



BIDEN SCHOOL JOURNAL of PUBLIC POLICY

Volume 12
Issue No. 1
April 2020

UNIVERSITY OF DELAWARE
ISSN 2575-8576 (print)
ISSN 2575-8522 (online)

**BIDEN SCHOOL JOURNAL
of
PUBLIC POLICY**

Editorial
Robert Colburn & Daniela Litterman, Biden School of Public Policy & Administration
Letter from the Director of Joseph R. Biden School of Public Policy and Administration
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Consequences and dangers of gerrymandering: An ongoing threat to voter equality and fairness
Ellen Schenk, University of Delaware, Biden School, Institute for Public Administration (IPA)

What is the Energy Efficiency Gap? Analyzing empirical evidence on energy efficiency
Francis Haguen, University of Delaware, Biden School, Energy & Environment Center, Energy Program

Beyond the Rubber Stamp? A Designated Survivor, Rescoring Washington, D.C.: An anniversary of the enactment of Columbia's University Plan
Zachary Clark, University of Delaware, Biden School, Center for Research Center (CRC)

Battery storage: storage systems for transmission of distributed energy resources: opportunities, challenges and feasibility in the US electricity sector
Siddhartha Chakrabarti, University of Delaware, Biden School, Energy & Environment Center, Energy Program

Intuitive disaster risk: European flood damage as a policy driver
Ugochi Okeke-Chinwe, University of Delaware, Biden School, Disaster Research Center (DRC)

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Consequences and dangers of gerrymandering: An ongoing threat to voter equality and fairness

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ARTICLE INFO

Article history:

Received: Nov 15, 2019

Revised: Feb 21, 2020

Accepted: Apr 3, 2020

ABSTRACT

Despite the many movements and organizations dedicated to fighting against gerrymandering, gerrymandering and its various forms remain a current issue in elections. While gerrymandering has been an issue consistently brought before the Supreme Court, there has been no established measure to identify a gerrymandered district. There is a broad scope of literature surrounding suggested measures, such as the efficiency gap, the mean-median gap, and the seats-to-votes curve. Gerrymandering presents a clear and present threat to the equality of elections due to the lack of competition and an unfair process of redistricting. Reforms such as guidelines for commissions and the 2020 census need to be undertaken to ensure a fair and just reapportionment process.

1.0 INTRODUCTION

In his 2016 State of the Union, President Barack Obama warned of the dangers of gerrymandering and called for change:

But, my fellow Americans, this cannot be my task—or any President’s—alone. There are a whole lot of folks in this chamber who would like to see more cooperation, a more elevated debate in Washington but feel trapped by the demands of getting elected. I know; you’ve told me. And if we want a better politics, it’s not enough to just change a Congressman or a Senator or even a President; we have to change the system to reflect our better selves. We have to end the practice of drawing our congressional districts so that politicians can pick their voters and not the other way around. (The White House, 2016).

Gerrymandering, or the deliberate drawing of election district lines to skew an election, is a continuous threat to fair elections. Although efforts have been made to reduce its occurrence, gerrymandering still occurs at all levels of government. This research article aims to explain different types of gerrymandering, ways to identify it, and suggest how to reform the system to avoid unfair elections. The article starts with a background, then provides a brief review of literature, followed by analysis and discussion, and finally, the conclusion.

2.0 BACKGROUND

2.1 History of Gerrymandering

The term “gerrymandering” is a combination of “salamander” and the last name of Elbridge Gerry, the governor of Massachusetts in 1812, who signed into law a plan to change voting districts to benefit his political party (Barasch, 2012). Gerry, a Republican, was upset that the Federalist Party was critical of James Madison’s foreign policy, so he created a reapportioning plan that favoured the Republicans and concentrated the Federalists into a few districts (Davis, 2017). As a result of this plan, the Republicans won 29 seats, while the Federalists won 11. A month after the law was passed, the *Boston Gazette* published a map of the districts, comparing

its shape with that of a salamander and coined it a “gerrymander” (“The Gerrymander. A New Species of Monster,” 1812). It was then that an important election term was born.

2.2 Current Laws Relevant to Gerrymandering

2.2.1 The Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is a federal law that ensures that legislatures at all levels of government reflect the racial and ethnic diversity of the people they represent. It prevents state and local governments from drawing lines that prevent minorities from electing a candidate of their choice. It also prevents racially polarized voting, which is when all the minorities vote for their candidate that they want to win, and all the majorities vote for their candidate (Pérez & Agaraharkar, 2013). There are two relevant sections of the VRA. Section 2 states that if there is racially polarized voting and if a minority opportunity district can be drawn, then it must be drawn. Section 5 states that certain jurisdictions must clear any electoral changes with the Department of Justice or the District Court of DC before being implemented (Department of Justice, 2011).

2.2.2 “One person, one vote.”

The concept of “one person, one vote” was first articulated in the Supreme Court case *Reynolds v. Sims*. In this case, the Court held that a failure to update boundary lines after changes in population violated the Equal Protection Clause (Ruley, 2017). In the majority opinion, Chief Justice Warren questioned how “one person [can] be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county... all who participate in the election are to have an equal vote” (Warren, 1964). This standard of voter equality and equity is a common theme in the Supreme Court cases that have challenged gerrymandered districts.

3.0 LITERATURE REVIEW

3.1 How Lines Are Drawn

3.1.1 State legislatures

The majority of states leave the power to draw district lines to the state legislature. Members are in charge of passing laws to create boundaries. Just like any other law, the governor can be allowed to veto. There are currently 30 states who are responsible for drawing state legislative districts, and 31 states responsible for drawing congressional districts (Brennan Center for Justice, 2019).

3.1.2 Commissions

Some states use different types of commissions in the redistricting process. While the commissions and their level of authority vary among states, legislators may still have a say in the process. Four states currently use advisory commissions to draw congressional districts. Advisory commissions have no authority to draw lines, but their guidance is supposed to influence the decisions made by the legislature. Members are to be independent of the legislature itself, so they provide objective and ethical perspectives to advise on the process. The government can decide to listen to or ignore the commission's suggestions completely. (Ruley, 2017).

True to their name, independent commissions consist of members who are in no way associated with the legislature. Some states mandate that members have a waiting period to run for office, if they wish, after serving on the commission (The Conference Board, 2018). Members are chosen by officials of the political parties in the state. Legislative commissions, on the other hand, consist of elected officials. For example, in Arkansas, members of the legislative commission are the governor, Secretary of State, and the Attorney General. In New Jersey, five members of each party serve on the commission (Levitt, 2010). While still separate from the legislature, the political views and ideologies of the members can still cloud their judgement, thus causing additional issues (Ruley, 2017).

Finally, there are backup commissions, which are used by three states for congressional districts and five states for state legislative plans. Backup commissions are a “failsafe” if the legislature does not reach an agreement. The backup commission may consist of the governor's plan, the plan of specific legislative actors, another elected or appointed official or a mixture. This commissions “serves as both an incentive for the legislature to reach a consensus and as a means of ensuring that the redistricting process does not end in gridlock” (Ruley, 2017).

3.1.3 Alternatives

There are additional possibilities and proposals as to who should be involved in drawing maps. Some include letting computers or algorithms draw lines, having citizen commissions where the members are selected by random, or even employing a commission of retired judges who are chosen randomly as well (Proposition 77: Redistricting Initiative Constitutional Amendment, 2005). It is essential that whatever way a state decides to redistrict, that it is done fairly and impartially to avoid bias or ill intent.

3.2 Types of Gerrymandering

3.2.1 Partisan Gerrymandering

Partisan gerrymandering occurs when one political party benefits by redistricting. Since lines need to be redrawn every 10 years, the party that has control over the legislature during this process will most likely create maps that will help them to remain in power. There are two ways in which partisan gerrymandering occurs. Cracking is when the votes of the opposing party are divided into districts to constitute a minority in each of them, making it impossible to win a majority. On the other hand, packing is when voters of the opposing party are concentrated in a few districts so that they win those but are unable to win overall (Royden, Li, & Rudensky, 2018). As the Brennan Center for Justice argues in their study of congressional elections from 2012-2016, partisan gerrymandering undermines the “one person, one vote” standard by promoting a political landscape that encourages election results that may not reflect a party's share of statewide

voters (The Conference Board, 2018). The Brennan Center attributes a net gain of 16 Republican House seats between 2012-2016 to partisan gerrymandering (Royden & Li, 2017).

3.2.2 Bipartisan Gerrymandering

There may be situations where control of the state legislature is divided between parties, or the governor is of a different party than the legislature. When this occurs, members of the government have an incentive to work together to manipulate the election in their favour by reducing competition. Since incumbents were elected before, they try to maintain the same map while also swapping voters who are unlikely to vote for them with those likely to. Cracking and packing may also be used here, but they may not be as obvious (Royden et al., 2018).

3.2.3 Prison Gerrymandering

Prison gerrymandering is the result of mass incarceration and unfair census guidelines that disadvantage low-income minorities. The census determines updated population numbers, which are used for reapportionment. The census has a “usual residence rule” which states that people will be “[counted] at their usual residence, which is the place where they live and sleep most of the time” (United States Census Bureau, 2010). As such, prisoners are counted where they are incarcerated. Michael Skocpol argues in his Stanford Law Review note that the consequences of prison gerrymandering are threefold. First, the prisoners’ home communities suffer since their democratic representation is eroded – the population may be much lower since prisoners are not being counted as living in their home. Next, prisoners are being used to inflate population numbers. Prisoners in many places cannot even vote, but they are being counted as equal constituents with those who can.

Lastly, Skocpol identifies distortive effects: “Mass incarceration results in districts where representatives tend to favor policies that favor even more mass incarceration” (Skocpol, 2017). A rule was enabled by the Census in 2010 to adjust for prison populations, but it was not used. Some argue that administrators at prisons will be burdened because they will need to collect more information

from prisoners (Ebenstein, 2018). There has been no change in the way prisoners are counted for the upcoming 2020 census.

3.3 Identifying Gerrymandering

3.3.1 The Efficiency Gap

The efficiency gap was first introduced by Nicholas Stephanopoulos and Eric McGhee in their paper *Partisan Gerrymandering and the Efficiency Gap* as the difference between the parties’ respective wasted votes in an election divided by the total number of votes cast. Votes are considered to be wasted if they were cast for the losing candidate or are additional votes cast for a winning candidate beyond the threshold needed to win. In other words, wasted votes are the sum of lost and surplus votes.

One of the benefits of the efficiency gap is that it can be determined for any district plan, no matter how gerrymandered the state as no additional information is needed besides the election results. An example of perfect partisan symmetry would have the same number of wasted votes, resulting in no efficiency gap.

Stephanopoulos and McGhee calculated the efficiency gap for state and congressional house plans between 1972 and 2012 and came up with interesting results. While they found that the majority of plans hovered around an efficiency gap of zero, recently, plans have been tilted in the pro-Republican direction. Also, they looked specifically at the efficiency gap of districts named in gerrymandering litigation. They found that they had a relatively small measure, indicating that according to the efficiency gap, these districts may not have been truly gerrymandered.

Potential limitations discussed regarding the efficiency gap include the instability of the metric over time, uncontested seats, and strange results that occur when a district is extremely partisan, which occurs when a party receives more than 75% of the vote across the state (Stephanopoulos & McGhee, 2016).

3.3.2 Seats-to-votes curve

The seats-to-votes curve was pioneered by Gary King and Edward Tufte in the 1980s and revisited by Nicholas Goedert in 2014 in his analysis of the 2012 congressional elections. Gary King identified the pitfalls with previous attempts to measure unfair voting practices and created a formula to model historical share of votes won by a party based on that party's statewide vote share. King was able to measure partisan bias and democratic representation by fitting a curve to the relationship between a party's average share of the statewide vote and its share of seats in a statewide congressional delegation. Once an election happened, the actual seat share as compared to the expected seat share, and discrepancies may have been the result of gerrymandering (King & Browning, 1987).

Nicholas Goedert took King's model of expected responsiveness of seats and imputed a slope that is the average for all congressional elections since federal equal-population districts were implemented. Goedert found that in 2012, in every state where Republicans controlled redistricting, Democrats won fewer seats than expected based on historical patterns. In six cases, states underperformed by 20% or more. He concluded that Republicans cost Democrats nine seats as a result of the maps that they drew. Goedert recognized limitations to his model as it fails to account for incumbency playing a role in elections as well as unequal population distribution (Goedert, 2014).

3.3.3 Mean-median gap

First proposed by Michael McDonald and Robin Best in 2015, this metric focuses on the consequence of unequal voting rights as a result of gerrymandering. Simply, the symmetric vote bias is equal to the difference in the median district percent minus the mean district percent. This measure may be preferred compared to the seats-to-votes curve because it is an observed measure and more transparent. While the seats-to-votes curve is beneficial because it looks at historical data, it may be too complicated for the less-scientifically or data-inclined. The mean-median difference is one number with a straightforward interpretation.

4.0 ANALYSIS AND DISCUSSION

4.1 Why do redistricting and gerrymandering matter?

4.1.1 Politicians choose their voters

Politicians who control redistricting are given the power to decide who will be voting for them. In a bipartisan gerrymander, legislators try to draw districts to encompass those who will vote for them and replace those who will not. Due to the increased availability of information about voters and advancements in technology, politicians can precisely draw lines to maximize their chances of winning (The Conference Board, 2018). As such, the election becomes less about who can appeal to voters, who has the best policies, and who represents the majority of the people. A shift in voter ideology will most likely not be reflected in who wins the election because a party's share of voters in a state does not translate into legislative representation in gerrymandered districts.

4.1.2 Non-competitive elections

Incumbency reelection rate in 2018 in the House of Representatives was 91% (OpenSecrets.org, 2019), this is nothing new: An editorial 15 years ago argued that "both parties have succeeded in drawing district lines in ways that cement their current power by eliminating contested elections" ("Elections with No Meaning," 2004). Still, if there is an expectation about who will win an election, people will be even less likely to vote. In the United States, voter turnout is already much lower compared to other established democracies. Belgium, Sweden, and Denmark have turnout rates of well over 80% of registered voters (Desilver, 2018). The uncompetitive nature of elections means that citizens are not participating in the civic engagement process. The two main political parties are disincentivized to compromise, leading to distortion and the powerlessness of citizens' votes.

4.2 Other Potential Causes

Despite evidence to the contrary, some argue that gerrymandering is unintentional or the result of where people choose to live. Even with independent commissions or bipartisan efforts, gerrymandering may take place accidentally. For example, commissions sometimes are unaware of the demographic characteristics of an area to avoid racial gerrymandering. However, it could still take place unintentionally. Citizens of similar race, socioeconomic status, ideology, and lifestyles tend to live in common geographic areas. In major cities, the centre is usually dominated by Democrats, whereas Republicans cluster in suburban and rural communities (Chen & Rodden, 2013). These patterns of human geography, where one party's voters are more geographically clustered than another's, could also influence the outcomes of elections if district lines are drawn to preserve communities.

4.3 Suggestions for Reform

4.3.1 Independent commissions

Out of all of the ways possible to draw lines, independent commissions seem to be the most impartial. However, these commissions must have relevant characteristics to ensure autonomy and fairness. Commissions should be leaders in the process, be independent of the legislature, and have limits on how soon members can run for office after serving. They should have access to demographic information to avoid unintentional gerrymandering and guarantee compliance with the VRA. The process should be transparent to the public. Only the commissions should be responsible for drawing maps, and they should have nonpartisan staff and nonpartisan funding (The Conference Board, 2018; Zellner & Nierzwicki, 2014).

4.3.2 Prisoners

There must be new standards adopted by the Census Bureau and state governments to count prisoners in their home communities rather than as members of prison communities. Not doing so inflates the representation of mostly white, rural communities where prisons are located at the expense of minority communities due to the drastic racial

disparities in who is incarcerated (Skocpol, 2017). Representational equality is a right that the Supreme Court agrees within their assertion of "one person, one vote," so prisoners should be able to share that right with their community. There needs to be more legislation around prison gerrymandering. Delaware, Maryland, New York, and California have already taken action to make changes (Prison Gerrymandering Project, 2018), and more states need to follow.

4.3.3 2020 Census

Since reapportionment is based on census numbers, the accuracy and integrity of the count are integral to the redistricting process. There are plans to offer online completion options to some citizens. Still, the high cost of this approach will leave the Census Bureau without adequate funding to certify high-quality data collection. This lack of money has meant that the Bureau has failed to complete preparation projects in anticipation of the 2020 count (The Conference Board, 2018). The proposal of a citizenship question to the census could mean a much lower response rate and thus an inaccurate count. Adequate leadership, funding, and appropriate questions that do not disadvantage specific populations are vital since the census is so essential to redistrict.

5.0 Conclusion

In recent years, the political climate seems to have become increasingly more divisive. The polarization of voters and legislatures is only exacerbated by the unequal division of votes to benefit the party in charge. Gerrymandering undermines the voting process, often at the expense of minority populations and other disadvantaged groups. Laws need to be created, using appropriate and proper methods, to directly address the abuse of power by the ruling political party to restore fairness to the election process. Without them, elected officials will not represent the majority or reflect potential changes in the ideological landscape of the constituents. It is up to political parties to work together to construct unbiased and equitable districts to ensure that voters can elect the candidate who will best represent them.

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