



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, and the policies, process and politics that shape them.

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Redistricting: Numbers Are In, Race Is On | 09/15/2021 | Episode 141

Ed: Hello and welcome to “Our American States,” a podcast from the National Conference of State Legislatures. This podcast is all about legislatures: the people in them, the policies, process and politics that shape them. I’m your host, Ed Smith.

“Usually, this time of the decade we would have seen at least half of the states have their maps drawn. This is a different decade. The data was late. So, we’re seeing just the states getting started on their redistricting and we do expect throughout the fall, though, these special sessions, and then some states will even be waiting until the beginning of 2022 to get the redistricting done.”

Ed: That was Wendy Underhill, the director of the elections and redistricting program at NCSL. Redistricting is the once-a-decade process when states, using data from the Census, redraw the congressional and state legislative districts in their states. Legislatures control redistricting, though commissions also play a role in some states.

Delayed data from the U.S. Census Bureau has left states behind in the process compared to earlier cycles. Underhill talks about how the delays have affected states, what they did to prepare, new tools citizens can use to make their voices heard, and some thoughts on what she’s learned during her immersion over the past few years in the world of redistricting.

Here’s our discussion. Wendy, welcome to the podcast.

Wendy: Nice to be here. Thank you for having me.

Time Marker (TM): 01:39

Ed: We talked about the Census and redistricting earlier this year for a podcast in March. We knew the data for reapportionment would come at the end of April, and we had a date of September 30th for redistricting data that states could use to draw legislative maps.

But things changed and most states ended up with the data they needed for redistricting in mid-August. So, how far along in the process does that put states?

Wendy: There were a number of little changes along the way about the dates. In the end, the Census Bureaus said it was going to send out the exact same data in two different formats. One came in August, as you mentioned, August 12th, and most states have said yeah, we can work with that.

There's another release of the exact same data coming in September, but that's going to be a bit of a non-event because the states have what they need from that August data.

Once the data arrives, that's when redistricting can start. Of course, it does take a week or two or three for the data folks to get that data into their software that each state is going to use, but it basically is the kickoff for the actual redistricting.

Usually, this time of the decade we would have seen at least half of the states have their maps drawn. This is a different decade. The data was late. So, we're seeing just the states getting

started on their redistricting, and we do expect throughout the fall, though, these special sessions and then some states will even be waiting until the beginning of 2022 to get their redistricting done.

TM: 03:04

Ed: States are always under pressure to get their final maps drawn in time for candidates to file to run. This is true every cycle. Where do we stand now compared to ten years ago?

Wendy: We are definitely behind ten years ago. As you point out, you might say the deadline isn't when the primary is run; it's when candidate filing opens up. And incumbents and challengers need to know what district they live in to determine what district they're going to run in.

The delay in knowing that is uncomfortable for politicians. It's also not the end of the world not having maps to run your elections for the coming year. Now, that would be really quite something for the nation.

So, what we've got now is states that are shrinking the time they're using to do redistricting and also asking election officials to shrink the time that they've got to get re-precincting done and get voters in the right precincts and get candidates in the right precincts.

So, it's fast action. And does that mean it's going to be a problem? If there are no more major delays, probably not, but each state does have its own set of deadlines. Those are the deadlines that are written into the constitution or perhaps into statute on when this is supposed to be done, and then their own filing deadlines.

We did see one interesting thing out of Texas. There's a bill that's out of the legislature and on the Governor's desk and it makes the date of its primary contingent on when their redistricting is completed. Ordinarily, Texas is one of the very first states to have its primary, perhaps even the first state. But if they don't have their maps drawn by a certain time, they will delay and if

it's not done by yet a later date, they'll delay again. So, you can see how redistricting and the running of elections really are almost on a continuum.

TM: 04:54

Ed: Speaking of that, I'm sure states didn't sit around twiddling their thumbs waiting for the data. So, tell us what states were doing to prepare so they'd be ready to go when the data arrived.

Wendy: One of the things that states were often doing was gathering input from local communities and individuals and groups on what they want to see in their districts. So, this public input piece is a bigger deal this decade than it ever has been before. More organizations have organized; sort of it's the grass roots and grass tops as well are engaged in this.

That's meant that there has been a series of hearings in many states trying to get people to come out and share their opinions. One thing they're looking for in particular is: What do people see as their community of interest? And that phrase "community of interest" is a term of art in the redistricting world. It references any group that's not the same as a political subdivision like a county or a city; some other group that has common, shared economic or other interests.

Each person can make their own definition of what that means for them, so the states are out asking people: What's your community of interest? And then if that shows a preponderance of people who think a certain area has common interests, then that can be used in the redistricting process to help create districts that incorporate keeping communities of interest together.

This is a little tricky because a community of interest without a real definition is a little squishy, whereas a political subdivision such as a city or a county where the boundary is written on a map, that's not squishy. Which of the two priorities to preserve political subdivisions or preserve communities of interest takes priority? That's a bit of a legal conundrum in virtually all the states.

And I don't think communities of interest were paid that much attention to in most states last decade, but it's sort of come to the forefront that there is this thing, community of interest; people can define it for themselves; they can share that information with the redistrictors. And whether they're unhappy if they don't get that community of interest inside of a district is yet to be seen, but it does mean, as with so many other things, that redistrictors, mostly legislators, are balancing competing interests.

TM: 07:14

Ed: I understand there are some new tools: apps, map-making software, that sort of thing that people will be able to use this cycle to assess things like communities of interest or partisan tilt. Can you talk about those?

Wendy: Sure. This is another way in which this decade is different than the last decade or any previous decades. In the last decade, a great deal of work has gone into developing algorithms – that's a word I never used to use and now it seems like I use it all the time – and tools and toolkits for measuring several different things, as you suggested.

They are also used to gather some of that information that we were just talking about. So, for instance, there are apps, ones in use in California, where the citizen can draw on their phone what they think is their community of interest, and that would be sent forward. So, there's a lot of new technology there.

But what we're talking about here is once you draw a draft map, say, you can submit it, and have it you might say evaluated based on mathematics of how compact it is. And compactness is not the be-all, end-all. There are reasons why districts sometimes aren't going to be compact. But it is a measure that's in virtually every state's constitution for something that needs to be met.

And also, these tools can represent whether the map tends to have a Democratic or a Republican lean to it, and it can represent perhaps the communities of interest. That's a little trickier because, as I said, it doesn't have a really solid definition.

So, the point is that these tools can be used at the moment when redistricting is taking place before final decisions are made, or they can be used potentially as challenges to maps. We've seen a few of those happen at the end of the 2010s where these kinds of tools that measure these various things are being used. We'll see more of that this time around. So, hopefully you use the tool to kind of do some measuring in advance and then you might see that tool showing up in a court case afterwards.

And I do want to say one more thing, Ed, before I leave that and that is there's a way to think about this as not so much about the math, but if we can envision that you could make hundreds of maps, thousands of maps, maybe even millions of maps in each state that meet the criteria that are set forth in the state constitution. And then you measure all of those many, many maps and you could build a bell curve with them, and then you would compare the map that's in question, that's been developed by the redistrictors to that bell curve of thousands of maps, millions of maps, and see where it stands on compactness or partisan tilt, or any of a number of other factors.

So, it's kind of a clever thing, but if you remember bell curves, you know that you're comparing the one chosen map against a bell curve of many possible maps, and then the concept starts to firm up a little bit.

TM: 10:11

Ed: Speaking of that sort of thing, do you expect we'll see new avenues of litigation this time around? Redistricting always results in a lot of legal challenges, but I'm wondering if we'll see something new.

Wendy: I do indeed. Redistricting is a fertile terrain for litigation. The joke of "it's all about keeping lawyers employed" is an old one. Usually, there are cases that are looking at whether the maps are in alignment with the Voting Rights Act, so that's whether they've handled racial issues correctly. Have they created districts from which minority populations can elect the candidate of their choice? That's been going on since at least 1980.

There are often cases that relate to partisanship. This decade we expect we'll see more of those. They will not be in federal court. They'll be much more likely to show up in state courts. But, again, they're part of a longstanding tradition. And sometimes there are cases throughout history that relate to: What does one person/one vote mean? We might see some more of that. That's about the numbers part of it.

But what's new this year is right at this very moment we have cases that relate to how states are redistricting based on those Census delays that we started talking about. Is it okay if deadlines are missed? Does a court need to sign off on that? We're getting some mixed signals on that. And what data has been used? A couple of states went early on before the Census data was released and they used some other measures. Is that okay?

So, there's some new stuff that's based on the Census delays. And then there are also these new cases that will be based on sort of the new math, these new tools that we were just talking about.

TM: 11:58

Ed: Well, it's nice to know you can also rely on a lot of litigation around redistricting. Some things never change.

Wendy: (laughter) What we litigate will be different perhaps, but the fact that we'll see litigation, that's something we can bank on.

TM: 12:15

Ed: You touched on the public input aspect of this process. I wonder how you think COVID-19 will affect that.

Wendy: I've got a couple of thoughts and COVID-19 is one of them. Going around the state and holding public hearings made sense when COVID was waning and maybe for individuals may not make sense as it's surging again. So, that's the negative. COVID might mean in-person testimony is harder.

But technology really makes up for that and you don't even have to leave the comfort of your home to submit a map or submit testimony. There are the traditional ways: an email does it, a letter does it, speaking in a meeting does it. But many, many states now have systems by which you can submit a map of your own drawing, which means the states are making available to the public software and the data needed so that people can try their hand at redistricting.

I will say that sometimes when a person tries their hand at it, they realize it's a lot harder than they thought, not so easy to make it perfect, and maybe they'll understand a little bit about the difficulties that a legislature or whoever the entity is in the state has in getting to a fine map that's going to meet everybody's needs. In fact, maybe a fine map is one that makes everybody a little disgruntled, but not too angry.

So, technology comes into play here. It's the good and the bad of COVID. And then I learned something from somebody else recently and that's that sometimes people have an easier time

providing public input if they have a draft map to look at. So, in a vacuum to say what do you think should be the map of your state is harder than saying: Oh, I'm looking at this map and this doesn't make sense to me in this corner.

So, some states, and Colorado is one of them, have shopped draft maps around and now they're on their second set of draft maps. But just a thought that people are more able to comment if they've got something to respond to.

Ed: Thanks, Wendy. We'll be right back with the rest of our discussion after this.

MUSIC and Female VO

NCSL's Legislative Summit is back. Connect with your colleagues November 3rd through the 5th in sunny Tampa, Florida to gain unique insights and practical knowledge and drive results for your state. Register today at www.ncsl.org.

TM: 14:50

Ed: I'm back with Wendy Underhill and we're talking redistricting. You've conducted a number of multi-day seminars over the last couple of years to help states get ready for this process. I'm wondering what you heard from legislators, legislative staff and others about the challenges this time around.

Wendy: When a person is a newcomer to the field of redistricting, it can feel pretty intimidating. You've got the attorneys, you've got the data specialists, you've got the outside groups, and it just feels as though a lot of information is coming at you fast and furiously.

So, I think a lot of what I heard from folks was wow, this is harder than I thought. And then you try to take that point of view and then you say okay, well let's get it down to the basics. And what are the basics of redistricting? It's that you need to have the districts from which people are elected be of equal population.

I love to kind of come back to that, that the whole reason we do it is to distribute political power based on population. So, everything else that we're talking about is subsidiary to that equal population. And that brings to mind that this decade with the Census being late, that felt harder, then there were some changes in the way the Census did its data collection, and one is that they changed the categories that they used for race and ethnicity, so that gives people a little bit of a jolt because they couldn't compare exactly from last decade to this decade.

And this decade a number of states have agreed that they're going to handle how their prisoner populations are managed from a data point of view. I'm going to just do a little caveat on this, Ed. The prisons are often in rural areas, the prisoners often came from other areas, perhaps urban areas or suburban areas. Should those people be counted in the prison location where they actually sleep? Should they be counted back at their home communities? This is a policy question and once you get through that policy question, if you do decide you want to move the data related to those prisoners, then you've got quite an implementation question about how to do that.

So, these are data things that can be confusing and hopefully each state has its experts right there in the legislature. I've been so impressed with the quality of the work that's done by legislative staff on this and their ability to make things comprehensible to those of us who don't live and breathe this every day.

And then I think states are thinking about who is... they're getting some pressure from their congressional delegations or perhaps from the national parties to draw the maps in a way that meets those folks' needs, and then they've got pressures from within their caucuses and within their own legislatures and then with their constituents.

So, it is a balancing act and I think having a little bit of fear as you go into it is good and then at the end of the day to say well, we did the best we could and here we go forward.

TM: 17:52

Ed: There's been a lot of concern expressed, particularly on the left, that in this round of redistricting, Democrats will be at an extreme disadvantage because Republicans control the process in more states. From what you know about how things stand, what do you think about that concern, and how much change do you think we'll really see, especially at the state legislative level?

Wendy: Yeah, I know what you're talking about. If you look at the states that are held by Republicans versus the states that are held by Democrats, and then you pull out the states that have a commission and some of the commissions are truly bipartisan and some are not, it does look like Republicans have an advantage and I think Democrats and Republicans would agree that's the case.

That doesn't make it a slam dunk. There are a couple of countervailing plots. One is that with what population growth we saw in the Census and with the shifts of population within states, population is moving out of rural areas, which tend to be more Republican, and towards urban areas, which tend to be more Democratic.

So, it's very hard to make a district in a rural area of virtually any state that isn't going to have to grow geographically to get enough people to be within it, and states are going to absolutely have to be looking at making more districts in their urban areas based on population changes.

So, we've got that. And then we also have the question of the pendulum swinging and maybe the pendulum has already swung fairly far towards the Republican side in terms of districts in Congress and possibly at the state level that they can hold. So, I would say that both Democrats and Republicans, as they do this, they still have guardrails up that are those constitutional guidelines that are in each state's constitution and the federal ones of equal population in all districts and racial discrimination is prohibited. At the same time, race can't be used as a predominant factor.

So, they've got some guardrails up. I'm thinking that yes, indeed, Republicans are in charge of more districts than Democrats are and yet I'm not sure it's going to have a big impact in terms of change in large part because we are already at a place where Republicans have significant control in the legislatures and such.

TM: 20:13

Ed: So, advantage GOP, but maybe the Democrats shouldn't have their hair completely on fire yet.

Wendy: I like that, I like that, yes.

TM: 20:23

Ed: You've spent the last few years working on a variety of projects related to redistricting including the red book dealing with all the litigation over the years and these very impressive meetings that drew a lot of attendees and led to sharing a lot of information with the folks charged with the work of redistricting.

As we wrap up, I wonder if you have any thoughts to share as a result of that experience.

Wendy: When I first got into this, I was a little bit surprised to meet a number of people who have been in the field for 30, 40 or even 50 years. And now I get it. It's because the parameters are always changing just a little bit. It's not straightforward, the changes over time, the changes with technology, the changes with politics, and the changes people think of with new ideas that hadn't been thought of before.

So, I get why people want to stay in this business because it's really quite intellectually challenging, if you want to think of it that way.

I also recognize now something I didn't know at the beginning, which is that while we think of the creation of the maps as the outcome and obviously that is the real outcome of this, there's something else that redistrictors can be doing and, again, redistrictors are mostly legislators; I use those words interchangeably sometimes. And that is creating a record of why they made the choices they made, both why is the map as a whole drawn the way it is and why did we do each district's boundaries the way we did.

And if you've got a rationale for it and you end up in court, that rationale of we wanted to keep counties whole, we saw that there were commonalities between people along a river, these kinds of things, the court will give you the benefit of the doubt if somebody is saying it's not compact, for instance.

So, having that story you might say documented as you go along is something that really matters when you get to what we could think of as the next stage of redistricting, the litigation stage. And who knew that? I didn't know that, and I think we learned that from some folks who didn't have that kind of track, that kind of record in the last decade and they were worse off for the wear. So, that maybe is one of the takeaways this decade is that good record keeping, good explanations are part of the work that you're doing as you make these new maps.

Ed: Wendy, thanks again for coming on for this very timely discussion about redistricting, just as the country is ready to plunge ahead and get this process done. Take care.

MUSIC

Ed: And that concludes this episode of our podcast. We encourage you to review and rate NCSL podcasts on Apple podcasts, Google Play, Pocket Casts, Stitcher, or Spotify. We also encourage you to check out our other podcasts: *Legislatures*, *The Inside Story*, and the special series *Building Democracy*. Thanks for listening.