



Gerrymandering and Local Democracy

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Introduction

Intentional partisan gerrymandering, where one political party draws electoral districts in its own favor, skews the makeup of Congress and state legislatures, creating a legislative body that is unrepresentative of voters' preferences. This practice damages faith in democracy by engendering distrust of government, which can lead to lower voter participation rates. This paper highlights the additional harm that gerrymandering poses to *local* democracy when unrepresentative state legislatures use preemption to roll back local enactments and strip municipalities of power.

States exercise near-plenary control over their local governments. For this reason, it is essential that state legislatures accurately represent the statewide public's views when legislating with respect to local power. In too many states, highly gerrymandered state legislatures do not accurately represent the public's views. In many of these states, gerrymandering minimizes the influence of voters in the most populous cities. Those cities in turn often find their legal authority attacked by the state legislature.

Proponents of good government had hoped that the United States Supreme Court would set constitutional limits on gerrymandering in the recent case of *Gill v. Whitford*. There, plaintiffs challenged the Wisconsin legislature's drawing of its state assembly district lines. Plaintiffs presented compelling evidence that the Republican majority, in conjunction with a Republican governor, designed districts that would allow the party to retain a majority of seats even when Democrats won significantly more votes statewide. The Supreme Court in June 2018, however, found that the plaintiffs lacked "standing" — that is, they were not legally qualified to challenge the entire map of assembly districts because they had not shown that the districts in which they resided were gerrymandered. The Supreme Court remanded the case back to the trial court; there the plaintiffs can attempt to make a better case for standing and pursue their anti-gerrymandering challenge. Nevertheless, the *Gill* decision disappointed proponents of fair map-drawing who were anticipating that the Court would set clear constitutional limits on the practice of partisan gerrymandering.

With changes in the Supreme Court's composition, it is unclear whether five justices will vote to strike down political gerrymandering in the near future. Regardless, there are other strategies that reformers can pursue to end the practice, such as:

- Changing state constitutional or statutory law to prohibit or reduce the role of politics in gerrymandering;
- Suing under existing state constitutional provisions; and
- Changing federal law to reduce gerrymandering of the U.S. House.

The first two strategies have already achieved significant successes in some states.

The Practice of Gerrymandering

While the practice of gerrymandering is as old as the Republic, in recent years, politicians have taken the practice to a new level through the use of sophisticated technology and data modeling. Legislators have used this data to draw state and Congressional districts to maximize partisan advantage. A common tactic is “packing” voters likely to favor the opposing party into fewer districts that it wins overwhelmingly. Simultaneously, the party in charge “cracks” other voters likely to favor the opposing party into more numerous districts where they constitute a minority unlikely to win elections. The effect is that the opposing party wastes proportionally more votes for its candidates and gains fewer seats in the legislature, even though it may garner an equivalent number of cumulative votes for the legislative office in question statewide.

After the 2010 elections, several states with one-party control of government engaged in legislative district-drawing that sought to maximize partisan advantage in legislative and Congressional elections for the next decade. Most of these states were controlled by Republicans. Key states with Republican-controlled districting included Florida, Indiana, Michigan, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Wisconsin. States with Democratic-controlled districting after 2010 included Illinois, Maryland, Rhode Island, and Vermont. Because the Republican-controlled states were both more numerous and larger in population, the cumulative effect of the post-2010 districting in U.S. House of Representatives races favored Republicans. In 2012, for instance, Democratic candidates won 48.8 % of the total national vote for

federal House candidates while Republicans won 47.6 %, yet Republicans held on to a comfortable seat majority of 242 to 193, or 51.7 to 44.9 %.¹

A similar dynamic has occurred in many state legislatures. In Wisconsin, for instance, Democrats won more votes cast statewide for members of the assembly in 2012, but Republicans retained a 60-to-39 seat edge.²

Gerrymandering and Preemption

Intentional partisan gerrymandering can deny a political majority the opportunity to pass an agenda consistent with its policy objectives. In certain states, like Wisconsin, this majority may be clustered in large cities like Madison and Milwaukee. Since urban voters in Wisconsin strongly prefer the Democratic party in partisan elections for state officials, a Republican-enacted gerrymander may deny an urban-centered majority the ability to enact its legislative agenda at the state level. If this were the only harm of gerrymandering, it would be problematic enough, but voters in Madison and Milwaukee might still be empowered to enact many of their policy preferences at the city level.

Gerrymandering becomes even more pernicious when the state legislature that it produces also attacks local authority by preempting local enactments and repealing local power. Gerrymandered state legislatures may also decline to repeal preemption from years earlier that a non-gerrymandered legislature might have otherwise reconsidered.

The valence of gerrymandering and preemption in recent years has often been in an anti-urban direction for a couple of reasons. First, as noted above, the wave election of 2010 produced Republican legislative majorities in several key states that drew most of their political support from suburban, exurban, and rural areas. These legislative majorities then used their control of post-2010 redistricting to entrench themselves into power for the decade. Second, some political scientists have

¹ See Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 2, 2013, <https://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html>.

² Bill Lueders & Kate Golden, *Wisconsin Vote Split Was Closer Than Results*, WISCONSINWATCH.ORG, Nov. 18, 2012, <https://www.wisconsinwatch.org/2012/11/2012-election-analysis/> (noting that Democratic candidates cumulatively received 200,000 more votes statewide than Republican candidates).

observed that the concentration of Democratic voters in large cities in many states — as opposed to the more even dispersal of Republican voters throughout exurban and rural areas — can make it easier for Republican line-drawers to pack Democratic voters into fewer districts.³ Such “self-sorting,” or “unintentional gerrymandering,” however, is at best a partial explanation for what has transpired in many states.⁴

While a pro-Republican tilt to gerrymandering in state legislatures after 2010 may be the recent trend, pro-Democratic gerrymandering of state legislatures is just as potentially harmful to local democracy. Assuming the common political geography concentrating Democratic voters in large cities, a pro-Democratic gerrymander of the state legislature may result in policies imposed on exurbs and rural towns that are particularly unpalatable to those areas and that are not consistent with statewide voter views. Interestingly, the state legislature with some of the strongest indicia of pro-Democratic gerrymandering after 2010 — Rhode Island — preempted its cities’ authority to raise the minimum wage, just as many state legislatures with indicia of pro-Republican gerrymandering have done.

Among the states with strong evidence of pro-Republican gerrymandering, the legislatures have not been shy about usurping local power. In Florida, Michigan, and North Carolina, for instance, the legislatures have preempted cities’ longstanding power to regulate wages and workplace benefits. North Carolina also preempted the authority of cities to ban certain kinds of discrimination through the notorious “Bathroom Bill” of 2016 that led to numerous corporate boycotts of the state. The legislature ultimately revised the bill but the new version still left in place the prior bill’s sweeping preemption of local authority to enact nondiscrimination policies and regulate wages and workplace benefits.

Other areas in which local authority have been attacked include plastic bag bans, municipal residency requirements for city employees, local-hire ordinances, and food and nutrition regulation. Moreover, Michigan’s legislature engaged in a protracted

³ See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013); see also

⁴ See Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin’s Act 43 Assembly Districting Plan*, 16 ELECTION L.J. 443, 444 (2017) (demonstrating that the levels of “natural electoral bias” in Wisconsin resulting from geographic dispersal of voters “pale in comparison to the much more extreme electoral bias” produced by the Wisconsin Republicans’ districting plan).

battle to impose a state-appointed emergency manager on Detroit and other cities. After voters passed a statewide initiative restoring control to cities in 2012, the legislature overrode the voters' will and re-instituted the emergency manager scheme.

Potential Solutions

In addition to federal constitutional litigation, there are other options for reducing partisan influence in legislative line-drawing that have been gaining traction in recent years:

Neutral Districting Processes

Several states have created districting processes that aim to reduce the role of partisanship by placing the power to draw districts in the hands of citizen commissions. By design the members of these commissions must be evenly split between the major political parties, with some also allowing input from minor parties and unaffiliated voters. Some states require super-majority approval of district maps to ensure fairness. The most robust systems give commissions the final say over how maps are drawn, without requiring legislative approval. Arizona and California are good examples of these systems.⁵

Iowa and New Jersey are well-known for their redistricting processes. Iowa delegates much of the responsibility for districting to nonpartisan, professional staff charged with drawing maps free from partisan influence. New Jersey similarly farms its districting process out to an appointed bipartisan commission. In both states, the legislature retains only a limited role in approving proposed maps.

⁵ The Arizona state legislature challenged the constitutionality of the redistricting commission in a case that reached the Supreme Court in 2015. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). The legislature argued that the federal Constitution gives state legislatures the exclusive authority to draw Congressional districts, subject only to federal regulation. By a vote of five to four, the Court rejected the legislature's argument that because the districting commission was created by voter initiative, it unconstitutionally usurped the legislature's prerogative. Now-retired Justice Kennedy provided a key fifth vote for the majority, so the views of his potential replacement on this issue will loom large in any future litigation over the constitutionality of voter-enacted independent commissions as they affect U.S. House districts.

Other states have taken action or are considering proposals that will affect districting after 2020. Ohio voters in 2015 approved a constitutional amendment that aims to make state legislative district drawing more bipartisan, although the ultimate decision is still in the legislature's hands. In 2018, Michigan voters will decide on whether to create an independent redistricting commission akin to Arizona's.

In states that lack the direct initiative process, reforms can only emanate from the legislature itself. This is obviously less likely where one party enjoys a grip on power absent political pressure from reform-minded groups.

State Constitutional Litigation

Every state has its own constitution, and these constitutions are generally much easier to amend than the federal Constitution. In addition to the districting commissions discussed above, many of which were implemented by voter-initiated amendments to state constitutions, voters in Florida in 2010 simply outlawed the use of partisanship in districting by adopting the Fair Districts Amendment to their constitution.

Because the authority for districting remained with the legislature, the onus is on citizens to sue when partisanship infects the districting process. In 2015, the League of Women Voters succeeded in litigating under the amendment to throw out the state's Congressional maps.⁶

In Pennsylvania, plaintiffs succeeded in challenging the state's Congressional maps under a clause of the state constitution requiring that all elections "shall be free and equal."⁷ While the decision applies to Pennsylvania only, eleven other states have "free and equal" clauses in their constitutions that might be used to similar effect.⁸

Fair Vote Act

Finally, while not applicable to state legislatures, five members of Congress have sponsored a bill that seeks to reduce partisan influence over Congressional district

⁶ League of Women Voters of Fla. v. Detzner, 172 So.3d 363 (Fla. 2015).

⁷ League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

⁸ *Id.* at 808 n.69; *see also* Mark Joseph Stern, *How to Kill Partisan Gerrymandering*, SLATE, Feb. 11, 2018, <https://slate.com/news-and-politics/2018/02/pennsylvania-gave-state-courts-a-blueprint-to-strike-down-partisan-gerrymandering.html>

drawing. This proposal, known as the Fair Vote Act (FVA), would use multi-member districts and ranked-choice voting to reduce political polarization.⁹ Rather than each Congressperson representing a small territory of his or her own, the FVA would create larger districts with up to five representatives elected therefrom.

Potential Solutions

Gerrymandering is a threat to our democracy in general, and poses harm to local democracy, in particular. Despite the Supreme Court's decision in *Gill*, there are several methods that activists may pursue to end this scourge. Raising consciousness of the problem, and its impact on city power, is an important part of the project.

⁹ See H.R. 3057, 115th Cong. (2017).