A Discernable and Manageable Standard for Partisan Gerrymandering

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Abstract

The case of *Veith v. Jubelirer* (2004) challenges us to find a standard for partisan gerrymandering that is judicially discernable and manageable. Without such a standard even the most egregious partisan gerrymanders cannot be effectively challenged. However, we argue that the way to find a suitable standard is not to embark on a quest for a "new" standard. Rather it is to take the existing valid measures that science gives us, and show that these can be grounded in constitutionally protected rights. Using recent results in social choice theory, we show that the existing partisan symmetry standard can be derived from an individual right to equal protection. We also show that the existing technology for measuring partisan symmetry can provide a judicially manageable test for partisan bias.

I. Introduction

The Supreme Court's decision in *Vieth v. Jubelirer* (2004) challenges us to find a viable standard for judging political

gerrymandering cases. Although the Court did not come to any joint opinion, a majority of Justices indicated that there was currently no viable judicial standard for judging partisan gerrymandering cases. Justice Scalia, joined by three other Justices, argued that no such standard could exist in principle and that partisan gerrymandering was a non-justiciable "political question". Justice Kennedy argued that no standard currently existed, but that one might in principle be found. As a result, until the Court is convinced that a suitable standard has be found, there is no possibility of a partisan gerrymandering case succeeding. This means that in practice (though not in principle) partisan districting is a non-justiciable political question. In the districting round following the *Vieth* decision, many states have pursued maximum partisan advantage, as we will see later in this paper.

Given the demand for a standard, it might be tempting to go looking for a new standard for partisan gerrymandering. Such a strategy, however, would be unfortunate. A decision by the Supreme Court may change the law, but it does not change what partisan bias is. What is needed is a correct definition and measure of partisan bias. We will argue that social scientists are quite capable of measuring partisan bias reliably (see King et al. 2006; Grofman and King 2007). Appropriate methodology has

been developed, peer-reviewed and implemented, such as the partisan symmetry standard (Gelman and King 1994b). However, what is needed is not simply a *scientific* standard of partisan bias; what is needed is a *legal* standard. It is not enough to show that a districting scheme treats parties differently; it is necessary to show that this represents a violation of the constitutional rights of individual voters. As Justice Kennedy puts in in his opinion on *LULAC v. Perry* (2006), what is lacking is "a reliable measure of *unconstitutional* partisanship" (italics mine).

The problems that come with trying to invent a new standard, as opposed to making use of the existing science, can be illustrated by considering the new standard recently proposed by Stephanopoulos and McGee (2015). Although the authors claim that this is a measure of the partisan symmetry standard discussed in *LULAC v. Perry* (2006), it is actually something quite different.[1]

[1] The reason the partisan symmetry approach of Gelman and King (see King et al. 2006) was a major advance was that it separates symmetry/bias (whether the districts treat the two parties differently) from responsiveness (how much do the districts advantage the larger party, whoever that may be). The efficiency gap standard, however, once again conflates these two things. Symmetry requires that if the Democrats get a certain number of seats for (say) 60% of the vote, then the Republicans must get the same number if they get 60%. It does not matter if the party with 60% gets seven seats out of ten, as opposed to six or eight, as long as both parties get the same if they attain a 60% vote share. The efficiency gap standard, however, requires that a party must receive an additional 20% of the seats for every 10% of the vote it receives over 50% – if it gets 60% of the vote, it must get 70% of the seats. The problem is that there is no obvious basis – in either law or equity – for demanding this level of responsiveness. In fact there are very good reasons why different states should have different levels of responsiveness – if there are geographical concentrations of partisans or majority-minority districts required by the Voting Rights Act, then there will be some very safe districts that will lead to low responsiveness. This will be misinterpreted by the efficiency gap measure as bias.

The new standard they propose is based on what they call the "efficiency gap" – the idea that the number of "wasted votes" for each party should be equal.[2] The problem is that it is not clear how is standard can be linked to any constitutionally protected right, apart from the general fairness argument that the authors make. Furthermore, it is not obvious that each party having an equal absolute number of wasted votes is uniquely fair. It could equally well be argued that parties should waste the same share of their vote – so if one party has twice the votes of the other, it should waste twice as many. Or it could be argued that the parties should waste the same number of votes for every seat they receive. These standards lead to very different results. If a plaintiff was to argue based on the Stephanopoulos and McGee efficiency gap standard, the defendant could simply reply that there are many equally plausible standards.

Thus there is no need to invent a new definition or measure for partisan bias, as social scientists are already quite capable of defining and measuring this. What is required is to show that the partisan bias we measure represents a violation of a constitutionally protected right. In the plurality opinion on

[2] A wasted vote is defined as any votes a party receives over 50% in a district it wins, plus any votes it receives in a district it loses.

Vieth v. Jubelirer (2004), Justice Scalia challenges the existing arguments for the unconstitutionality of political gerrymandering in a fundamental way. The argument that partisan gerrymandering is unconstitutional has been based on the assumption that drawing districts to dilute the influence of a political group violates the Equal Protection Clause of the 14th Amendment. Justice Scalia, on the other hand, asserts that it is only individual voters, and not political groups, who have a right to equal treatment under the Equal Protection Clause. It this is so, then the question of whether there is political gerrymandering appears to be constitutionally irrelevant. Justice Scalia's objection appears decisive because the Constitution certainly does not enumerate a right of political groups to equal treatment.

Of course, Justice Scalia was only writing for a plurality of Justices, not for the Court. However, Justice Kennedy – the pivotal fifth Justice in the case – accepted the plurality's analysis of previously proposed standards for partisan gerrymandering. In particular, Justice Kennedy agreed with Justice Scalia's assessment of the plaintiff's proposed standard (that a majority of voters should be able to elect a majority of voters), stating that "There is no authority for this precept" (2004, 308). He also agreed that even if this standard could be

constitutionally justified, there was no way to derive a judicially manageable standard from it. Furthermore, he accepted that the plurality had demonstrated "the shortcomings of the other standards that have been considered to date" (2004, 308). Justice Kennedy opinion differs from that of the plurality in that he does not foreclose the possibility that a viable standard may be found. However, he endorses the plurality's analysis of previously proposed standards. Therefore it Justice Kennedy is to be convinced that a standard is viable, it is absolutely necessary to address the objection made by Justice Scalia for the plurality. We need to show that the standard we propose is both judicially discernable and manageable.

Fortunately we have the tools to address the challenge posed by Justice Scalia. We can show that the majority rule standard can be derived strictly from the equal treatment of individual voters, without relying on any argument about group rights. This provides a response to Justice Scalia's objection.

The result is based on recent work in mathematical voting theory published after *Vieth v. Jubelirer* (2004). The consequence of this is that partisan gerrymandering violates individual, and not just group, rights. Thus we can provide a constitutional justification for partisan gerrymandering claims based on

Article 1§2 of the Constitution and the Equal Protection Clause of the 14th Amendment.

Once we have shown that the majority rule standard can be derived from the Constitution, it is necessary to show that it can yield a judicially manageable standard. We can do this by showing that applying the majority rule standard nationally logically implies partisan symmetry at the state level. There already exists an established, peer-reviewed technology to measure partisan symmetry (Gelman and King 1994b, 1994a, 1990). Indeed this measure was proposed in an amicus brief for *LULAC v. Perry* (2006) and discussed in the judgment to that case. Justice Kennedy did have some reservation about the measure, but we will argue that these can be addressed. Indeed, we can demonstrate the tractability of this measure by calculating it for all states in this paper.

This paper proceeds in three stages. First we show that it is possible to a find a judicially discernable standard for partisan gerrymandering. That is, we can derive such a standard from the constitutionally protected rights. We can show that the right to equal protection of individual voters implies the majority rule principle – a majority of voters should be able to elect a majority of representatives. Secondly we show that the

majority rule principle logically implies the partisan symmetry standard. We also consider various objections that have been made to it by various Justices. Finally we briefly show how the partisan symmetry standard can be implemented. Thus, instead of embarking on a quixotic quest for a new standard, we can show that an existing, well-proven measure can be grounded in the Constitution.