

# Redistricting 2011

## Gerrymandering & Traditional Districting Principles

History is not always kind to those who find their way into its spotlight.

Take Elbridge Gerry. Delegate to the Continental Congress. Signer of the Articles of Confederation—and the Declaration of Independence. Governor of Massachusetts. And fifth vice-president of the United States. His was a substantial resume, to be sure.

Yet rare is the person who remembers his name . . . except in connection with that map controversy. The one that caused him to lose the governorship.

More than willing, apparently, to stack the deck in his party's favor, then-Governor Gerry signed into law an 1812 redistricting bill that created an oddly salamander-shaped district designed to benefit his beloved Democratic-Republican Party.

Predictably, outraged members of the other party, the Federalists, cried "Foul!" Then, the *Boston Weekly Messenger* entered the fray, publishing a clever editorial cartoon that has since been memorialized in countless history and civics textbooks. The cartoon, drawn by the same fellow who painted the portrait of George Washington that appears on the one-dollar bill, depicted the oddly shaped district as a fearsome monster, which the newspaper cleverly dubbed the "Gerry-Mander."

As noted above, Governor Gerry was rewarded for his political machinations by subsequently becoming the *ex*-Governor of Massachusetts. Then things started looking up, and he won the vice-presidency. But he died a year and a half into his vice-presidential term and faded into oblivion.

Meanwhile, the word added to the American political lexicon as a result of Gerry's ground-breaking tactics has developed a life of its own.

### Gerrymandering Defined

Gerrymandering is the act of drawing voting districts in such a way that a particular group of people—for example, members of a certain political party or racial group—gains an electoral advantage. It often involves creating a district with boundaries comprised of odd knobs, twists, and turns that meander over the targeted geography, capturing "desirable" voters while excluding others.



Regardless of how questionable it may sound—and, as Governor Gerry learned, how unpopular with voters—gerrymandering is not necessarily impermissible. When the goal of the gerrymander is solely to advance a partisan political agenda or the desire to include an incumbent in a particular district, the courts are likely to defer to legislative prerogative. But a gerry-

mandered district may send up a red flag when it comes to the racial makeup of the population it encompasses.

### Racial Gerrymandering

When the composition of a political district is challenged on the basis of alleged racial discrimination, chief among the factors the court will consider is the shape of the district. In a number of notable decisions handed down following the 1991 round of redistricting, the U.S. Supreme Court struck down a number of state legislative plans that were drawn with an eye towards creating so-called "majority-minority" districts. (Districts in which a racial or language minority constitutes a majority of the total population.) In so doing, the Court paid particular attention to oddly configured districts.

In addressing a North Carolina plan containing what were held to be two instances of racially gerrymandered legislative districts, the Court noted that one of the districts in question "was approximately 160 miles long and, for much of its length, no wider than the I-85 corridor." *Shaw v. Reno*, 509 U.S. 630, 635 (1993). The other extended from the northeast corner of the state, and "then, with finger-like extensions, it reaches far into the southernmost part of the State." *Id.*

Despite the legal significance of the shape of the challenged districts, the Court, in *Shaw* as well as subsequent racial gerrymandering cases, has taken pains to put the shape factor in perspective: "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because *it may be persuasive circumstantial evidence that race for its own sake, and*

not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. *Miller v. Johnson*, 515 U.S. 900, 913 (1995). (Emphasis added.)

In essence, the Court has said that racial gerrymandering may be found to exist when a legislature "subordinates traditional race-neutral districting principles to racial considerations." *Redistricting Law 2010*, National Conference of State Legislatures, p. 71.

That is not to say, however, that racial awareness is tantamount to racial motivation in the Supreme Court's eyes. "Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process." *Miller, supra* at 916.

Yet, if the court determines that so-called "traditional districting principles" were subordinated to racial considerations when a redistricting plan was drawn, the judicial standard of review known as "strict scrutiny" will apply. Under that standard, which is a difficult one to meet, a state will have to prove that it had a compelling interest in creating the district as it did, and that the plan was narrowly tailored to serve that interest.

## Traditional Districting Principles

The following have been recognized by the courts as "traditional districting principles" to be used in evaluating districts when allegations of gerrymandering have been made:

- ❖ compactness;<sup>1</sup>
- ❖ contiguity (all parts of a district must be connected to the rest);
- ❖ preservation of political subdivision boundaries;
- ❖ preservation of communities of interest;
- ❖ preservation of the cores of prior districts;
- ❖ protection of incumbents; and

<sup>1</sup>"A district is generally considered compact if it has a fairly regular shape, with constituents all living relatively near to each other. A district shaped like a circle is very compact; a district with tendrils reaching far across a state is not. Beyond that I-know-it-when-I-see-it definition, there is little agreement about when a district is compact. Experts have proposed more than thirty different mathematical formulas to measure exactly how compact a district is." Justin Levitt, *A Citizen's Guide to Redistricting* (2008), p. 49, Brennan Center for Justice, New York University School of Law.

❖ compliance with Section 2 of the Voting Rights Act.

Of these, compactness, contiguity, and the preservation of political subdivision boundaries are the most critical. If these factors are not present, the court may be unwilling to look at the other principles on the list.

## Partisan Gerrymandering

In 1986, six Justices of the Court—Powell, Stevens, White, Brennan, Marshall, and Blackmun—held that claims of partisan gerrymandering are justiciable (subject to judicial review) under the Equal Protection clause of the 14<sup>th</sup> Amendment. Justices O'Connor, Burger, and Rehnquist argued that they are not. *Davis v. Bandemer*, 478 U.S. 109 (1986).

The general standard articulated by the majority for determining whether partisan gerrymandering rises to the level of unconstitutional discrimination was quite narrow: "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

The Court noted that elections are not the whole story in terms of political influence, and "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult . . ." *Id.* The Court indicated that the showing of unconstitutional discrimination must be more than *de minimis*.

For the next two decades, the lower federal courts struggled to articulate more specific standards that could be used to judge whether a given redistricting plan amounts to a partisan gerrymander. Consistency proved an elusive goal.

After watching the lower courts fail to arrive at any consistent standards, a plurality of the Court (Scalia, Rehnquist, O'Connor, Thomas), joined by Justice Kennedy, dismissed a partisan gerrymandering case, the four in the plurality having concluded that there are no viable standards and that the issue is therefore non-justiciable. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Justice Kennedy concurred in the result, but on the justiciability question, he joined the four dissenters (Breyer, Ginsburg, Souter, Stevens), who argued that the issue was justiciable.

Two years later, in *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006) the Court again

addressed the issue. In dismissing the case on grounds not related to justiciability, five members of the deeply divided Court (Kennedy, Souter, Ginsburg, Stevens, Breyer) held to the opinion that partisan gerrymandering cases are justiciable. New Justices Roberts and Alito reserved judgment on the question, and Justices Scalia and Thomas came down on the side of non-justiciability.

Any partisan gerrymandering cases that might result from the 2011 round of redistricting would come before a new Court. Changes on the bench since *Perry* have left: three justices (Kennedy, Ginsburg, and Breyer) who have opined in favor of justiciability; two who have come down on the side of non-justiciability (Scalia and Thomas); two who have heard one case but reserved judgment on the question (Alito and Roberts); and two who have not had occasion to consider the issue (Sotomayor and the individual who will fill Justice Stevens' seat).

However, one thing hasn't changed. Should the issue arise once more as a result of what is done by state legislatures in 2011, litigants will again have their work cut out for them in terms of making arguments that will convince the Court that a workable standard is within its reach. Retired Justice David Souter captured the difficulty of that challenge:

[T]he issue is one of how much [partisanship] is too much, and we can be no more exact in stating a verbal test for too much partisanship than we can be in defining too much race consciousness when some is inevitable and legitimate. . . . [T]he Court's job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness." *Vieth v. Jubelirer*, 541 U.S. 267, 344 (2004).

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**This is the fourth in a series of newsletters to be released by the Legislative Research Office in conjunction with the 2011 redistricting process. The newsletters are designed to provide interested parties with information about the history of and some of the principal legal issues related to redistricting. If you would like additional information, please contact the Legislative Research Office at 402.471.2221.**