



LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE

# REDISTRICTING

## BACKGROUND BRIEF

The United States Constitution requires a census every ten years to determine the number of people residing in each state. Once the population of each state has been determined, the 435 seats in the U.S. House of Representatives are redistributed based on population losses or gains in each state. This process is known as reapportionment.

Redistricting is the process of redrawing the district boundaries of state House, Senate, and Congressional districts. States take a variety of approaches to accomplish redistricting. Redistricting can be performed by the legislative, judicial, or executive branches, or by an independent commission. In Oregon, the state Constitution directs the Legislative Assembly to draw the district boundaries.

The Legislative Assembly draws maps to create districts that contain roughly equal populations for each of the three types of districts. In 2011, the ideal population for Oregon's districts were as follows:

- 60 House districts of 63,851;
- 30 Senate districts of 127,702; and
- 5 Congressional districts of 766,215.

By law, the U.S. Census Bureau must send the numbers of seats allocated to each state in the House of Representatives by December 31<sup>st</sup> of years ending in zero (i.e., 2000, 2010, 2020, etc.) to the President. No later than April 1<sup>st</sup> of the following year, the U.S. Census Bureau must send population data to the states. In Oregon, the Legislative Assembly has until July 1<sup>st</sup> of the year following a census to pass redistricting legislation.

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## WHO IS RESPONSIBLE FOR REDISTRICTING?

Under Article IV, Section 6 of the Oregon Constitution, the Legislative Assembly is responsible for drawing legislative and Congressional maps. Redistricting plans are passed as bills that attribute census blocks to each of the districts. [Senate Bill 989 \(2011\)](#) enacted the House and Senate districts and [Senate Bill 990 \(2011\)](#) enacted the

Congressional districts. As is the case with all bills, the Governor retains the power to veto the plans.

**Legislative.** If legislative maps are not enacted by July 1<sup>st</sup>, then the responsibility of drawing legislative maps or correcting for a specific problem falls to the Secretary of State. If state legislative maps are approved by the Governor, then an affected individual or group may petition the courts to address a grievance. In Oregon, all such challenges are reviewed directly by the Oregon Supreme Court. If the Court agrees with the challengers, then the Secretary of State is required to correct the plan. This process is different for the Congressional map.

**Congressional.** In the case of Congressional redistricting, if the Legislative Assembly fails to enact a plan or a plan is successfully challenged in court, a special judicial panel appointed by the Chief Justice of the Oregon Supreme Court is tasked with developing a Congressional plan.<sup>1</sup>

## OREGON'S CRITERIA AND PROCESS FOR REDISTRICTING

### Constitutional and Statutory Criteria

[ORS 188.010](#) describes the criteria used for creating legislative and Congressional districts in Oregon. As nearly as practicable, each district shall:

- be contiguous;
- utilize existing geographic or political boundaries (see Figure 1);
- be of equal population (see Figure 2, page 3);
- not divide communities of common interest; and
- be connected by transportation links.

The law also specifies that no district is to be drawn to favor any political party, incumbent legislator, or other person. Additionally, districts may not dilute the voting strength of any language or ethnic minority group.

“Communities of common interest” is a broad term that can mean any subpopulation that expresses an interest in occupying the same district and is not limited to ethnic or racial minority blocs (see Appendix 1 for Oregon’s legislative redistricting history).

The Oregon Supreme Court has not had an opportunity to thoroughly consider what compliance with these sections requires but has generally recognized the discretion of

#### Figure 1: Protecting County Boundaries

The Oregon Constitution also includes Article IV, Section 7, which states:

A senatorial district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating senatorial districts.

However, the Oregon Supreme Court has found that Article IV, Section 7 does not create additional responsibilities beyond what is found in ORS 188.010 because to comply with the U.S. Constitution, districts must be changed without regard to county lines. In other words, because a strict application of Section 7 would cause population deviations well beyond those acceptable under the Fourteenth Amendment, county boundaries can only be a factor to consider.

*Source: Legislative Policy and Research Office*

<sup>1</sup> [HB 2887 \(2013\)](#)

the Legislative Assembly or Secretary of State when considering how criteria will be weighed against one another.<sup>2</sup>

Additionally, the Oregon Constitution requires that two House districts be “nested” in each Senate district, meaning that each Senate district must comprise exactly two distinct House districts.<sup>3</sup>

Finally, Oregon, like many states, has a provision in its constitution requiring that elections be “free and equal.”<sup>4</sup> The meaning of this provision has rarely been raised before Oregon courts, though it was included, and later dismissed, in a challenge to the 2001 maps.<sup>5</sup> However, similar provisions in other states have been used to overturn maps considered to favor one political party. For instance, in 2018, the Pennsylvania Supreme Court used the state’s “free and equal” clause to strike down a map that resulted in Democrats winning only five of 18 Congressional seats, despite receiving close to 50 percent of the statewide vote in each of those elections.<sup>6</sup>

### Figure 2: Oregon’s Equal Population Requirement

The Oregon Constitution adds to the federal requirements contained in the Constitution and federal statute. Article IV, Section 6 (1) affirms the federal requirement that the target population for each House and Senate district is to be determined by dividing the total population by the number of House and Senate seats respectively. However, it does not further specify what level of deviation from the target population is permitted. Historically, some deviation has occurred. For instance, districts created for the 2011 Oregon Senate map varied by as many as 1,984 people, or a total of 1.55 percent of the target population.

Oregon courts have not declared what level of deviation will comply with the Oregon Constitution, though the Oregon Supreme Court has stated no text, context, or history requires strict equality. It has also stated that the Secretary of State’s decision to adopt a plus-or-minus one percent deviation standard for the 1991 redistricting effort was in line with the constitution. Thus, it is likely that some amount of deviation for Oregon House and Senate districts is acceptable under the Oregon Constitution, though it is unclear whether a deviation of 10 percent, as presumptively allowed under federal law, would also be acceptable under the state constitution.

Source: Legislative Policy and Research Office

## Oregon’s Redistricting Process

Oregon law requires public hearings throughout the state at various points in the redistricting process.<sup>7</sup> The Legislative Assembly or Secretary of State is required to hold at least ten public hearings throughout the state *prior* to proposing a redistricting plan and to hold five public hearings *after* plans have been proposed; these final five hearings are required to occur, provided they not delay the adoption of the plan.<sup>8</sup> These hearings must include:

<sup>2</sup> *Hartung v. Bradbury*, 332 Or. 570, 587 (2001)

<sup>3</sup> Or. Const. art. IV, sect. 6

<sup>4</sup> Or. Const. art. I, sect. 2

<sup>5</sup> *Bradbury* 332 Or. at 584

<sup>6</sup> *League of Women Voters v. Commonwealth*, 645 Pa. 1, 37 (2018)

<sup>7</sup> [HB 2974 \(2015\)](#)

<sup>8</sup> ORS 188.016

- at least one hearing in each Congressional district;
- at least one hearing in areas that have experienced the largest shifts in population since the previous redistricting; and
- provision for individuals at remote sites throughout the state to provide public testimony through the use of video equipment.

(Please see Appendix 2 for redistricting initiatives, referendums, and referrals in Oregon.)

## FEDERAL CRITERIA AND JUDICIAL INTERPRETATIONS FOR REDISTRICTING

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Federal criteria relating to redistricting can be found in the United States Constitution, the Fourteenth Amendment, and the Voting Rights Act of 1965.

### The United States Constitution – Strict Equality

The Constitution requires members of the House of Representatives be elected every two years. The U.S. Supreme Court has interpreted that each person’s vote should, as nearly as practicable, have the same weight as another’s within a state.<sup>9</sup> In this case, “as nearly as practicable” is defined as mathematical equality being achieved, or a state giving a good-faith effort to do so.<sup>10</sup> If a deviation in a redistricting plan is challenged and the challengers show that deviation could have been reduced or eliminated, then the state must amend the plan or prove the deviation exists in order to fulfil another criteria.<sup>11</sup>

### U.S. Supreme Court – The 14<sup>th</sup> Amendment, Voting Rights Acts, and Case Law

**Legislative District Population.** The Fourteenth Amendment protects the right to vote in state elections and requires both chambers of a state’s legislature to be redistricted based on population.<sup>12</sup> The U.S. Supreme Court has held that legislative plans with population deviations less than 10 percent are defensible.<sup>13</sup> Whether this same standard exists under the Oregon Constitution is not clear. (Please see Appendix 3 for historic U.S. Supreme Court cases.)

**Racial Gerrymandering.** The Fourteenth Amendment restricts legislatures from separating populations into different districts based on race without a narrow, compelling legislative interest. One permissible legislative interest would be the formation or protection of a majority-minority district under the Voting Rights Act of 1965.<sup>14</sup> This type of district is one created specifically to allow a racial- or language-minority group to elect the candidate of their choice. To determine whether such a group exists, the U.S. Supreme Court created a three-pronged test. If all three elements are met, the district may not be divided.

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<sup>9</sup> *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)

<sup>10</sup> *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)

<sup>11</sup> *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983)

<sup>12</sup> *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)

<sup>13</sup> *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016)

<sup>14</sup> *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986)

The test requires:

- The group is large and compact enough to create a majority in a single-member district;
- The group is politically cohesive and will likely vote as a bloc; and
- A white majority generally votes en bloc and defeats the minority's candidate of choice.<sup>15</sup>

**Political Gerrymandering.** State law prohibits plans which favor any political party, incumbent member, or another person. Challenges brought under this section can only be considered in the state court. There is no comparable federal legislation on this matter. The U.S. Supreme Court recently decided that cases relating to partisan gerrymandering are beyond its federal scope, essentially leaving these questions to be dealt with in state courts.<sup>16</sup>

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<sup>15</sup> *Id.* at 49

<sup>16</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019)

**APPENDIX 1: OREGON'S LEGISLATIVE REDISTRICTING HISTORY**

<b>1961</b>	<ul style="list-style-type: none"><li>• The Legislative Assembly enacted a state legislative redistricting plan that was challenged and overturned because of under-representation in Multnomah and Lane Counties. The Supreme Court approved adjustments made by the Secretary of State.</li></ul>
<b>1971</b>	<ul style="list-style-type: none"><li>• No state legislative redistricting plan was enacted. Plans were drawn by the Secretary of State.</li></ul>
<b>1981</b>	<ul style="list-style-type: none"><li>• The Legislative Assembly enacted a state legislative redistricting plan that was challenged and overturned because one district was left without a Senator for two years. The Supreme Court approved adjustments made by the Secretary of State.</li></ul>
<b>1991</b>	<ul style="list-style-type: none"><li>• The Legislative Assembly failed to enact a legislative redistricting plan. After court challenges and minor modifications, the Secretary of State's legislative district plan was approved by the Supreme Court.</li></ul>
<b>2001</b>	<ul style="list-style-type: none"><li>• The Legislative Assembly approved legislative and Congressional redistricting plans. However, both plans were vetoed by the Governor and responsibility for preparing a plan fell to the Secretary of State. The Supreme Court affirmed one court challenge because the prison population in Sheridan was put outside the city by the federal census. Upon correction, the Secretary of State's plan was approved.</li></ul>
<b>2011</b>	<ul style="list-style-type: none"><li>• The Legislative Assembly enacted a legislative redistricting plan, Senate Bill 989, and a Congressional redistricting plan, Senate Bill 990. Both plans were signed by Governor John Kitzhaber and neither plan was the subject of a successful court challenge. The average deviation in Oregon legislative districts was less than one percent. For Congressional districts, the deviation was zero in two districts; plus one person in one district; and minus one person in two districts.</li></ul>

Source: Legislative Policy and Research Office

**APPENDIX 2: INITIATIVES, REFERENDUMS, AND REFERRALS IN OREGON****1910 - Measure 4 fails**

- Would have provided separate districts for each state senator and representative.

**1914 - Measure 25 fails**

- Would have amended the Oregon Constitution to require proportional representation.

**1950 - Measure 8 fails**

- Would have amended the Oregon Constitution related to legislative representation and reapportionment.

**1952 - Measure 18 passes**

- Amended the Oregon Constitution related to legislative senator and representative apportionment enforcement.

**1954 - Measure 2 passes**

- Subdivided counties for electing state legislators.

**1962 - Measure 8 fails**

- Would have amended the Oregon Constitution related to legislative apportionment.

**1972 - Measure 2 passes**

- Repealed requirements for the decennial state census.

**1986 - Measure 2 passes**

- Amended the Oregon Constitution related to legislative district reapportionment procedures after the federal census.

**2008 - Measure 55 passes**

- Amended the Oregon Constitution related to changing the operative date of redistricting plans allowing affected legislators to finish their term in their original districts.

**2020 - Initiative Petition 5 withdrawn**

- Would have established a Citizen Commission for Legislature Redistricting.

**2020 - Initiative Petitions 57, 58, and 59 pending**

- Attempting to establish the Citizens' Redistricting Commission

Source: Legislative Policy and Research Office

### APPENDIX 3: HISTORIC U.S. SUPREME COURT CASES

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#### Equal Protection

- *Baker v. Carr*, 369 U.S. 186 (1962)
- *Shaw v. Reno*, 509 U.S. 630 (1993)

#### Racial Gerrymandering

- *Miller v. Johnson*, 515 U.S. 900 (1995)
- *Bush v. Vera*, 517 U.S. 952 (1996)
- *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015)
- *Cooper v. Harris*, 137 S. Ct. 1455 (2017)

#### Partisan Gerrymandering

- *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)

#### Minority Vote Dilution

- *Thornburg v. Gingles*, 478 U.S. 30 (1986)

#### Total Eligible Population

- *Wesberry v. Sanders*, 376 U.S. 1 (1964)
- *Reynolds v. Sims*, 377 U.S. 533 (1964)
- *Gaffney v. Cummings*, 412 U.S. 735 (1973)
- *Karcher v. Daggett*, 462 U.S. 725 (1983)
- *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)

#### Compactness

- *Bush v. Vera*, 517 U.S. 952 (1996)

#### Oregon Supreme Court Cases

- *Ater v. Keisling*, 312 Or. App. 207 (1991)
- *Hartung v. Bradbury*, 332 Or. App. 570 (2001)

Source: Legislative Policy and Research Office