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Commentary

Time for New Standard of Review for Gerrymandering Challenges

Current process makes mockery of *Baker v. Carr*, explains voter apathy

By Frank Askin

A strange thing happened to our national legislature on the way to the 21st century.

At the beginning of the republic, the House of Representatives was considered the People's House, with biennial elections which were supposed to allow frequent turnover to keep it in sync with a political climate. The U.S. Senate, on the other hand, was meant to provide political stability with members appointed by the state legislatures for six-year terms.

As a result of the 17th Amendment, adopted in 1913, senators are now elected by the people, and there is relatively frequent personnel change. Meanwhile, state legislatures, which create the districts from which representatives are elected, have all but abolished competitive House districts, guaranteeing long-term tenure to incumbents.

Partisan Packing

With modern computer technology,

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it is child's play for partisan politicians in states where the executive and legislative branches are controlled by the same political party to maximize their candidates' success by packing all of the other party's voters in a minimum of districts and leaving the rest for themselves.

In the last congressional election, 99 percent of the House incumbents who sought re-election were successful, while nearly 10 percent of senators up for re-election lost their seats. The prospects for "packing" are so enticing that partisan politicians are no longer waiting for decennial redistricting as required by the Constitution; they do it mid-cycle, as soon as they gain political control. Witness what is now going on in Texas.

So we now have the anomalous situation that the House of Representatives is, for all intents and purposes, selected by the various state legislatures; while the people elect the senators, who run statewide and cannot be gerrymandered. James Madison and the other co-authors of our Constitution would no doubt be astounded by this turn of events.

Gerrymandering is the process of "fixing" legislative districts to guarantee maximum success for the party in control of the process. It is named for a colonial governor, Elbridge Gerry of Massachusetts, who was one of its first successful practitioners. Gov. Gerry's name has thus lived on in political infamy. Some think it is about time to

give him a proper burial.

That possibility was suggested by the U.S. Supreme Court in 1986 in a case out of Indiana, *Davis v. Bandemer*. The Court majority agreed that a claim of deliberate gerrymandering to benefit one political party presented a justiciable controversy under the Equal Protection Clause of the 14th Amendment. In that case, the Democrats had challenged the reapportionment plan for the Indiana State Legislature enacted by a Republican-controlled legislature and signed into law by a Republican governor for unconstitutionally diluting Democratic votes.

The opinion by Justice Byron White acknowledged that those responsible for drawing district lines will almost invariably know the political consequences of their decisions: "The political profile of a state, its party registration, and voting records are available precinct by precinct, ward by ward. ... It requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable that the location and shape of districts will determine the political complexion of the area. District lines are rarely neutral phenomenon."

According to the Court, mere intentional gerrymandering to favor one party rather than another was insufficient to prove a constitutional violation. In order to bring a successful challenge, the Court said a challenger had to "produce evidence of the continued frustration of the will of the majority of the voters or the effective denial to a minority of the voters of a fair chance to influence the electoral process." Relying on

a single election to prove unconstitutional discrimination could never be sufficient.

As implemented in the lower courts, this has meant demonstrating that an identifiable political group has been shut out of the process over a series of electoral cycles. The problem under that timetable is that, by the time a successful court challenge can be brought, it is practically time for the next redistricting.

A dissent by Justice Sandra O'Connor, often considered the Court's swing vote nowadays, would have dismissed the case as a nonjusticiable "political question."

The Court's Next Chance

The Supreme Court gets another chance to grapple with this issue on Dec. 10, when *Veith v. Jubelirer*, concerning congressional districting in Pennsylvania, will be argued.

Pennsylvania Democrats are challenging the redistricting plan enacted by the Republican legislature after the 2000 census that allowed the GOP to capture 12 of the 19 seats in the next election, while the Democrats were winning 55 percent of the statewide vote for governor. Democrats in California had done a similar thing in 1990, allowing them to capture 60 percent of the congressional seats with just about 50 percent of the statewide vote.

Relying on its reading of *Bandemer*, a three-judge district court granted the defendants' motion to dis-

miss the Democrats' suit.

Because there were no "allegations that anyone has ever prevented, or will ever prevent, plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matter of public concern," the Court ruled that the plaintiffs would be unable to establish that they had been "shut out" of the political process. It is hard to imagine the kind of proof it would take to surmount that hurdle!

An amicus brief submitted to the Supreme Court by the American Civil Liberties Union and the Brennan Center for Justice, in *Veith*, urges the Court to create a new standard of review in such cases to make it feasible to bring timely challenges where there is blatantly unfair partisan gerrymandering.

The fact is that the Court has already done this where there is a charge of racial gerrymandering. Indeed, the Court has done so despite the provision of the Voting Rights Act, which requires respect for the ability of racial minorities to be able to elect candidates of their choice. There is no such statutory protection for political gerrymandering, which should make it all the easier for the Court to implement a similar mechanism in situations not involving race.

The ACLU's brief also focuses on the obligation of government under the First Amendment to act as a neutral arbiter in the electoral process itself, and not to stack the deck in favor of one

side. "Unless government remains neutral in administering the contest, the electoral competition cannot operate fairly."

In so arguing, the amici rely on the political patronage cases, which forbid denying government employment on the basis of political affiliation or belief (*Elrod v. Burns*, 1976), and forbid conditioning government contracts on support for political incumbents (*O'Hare Truck Service v. City of North Lake*, 1996). If governmental bodies must remain politically neutral on issues of patronage and contracting, why should they be able to play a partisan role in determining the outcome of elections?

A Neutral Solution

It may be of more than passing relevance that of the 35 or so "swing districts" designated by political scientists in the 2002 House elections, four were in Iowa, where, by statute, districting is done by nonpartisan civil servants. Could Iowa be the way of the future for legislative districting?

It has been some 40 years since the Supreme Court ruled in *Baker v. Carr* in 1962 that every voter was entitled to an equally weighted vote. Political gerrymandering makes a mockery of that principle. It also helps to explain why so many voters refuse to vote on the theory that their vote doesn't matter. The truth is that as a result of partisan legislative districting, that is the case more often than not. *Veith v. Jubelirer* could be the new *Baker v. Carr*. ■