

League of Women Voters: The Ins and Outs of Redistricting

April 18, 2015

Overview

- Redistricting:
 - Process of drawing electoral district boundaries (this occurs at every level of government – from members of House of Representatives to local districts or wards within a city). Done every 10 years – after the census. Determines representation – at the federal level a state can gain or lose seats in the House based on population shifts. Mississippi currently has 4 house members.
 - 33 states – state legislature has the primary responsibility for drawing districts – including Mississippi.
 - 11 states have districts that are determined in some manner by a commission (Ariz, Cal, Hawaii, Idaho, Montana, New Jersey, and Washington)
 - NOTE: The League of Women Voters was an active participant in pushing for California's constitutional amendment requiring an independent commission to draw lines.

- Elections Clause: “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each **State** by the **Legislature** thereof;” U.S. Const, art. I, § 4, cl.1.
- Arizona State Leg. V. Arizona Independent Redistricting Commission
 - Oral Argument March 2, 2015.
- Issue – if the districts for members of Congress are drawn by a commission – instead of the legislature – it violates this constitutional provision.

- The goal of redistricting is that each district should have roughly if not precisely the same number of people.
- If the World was ruled by rainbows and unicorns – redistricting would be easy.
 - Would determine population (1,000) and the number of districts needed (5) – and we would just put an equal number of people in each district – 200.

- We run into our first problem when districts are not precisely equal in number. When is a deviation from equal districts problematic?

– *Karcher v. Daggett*:

- 1. Could the deviation in population be eliminated all together by a good faith effort to draw equal districts?
- 2. If deviation could be eliminated – state has the burden of demonstrating that a deviation was necessary to achieve a **legitimate goal**.

Legitimate Goal for population deviation

- Making District Compact
- Respecting Municipal/county boundaries
- Avoiding contests between incumbents

NOTE: Even the smallest deviation must be justified – and the higher the deviation the greater the justification must be.

Smith v. Clark (S.D. Miss. 2002)(Pop. Deviation of 10 persons – upheld b/c would have to split precincts).

- It should be noted that the rule of population equality of districts applies strictly to federal districts.
 - Districts at the state level – must make an “honest and good faith effort” to create population equality.
 - If there is a population deviation of 10% or less – rebuttable presumption of good faith effort.
 - Above 10% -- presumption of discrimination that state must overcome.
 - Can use same arguments as at federal level to justify.

- ### Another Problem
- If the goal of drawing districts is to have “equal population” – how do you count population?
 - Should it be voting age?
 - Should it be total population?
 - Should it be left to the political process to determine? [5th Circuit]
 - Supreme Court has not addressed.

II. Constitutional Limits on Political (or Partisan) Gerrymandering

- Named after Eldridge Gerry – Politician from Massachusetts who served as Vice president under James Madison.
- Gerrymandering – drawing district lines to favor the political party in power.



- ### Methods of Partisan Gerrymandering
- “packing” – placing partisan opponents in the same district. So they win only the “packed” district.
 - “cracking” – dispersing opponents among a no. of districts so they have no majority in any district.
 - NOTE: There is presently no constitutional limit on partisan gerrymandering.

Other redistricting concerns

Voting Rights Act

Section 5

- Section 5 of the Voting Rights Act: Historically required certain states (including Mississippi) to obtain preclearance for any change in “standard, practice, or procedure with respect to voting.” -- of course this would include redistricting.
 - *Shelby County v. Holder* (2013) – S.Ct. struck down the preclearance requirement – holding that the formula used to determine preclearance was out of date.

Section 2

- Applies Nationwide
- Seeks to ensure that the right to vote is not abridged on the basis of “race or color”
- Violated if: (1) a district is drawn intentionally to discriminate based on race; or (2) the effect of the district is racially discriminatory.

Establishing a Section 2 claim

- If you think about when Section 2 would come into play – it would be when districts, which *should have* had a majority minority population are manipulated in such a way that the vote of the minority is diluted.

- Here’s how the Supreme Court has said you can tell – and when a majority minority district must be created (all 3 must be satisfied):
 - Minority group is sufficiently large and geographically compact to constitute a majority
 - Minority group is “politically cohesive”
 - White majority vote usually allows it to defeat the minority group’s preferred candidate (vote diluted)

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Each of these elements have complications

- Minority group is sufficiently large and geographically compact to constitute a majority
 - What is the proper population base to determine size of minority – is it voting age population; citizens of voting age; registered voters; the number of registered voters who actually turn out in elections?
 - *Brewer v. Ham* (5th Cir. 1989)(adopting voting age – noting that the Voting Rights Act would be defeated if took into account total population – but the minority still could not win because not enough individuals of voting age.

- What does “geographically compact” mean?
 - Could mean : (a) when you look at a map it looks geometric and not weird; or (b) shared political culture and interests.
 - S.Ct. has taken into account both of these when examining cases.
 - Ex. Texas abolished a geographically compact district where Latinos were majority and created a new district – 300 miles long (not geographically compact) to connect two Latino groups that did not have the same social/political interests)

- Minority group is “politically cohesive”
- White majority vote usually allows it to defeat the minority group’s preferred candidate (vote diluted)
 - *Statistical methods are used to determine how whites/minorities are voting.*

Significant and growing problem

- Should courts take into account and consider factors *other* than race? In other words, polarized voting might occur not because of race but because races align with different political parties.
 - Courts have a very difficult time with this – some will say that if the state can bring forth evidence that something other than race is motivating the polarization then challenger must come forward with evidence that district was drawn to dilute based on RACE.

- A little in the weeds – even if all 3 factors are met – a claim that a particular district is discriminatory may fail if the state can show that the No. of majority minority districts overall is proportional to the minority’s share of the state population.

Constitutional Limits of Racial Gerrymandering

- Equal Protection Clause

Conclusion

- Redistricting would be easy if it weren't for politics!