

## Gerrymandered Elections: Who Has the Right to Decide?

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Who has the right to decide when election districts are so distorted that they deprive citizens of the meaningful right to vote? At one time it was argued that only the citizens could make that decision by voting the bums out. However, if the districts created are unfair enough, the incumbents are protected forever. What about the role of the state in declaring that federal reapportionment is unfair? Is it a state's rights issue or can only the federal courts decide when federal congressional districts deprive citizens of the right to vote?

Earlier in my career, I became involved in malapportionment suits where school districts blatantly violated state law and never reapportioned after the census. By state law, school districts in Pennsylvania with multiple regions were required to be contiguous and nearly equal in population. Many school districts simply ignored the law. I filed lawsuits on behalf of a number of citizens' groups. In one particularly egregious case, the common pleas judge made it clear to me that no matter how many times the Commonwealth Court told him that the school district had to be fairly constituted, he would not listen. The judge had his political reasons. The Commonwealth Court, in an extraordinary move, actually delayed the election and assured that the school district was properly configured. The common pleas judge ultimately left the bench due to corruption.

Enter the recent blockbuster decision of *League of Women Voters of Pa. v. Commonwealth*, 2018 Pa. LEXIS 771 (February 7, 2018) Todd, J. The Pennsylvania Supreme Court, divided on political grounds, determined that the Pennsylvania Congressional Redistricting Act of 2011 infringed on the right to vote, but perhaps just as importantly, that this is a state's rights matter even though it was federal districts at issue.

The court specifically held that the 2011 Plan violated Article I, Section 5, the Free and Equal Elections Clause of the **Pennsylvania** Constitution. Further, the court held that the illegal plan was intended to benefit Republicans.

The relationship between federal and state power is a political scientist's dream when it comes to congressional redistricting. Pennsylvania's congressional districts are drawn by the state legislature, subject to veto by the Governor. It is a process dictated by the federal Constitution, but delegated to the states. The federal Constitution's Elections Clause provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof" unless Congress should "make or alter such Regulations." United States Constitution, Article I, § 4, clause 1. Pursuant to the Elections Clause, Congress passed 2 U.S.C. §

2a which provides that following the 10-year census and reapportionment, the Clerk of the House of Representatives shall send to the executive of each state a document indicating the number of Representatives to which the state is entitled. It is then the state's job, according to federal law, to redistrict.

In the November 2010 general election, voters elected Republicans to majorities of both houses of the General Assembly in Pennsylvania and elected a Republican Governor. It was thus the Republican-led General Assembly which was required to develop Pennsylvania's congressional districts.

A bill was drawn up and passed by the Pennsylvania legislature. It was signed into law as Act 131 of 2011, the so-called 2011 Plan.

Looking at the maps created is remarkable, especially the 6<sup>th</sup> Congressional District which resembles a backwards "C," the 7<sup>th</sup> Congressional District which appears to be two kidneys attached by a thin vein and a few other outlying outposts of voters. Other Congressional Districts equally resemble a blotch on a Rorschach test.

The *League of Women Voters* opinion is filled not only with the history of the Pennsylvania Constitution, but also a lengthy discussion of expert testimony. Gerrymandering may trace its history back to English days, but has become a full-scale American embarrassment. Of course, it is not Republicans who do this alone, since Democrats seek equal revenge when they are running the show.

Most of the opinion concentrated on "partisan gerrymandering"; but in truth, any gerrymandering is inconsistent with the political experiment which has made "America great" from its inception.

Pennsylvania's election clause is incorporated within the Pennsylvania Constitution "Declaration of Rights." The clause, in a different form, appeared in the Commonwealth's first organic charter of governance adopted in 1776, which was 11 years before the United States Constitution was adopted. The Court interpreted Article I, Section 5 as guaranteeing to voters an "equal opportunity to translate their votes into representation." Also in 1776 the Pennsylvania Constitution required that representation be proportional to population and that reapportionment be performed every seven years. The Founders of this country were well aware of how voters in Great Britain slowly and imperceptibly lost their rights to control their government through the creation of voting zones, some of which had more power and others had little or no power, all thanks to practices such as gerrymandering.

As Pennsylvania grew and suffered through its own internal struggles, it was clear that the State Constitution needed to be revised. The language of Article I, Section 5 was altered to remove all "prior ambiguous qualifying language." Hence the phrase "elections shall be free and equal" has a clear metaphor to prohibit the dilution of the right of voters to select representatives to govern their affairs.

The most unique challenge for the Court in the *League of Women Voters* case was to develop a measure to assess a dilution claim under the Free and Equal Elections Clause of the Pennsylvania Constitution. An essential component of any “dilution” inquiry is whether a plan creates districts that are “composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township or ward, except where necessary to ensure equality of population.” At slip opinion, p. 48 of 66.

The Court also urged the use of map drawing technology and analytical software to allow mapmakers in the future to engineer districting maps that may help or hurt the goal of preventing dilution of votes.

How much was the opinion influenced by the fact that Republicans, by virtue of the 2011 Plan, guaranteed their own incumbency? No doubt it was a factor. While an attempt by one party to dominate the other is not a crucial criterion for finding redistricting unconstitutional, it certainly was the icing on the cake in this case. Even where both parties are relatively equal in a government unit, it is not unusual to see districts created to benefit one or another powerful interest as a matter of “compromise.” That sort of nonsense needs to be banished from state, local and federal redistricting as well. We can and should do better in assuring that all our citizens’ rights are respected when it comes to the precious gift of the right to vote.

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