

POLICY ESSAY

A WAY OUT OF THE POLITICAL THICKET: THE SIMPLE SOLUTION TO PARTISAN GERRYMANDERING

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The Supreme Court has not agreed upon a remedy for partisan gerrymandering because everyone assumes that such a remedy must entail some formula for proportional representation, and no one has articulated a formula for proportional representation that the Court is willing to impose on the states. With good reason: the problem with any formula for proportional representation is that it would only be worthwhile if it worked, and it would only work if it dictated electoral outcomes in some predetermined manner. But that's the problem with partisan gerrymandering to begin with: the partisans in control of state legislatures already draw district lines so as to dictate electoral outcomes. Likewise, any purely arbitrary formula, such as one based on compactness, would also end up dictating electoral outcomes, but on the basis of how voters are segregating themselves into partisan voting enclaves.

The author argues that the only way to prevent electoral outcomes from being dictated by partisan legislatures, or by the self-sorting of the voters themselves, or by well-meaning courts, is for the Court to insist that district lines be drawn in such a way as to eliminate any partisan advantage, in as many districts as possible. It would also be a relatively easy standard for the courts to impose and enforce.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹

—Justice Hugo Black

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¹ Westberry v. Sanders, 376 U.S. 1, 17 (1964).

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I. INTRODUCTION

Folks in the know understand that, today, the number-one way to undermine the right to vote is through partisan gerrymandering. That’s because partisan gerrymandering allows the party in control of a state’s government to use that power to design voting districts in such a way as to “waste” more of the other party’s votes than its own. With gerrymandering every vote gets counted, but some votes count a whole lot more than others, systematically and consistently.

Until 1986, the Supreme Court wouldn't touch the issue, holding that claims of partisan gerrymandering were non-justiciable.² This allowed the Court to disapprove of the practice while doing nothing to stop it. The resulting policy of the law was for the courts to defer to the states, and thereby allow the partisans who controlled state governments to be as partisan as they could get away with. The inescapable effect of this policy is that we ended up with maps that were as partisan as they could be.

The Court's attitude appeared to change in *Davis v. Bandemer*,³ when the Supreme Court held for the first time that a claim of partisan gerrymandering was justiciable.⁴ Nonetheless, in that case the Court upheld the legislative redistricting plan that had been challenged by Indiana Democrats.⁵ *Bandemer* made for strange bedfellows, with national Republicans arguing on behalf of Indiana Democrats (throwing Republicans in Indiana under the bus for the greater good of Republicans everywhere else), and California Democrats taking the side of Indiana Republicans (throwing Democrats everywhere else under the bus for the even greater good of Democrats in California).

In *Vieth v. Jubelirer*,⁶ the forces of counter-reformation almost won the day: five justices, including Justice Kennedy, voted to reject the challenge by Pennsylvania Democrats to the congressional reapportionment following the 2000 census. Four of the five, led by Justice Scalia, wanted to overrule *Bandemer* altogether and rule that such claims were not justiciable after all.⁷ Meanwhile, another five justices, also including Justice Kennedy, voted that such claims were justiciable. Justice Kennedy was the swing vote, concluding that even though such claims are justiciable no one had yet come up with a remedy he could vote for.⁸ After *Vieth*, the hunt was on for an effective remedy for partisan gerrymandering that could garner Justice Kennedy's vote, and the game has been afoot for thirteen years now.

This Term, in *Gill v. Whitford*,⁹ the Supreme Court will take up partisan gerrymandering once again, this time in a challenge by Wisconsin Democrats to the legislative reapportionment by Wisconsin Republicans following the 2010 census. Conventional wisdom holds that *Gill* will be either a *Brown v. Board of Education*¹⁰ that will begin the process of reining in partisan gerrymandering once and for all, or a *Plessy v. Ferguson*¹¹ that will set back the cause of judicial reform of partisan gerrymandering for a generation. It

² See, e.g., *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965).

³ 478 U.S. 109 (1986).

⁴ *Id.* at 125.

⁵ *Id.* at 143 (plurality opinion).

⁶ 541 U.S. 267 (2004).

⁷ *Id.* at 281 (plurality opinion).

⁸ *Id.* at 311, 313 (Kennedy, J., concurring).

⁹ *Whitford v. Gill*, 15-CV-421-BBC, 2017 WL 383360 (W.D. Wis. Jan. 20, 2017) (three-judge panel), *cert. granted*, 137 S. Ct. 2289 (2017).

¹⁰ 347 U.S. 483 (1954).

¹¹ 163 U.S. 537 (1896).

may be neither, just another seemingly interminable step along the way from *Brown*'s "all deliberate speed"¹² to *Alexander*'s "at once and . . . now."¹³

Whatever the outcome, the techniques of partisan gerrymandering, as applied today, systematically undermine the right to vote of voters everywhere. The ordinary political process is incapable of fixing the problem, and the only way to end this kind of systematic political discrimination is for the Court to decide what it already knows: that discrimination on the basis of partisan voting preference is pervasive, it undermines the right of voters to choose their representatives, and the only effective remedy is to forbid the practice to the maximum extent possible.

I submit that an effective remedy is surprisingly easy to articulate, and to apply, once a few things have been gotten right: first, *Bandemer* was correct in holding that, in order to prevail on a claim of partisan gerrymandering, it's not enough for a plaintiff to show that a given map has resulted in the failure of a group of voters to achieve a certain degree of proportional representation.¹⁴ What a plaintiff does need to show is that a given map "will consistently degrade a voter's or a group of voters' influence on the political process as a whole."¹⁵

Not only is it not enough to show a lack of proportional representation, it's not possible to do so, because the plurality in *Vieth* is also right: no one can agree on a formula of proportional representation to begin with.¹⁶ This is as it should be. The First Amendment does not care about outcomes so much as process—the ability of political ideas to compete in the political marketplace on as equal a footing as possible.

Where *Vieth* goes wrong is in assuming that the only remedy for partisan gerrymandering is one that allows some reasonable deviation from some predetermined formula for proportional representation. Since no such formula exists, the quest for one becomes a constitutional snipe hunt: to set out to find it is, in essence, a decision to come up emptyhanded.

However, partisan neutrality in the government's treatment of parties is the correct principle, not any desire to rig the system in order to produce any sort of predetermined partisan "balance." Accordingly, the correct rule is to require *maximum achievable neutrality* in district maps. Under such a rule the dominant party in the overall population will still have the opportunity to dominate, as it should have in any representative democracy. But they will not be able to use their power over government to adopt district maps that

¹² *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

¹³ *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (abandoning *Brown II*'s ruling that desegregation be accomplished with "all deliberate speed" and holding instead that "[t]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools").

¹⁴ *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality opinion).

¹⁵ *Id.* at 132.

¹⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

consistently enhance their electoral power by degrading the voting power of their rivals.

The good news is that, just as the courts are utterly incapable of coming up with an outcome-based formula for proportional representation, they are fully capable of deciding the much easier question of whether a given map eliminates any partisan advantage to the greatest extent possible. All it takes is comparing a proposed government map with any alternative that may be put forth that does a better job of eliminating any partisan advantage, for either side.

Once the constitutional standard of maximum partisan neutrality has been met, then traditional redistricting principles can be resorted to in order to give preference to one equally neutral map over another. Indeed, it is only if partisan neutrality is achieved as much as possible at the outset that Justice Scalia's taunt that "there *always is* a neutral explanation [for a partisan gerrymander]"¹⁷ can be met with genuinely neutral explanations for maps that are not partisan gerrymanders.

II. THE PROBLEMS OF PARTISAN GERRYMANDERING TODAY ARE FUNDAMENTALLY DIFFERENT THAN THEY WERE IN THE PAST.

We must begin with a blunt assessment of the role that partisan gerrymandering plays in the real world of politics. For unless the courts understand how partisan gerrymandering plays out in the real world of politics today, it will be impossible to fashion an effective remedy.

This much must be understood: The combination of modern, computerized, map-making technology on the one hand, and changes in the voting and residential preferences of voters on the other, has taken an old and manageable problem and turned it into a new and unmanageable crisis in our representative form of government. Each has contributed to the problem, and each has profound implications for crafting an effective remedy.

A. *The Impact of New Technology on an Old Problem.*

For most of the history of the rule of non-justiciability, partisan gerrymandering was a problem but not nearly as big a problem as it has become today. When the only tools that partisan mapmakers had to work with were county election returns, yellow pads, pencils, and green eyeshades, there was only so much partisanship that could be squeezed into a map. That day is gone.

Today's mapmakers are able to "take advantage of massive new amounts of public data drawn from social media that [allow] them to pinpoint likely voters with more accuracy than ever before, and advances in

¹⁷ *Id.* at 300.

mapping technology that [make] it possible to redraw districts precisely around the location of those voters.”¹⁸ As David Daley explains:

The debate over how you draw lines can feel a little theoretical until you see exactly how it is done these days. Mapmakers have access not only to the massive amount of demographic data collected by the U.S. census, but they can also purchase any number of other databases or public records. Anything you like on Facebook, anything you purchase on Amazon, any license or registration or magazine subscription—in the same strange way that an ad might track you across the web, it’s likely landing in some direct marketer’s database as well. . . .

. . . This level of technological sophistication, combined with hardened partisanship among voters who define themselves as red and blue, makes our voting preferences almost shamefully easy to predict. Add census information and public records to the formula—say, household income, ethnicity, and the elections you’ve voted in—and the picture becomes even clearer. The data and the technology make tilting a district map almost as easy as one-click ordering on Amazon.¹⁹

Emily Bazelon sums up the results:

Both parties use gerrymandering to cement their hold on power. The effects are especially clear nationwide for congressional delegations, according to a 2012 analysis by the Brennan Center. In the 17 states where Republicans drew the maps this decade—for 40 percent of the total House seats in the country—their candidates won about 53 percent of the vote and 72 percent of the seats. In the six states where Democrats drew the lines, for only about 10 percent of the House, their candidates won about 56 percent of the vote and 71 percent of the seats. In the remaining states, the parties shared control over redistricting, or a court or an appointed commission drew the lines, or there were none to draw because there is only one congressional district.²⁰

¹⁸ David Daley, *The House the GOP Built: How Republicans Used Soft Money, Big Data, and High-Tech Mapping to Take Control of Congress and Increase Partisanship*, N.Y. MAG.: ELECTION 2016 (Apr. 24, 2016, 9:02 PM), <http://nymag.com/daily/intelligencer/2016/04/gops-house-seats-are-safe-heres-why.html> [http://perma.cc/WP4Y-A6CE].

¹⁹ *Id.*

²⁰ Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. TIMES MAG., Aug. 29, 2017, at MM48 <https://www.nytimes.com/2017/08/29/magazine/the-new-front-in-the-gerrymandering-wars-democracy-vs-math.html?smid=pl-share> [https://perma.cc/D84X-3HJK] (citing SUNDEEP IYER & KEESHA GASKINS, BRENNAN CTR., REDISTRICTING AND CONGRESSIONAL CONTROL: A FIRST LOOK (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/Redistricting_Congressional_Control.pdf [https://perma.cc/2E2N-Z5EV]).

B. *The Disappearance of the “Swing” Voter Means the End of the “Swing” District.*

Before modern technology made partisan mapmaking so much easier than ever before, the voters still made it hard, or at least they made it harder than they’re making it today. That’s because voters used to “split” their ballot, a lot. And to that extent voter behavior served as something of a check on partisan mapmaking. After all, a voter can live in just one district at a time, and if the voter insists on splitting his or her ballot the mapmaker cannot sort the vote without splitting the voter.

Throughout the last half of the 20th century, the percentage of congressional districts where the voters split their vote between president and representative varied from as low as 19% to as high as 44%.²¹ In 2012, it was 6%.²²

The decline of split-party voting is all the more striking when we consider that, for most of the last century, even purely straight-party voting was more partisan in name than in effect. This is because for most of that time the parties were more bipartisan. Indeed, during the existence of the so-called “Roosevelt Coalition,” the Democratic Party was effectively “tri-partisan.” “[F]or most of the last century, the parties were less internally unified and ideologically distinctive, and more coalitions in Congress cut across parties than is the case today.”²³ During this time, “[t]he parties were ideologically ambidextrous, and the low levels of polarization in Congress that emerged after World War II continued well into the mid-1970s.”²⁴ Like M&Ms, both parties were the same: they were diverse on the outside and similar on the inside. As a result, even voters who voted a straight-party ticket were in effect voting for bipartisan representatives. The roll call votes between representatives from both parties substantially overlapped. There were substantial percentages of Democrats who were ideologically aligned with Republicans, and *vice versa*. The result is that the effect of split-ticket voting was even stronger than the figures suggest, since the actual number of split-ticket districts was enhanced to the extent that many straight-party voters elected representatives who were ideologically aligned with the other party.

²¹ *Vital Statistics on Congress*, BROOKINGS INST., 1 tbl.2-16 (Sept. 7, 2017), https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch2_tbl16.pdf [<https://perma.cc/E5KQ-BWEM>] (appearing in *Vital Statistics on Congress*, BROOKINGS INST. (Sept. 7, 2017), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/> [<http://perma.cc/4AHV-W2MRJ>]).

²² *Id.*

²³ THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 44 (2012).

²⁴ BILL BISHOP WITH ROBERT G. CUSHING, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 103 (2008).

Not anymore. “[I]n the 111th Congress, for the first time in modern history, in both the House and Senate, the most conservative Democrat is slightly more liberal than the most liberal Republican. This is another way of saying that the degree of overlap between the parties in Congress is zero.”²⁵ That was four Congresses ago, and things have not gotten better since.

The fact that voters have developed a consistent partisan voting preference means that the districts they comprise will also have a consistent partisan voting preference. The disappearance of “swing” voters therefore means the disappearance of swing districts, and that means that virtually any partisan advantage in a given district will almost certainly dictate the outcome of any general election in that district.

C. The Disappearance of the “Swing” District Has Made Partisan Gerrymandering Even Easier.

Although partisan gerrymandering has been going on forever, the disappearance of the “swing” district is a relatively recent development, and it has greatly expanded the extent to which partisan mapmakers can enhance their political power through gerrymandering.

The techniques of partisan gerrymandering include drawing districts that “crack” the other party’s voters (and thereby prevent them from forming a majority) in as many districts as possible, or “packing” the other party’s voters into the fewest districts possible, or some combination of the two.²⁶ The object, in the parlance of the day, is to “waste” more of the other party’s voters than your own. Voter behavior used to make this much harder, but today’s voters make it much easier.

When there were lots of voters who split their ballot, partisan mapmakers could not “cut” the majorities in “their” districts too closely without giving the other party an opening whenever there was even a slight turn in the political tide. A significant percentage of split-ticket voters would cause even the greediest of partisan mapmakers to insist on a substantial safety factor when designing “their” districts.

In short, in an age of widespread split-ticket voting, a reliable majority required a considerable safety margin. But in an age of overwhelmingly partisan voters, old margins of safety have gone out the window. And that gives partisan mapmakers a much larger field of play.

In the 1970s, almost one half of the congressional districts in this country were represented by members of Congress whose voters split their ballot by voting for the presidential candidate of the other party.²⁷ Today, the per-

²⁵ MANN & ORNSTEIN, *supra* note 23, at 45.

²⁶ *See, e.g.,* Whitford v. Gill, 218 F. Supp. 3d 837, 872 (W.D. Wis. 2016) (three-judge panel), *cert. granted*, 137 S. Ct. 2289 (2017).

²⁷ In President Nixon’s big win in 1972, a majority of the voters in forty-four percent of congressional districts split their ballot. Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 701 fig.12 (2013). In the much

centage of districts where the voters split their ballot is eight percent (twenty-three Republicans represent congressional districts that voted for Clinton, and twelve Democrats represent districts that voted for Trump).²⁸

Partisan mapmakers now have all the old incentives to make their maps as partisan as possible, but they now have new opportunities to do so: the old “swing district” is the new “safe seat.” As a result, partisan gerrymandering has become even more effective, as districts that would once have been considered moderate are now understood to be partisan enough to win, every time.

D. *The Impact of the Loss of Moderate Representatives on Congress and State Legislatures*

While it’s obvious that the disappearance of swing legislative districts will mean the disappearance of moderate legislators, what’s not so obvious is how much this affects the behavior of representatives from districts that would once have been considered “moderate.” “[I]deological polarization has increased among representatives from marginal as well as safe districts and among senators as well as representatives. In the 108th Congress, representatives from marginal districts were almost as polarized as representatives from safe districts.”²⁹ That was true seven Congresses ago, and things have not gotten any better since then.³⁰

closer elections of 1976 and 1980 the percentage was twenty-nine percent and thirty-three percent, respectively, *id.*, and all under the same congressional district maps. And in President Reagan’s big win in 1984, after the next general reapportionment, it was back up to forty-five percent of congressional districts whose voters voted a split ticket. *Id.*

²⁸ David Hawkings, *The Incredible Shrinking Split Tickets*, ROLL CALL (Feb. 1, 2017, 7:04 AM), <https://www.rollcall.com/news/hawkings/polarized-politics-split-tickets-midterms> [<https://perma.cc/RR7Z-7XVR>]. In 2012, it was six percent. *Id.*; see also Jacobson, *supra* note 26, at 697.

²⁹ ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 13 (2010).

³⁰ Abramowitz and Bishop both argue that gerrymandering cannot be the cause of political polarization, and cite evidence of polarized voting in districts that do not undergo redistricting (such as elections for statewide offices and the Senate), as well as the fact that states that had nonpartisan commissions or courts in charge of redistricting had a greater percentage of safe districts than those that put partisan legislatures in charge. See *id.* at 101; BISHOP WITH CUSHING, *supra* note 24, at 28–31. However, the problem of what causes political polarization—on the part of voters or their elected representatives—is beside the point: gerrymandering relies on polarization on the part of voters, whatever the cause. Also, representative districts—whether for city council, the county commission, the state legislature, or the U.S. House—are the product of state action, and frequent state action. Unlike jurisdictions that are relatively constant (such as city-wide or county-wide offices), or are permanently fixed (like states), congressional districts change regularly; they are designed by state legislators who assign voters to districts, and the lines of these districts move even when voters don’t. And, because of the polarization of the voters assigned to these districts, state actions assigning these voters virtually dictate the electoral outcome in their districts. “‘Everybody assumes that it’s sorting, the big sort, and that demographics are driving this,’ said Chuck Todd, the host of NBC’s Sunday morning tradition *Meet the Press* and a district-by-district student of American politics. ‘But the fact of the matter is they’re not looking at the lines.’” Daley, *supra* note 18.

The reason is simple: if the only election you will ever have to worry about is your very next primary election, the only way to make that problem go away is to be just as partisan as the most partisan voters in your primary.

It used to be the exact opposite—those districts with close partisan voting margins promoted bipartisan behavior on the part of their representatives. This was because, with plenty of voters who could—and did—vote both ways, excessive partisanship on the part of the incumbent would result in the election of the other party’s candidate. Not anymore. The demise of swing districts means the demise of the moderate representative.

The disappearance of moderate members in both caucuses means that partisan gerrymandering is a double-edged sword: if there are no members who get elected with the support of crossover voters back home, then there will be no members who can cross the aisle and vote with the other side, even when that is needed. This is a problem for the majority as well as the minority, but more of a problem for the majority. Just ask former Speaker of the House John Boehner.³¹

The result of all this is that we now have national and state legislatures where the overwhelming majority of the districts are more partisan than the country as a whole—and the representatives of these districts are even more partisan than their districts.

The impact of this on the behavior of a legislative body is profound: any body with a majority of members practicing the politics of cooperation and the rest split between opposing partisans who practice the politics of confrontation, will behave very differently than will a body where ninety percent of the members practice the politics of confrontation and only ten percent practice the politics of cooperation. That’s the difference between the Congresses that we had in the 1970s and what we have today.

E. The Problem of De Facto Gerrymandering

The problem of voting districts that discriminate against voters on the basis of their political preference is not confined to government-mandated gerrymandering sponsored by the party in control. That’s because there is a huge amount of “self-gerrymandering” that has taken place over the last half century. Just as the voters were sorting themselves out along ideological lines—changing from split-ticket voters who associated with non-ideological parties into straight-party voters who vote with parties that promote a highly ideological agenda—they were also sorting themselves out geograph-

³¹ Daley, *supra* note 18 (“The gerrymander of 2011 built such a firewall around GOP control of the House that when Barack Obama was reelected in 2012, Democratic congressional candidates earned 1.4 million more votes than Republicans, but the GOP retained a 234-201 majority. You might even argue it worked *too well*, creating the solid conservative districts that gave rise to the renegade House Freedom Caucus, forced Speaker John Boehner out of office, and fomented the grass-roots anger that fueled Donald Trump’s ascent and punctured the GOP establishment.”).

ically.³² This has happened to such an extent that the application of even purely neutral redistricting criteria would have the effect of systematically discriminating against voters on the basis of where they choose to live. As a result, the problem of government gerrymandering for partisan purposes will not be solved by merely banning partisan intent in redistricting—it will also require the prohibition of redistricting that has a substantial partisan effect.

In the third quarter of the last century, post-war prosperity allowed people to move more than they used to, but their movements actually contributed to greater, not lesser, political integration. “In the 1976 presidential election, Democrats and Republicans were more geographically blended than at any time since the end of World War II.”³³ But ever since that high-water mark, “the movement toward political mixing slammed to a halt and headed in the opposite direction.”³⁴ Today, some 10 million Americans move each year, and they are moving to areas that are more aligned with their politics: “As many as 100 million Americans resettled across a county border in the 1990s. People didn’t scatter like ants from a kicked-over hill. There was an order and a flow to the movement—more like the migration of different species of birds.”³⁵

“As a result of this sorting, most counties were zooming off in partisan directions.”³⁶ In the equally close presidential elections of 1976 and 2004, the number of “landslide counties”—counties where the presidential winner won the county vote by 20 or more percentage points—went from less than 40% of all counties in 1976 to more than 60% of all counties in 2004.³⁷

Electoral rules that favor one group of voters over another on the basis of where the voters choose to live are not new. Consider Georgia’s county unit system, which systematically discriminated against urban voters and in favor of rural voters.³⁸ What is new is the extent to which the voters are gerrymandering themselves. As far as an effective remedy is concerned, the issue is the same: the degrading effect on the votes of persons based on where they choose to live is the same if legislators are going out of their way to inflict that harm as it is if they are merely ratifying the harm that voters are doing to themselves. One is aggressive, the other passive, but the impact on elections is the same.

³² BISHOP WITH CUSHING, *supra* note 24, at 37.

³³ *Id.* at 103.

³⁴ *Id.* at 38.

³⁵ *Id.* at 130.

³⁶ *Id.* at 44. Counties are the most relevant place to look for patterns in the geographical sorting of voters, as everyone knows what kind of neighborhood they’re moving to, and what county, city, or school district they’re getting in the bargain. As a result, the self-sorting of voters along partisan lines is more obvious in the election results of counties, which are both visible and constant, even if impossible to follow in constantly changing legislative districts.

³⁷ *Id.* at 45.

³⁸ See Emily Badger, *As American as Apple Pie? The Rural Vote’s Disproportionate Slice of Power*, N.Y. TIMES, Nov. 21, 2016, at A11, https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html?_r=0 [https://perma.cc/PB8D-P3B3].

The implications are enormous when it comes to fashioning an effective remedy for government decisions that either generate or ratify partisan gerrymandering. Otherwise neutral redistricting criteria—the so-called “legitimate government criteria” or “traditional redistricting principles”—may be perfectly legitimate, all other things being equal. But they cannot be deemed legitimate if all other things are not equal, and the application of such otherwise neutral criteria systematically and consistently enhances the voting strength of some voters at the expense of others.

All other things being equal, criteria such as compactness, traditional jurisdictional lines, or contiguity might be both traditional and legitimate. But they are neither when every other tradition has been thrown out the window and the only effect is a result that cannot be considered legitimate. Legitimate is as legitimate does.

F. *Why the Political Process Cannot Fix Things*

Virtually all of the redistricting reform that has occurred in the country has been outside the ordinary political process—by what can only be described as the extra-ordinary political process. Virtually all of the jurisdictions that have adopted some sort of redistricting reform have been jurisdictions where the voters have the power to enact legislation on their own, by way of popular initiative.³⁹ It does not appear that any state has adopted an independent redistricting process except by popular referendum. We are thus “maxed out” at the level of reform we can expect from the ordinary political process—we can’t expect much more, no matter how much the voters want it.

There are a number of reasons why it is futile to expect reform to come from the political bodies that are dominated by the hyper-partisanship that is both the cause and effect of partisan gerrymandering.

First, this is not a process driven by bad people doing bad things. This is a process driven by good people doing bad things, either because they don’t think that what they are doing is bad, or because the end justifies the

³⁹ See *States with initiative or referendum*, BALLOTPEdia, https://ballotpedia.org/States_with_initiative_or_referendum [https://perma.cc/23T3-TTV8] (noting that 24 states allow the adoption of statutes or constitutional amendments by way of direct initiative: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming); *Independent redistricting commissions*, BALLOTPEdia, https://ballotpedia.org/Independent_redistricting_commissions [https://perma.cc/NP2T-HCML] (noting that, at present, independent redistricting commissions exist in six states—Alaska, Arizona, California, Idaho, Montana, and Washington—each of which is an initiative state); *Florida Congressional District Boundaries, Amendment 6 (2010)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Congressional_District_Boundaries,_Amendment_6_\(2010\)](https://ballotpedia.org/Florida_Congressional_District_Boundaries,_Amendment_6_(2010)) [https://perma.cc/7PW9-U2JN] (showing that in Florida, by contrast, limited redistricting reform has been attempted, with equally limited success, by means of a constitutional amendment, adopted by popular initiative, purporting to limit legislative discretion).

means. The vast majority of politicians who are in control of redistricting at the state level are good people driven by the highest of ends: stopping the “enemy” from making any gains and restoring right and justice in the world.

Those who are the product of a hyper-partisan selection process seldom see themselves as others do, and certainly not as the other side sees them. The very fact that they have survived a highly partisan selection process in order to have a hand in continuing the process that selected them makes them less likely to see the need for change. As that noted constitutional scholar Upton Sinclair observed, “[i]t is difficult to get a man to understand something, when his salary depends on his not understanding it.”⁴⁰ It is likewise difficult for a legislator in the majority party to understand something when his party’s power to do anything depends on his not understanding it.

Second, revenge masquerading as compensation, and compensation that looks like revenge, make it impossible for anyone to declare a “day of jubilee” on the subject. The Republicans in North Carolina can justify what they did after the census of 2010 based on what the Democrats in North Carolina did after the census of 2000. And the Democrats in Illinois can justify what they did after the census of 2010 based on what the Republicans in Pennsylvania were doing at the same time. The old excuse that “we’ve always done it” has always been a lousy excuse for why there’s nothing wrong with it.⁴¹ But the fact that “they did it to us and will do it again the very next chance they get” is a very, very good reason to keep right on doing it.

The problem when everyone engages in “tit for tat” is that everyone ends up doing the wrong thing—even though they know that what they’re doing is wrong—because the “other side is doing it.” The situation takes on the character of a “nuclear arms race” of partisan redistricting: neither side can adopt a policy of “unilateral disarmament” even if they wanted to. Each side is compelled to do as much as it can, wherever it can, and—after *LU-LAC v. Perry*⁴²—whenever it can,⁴³ because “if we don’t the other side will.” Each side goes on piling up weapons of mass partisanship because that’s what the other side is doing. And, like the nuclear arms race, the eventual outcome is the same: mutually assured destruction.

⁴⁰ Paul Krugman, *The Greatness of Keynes* . . . , N.Y. TIMES: OPINION PAGES (Nov. 30, 2008, 1:05 PM), <https://krugman.blogs.nytimes.com/2008/11/30/the-greatness-of-keynes/> [<https://perma.cc/W5DG-KBJA>].

⁴¹ See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”). Likewise in the time of Elbridge Gerry.

⁴² 548 U.S. 399 (2006).

⁴³ See *id.* at 416–23 (plurality opinion) (concluding, among other things, that, insofar as the federal Constitution is concerned, states can redistrict as often as they want).

III. THE CONSTITUTION PROHIBITS A POLITICAL PARTY FROM USING ITS POWER OVER GOVERNMENT TO ADOPT A MAP THAT CONSISTENTLY DEGRADES THE VOTING POWER OF A RIVAL POLITICAL PARTY.

A. *The Fact That the Harm Is to First Amendment Rights Means That, for All Practical Purposes, Intent to Harm Is Presumed.*

Bandemer required proof of both discriminatory intent and discriminatory harm in order to make out a claim of partisan gerrymandering.⁴⁴ This has served as an open invitation to partisan mapmakers to simply lie about their motives and cloak the most obvious of partisan gerrymanders in ostensibly neutral garb. This, in turn, has burdened plaintiffs, and bedeviled the courts, all unnecessarily.

The problem of neutral explanations being offered as a rational basis for classifying voters into different voting districts may be hard to resolve under the Equal Protection Clause of the Fourteenth Amendment, but it is a much easier problem to resolve under the First Amendment. And Justice Kennedy was certainly correct to observe in *Vieth* that First Amendment law holds the key to resolving these cases.⁴⁵

First, the First Amendment clearly applies to claims of partisan gerrymandering, because they “involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”⁴⁶

Second, First Amendment analysis demands strict scrutiny of any claim that a government choice discriminates on the basis of political belief. As Justice Kennedy noted in *Vieth*, “[u]nder general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest.”⁴⁷

Strict scrutiny disposes of virtually all but the most compelling explanations for adverse electoral impact that are based on so-called “legitimate government criteria” or “traditional redistricting principles.” These may all be “nice to haves” in the world of politics, but none are “must haves” under the Constitution. Non-discrimination in drawing voting districts *is* a “must have,” at least to the extent possible.

There is yet another basis for finding intent whenever the state has chosen to inflict electoral harm that it could have prevented or avoided by an alternate choice: the law presumes that an actor intends the natural and prob-

⁴⁴ See *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (“We also agree with the District Court that in order to succeed the *Bandemer* plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”).

⁴⁵ See *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.*

able consequences of his actions. The same reasoning applies when divining legislative intent in partisan gerrymandering cases: when a political faction uses its power over government to adopt a district map the natural and probable consequence of which is to consistently degrade the votes or voting strength of a rival political faction, then an intent to discriminate against that rival political faction can only be presumed.

In this view, the only real defense to a successful showing that (a) a legislative map consistently degrades the electoral vote of a rival political faction, and (b) such harm is avoidable and preventable by means of a map that degrades the electoral vote of that rival faction even less, is to show that the harmful impact complained of, in fact, could not be avoided in the first place. In this scenario, no alternative map would consistently degrade the votes of the rival faction even less. This is easy to show if true, and just as easy to disprove if false.

B. The Constitution Mandates That the Government Show Partisan Neutrality Whenever the Government Makes Choices That May Have an Adverse Electoral Impact on a Disfavored Minority.

In *Elrod v. Burns*,⁴⁸ the political patronage case, the Court held that the government cannot discriminate on the basis of partisan affiliation when hiring employees in non-policy making positions.⁴⁹ In “starv[ing] political opposition by commanding partisan support, financial and otherwise,” political patronage “tips the electoral process in favor of the incumbent party.”⁵⁰

Most importantly, cases such as *Elrod* hold that political discrimination in the administration of governmental functions is unconstitutional not *if* it harms the public interest but because it *may*.⁵¹ In addition, whether or not political patronage ends up harming the larger public, it harms the victim: *any* use of governmental power to further a purely political end burdens the First Amendment rights of those who are outside the favored political group.

Likewise, the Supreme Court has imposed an absolute ban on the partisan exercise of governmental power—without any showing of harm—under other provisions of the Constitution besides the First Amendment. For exam-

⁴⁸ 427 U.S. 347 (1976).

⁴⁹ *Id.* at 373.

⁵⁰ *Id.* at 356; see also Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 3, 18 (forthcoming Dec. 2017).

⁵¹ See Kang, *supra* note 50, at 18 (“In the general case, the constitutional bar on party patronage does not vary with the egregiousness of the partisanship. A constitutional violation arises from the simple fact that the employment decision was based on partisanship rather than legitimate hiring criteria, not that the magnitude of partisanship exceeded some allowable minimum amount. Nor does the case law allow for the government to hire and fire a small number of employees based on partisanship, drawing a constitutional bar only at some higher threshold or percentage of government employees. The problem is simply that partisanship drives the government decision and disqualifies it in the absence of other legitimate hiring justification. The basic constitutional prohibition on government partisanship is one of kind, not degree.”).

ple, under the Elections Clause,⁵² the Court has struck down state laws that use ballots to inform voters of candidates' political positions, even when accurate and even when those political positions run counter to the state constitution.⁵³ Despite the fact that the Elections Clause expressly grants to the states the power to regulate the "time, place, and manner" of congressional elections, the Supreme Court has held that such power does not authorize any measure that is calculated to or may "dictate electoral outcomes."⁵⁴ And an attempt to "dictate electoral outcomes" is the very essence of a partisan gerrymandering claim.

Finally, the courts are applying a "norm" of partisan neutrality in a whole host of cases governing election administration and ballot access. Although initially upheld against claims of facial invalidity, courts have shown an increasing tendency to strike down such laws where it has been shown that, as applied, they have a demonstrably partisan effect.⁵⁵

C. The Constitutional Wrong is Not the Failure to Achieve a Measure of Electoral Success—It Is the Denial of the Opportunity to Compete for Success on as Equal Footing as Possible.

Bandemer held that, in showing harm, it wasn't enough to show lack of proportional representation.⁵⁶ What did have to be shown was that the map chosen by the dominant political faction consistently degrades the voting power of the rival faction.⁵⁷ This framing of what constitutes the wrong is the key to framing an effective remedy.

In *Vieth*, the plurality sought to frame the issue of a remedy in terms that had been expressly rejected by *Bandemer*'s definition of the wrong: *Bandemer* holds that mere lack of proportional representation does not make a wrong, while the *Vieth* plurality argues that only some standard of proportional representation can make a right.⁵⁸

According to the *Vieth* plurality, the Constitution permits partisan mapmakers to draw up a map that deviates from proportional representation, "so long as one doesn't go too far."⁵⁹ But it's impossible to show if a map

⁵² U.S. CONST. art. 1, § 4, cl. 1.

⁵³ *See, e.g.,* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995).

⁵⁴ *Id.* at 833–34 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and *not as a source of power to dictate electoral outcomes*, to favor or disfavor a class of candidates, or to evade important constitutional restraints." (emphasis added)).

⁵⁵ *See* Kang, *supra* note 50, at 28–35 (describing the shift in cases involving voter ID laws, cutbacks on early voting, and granting of selective voting rights to favored groups of voters).

⁵⁶ *See* 478 U.S. 109, 132 (1986).

⁵⁷ *Id.*

⁵⁸ *See* Vieth v. Jubelirer, 541 U.S. 267, 293 (2004).

⁵⁹ *Id.*

has deviated “too far” from proportional representation if there is no formula for proportional representation in the first place. The appeal of this argument is intuitive: you cannot draw a map that is perfectly proportional if you cannot draw a map that is only somewhat proportional, and you cannot draw a map that is only somewhat proportional if you cannot draw a map that is perfectly proportional. This framing of the remedy inevitably leads to an abandonment of the whole enterprise, and a rejection of the wrong.

While Justice Kennedy refused to reject the wrong, he agreed that no one had yet articulated an effective remedy: “Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards” for saying when partisan gerrymandering is too partisan.⁶⁰

The problem persists because the courts have struggled to do what the *Vieth* plurality asked them to do: find a remedy that allows *some* partisanship in our political maps, so long as it does not go “too far.” The *Vieth* plurality argues that the insolubility of their own “how partisan is too partisan” riddle means that partisan gerrymandering is not a wrong after all (or, at least, not a wrong that the courts can or should address).⁶¹ But the problem is not with *Bandemer’s* understanding of what is wrong, but with *Vieth’s* notion of the proper remedy.

IV. THE PROPER REMEDY FOR PARTISAN GERRYMANDERING IS NOT TO REQUIRE MAPS THAT WILL PRODUCE PROPORTIONAL REPRESENTATION BETWEEN RIVAL POLITICAL PARTIES—IT IS TO REQUIRE MAPS THAT ARE AS NEUTRAL AS POSSIBLE BETWEEN RIVAL POLITICAL PARTIES.

The key to the issue of remedy is to realize that proportional representation cannot be the remedy if the wrong does not consist of the *lack* of proportional representation.

What’s needed is a rule that is fair to rival parties but does not try to dictate electoral outcomes. That does not mean the pursuit of some illusory formula for drawing a map that gives each side some predetermined “fair share” of safe seats. It means making each side fight it out on genuinely neutral territory as much as possible, and to allow the dominant party to dominate only the smallest number of districts possible, and in those districts only as little as possible.

In short, the answer to how to design a level playing field is not to allocate a “fair share” of un-level playing fields to each team. The answer is to make as many of the playing fields as level as possible, and to minimize any tilt in the remainder as much as possible.

⁶⁰ *Id.* at 307–08 (Kennedy, J., concurring).

⁶¹ *Id.* at 305–06.

A. *Nothing Less Than Maximum Achievable Neutrality Will Work*

First, we need to acknowledge that anything less than maximum achievable neutrality will not change anything. In this age of partisan voters, any district that contains even the slightest partisan advantage is a district whose electoral outcome is practically assured. Any partisan advantage in a district virtually dictates the outcome of the election in that district.

Accordingly, any remedy that relies upon some theory of proportional representation is a constitutional dead end, for two reasons: first, as already shown, because no one can agree on such a formula to begin with. And, second, because even if we were to agree on a formula for proportional representation, drawing districts in conformity with such a formula means that voters will still be assigned to districts where the composition of the district virtually determines the outcomes of elections in those districts. After all, if a theory of proportional representation were actually to be adopted and applied, it would only be worth the effort if it could produce outcomes that were predictable and reliable.

It might appear that something had been done to make the problem “better” if we were to have significantly more districts where the partisan advantage was in the neighborhood of 52/48% rather than 58/42%, but that appearance would be completely deceiving. The outcomes would still be the same. In every such district there would still be voters who would be consistently disadvantaged on the basis of their politics, only it would be an even larger percentage of consistently unsuccessful, and frustrated, voters. This would not empower voters whose votes are currently wasted in districts that favor another party’s voters—it would only serve to frustrate more voters, and more often. Republicans in Democratic districts, Democrats in Republican districts, and independents everywhere already labor in vain—making electoral outcomes both reliably certain *and* closer only adds the curse of Tantalus to that of Sisyphus.

Half measures that are the product of excessive timidity will not do. The problem has the character of an existential dilemma: not to decide to banish as many partisan-leaning districts as possible—the only way to prevent a dominant party from enjoying any more dominance than it deserves—is to decide to have as many partisan-leaning districts as possible, and thereby to dictate electoral outcomes as much as possible.

B. *How a Rule of Maximum Partisan Neutrality Would Work*

We’ve seen how the current policy of the law works—with the courts deferring to partisans to allow them to make their maps as partisan as they can get away with. And we know that such a practice violates the Constitution by consistently degrading the electoral prospects of the disadvantaged party. And we can see how a policy of “partisan lite” would work—the courts would no doubt congratulate themselves for having “finally done

something to fix” the problem, when in fact they will not have fixed anything but probably will have made things even worse. And we can see how a policy of abandoning the effort altogether, and returning to the days of non-judiciality, would definitely make things worse, as partisan mapmakers would finally be given the “green light” to drop all pretense at neutral explanations for partisan maps and make their maps even more partisan than they are now.

But how would a rule of maximum achievable neutrality work? First, drawing a district map to minimize partisan advantage as much as possible is relatively easy to do. In fact, with modern computer-assisted districting technology, it’s child’s play.

The problem of achieving some predetermined balance, by rigging the district lines in a sufficient number of districts in order to produce a sufficient number of predetermined outcomes, is not a problem of how to design the districts—it is a problem of how to agree on the predetermined number of districts to allocate to each side.

However, the problem of minimizing partisan advantage in any given district is easy: simply take the same technology that partisan mapmakers currently use to draw a district with a predictable and reliable partisan advantage and use it to produce a district that is as predictably and reliably dead even as possible—where neither party will have any partisan advantage whatsoever.

In some states, the number of genuinely independent, swing voters might mean that a given district only needs to be 45D/45R in order for the district to be maximally competitive. In others, it might have to be 49D/49R. It doesn’t matter—the parties know, and the adversarial process is remarkably well suited to ferreting out the truth when one side’s experts claim that their map does a better job than the other side’s map.

All that is necessary is to apply this policy in the largest number of districts possible, and then to apply the same policy in the remaining districts—so that the smallest number of districts will have any partisan advantage, and in each of those districts the partisan advantage will be as small as possible.

In some states, the number of genuinely neutral districts that can be created in this way will be more than can be created in others, based on the partisan advantage in the population as a whole. But the result will be that every state will have some districts where everyone’s vote counts as much as possible, and the smallest number of districts where the outcome is predetermined. We can’t say that now, and, unless we insist on a policy of maximum partisan neutrality, we never will.

Meanwhile, in every state the dominant party will still dominate the state’s politics, which is as it should be. But it will have to earn its legislative majority every election. And in every election at least some of the dominant party’s candidates will win or lose their elections on the basis of how their fellow partisans—the ones from the “safe seats” that cannot be avoided, as

well as the ones from genuinely competitive districts—use (or abuse) their majority status. This is also as it should be, and, again, we can't say that now.

Indeed, a rule of maximum partisan neutrality would have a uniquely positive effect in those states where the electorate is highly polarized and yet very closely balanced—the very states where the political “whiplash” effect is greatest whenever there is the slightest shift in the balance of political power. In such states it would be possible (because of the close partisan balance in the population as a whole) to produce an overwhelmingly large percentage of districts with no partisan advantage, and only a very small number of districts with the remaining, irreducible degree of partisan advantage. Those are just the kind of districts that a polarized electorate needs, because they will produce just the kind of representatives such a state needs—those who can win if the other candidate is too partisan, and those who will have an edge if they have the ability to appeal to voters who usually vote the other way.

We should acknowledge that this is not the reason *why* the courts should impose such a rule: the Constitution assumes that the people will choose representatives who can compromise, but it doesn't insist on it. The people have the right to vote for hardliners if they want. The constitutional reason for the rule is to prevent partisans from stacking the electoral deck in their favor. The point is that what the Constitution requires in the way of government neutrality in electoral law will also give us what the framers of the Constitution knew we would need in order to govern wisely. The current world of partisan gerrymandering is giving us just the opposite of what we need.

Litigation in this area can also be expected to be much easier to conduct, and easier to avoid. As noted, strict scrutiny will make short work of pretextual explanations for partisan advantage. Also, once it is clear that the Supreme Court means it when it mandates maximum partisan neutrality, litigation in this area would quickly take on the character of judicially supervised “baseball-style” arbitration. Each side would have every incentive to make their best “offer”—to produce the best combination of maximum partisan neutrality, plus as many features that satisfy other “legitimate governmental criteria” and “traditional redistricting principles”—on the understanding that the courts would accept a better “offer” from the other side. Some maps will be politically “prettier” than others in which event, as between equally neutral maps, the prettier map should win.

Finally, nothing in such a ruling would require any state to adopt any new laws or change its procedures in any way. The states can continue to produce their maps in whatever way they choose—independent commissions, partisan legislatures, whatever. They only need to know that the Supreme Court means it when it says that partisan advantage must be eliminated to the maximum extent possible.

V. CONCLUSION

No one can argue with the proposition that a political party should not be allowed to use its power over the government to enhance or extend the political power of that party by deliberately weakening the voting power of a rival party. Parties can be partisan, but government must not.

There's no point in blaming the politicians for our predicament. They can't help themselves. And there's no point in blaming the voters: the Constitution is needed to protect the voters we've got, not the ones we want. And there's no point in blaming the courts—unless they refuse to recognize that the Constitution will continue to be violated by partisan gerrymandering until the courts do what only *they* can do, and that's put a stop to it.

