

Hello, This Leslie Gielow Jacobs. I'm a Professor University of the Pacific, McGeorge School of Law. The topic of this In Brief is gerrymandering.

What is gerrymandering? Well, quite simply, it's the technique of drawing voting districts to favor the group you like. We talk about partisan gerrymandering, and that's to favor a political party. Or we can have racial gerrymandering, and that's to favor a particular race.

Where do we get the word gerrymander? That's an interesting thing to start with. It comes from Elbridge Gerry, who was a signer of the original Constitution. He also became Governor of Massachusetts in 1810 and it was there that he oversaw the drawing of districts to disadvantage the Federalist Party, packing so many of them into single district that although they got the popular vote, they got less than half of the State Senate seats.

Why is it called Gerrymander? Well, a newspaper reporter got a picture of these voting districts, and one particularly drawn district looked like a serpent. Or maybe a salamander? So, he coined the term gerry plus mander, gerrymander. And that's what we call this line drawing ever since.

So gerrymandering we can also call districting. And where does districting come from? It comes from the Constitution, which gives the original power to the states to draw the districts, both for their own Legislature and for Congress. Congress is also allowed to make rules, in particular, as to the Congressional districts. So it has made a rule that the states can't have at large elections. They need to have districts.

Moreover, although the states have the original authority to draw these districts, they have to do so consistent with other provisions of the Constitution, in particular, the 14th Amendment's Equal Protection Clause. "No state shall deny any person within its jurisdiction the Equal Protection of the law." So, under the Equal Protection Clause, the Supreme Court of the United States has made several rules that impact what legislatures can do in districting.

The first one, highly significant, was in the 60's, when it came up with what we now call the "One Person One Vote Rule." It used to be that in districts that the states would draw, there would be many, many more people in one district than there were in another district. And so the result of that is that the people who are all crammed into one district, so many of them, their votes were diluted and had much less weight, because they'd get one representative. And then the far fewer ones who were in the other districts, often the rural districts, would have much more weight attached to their vote. So the Supreme Court said the Constitution, the Equal Protection Clause, requires that these districts have roughly equal numbers of people in them.

That has resulted in the Census that we know about happening every ten years. That is when a huge effort of the United State is undertaken to count all the people living in the US and who it's so important to find out who all of them are. Because the number of voters in each particular state determines how many representatives they get. We have 435 representatives in the House of Representatives, but that can be allotted to different states according to their populations. And so, that's what the Census is about, and that tells the states how many districts to draw or, also how to draw them, so that they have a roughly equal number of people in them.

Another rule that the Supreme Court's articulated and said that limits what states can do is, again from the Equal Protection Clause, and this is that state's cannot draw their districts so that they disadvantage people according to race. Race is a highly suspect classification under the Equal Protection Clause, and so, if in fact, race is a predominant factor in drawing lines of district, then, what we call strict scrutiny, really rigorous scrutiny will apply, and it will be very, very difficult for a state to justify doing that.

There's also a statute that Congress has written called the Voting Rights Act which requires some consciousness about race in drawing districts, but between those two things, we still have the rule that drawing district based upon race, in a way that disadvantages one of them is indeed an Equal Protection Clause violation.

That stands in contrast to this gerrymandering for political advantage which Eldridge Gerry didn't necessarily initiate, but certainly did in an early way and very egregious way. So, partisan gerrymandering, that is drawing district so that one party advantages their own party as against the other, the Supreme Court has never said that that violates the Equal Protection Clause. In fact, it has, or at least its justices has, a number of times, recognized, that because state legislatures are primarily in charge of districting, they're going to try to exert their political advantage and that that's been going on for a long time and not necessarily a constitutional violation.

We don't know the answer, and we'll see if the court decides if something is an Equal Protection Clause violation. Actually, back in 2004, four justices, that's one short of what we'd need to have a rule established, said that claims of political party gerrymandering aren't even justiciable - meaning that courts can't even decide them. Justices saying that there's nothing in the Constitution that helps them decide when taking account of political party is okay or not okay under the Constitution. So that's a question as well, whether the court can even hear a claim of partisan gerrymandering, or whether in fact it is an Equal Protection Clause violation.

So, where are we now? After the 2010 census, we have a number of states that indeed did engage in partisan gerrymandering, in ways that are highly visible. One of these states, Wisconsin, the challengers challenged the lines and it is before the Supreme Court with a challenge to whether in fact it's an unconstitutional gerrymander. A three-judge district court, which is the type of court to hear it, said that in fact it is. So we'll see what the answer to that is.

These partisan gerrymanders happen in a number of different states, and Wisconsin in particular, it was the Republicans who took over in 2010 and controlled the districting. So after that, in 2012 is one example although the Republicans got only 48.6% of the vote, 60 out of 99 of the seats in the Wisconsin Assembly were given to Republicans.

Brief mention of how this districting goes on to advantage political parties. They engage in these tactics called pack and crack. Packing is that you pack a number of the opposition supporters into a few districts so that they're candidates win by a wide margin but then there are more districts where your candidates can win. That's packing. Then cracking is cracking up majorities in other districts that would in fact lead to a representative and distributing

them in a way that then your party wins and not that other party. So pack and crack being the example.

Finally, how is it that states do this districting nowadays? Well, it is still primarily by legislatures. Most states, about 37 of them, do it by the state legislature. But there are way other ways that going along with the state legislature. There are various different commissions that can participate, either before the legislature acts or after the legislature tries to act but can't do it. And then there are commissions that do the line drawing itself.

Some states have politicians be members, and then a few states, four or five of them, including California, have an independent commission that does the drawing made up of people who aren't politicians, and the thought there is that indeed the lines then won't represent this partisan advantage and that has in fact been the case. California did this by ballot initiative and the Supreme Court recently reviewed a similar move in Arizona and upheld it against a constitutional challenge, S it is ok to have these independent commissions, although it's not the way most states do it.

That concludes this in brief on the topic of gerrymander. This is Leslie Gielow Jacobs, of McGeorge School of Law in Sacramento. Thanks so much for listening.