současné době za překreslování zodpovědné, jejich charakteristikám, pozitivům a negativům. Zákonodárné sbory, které nové mapy schvalují stejným způsobem jako jakýkoliv jiný zákon, čelí největší kritice, ale pravomoc překreslovat mají ve většině států. Různé typy komisí (poradní, záložní či politické) překreslovací proces v zásadě neproměnily. O radikální změnu se snaží nezávislé překreslovací komise, které nové mapy schvalují bez souhlasu zákonodárných orgánů a v současnosti jsou považovány za vrchol reformních snah. Často diskutováno a kritizováno je však jejich složení a rozhodovací mechanismus. Některé jimi schválené plány čelily obvinění z gerrymanderingu, protože byly očividně výhodnější pro jednu z politických stran.

Ve třetí části byla podrobněji rozebrána problematika politické soutěže a stranictví, jelikož oba tyto fenomény jsou neodmyslitelně spjaty s jakoukoliv reformou překreslování volebních okrsků. Ochota, s jakou volič přijímá vliv stranictví a existující či neexistující politickou soutěž, zásadně ovlivňuje to, jakým směrem by se podle něj měla reforma překreslování ubírat. Kromě nezávislých překreslovacích komisí byly dále

analyzovány i další navrhované změny, např. účast „nepolitiků“ a jejich dohled na proces překreslování či větší zapojení počítačové techniky.

Ze zkoumaných reformních návrhů autor práce považuje za nejperspektivnější nezávislé komise vybírající výslednou mapu podle předem stanovených kritérií z plánů navržených nezávislými experty či politickými stranami. Nejdříve je však nutné přijít s všeobecně přijatelným složením komise, která by o nových okrscích měla rozhodovat, a dosáhnout shody na definici kritérií, kterými by se tato komise řídila.

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