Gerrymandering

‘Gerrymandering’ is the act of drawing voting districts so as to unfairly advantage or disadvantage a candidate or a party. While gerrymandering has been challenged on both statutory and constitutional grounds,¹ the Supreme Court first considered constitutional challenges ‘nonjusticiable’ – i.e. political questions better left to the judgment of the political branches of government.² But in Baker v. Carr (1962), where voting districts for the Tennessee

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legislature were challenged on ground of population disparities (some districts had more than eighteen times the population of other districts with equal voting power), the Court reversed course and declared gerrymandering a justiciable constitutional question, sending the case back to the lower courts. The dissent objected that the drawing of voting districts was not amenable to “accepted legal standards or criteria,” and that the Court’s venture into “the clash of political forces” was bound to harm its authority; but a majority of Justices refused to leave the issue to the exclusive control of elected officials, conceivably because the claim involved the legitimacy of the very processes by which these officials were elected.

Soon thereafter the Court found a constitutional violation in population disparities among voting districts for the U.S. Congress, and then, more controversially – because of federalist concerns – in population disparities among voting districts for a state legislature (in Reynolds v. Sims [1964] – an opinion whose author, Chief Justice Warren, later described as his most important). (Both findings involved constitutional violations on the part of the States since the arrangement of federal elections is primarily the states’ responsibility.) The constitutional principle announced in these decisions was the famous “one-person-one-vote”: The U.S. Constitution granted each citizen equal electoral power, and it was therefore unconstitutional to have voting districts with different population sizes but equal electoral weights. This constitutional requirement, said the Court, derived from Article I Section 2 (which commands that members of the House be chosen “by the people”) in the case of federal elections, and from the 14th Amendment’s Equal Protection Clause in the case of State elections. The Court rejected

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4 See Gray v. Sanders, 372 U.S. 368 (1963) (primary elections for Congress and party officers); Wesberry v. Sanders (elections for Congress).
6 See U.S. Constitution, Article I Sections 2 & 4
the claim that the U.S. Constitution could not contain a “one-person-one-vote” principle given that elections for the U.S. Senate clearly violated that principle (by allotting two senators for each state, no matter its population size): The analogy was misplaced, said the Court, since the federal arrangement arose from “unique historical circumstances,” and – unlike the political subdivisions of the Union – the political subdivisions of the States were never considered sovereign entities on equal footing with each other.\(^7\) The Court was equally unmoved by the claim that the “one-person-one-vote” principle assumed a controversial theory of democracy, one that placed majority rule over all other districting factors – including the wish to grant rural interests robust representation vis-à-vis urban ones.

Paradoxically, the insistence on population parity, which necessitated continuous readjustment of voting districts’ boundaries (if only as a result of natural population shifts), ushered in new forms of unconstitutional gerrymandering. Among the gerrymandering techniques soon challenged in courts were the so-called “cracking” – the fragmentation of a targeted group of voters into separate districts; “stacking” – the inclusion of a targeted group within a larger majority (often done in multimember electoral districts where the majority takes all the available seats, thereby denying a minority the opportunity to elect a representative in a single-member district it could dominate); and “packing” – the wasting of a group’s votes through the creation of a voting district where it holds an excessive majority.

The Supreme Court first encountered these practices in cases challenging the dilution of racial minority votes.\(^8\) In White v. Regester (1973), the Supreme Court found a Texas districting

\(^7\) *Id.* at 574-5.

scheme unconstitutional for diluting the votes of racial minorities.\(^9\) Yet unlike the “one-person-one-vote” principle, whose application was a straightforward matter of counting heads, the Court’s standard for unconstitutional racial vote-dilution involved the much fuzzier determination of whether an electoral process was “not equally open to participation by the group in question [so] that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”\(^10\) This necessitated a finding of discriminatory purpose and effect.\(^11\) (Racial vote dilution has also been forbidden statutorily by the Voting Rights Act of 1965, where a showing of a discriminatory purpose is not necessary.\(^12\))

In 1993 the Court decided Shaw v. Reno (1993), where it identified an additional and “analytically distinct” form of racial gerrymandering.\(^13\) Shaw involved a minority-dominated voting district drawn in an attempt to comply with a provision of the Voting Rights Act (which protected the voting rights of racial minorities\(^14\)). But the fact that the redistricting plan was meant to comply with statutory requirements, or that it was aimed at benefitting (rather than diluting) minority votes, has proven inconsequential: although some consideration of race may be desirable, and may even be mandated by statutory law, the Court held that strict constitutional scrutiny applies whenever the shape of a voting district could only be explained “as an effort to segregate the races for purposes of voting.”\(^15\) The decision – which relied on racial discrimination principles of Equal Protection doctrine – has proven fatal for the challenged

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10 Id. at 766.

14 42 U.S.C. § 1973c, as amended. A subsequent Supreme Court decision read the Act as not requiring the challenged district.
district: employing strict scrutiny, a subsequent Supreme Court decision found the Shaw plan unconstitutional.\textsuperscript{16} Thus, unlike the racial vote dilution standard employed in Regester and its progeny, no proof of discriminatory purpose or effect is necessary for a finding of unconstitutionality where race is the “predominant, overriding [redistricting] factor.”\textsuperscript{17}

Unsurprisingly, the problem of vote dilution was not limited to racial minorities: The Court soon faced constitutional challenges alleging vote dilution of partisan minorities, and even of partisan majorities – claims brought by both Democrats and Republicans. Indeed the advent of sophisticated computer technology allowed partisan gerrymandering to become so efficient that, increasingly, elected representatives were choosing their voters as much as the voters were choosing them (a situation many believed lead to the election of polarized candidates pandering exclusively to party loyalists). But the fuzziness of the constitutional standard governing racial vote dilution made the Court disinclined to enter this partisan battlefield. Thus it appeared at first that – unlike gerrymandering involving population disparities or racial vote dilution – claims of partisan gerrymandering would remain nonjusticiable: The Court initially affirmed lower courts’ decisions finding political gerrymandering nonjusticiable, and even rejected some claims of racial vote dilution by recasting them as partisan grievances.\textsuperscript{18}

However, in Davis v. Bandemer (1986) the Court, relying heavily on racial vote dilution cases, recognized partisan gerrymandering as a justiciable constitutional claim.\textsuperscript{19} The move from the justiciability of racial vote dilution to that of partisan vote dilution was not free of complications: Whereas racial gerrymandering implicated protections against racial discrimination that were well-entrenched in the Constitution and that involved easily identifiable

\textsuperscript{17} Miller v. Johnson, 515 U.S. 900 (1995).
\textsuperscript{18} See, e.g., Whitcomb v. Chavis, 403 U.S. 124 (1971).
and relatively powerless groups, partisan gerrymandering affected political parties having ever-shifting supporters and enormous local and national power. Moreover, while race or ethnicity were not traditional and valid redistricting criteria, partisan considerations were long deemed a legitimate and even a desirable factor in the drawing of voting districts (for example, in order to assure that 51 percent of the voters do not take 100 percent of the seats). These made a finding of unconstitutional partisan gerrymandering far more difficult than a finding of unconstitutional racial gerrymandering. Nevertheless, it was hard to avoid recognizing the justiciability of partisan gerrymandering given that it implicated concerns over majority rule and “fair and effective” representation similar to those implicated in the “one-person-one-vote” cases. Thus in Bandemer, which involved elections to the Indiana legislature, Democratic candidates for the House received 51.9 percent of votes but won only forty-three out of one hundred seats; and in two of the districts Democratic candidates drew 46.6 percent of the vote but took only three of twenty-one seats. (These results were achieved by “packing” Democratic voters into districts with overwhelming Democratic majorities, and by assuring that in many other districts Republicans had a small but safe majority of the votes. Needless to say, Democrats engaged in similar tactics.)

But while Bandemer recognized the justiciability of partisan gerrymandering, the Court was split on the constitutional standard to be employed. Four Justices thought that a successful plaintiff must demonstrate “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group” (requirements also found in racial vote dilution cases), and also show that the electoral plan “will consistently degrade…a group of voters’ influence on the political process as a whole.”20 Applying this rather demanding standard, the

20 *Id.* at 127, 132.
four Justices found no constitutional violation in Indiana’s redistricting scheme. (This plurality test came to dominate later lower courts decisions, and subsequent plaintiffs found it similarly impossible to pass the bar.) Disagreeing with this standard, two other Justices would have found a constitutional violation. The remaining three refused to find partisan gerrymandering a justiciable constitutional matter, charging that the decision violated the precept that Equal Protection rights belonged to individuals, not to groups. Racial gerrymandering, they said, was somewhat different in that in the case of racial discrimination there was a “stronger nexus between individual rights and group interests,” and, moreover, the Constitution spoke directly on that issue.  

Eighteen years later, in Vieth v. Jubelirer (2004), four Justices concluded that it was time to re-recognize partisan gerrymandering as nonjusticiable. Since political considerations legitimately played some role in redistricting plans, so that the question was ‘how much is too much,’ partisan gerrymandering presented a question having no judicially manageable standards (the Bandemer plurality standard, they said, was incapable of “principled application”). Moreover, the assertion that partisan gerrymandering was unconstitutional was based on a requirement of proportional representation nowhere to be found in the Constitution and having little to do with the majoritarian “one-person-one-vote” principle. A fifth Justice joined the four in voting to dismiss the complaint, agreeing that no judicially manageable standard had yet been found but holding out the possibility that one would be – thereby refusing to find partisan gerrymandering nonjusticiable. The four Justices in the dissent produced three different

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21 Id. at 151.
23 Id. at 306.
standards for examining the constitutionality of partisan gerrymandering – all three different than the standard articulated by the Bandemer Plurality.

The Court issued its latest decision on the matter of partisan gerrymandering in League of United Latin American Citizens v. Perry (2006).24 A five-Justice majority began by noting that the nonjusticiability view expressed by the four Justices in Vieth was not adopted by a majority of the Court, so that claims of partisan gerrymandering remained justiciable. The opinion then moved to examine whether the case offered a “manageable, reliable measure…for determining whether a partisan gerrymander violates the Constitution.”25 Four justices identified such a measure (even while disagreeing on what it was), but five did not, and the claim of unconstitutional partisan gerrymandering was therefore dismissed. (One Justice who joined the majority that refused to reconsider the justiciability issue joined a different majority that found that no manageable judicial standard had been identified.)

As of today, the constitutionality status of partisan gerrymandering remains precarious: While some Justices believe that the issue is both justiciable (as standing precedent holds) and judicially manageable – even as they fail to converge on a governing constitutional standard – others refuse to accept the justiciability of partisan gerrymandering, and claim that there can be no judicially manageable standard with which to distinguish a “good” partisan gerrymandering from a “bad” one.

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25 Id. at 2607.
Selected Bibliography


