The John C. Stennis Institute of Government

At Mississippi State University

Policy Matters: Gerrymander

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Gerrymander is a word that is truly American. It came into the lexicon of the English language early in the 19th century to describe the drawing of election district boundary lines for partisan advantage, to favor the majority party and incumbent politicians of all political parties.

Whether history or myth, we currently believe that the word gerrymander was coined in 1812 as a combination of the last name of Elbridge Gerry and the latter half of the word "salamander." As Governor of Massachusetts, Gerry signed a bill which restructured voting districts in his home state, giving the Democratic-Republicans, the party in which he held membership, a majority of districts in the Massachusetts legislature. The term "gerrymander" utilized the combination of Gerry's surname and the last syllables of the reptile's name because it is said that the particular district in which Gerry himself resided looked like the outline of a salamander's body placed upon the map of Massachusetts.

Gerrymander is pronounced with a soft "g"; Gerry's surname is pronounced with a hard "g".

Gerry is probably best remembered as a result of his association with gerrymander, but he leaves a rich political legacy. Gerry was a signer of the Articles of Confederation as well as the Declaration of Independence. He served in the Continental Congress from 1776 to 1781, and represented Massachusetts in the House of Representatives from 1789 to 1793. At the request of President John Adams, he negotiated with France during the "Quasi-War", the undeclared war between the U. S. and France that was waged at sea from 1798 to 1800, and the XYZ Affair. Although he ran unsuccessfully for Governor of Massachusetts four times, he was ultimately elected to two consecutive terms in 1810 and 1811. In 1812, he was elected as James Madison's vice president, chosen to secure northern votes for Madison, a Virginian. Gerry died while Vice President. He was the second Vice President to die in office.

THE BETTMANN ARCHIVE

GERRYMANDER, a fictional creature based on the shape of an electoral district of Massachusetts, as set up for political reasons.

Although the Democratic-Republican party was in power in Massachusetts in 1812, it had little hope of retaining control in the approaching elections. To save something for the party, Governor Elbridge Gerry signed a reapportionment bill to construct new senatorial election districts that consolidated the Federalist vote. An exasperated news editor hung a map showing one of those districts, Gilbert Stuart, the painter, added head, wings, and claws to the outline, noting: "That will do for a salamander." "Better say Gerrymander," the editor responded. The Boston Weekly Messenger *brought the term into common usage when it printed an editorial cartoon illustrating the district in question with a monster's head, arms, and tail and named the creature gerrymander.*

Courtesy of Compton's Encyclopedia Online.

In the 21st century, the concept of gerrymander has been expanded. The United States has a rich heritage of both political gerrymander and racial gerrymander.

Political gerrymandering is the drawing of electoral district lines in a manner that enhances the electoral likelihood of members of one political party at the expense of another. In other words, when the majority political party wants to insure party success, it does so by drawing electoral district lines to discriminate against the minority party and thwart its success in an upcoming election. Political gerrymander is legal. At the current time, it is legal to draw district lines to protect incumbents of all political parties.

The establishing of voting districts is, of necessity, done by incumbent legislators. Therein lays the risk for gerrymander. Political scientists assert as a general rule that a district with a sixty percent (60%) voting majority – be the majority Democrats, Republicans or "little green men" – is a very safe district. Gerrymandered districts can produce sixty-five (65) to eighty (80) per cent safe election districts. Effectively done, gerrymander alone is sufficient to guarantee an incumbent victory or a victory for the incumbent's party when there is an empty seat in the district.

Not all safe election districts are gerrymandered; not all gerrymandered districts are safe.

Should we focus on the constraints imposed on the legislature when drawing district boundary lines, they are few:

1. One representative per district (single-member districts);
2. Approximately equal population for each district of the same type;
3. Contiguous districts; and
4. Additional constraints which respect geographical integrity "to the extent possible".

As a practical matter, political gerrymander is a difficult judicial concept. In the case of *Veith v. Jubeliner*, (2004) the U. S. Supreme Court, in a plurality (which cannot overrule existing case law) consisting of Chief Justice Rehnquist, Justices Scalia, O'Connor and Thomas, with a concurrence by Justice Kennedy, upheld the decision of the lower court that held that the alleged political gerrymandering was not an unconstitutional act. This is because the Court has never explicitly identified the proof necessary to show that direct or indirect influence to shape the result of legislative elections, when placed strategically to persuade a legislature as a whole or particular legislative members, would indicate a politicizing of the redistricting process so extensive as to invalidate the process, particularly since the Court has always given at least lip-service to the role of the legislature in the process.

"By far the most significant form of gerrymandering is partisan gerrymandering. It is painfully ubiquitous and yet can be covert, hidden in plain view."

—Charles Backstrom

In essence, the Court determined that partisan gerrymandering claims are not justicible questions; according to the Court, there exists no discernible and manageable standard for "adjudicating political gerrymandering claims." The *Veith* decision is at odds with the *Davis v. Bandemer* (1986), but a plurality decision does not overrule it.

The facts of *Veith v. Jubeliner* are easily delivered. Plaintiffs, Veith, *et al*., were Democrats registered to vote in the State of Pennsylvania. They brought suit against defendants, Robert D. Jubliner, President of the Pennsylvania Senate, *et al*., alleging that the state's General Assembly, which was controlled by Republicans at the time, had unconstitutionally gerrymandered the districts in order to ensure the election of Republicans. Plaintiffs claimed this denied Democrats such as themselves the full participation of the political process by violating the one-man one-vote requirement of Article I as well as denying Democrats equal protection of the laws under the 14th Amendment. The plaintiffs based their allegations on the fact that the 2000 census determined that the state was entitled to 19 U. S. Congressmen

(two fewer than the 1990 census results) and that required election districts to be redrawn. The further posited the fact that the Republican Party controlled both houses of the state legislature, as well as the Governor's office, when the redistricting was required. They sought to prove that prominent GOPs at the national level put pressure on the Pennsylvania Assembly to redistrict along partisan lines "as a punitive measure against Democrats for having enacted pro-Democratic redistricting plans elsewhere". Veith v. Pennsylvania (2002). The United States District Court for the Middle District of Pennsylvania dismissed the case and the Plaintiffs appealed.

The Supreme Court looked carefully at precedent of eighteen (18) years standing: Davis v. Bandemer (1986). "Eighteen years ago," the Veith majority wrote, "we held that the Equal Protection Clause grants judges the power – and duty – to control political gerrymandering." However, the Court then turned its back on the prior holding in Davis v. Bandemer by concluding that political gerrymandering claims are simply nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist.

In discussing justicibility, the Court recognized that the while state legislatures are granted the power to draw federal election districts by Article I, Section 4 of the federal constitution, Congress can "make or alter" those districts. However, in the perspective of the 21st century, the Court said that it was wrong when it said in Davis that the courts had power to control political gerrymander. The sitting Court now believes that neither Article I nor the Equal Protection Clause provides a judicially enforceable limit on the political considerations that the states and Congress may take into account when redistricting. This is because, according to the Court, a chief test for determining whether a question is "political" or "nonjusticiable" is: whether there are judicially discoverable and manageable standards for resolving the question. Baker v. Carr (1962). The Davis court thought there were manageable standards (478 US 123). Essentially, the Davis court held that a political gerrymandering claim could succeed only where the plaintiff shows both (1) intentional discrimination against an identifiable political group and (2) actual discriminatory effect on the group. The Court, in 2006, found this standard to be unmanageable in application.

What are "judicially discoverable and manageable standards"?

Discoverable standards are those that can be traced to the Constitution's text, structure, history and the like, such that courts can honestly say that their decision is guided by law. Manageable standards are those that lead to predictable and sensible results, such that actors (like state legislators) subject to them can conform their conduct to the standards and thus to the law.

It is essential to understand the significance of the most recent opinion (Veith). The plurality opinion determined that partisan gerrymandering claims were nonjusticiable but did not explicitly overturn Davis. Justice Kennedy, for example, believed that political gerrymandering cases were justiciable and manageable standards for cases of political gerrymander could be developed in the future.

Political gerrymander is different, however, from racial gerrymander which remains a justiciable issue under the 14th Amendment to the Constitution. The mandate of the Equal Protection Clause is "racial neutrality in government decision-making." Miller v. Johnson (1995). It prohibits purposeful discrimination against individuals on the basis of race. In Shaw v. Reno (1993), the Equal Protection Clause was applied to prohibit racial gerrymandering of a congressional district. The majority opinion, written by Justice O'Connor, determined that there existed a difference between impermissible racial gerrymandering by which voters are deliberately segregated into districts on the basis of race without compelling justification and permissible race-conscious state decision-making. The trick for legislators is to successfully determine the parameters of the difference.

Racial gerrymandering originally referred to manipulating legislative district lines to under-represent racial minorities. In 1982, the Voting Rights Act was amended to require many political jurisdictions to create "majority-minority" districts in order to allow more racial minorities to elect candidates of their choice. After the 1990 census, the Supreme Court invalidated several such redistricting plans as unconstitutionally race-conscious.

The law recognizes three general methods of racial gerrymander:

- Districts mapped concentrating minority party voters into the fewest number of election districts (known as "packing");
- Districts which distribute minority party voters among many districts so their vote will not significantly influence the election outcome in any one district (known as "voter dilution");
- Districts drawn to divide incumbent minority party legislative districts and their constituents up among multiple new districts with a majority of majority party voters (known as "cracking").

These methods of gerrymander are recognized by Section 2 of the Voting Rights Act of 1965, as amended in 1973, which makes it illegal for state and local governments to "dilute" the votes of racial minority groups by making the minority voters' votes less effective than those of other voters. The Civil Rights Division of the Justice Department also reminds us that, depending on the circumstances, "voter

dilution" can also result from at-large voting mechanisms, which, while legal, are currently suspect, particularly if coupled with a long-standing pattern of racial discrimination in the community that embraces at-large voting.

Subsequent to Reno v. Shaw, in Bush v. Vera (1996), the Court's majority, while explaining that a state's reapportionment scheme would not survive the Court's strict scrutiny if it is based predominately on race without sufficient regard to traditional redistricting criteria or serving a compelling state interest, it continued to suggest that the Supreme Court would make every effort not to preempt the role of the legislature whether or not racial or political gerrymander appeared to be present.

According to Mark Packman (2000) leading scholars and litigators have looked to Justice O'Connor's concurring opinion in Bush v. Vera and have distilled the following 5 premises as helpful for state and local government entities involved in the redistricting process. From Packman:

1. As long as states do not subordinate traditional criteria to race, they may intentionally create majority-minority districts without coming under strict scrutiny.
2. A state may have to create majority-minority districts where the three Gingles preconditions (compactness, minority cohesion, and white block voting) are satisfied.
3. A state's interest in avoiding Section 2 liability is compelling governmental interest.
4. A district drawn to avoid Section 2 liability is narrowly tailored so long as it does not deviate substantially, for predominately racial reasons, from the sort of district a court would draw to remedy a Section 2 violation.
5. Districts that are bizarrely shaped and noncompact and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.

Thus, in the period of twenty (20) years, the Court moved from its position in Davis, that partisan gerrymandering was justiciable and that in order to determine that a plan was unconstitutionally gerrymandered, one must focus on the extent of the harm dealt to those claiming unfair disadvantage. The reason? Essentially it is easier to demonstrate racial gerrymander than to demonstrate political gerrymander. The Court determined that those claiming unfair disadvantage as a result of partisan gerrymander must show "continued frustration of the will of a majority of the voters, or a denial to a minority of voters a fair chance to influence the political process." However, in light of the Veith decision, the majority is placing responsibility on the democratic process and those elected to make it work. It is not unreasonable to consider Justice Kennedy's hopes and aspirations as regarding political gerrymander:

> "The ordered working of our Republic and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself…. [Legislatures which abandon restraint] should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that [some of the legislators of our states – and in this case a state Senator from North Carolina] have reached the point of declaring that, when it comes to apportionment, 'We are in the business of rigging elections'."

Whether Justice Kennedy's attempt to sear the conscience of the legislators – a platitude bandied about in the pre Baker v. Carr era – will be effective is unlikely. It is human nature to attempt to protect our own, and it is as old an instinct as the Republic itself. Disgruntled individuals and groups continue to bring cases alleging political gerrymander. For the time being, however, it will only be racial gerrymander that will receive a remedy.

Cheat Sheet on
Political Gerrymander

***Burns v. Richardson*,384 U.S. 73 (1966).**
The Supreme Court noted that the drawing of district boundaries "in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."

***Kirkpatrick v.* Preisler, 394 U.S. 526 (1969).**
The Supreme Court ruled that, when a state legislature is attempting to draw districts of equal population, "the rule is one of 'practicability' rather than political 'practicality.'" "Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster."

***Gaffney v.* Cummings, 412 U.S. 735 (1973).**
The Supreme Court upheld the state legislature's consideration of "political fairness" between major political parties when drawing legislative districts. (In this case, the plan took into account the party voting results in the preceding three statewide elections and, on that basis, created a proportionate number of Republican and Democratic legislative seats.)

***White v.* Weiser, 412 U.S. 783 (1973).**
The Supreme Court reaffirmed its earlier holding in *Burns* that district boundaries that have been drawn "in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."

***City of Mobile v.* Bolden, 446 U.S. 55 (1980).**
Although this was a racial multimember district case, the Supreme Court put forth the discriminatory purpose test for violations of the Equal Protection Clause—later used for partisan gerrymandering purposes.

***Davis v.* Bandemer, 478 U.S. 109 (1986).**
The Supreme Court held that partisan gerrymandering was a justiciable issue, but ruled that a violation of the Equal Protection Clause by the Indiana legislature had not been proven.

***Badham v.* Eu, 488 U. S. 1024 (1989), summarily aff'g 694 F. Supp 664 (ND Cal. 1988).**
The Supreme Court upheld (without a written opinion) a lower court decision dismissing a partisan gerrymandering challenge to the redistricting of the California congressional delegation.

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Lydia Quarles is a Senior Policy Analyst at the John C. Stennis Institute of Government, Mississippi State University. She received her Juris Doctorate from Cumberland School of Law, Samford University, and her MA and BA from Mississippi University for Women, in 1972 and 1971 in political science and communication. After over a dozen years in the private practice of law in Alabama and Mississippi, she joined the Mississippi Workers' Compensation Commission as an Administrative Judge in 1993. Eight years later, in 2001, she was appointed Commissioner of the agency. In 2006, she resigned to join the Stennis Institute.

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