

REDISTRICTING CONGRESSIONAL AND STATE LEGISLATIVE DISTRICTS

A Proposal for an Essential-Data Count of the Resident Population for the Decennial Census and 21st Century Census Information Platform

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Abstract

James Madison proposed that the census collect information beyond an enumeration of the population. Congress agreed and amended the Census Act of 1790 to allow for the addition of questions about age, gender, and race. The decennial census has asked additional questions since then, going far beyond those needed for apportionment. We propose to return the decennial census in 2030 to its original focus to fully enumerate the population for apportionment through an *Essential-Data Count of the Resident Population*. This would be connected to a *21st Century Census Information Platform* designed to provide continuous measurements over the decade through the augmentation of the 2020 decennial census with multi-source federal and private sector data sources. This would be designed to provide continuous measurements for redistricting, use in the allocation of federal funds, and many other uses. **Here we describe the feasibility of this proposal in the context of redistricting.**

We examined relevant documents and concluded that there are no constitutional, legislative, or legal barriers to redistricting with this proposal for the 2030 Census. In fact, the proposal is expected to improve the redistricting process through the availability of timelier data that keeps pace with current societal changes and provides continuous measurements that preserve privacy and are fair, accurate, and of high quality, while ensuring equal voting participation in our democracy.

Redistricting Congressional and State Legislative Districts - A Proposal for an Essential-Data Count of the Resident Population for the Decennial Census and 21st Century Census Information Platform

1. Introduction

James Madison proposed that the census collect information beyond an enumeration of the population. Congress agreed and amended the Census Act of 1790 to allow for the addition of questions about age, gender, and race. The decennial census has asked additional questions since then, going far beyond those needed for apportionment. We propose to return the decennial census in 2030 to its original focus to fully enumerate the population for apportionment through an Essential-Data Count of the Resident Population. This would be connected to a 21st Century Census Information Platform designed to provide continuous measurements over the decade through the augmentation of the 2020 decennial census with multi-source federal and private sector data sources. This would be designed to provide continuous measurements for redistricting, use in the allocation of federal funds, and many other uses. Here we describe the feasibility of this proposal in the context of redistricting.

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2. Relevant Legislation

Public Law (P.L.) 94-171, enacted in 1975, amends Section 141 of Title 13, United States Code regarding the obligations of the Census Bureau for supporting redistricting.¹ First, it reinforces the need for an enumeration of the total population by States to be used for apportionment of Representatives in Congress according to Article 1 of the Constitution. Next, it directs the Secretary of Commerce to work with the states, starting four years before the decennial census year, on defining their sub-state tabulations to support Congressional redistricting. States participate voluntarily and the Secretary is given the latitude to determine the form and content of these data including the use of sampling procedures and special surveys.

In recent history, the Census Bureau has provided data by a variety of geographic areas within a state, including tabulations that used block-level decennial enumerations. The Census Bureau has also created special tabulations providing data on citizen voting age population (CVAP) by race and ethnicity, using American Community Survey (ACS) 5-year estimates. The CVAP file was first created after the 2000 Census and again after the 2010 Census. Since its publication in February 2011, the CVAP file has been produced annually (US Census Bureau 2018).

¹ See Section 141 of Title 13, United States Code

The Voting Rights Act, originally passed in 1965 and extended and amended multiple times since, is the primary piece of legislation that prohibits racial discrimination in voting.² Section 203 of the Voting Rights Act directs the Census Bureau to determine distributions of minority language populations. How to do this is not specified and historically the Census Bureau has developed statistical models to estimate such distributions based on data from either the decennial long form or the American Community Survey (see Slud et al. 2018 for an example using small area estimation)

3. Legislative Feasibility of the 2030 Census Proposal in Detail

To assess the feasibility of the 2030 Census proposal in the context of redistricting congressional and state legislative districts in each state, we examine the federal and state constitutions, legislation, and selected court cases that have influenced the design and use of earlier censuses.

The U.S. Constitution specifies two legislative bodies, the Senate and the House of Representatives. Article 1, section 3 requires that every state would have two senators elected every 6 years, divided into three classes, so that one-third of the senators is elected every two years. Article I, section 2, stipulates a House of Representatives whose membership is elected by the people and apportioned to each state based on population. “In keeping with the nature of the Constitution, however, only fundamental rules and regulations were provided. The interpretation and implementation of the instructions contained in the document were left to future generations” (CQ Press, 2010).

Redistricting is the adjustment of congressional districts that occurs every decade based on population changes measured by the decennial census. Apportionment determines the proportional number of members each US state sends to the House of Representatives, based on updated population figures from the decennial census. In response to apportionment, States change their congressional district maps to achieve the principle of one-person, one-vote, rule. States may also need to redraw Congressional Districts if there have been population shifts in their state, whether the number of Congressional seats apportioned to a state changes. At the same time, states may redraw their state legislative, voting districts, and other boundaries that determine representation or allocation of funds or services (NCSL, 2019).

Each decade, two major types of redistricting occur. One is for congressional districts, for the US Senate and House of Representatives as well as the electoral college. The other is for state legislative districts, those used for state assemblies.

3.A. Congressional Redistricting Criteria

At the federal level there are two major directives for congressional redistricting (1) equal population and (2) race and minority (Levitt 2019). The criterion of equal population is mandated by the Constitution at the congressional district level.

² Voting Rights Act and codified into law as 42 U.S.C. §§ 1973 to 1973aa-6.

Equal Population Requirement

For congressional redistricting, the Apportionment Clause of Article I, Section 2, of the U.S. Constitution requires that all districts be as nearly equal in population as practicable, interpreted as being equal. For state legislative districts, the Equal Protection Clause of the 14th Amendment to the U.S. Constitution requires that districts be substantially equal. Some states have interpreted this to mean that a deviation of 5 to 10% is acceptable (NCLS 2019). The ideal population is the number of people allotted to each district, when the total population is divided cleanly by the number of districts.

Relevant Supreme Court cases began in the 1960s after some states had not updated their legislative district lines for several decades (Levitt, 2019; NCSL, 2018). This led to several court cases that established the equal population requirement. The 1962 Supreme Court case, *Baker v. Carr* (369 U.S. 186) ruled that malapportioned districts are not constitutional and required that the Tennessee legislature had to be reapportioned. This case was important because the court held that the federal courts had jurisdiction to consider constitutional challenges to state legislative redistricting plans.

Baker v. Carr paved the way for the “one man, one vote” principles to be applied to redistricting (*Gray v. Sanders*, 372 U.S. 368, 1963). Subsequent cases reinforced that Federal courts could evaluate constitutionality of districts (*Westberry v. Sanders*, 372 U.S. 368, 1963), and that districts must be drawn based on population (*Reynolds versus Sims*, 1964, 377 U.S. 533, 1964). In 1983, *Karcher v Dagett* (462 U.S. 725, 1983) ruled that Districts must be equal in population mathematically. In 2016, *Evenwel v Abbott* (578 U.S. ____ (2016),) found that total population is a permissible metric for 'one person, one vote,' (not voting population that would exclude non-citizens and others).

Race and Minority Representation Requirement

The Voting Rights Act of 1965 was passed to ensure that minority population groups have the opportunity to vote as a bloc for candidates that represent them. The aim is to avoid gerrymandering practices such as cracking (splintering minority populations into small pieces across several districts to dilute voting power) or packing (cramming minority voters into a few concentrated districts) (Levitt 2019).

Section 2 of the Voting Rights Act has national applicability and requires that states not draw lines that affect or reduce minority communities' participation in the political process.³ This requirement does not require intention, so redistricting plans are vulnerable to being challenged in court as there are many other elements that may or may not align with minority populations geographically.

³ *Shelby County v. Holder* (570 U.S. 529, 2013) Supreme Court case eliminated Section 4 and rendered Section 5 unenforceable. VRA Section 4 determined applicability of special provisions by use of 'coverage formula'. Jurisdictions using 'test or device' to restrict voter registration and behavior. Jurisdictions with <50% eligible population either registered to vote or voting. Sixteen localities included: States: AL, AK, GA, LA, MS, SC, VA, and counties within: AZ, HI, ID, NC. VRA Section 5 specified special provision requiring federal approval of changes to election laws by administrative or judicial review. Preclearance included changes to redistricting plans. The *Georgia v Ashcroft* (2003) Supreme Court case held that the redistricting plan could be considered retrogressive by reducing the number of minority-majority districts.

3.B. State Redistricting Criteria

Drawing State legislative districts have similar but more requirements than for congressional districts (Levitt 2019). There are no legislative data requirements related to the Census Bureau for drawing State legislative districts, yet, over half the states mention the decennial census in their constitutions. The strictest is Florida that explicitly designates the federal decennial census the official state census. Some states are more flexible. For example, New York state explicitly names federal decennial census but also allows for alternative if necessary. Other states are more ambiguous. For example, Arizona does not mention the decennial census in its apportionment requirements but does defines population in later clauses to mean the Department of Commerce census.⁴

3.C. Drawing the Districts

States use one or more of methods for Congressional redistricting, including being set by state legislature, which can be vetoed by the governor, or use of a commission. States with one congressional representative (currently 7) do not need to redistrict. Approaches are emerging that make use of the decennial census and ACS data but also use other sources of data, including traveling the state to learn about communities of interest, geographic boundaries, and more.

Various forms of commissions are used by about half the states. Independent commissions and politician commissions have full authority to draft and implement a Congressional redistricting map.

- Independent commissions have full authority to draft and implement a Congressional redistricting map. Their composition ranges from state to state but can include appointees made by the governor, state senate and house, majority & minority leaders; and citizens that represent political views or party affiliations. The direct participation of elected officials is limited. Six states currently have independent commissions for Congressional Redistricting (Arizona, California, Colorado, Idaho, Michigan, and Washington).⁵
- Politician commissions also have full authority to draft and implement a Congressional redistricting map. They include elected officials, often from state legislature who are appointed by the governor, Chief Justice of the State Supreme Court, legislative leadership, or party leadership. Seven states currently have political commissions.
- Backup commissions have conditional authority to draft and draw up redistricting lines if the legislature does not come to agreement. The commission varies but can include appointees from the governor (Maryland), secretary of state (Oregon), legislative leadership, lieutenant governor, state treasurer, or the state attorney general. Seven states currently have backup commissions.

⁴The periodic census conducted by the United States department of commerce or its successor agency, or the annual update of such census by the department of economic security or its successor agency.

⁵The Information is from Justin Levitt's website. Michigan and Colorado created independent commissions in 2019. Alaska and Montana have independent commissions for state redistricting. Since they only have one district in each state, they do not have a commission for Congressional Redistricting.

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- Advisory commissions do not have redistricting authority. Rather, they help inform and provide input on redistricting. The members can include legislative leadership nominees, party leadership nominees, Chief Justice nominees, civil servants, and non-legislators. Five states currently have advisory commissions.

4. Summary

PL 94-171 requires Census Bureau to deliver redistricting file to states. The law does not specify the source or types of data nor the level of geography. The PL 94-171 file historically has included decennial census data at the block level by race and ethnicity, and American Community Survey data by citizen voting age population (CVAP) by race and ethnicity, and other small area estimates requested by a state. As part of the PL 94-171, the Census Bureau has a voluntary program for states to work with the Census Bureau to define geographic areas of interest to the state for redistricting purposes. A question that will need to be addressed through research and stakeholder engagement is the level of geography that is needed to meet congressional and state legislative districting requirements.

We conclude that an *Essential-Data Count of the Resident Population* combined with a *21st Century Census Data Platform* is possible at the federal and state level. We expect that the *21st Century Census Data Platform* may improve the redistricting process through the availability of multi-source federal and private sector data sources. One advantage of a new decennial census and integration of survey, administrative, and third-party data over the decade would be the guarantee that data are provided in a fair, accurate manner, are protected, and generally of high quality. This is a service that the Census Bureau can provide to states for redistricting purposes.

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