

# ALL ABOUT REDISTRICTING

## Where are the lines drawn?

<https://redistricting.ils.edu/redistricting-101/where-are-the-lines-drawn/>

(edited, parts of this article have been deleted to simplify the text)

Those who have the redistricting pen don't have a blank slate for drawing the lines. Various rules limit where district lines may or may not be drawn. Rules about equal population and minority voting rights have federal backing (though states may add additional constraints). But even after accounting for the federal rules, there are countless ways to divide a jurisdiction into districts. State constitutions — and sometimes, state statutes — provide a few additional rules for drawing the lines.

### Equal population

The U.S. Constitution requires that each district have about the same population: each federal district within a state must have about the same number of people, each state district within a state must have about the same number of people, and each local district within its jurisdiction must have about the same number of people.

### Congressional districts

States must make a good-faith effort to draw districts with the same number of people in each district within the state, and any district with more or fewer people than the average must be justified by a consistent state policy.

These population counts are calculated based on the total number of people in each state, including children, noncitizens, and others not eligible to vote. After the Civil War, we amended the Constitution to ensure that each and every individual present in the country would be represented in federal districts. On July 21, 2020, President Trump purported to suggest that he had the authority to exclude undocumented individuals from the census count — if valid, that would have affected not only how many districts the states got, but how those districts were divided within a state. Litigation over the issue hit procedural hurdles as it was unclear whether the data would be ready in time for President Trump to make the determination he'd flagged; ultimately, the data were delayed long enough for the Biden Administration to reverse course. As in prior decades, the Census counts will include everyone for purposes of apportionment.

**State and local legislative districts** have a bit more flexibility on the numbers; they have to be “substantially” equal. Over a series of cases, it has become accepted that a plan will be constitutionally suspect if the largest and smallest districts are more than ten percent apart.

Some states hold their state districts to stricter population equality limits than the federal constitution requires. Colorado, for example, allows at most five percent total deviation between the largest and smallest districts; Missouri asks districts to be no more than one percent above or below the average, except that deviations of up to three percent are permitted to maintain political boundaries. Iowa both limits the total population deviation to five percent, and also sets the overall average deviation at no more than one percent.

As far as who is counted for purpose of equalizing state and local districts, the Supreme Court has been less definitive about what the Constitution requires. In 2011, each and every state counted the total population. But some have suggested other measures, including voting-age population (“VAP”), citizen voting-age population (“CVAP”), or registered voters. The Supreme Court has formally left this question for a future case, their last word in the area left serious question as to whether such measures would be constitutional.

## Minority representation

The other set of major federal redistricting rules concerns race and ethnicity. Race relations and electoral politics are both quite complicated. But the law on race and ethnicity in the redistricting context essentially boils down to three concepts.

1. Don't draw lines that set out to harm voters based on their race or ethnicity.
2. Where discrimination plays or has played a significant role, and where voting is substantially polarized along racial or ethnic lines, look at electoral patterns and decide whether minorities already have proportionate electoral power. If not, the Voting Rights Act might require a change to the lines to give a compact and sizable minority community equitable electoral opportunity they do not currently enjoy.
3. When considering race in drawing districts, whether to satisfy the Voting Rights Act or otherwise, consider other factors in the mix as well.

## Intentional discrimination

For more than 100 years, the Constitution has prohibited intentional government efforts to treat similarly situated people worse than others, because of their race or ethnicity. In redistricting, one ploy is called “**cracking**”: splintering minority populations into small pieces across several districts, so that a big group ends up with a very little chance to impact any single election. Another tactic is called “**packing**”: pushing as many minority voters as possible into a few super-concentrated districts, and draining the population's voting power from anywhere else. Other tactics abound. And they have been used with disappointing frequency. Redistricting legislation usually just describes which census blocks fall in which districts, or which streets district lines follow: nothing in a redistricting statute *looks* like it has anything to do with race. But if the line-drawers intentionally drew the lines to harm residents specifically because of their race, that's almost always illegal.

That remains true no matter the underlying motive for the discrimination. Sometimes, the reason for intentional discrimination is old-fashioned hatred or stereotype. But singling out racial minorities for worse treatment because of the candidates or parties they prefer still involves singling out racial minorities for worse treatment. And it still invites particularly close scrutiny under the constitution.

## The Voting Rights Act

The federal Voting Rights Act of 1965 was designed to combat tactics denying minorities the right to an effective vote, including redistricting techniques like those above. As federal law, the Voting Rights Act overrides inconsistent state laws, just like the constitutional equal population rule overrides other state laws. From 1965-2013, the Voting Rights Act had an especially powerful provision targeting the jurisdictions with the worst history of discrimination. In these areas, the Voting Rights Act required every change in election rules to be run by the Department of Justice or a federal court before they took effect, stopping discrimination before it had the chance to work.

## Considering other factors

The Supreme Court has also said that the Constitution requires it to look skeptically at redistricting plans when race or ethnicity is the “predominant” reason for putting a significant number of people in or out of a district. This does not mean that race can’t be considered, or that when districts drawn primarily based on race are invalid. It means that there has to be a really good reason for subordinating all other districting considerations to race. (And the Court has also repeatedly implied that one such compelling reason is compliance with the federal Voting Rights Act.) In practice, this means that those drawing the lines try not to let racial considerations “predominate,” by considering other factors at the same time. This is not terribly difficult; there are lots of other considerations that go into deciding where to draw a particular district line, like the residential clustering of groups of voters with common interests, or the locations of municipal boundaries or physical geographic features, or the desire to keep a district relatively close together.

## Contiguity

Contiguity is the most common rule imposed by the states: by state constitution or statute.

A district is contiguous if you can travel from any point in the district to any other point in the district without crossing the district’s boundary. Put differently, all portions of the district are physically adjacent. Most states require portions of a district to be connected by more than a single point, but don’t further require that a district be connected by territory of a certain area.

Few redistricting concepts are absolute, and contiguity is no exception. Many states require contiguity only “to the extent possible,” and courts generally accept anomalies that otherwise seem reasonable in context.

Water also gets special treatment for contiguity. In most cases, districts divided by water are contiguous if a common means of transport (like a bridge or ferry route) connects the two sides of the district. Island districts are generally contiguous as long as the island is part of the same district as the mainland area closest to the island or most tied to the island by these sorts of transport routes. In Hawaii, where there is no mainland to consider, the state constitution prohibits the drawing of “canoe districts” — districts that are spread across more than one major island group, where it is necessary to use a “canoe” to travel between different parts of the district.

## **Political boundaries**

The next most common state rule is a requirement to follow political boundaries, like county, city, town, or ward lines, when drawing districts. By state constitution or statute, 34 states require state legislative districts to show some accounting for political boundaries; 15 states impose similar constraints on congressional districts. Most often, state law concerning political boundaries leaves a fair amount of flexibility in the mandate — one common instruction is to keep to political boundaries “to the extent practicable.” And like all other state redistricting law, this rule must bend where necessary to federal equal population or Voting Rights Act constraints.

It is worth remembering that some cities or towns spill over county lines; even though counties are usually bigger than cities, keeping strictly to county lines may mean cutting off pieces of these “spillover” cities or metropolitan areas.

Also, if counties or cities have to be split to comply with other redistricting requirements, most state law does not specify whether it is better to minimize the number of jurisdictions that are split, or to minimize the number of times that a given jurisdiction is split. The former might mean splitting a few jurisdictions into many pieces; the latter might mean splitting a greater number of jurisdictions, but into fewer pieces.

## **Compactness**

Almost as often as state law asks districts to follow political boundaries, it asks that districts be “compact.” By constitution or statute, 32 states require their legislative districts to be reasonably compact; 17 states require congressional districts to be compact as well.

Few states define precisely what “compactness” means, but a district in which people generally live near each other is usually more compact than one in which they do not. Most observers look to measures of a district’s geometric shape. In California, districts are compact when they do not bypass nearby population for people farther away. In the Voting Rights Act context, the Supreme Court seems to have construed compactness to indicate that residents have some sort of cultural cohesion in common.

## **Communities of interest**

Preserving “communities of interest” is another common criterion reflected in state law. By constitution or statute, 15 states consider keeping “communities of interest” whole when drawing state legislative districts; 11 states do the same for congressional districts.

A “community of interest” is just a group of people with a common interest (usually, a common interest that legislation might benefit). Kansas’ 2002 guidelines offered a fairly typical definition: “[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation.”

## Other state rules

There are three other notable structural rules that, in some states, govern the location of district lines.

The first is a “**nesting**” requirement. In states where districts are “nested,” the districts of the state Senate are constructed by combining two or three state House or Assembly districts (or the districts of the state House or Assembly are constructed by dividing up each state Senate district). In contrast, without nesting, the districts of each legislative house are independent; they may follow the same boundary lines, but they don’t have to. In 18 states, state law asks that the lower and upper legislative house districts be nested where possible; of these states, in California, Hawaii, Rhode Island, and Utah, the law amounts to rough preference rather than mandate.

The second rule concerns districts where 2, 3, or more representatives are elected from the same district; these are called “**multi-member**” districts. Since 1842, federal law has prohibited multi-member districts for Congress, but many local legislatures still elect several representatives from a single district. In the state legislature, Arizona, New Jersey, South Dakota, and Washington elect all lower house members from multi-member districts; 9 other states expressly authorize the use of one or more multi-member districts. In some instances, multi-member districts may be used together with nesting rules; in Arizona, for example, each district elects one state senator and two state representatives. In other cases (like West Virginia), multi-member districts for one legislative chamber are not tied to the districts of the other chamber: a Senate district and a multi-member Assembly district are entirely unrelated. Multi-member districts in which each representative is elected by majority vote may raise concerns under the Voting Rights Act, though such concerns can be alleviated through some alternative voting rules.

The third rule of note is the “**floterial**” district: a district that wholly or partially overlaps other districts in the same legislative chamber. Florida, Mississippi, and New Hampshire expressly permit floterial districts. Most floterial districts arose as a way to preserve political boundaries while also limiting severe population disparities. Imagine a state where the average district’s population is 100, but there are two adjacent towns with 150 people each. One way to ensure equal population is to split up the towns so that there are three mutually exclusive districts with 100 people each. An alternative is to create one district serving each town, and one “floterial district” elected by the 300 people in both towns together, so that the 300 people have the same 3 total representatives.

