(Mis)Understanding Gerrymandering: Escaping the Political Thicket through Fair Representation

Drew Spencer and Cameron Ferrante

INTRODUCTION

In *Colegrove v. Green*, the United States Supreme Court firmly refused to entangle itself in the political process of redistricting, offering its famous pronouncement: “Courts ought not to enter this political thicket.” However, less than twenty years later, in *Baker v. Carr* the Court threw its hat into the redistricting arena. In the more than 50 years since its entry into the “political thicket,” the Court has repeatedly tried and failed to locate a “judicially discernible and manageable standard” of the constitutionality of political gerrymanders.

Scholars and judges have proposed myriad judicial standards to no avail. Common to each of these proposals is a failure to acknowledge what political gerrymandering actually is and its relation to single-winner districts (“SWDs”) holding plurality elections. Ending political gerrymandering requires an approach which achieves substantive representation of cohesive political groups without inhibiting competition. This paper will argue that fair representation voting methods in multi-winner elections are the only such solution, and any other judicial standard would mire judges in the political thicket and present inescapable contradictions.

I. WHAT IS GERRYMANDERING? VOTE DILUTION & ENTRENCHMENT

Partisan manipulation of district lines has long been problematic in the United States. The Supreme Court defines a “political gerrymander” as “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” This definition concisely encompasses both what gerrymandering is and what it is not.

Gerrymanders are created for two differing purposes. Legislatures may seek to either minimize the political representation of an opposing party through “vote dilution” or to preserve the status quo by drawing districts which minimize competition in what I will call “entrenchment.” Vote dilution and entrenchment are the twin pillars of political gerrymandering and are what any judicial standard must identify and prevent. Too often, however, courts and critics address only one or the other or lose sight of these issues altogether.

After the 2010 census, both Pennsylvania and Maryland drew what are widely considered some of the most heavily gerrymandered congressional districts in the United States. In Pennsylvania, the Republican-controlled state legislature adopted a district map which gave them control over 13 of 18 congressional districts, though an analysis of voting patterns suggests that 51% of the state’s voters would prefer a Democratic house. Maryland represents the opposite extreme. About 61% of Maryland voters would prefer a Democratic house, and yet Democrats now have solid control over seven of eight (87.5%) of congressional districts.

The invidious minimization of political representation is not the only form of gerrymandering. Incumbents also regularly use gerrymandering to preserve political power through entrenchment. For instance, after the 2000 census, the California legislature, which has a history of political gerrymandering, engaged in a flagrant bipartisan
gerrymander. California’s Democratic and Republican parties negotiated a district map favorable to each party. As a result, neither party lost or gained any seats in the state legislature until November 2008.

Understanding gerrymandering in the context of its dual purposes makes it easy to recognize what gerrymandering is not. However, all too often, critics and courts are consumed with the outward appearance of impropriety and fail to address the actual harms posed by partisan gerrymanders.

a. WHAT ISN’T GERRYMANDERING? STRANGE SHAPES & UGLY DISTRICTS

Despite the frequent association of gerrymandering with bizarrely shaped districts and poor aesthetics, both merely provide circumstantial evidence of legislative wrongdoing. Drawing oddly-shaped districts is neither a goal of gerrymandering nor is it necessary for a map to be gerrymandered. It is not difficult to draw district maps that unfairly favor one political faction or entrench incumbents using attractively compact districts.

Nevertheless, identifying gerrymanders based solely on district aesthetics is a pitfall into which even the Supreme Court has fallen. In both *Gomillion v. Lightfoot* and *Shaw v. Reno*, the Supreme Court identified unconstitutional racial gerrymanders based principally on district shapes. The Court’s emphasis on subjective assessments of appearance detracts from the fundamental issue of the effect of such districts on representation and undercuts the need for objectivity in judicial standards. The Supreme Court was content to judge a book by its cover and was widely criticized for doing so.

The failure of the Court in *Shaw* underscores the need for a stable, objective standard to assess political gerrymandering. However, the Supreme Court’s attempts to devise a more objective standard for political gerrymandering have proven unsuccessful.

II. THE CATCH-22 OF SINGLE-WINNER DISTRICTS

An underlying flaw is common to all of the Supreme Court’s search for a standard of “fairness in representation.” The Court fails to acknowledge the limitations inherent in single-winner district elections. While SWDs are common in United States’ elections, they are a historical novelty which are by no means ideal. Many critics have acknowledged the comparative benefits of multi-winner election methods.

Single-winner districts are problematic as a gerrymandering remedy because they are unable to simultaneously maximize electoral competition and undiluted representation. Utilizing SWDs to remedy vote dilution requires creating safe districts, itself a form of entrenchment, which undermines the ability of voters to affect elections. Conversely, remedying entrenchment requires dispersing minority party voters across many districts, thereby diluting their actual voting power. The inability of SWDs to address the pillars of gerrymandering necessitates experimentation with different remedial election methods.

a. EFFECT ON INDEPENDENT REDISTRICTING SCHEMES

This Catch-22 is not limited to the intentional gerrymandering of incumbent legislators. Any organization or body attempting to design an election around SWDs will be faced with the same dilemma. This includes an independent redistricting commission, such as those established in Arizona and California. Even commissions which have taken pains to isolate themselves from political influence must strike a balance between electoral competition and proportionality in representation. The SWD dilemma requires independent commissions to either create safe seats to promote minority representation, disperse voters to promote competition, or to draw districts based entirely around aesthetic principles,
which would likely do neither. Where any commission decides to set that balance will invariably result in criticism from those affected and undermine the perceived impartiality of the body. 

Given the difficulties described, the Supreme Court and states must look to different electoral methods to remedy political gerrymandering.

III. FAIR REPRESENTATION METHODS AS A MEANS OF ESCAPE

a. THE PROMISE OF FAIR REPRESENTATION

The ideal way to resolve the single-winner district dilemma is to simply stop using single-winner districts. As Reihan Salam argued last year, “If our goal is to create legislative districts that truly reflect their electorates, our best bet would be to give up on single-member districts altogether and replace them with multi-member ones.” FairVote advocates for the adoption of “fair representation voting methods” which use multi-winner elections to provide representation for cohesive minority groups while also increasing electoral competition and preventing vote dilution.

Fair representation voting methods refer to American, candidate-based form of proportional representation. Fair voting uses multi-winner districts (“MWDs”) coupled with ranked choice voting, cumulative voting, or similar candidate-based voting methods to provide greater proportionality in representation. Using fair voting methods, any candidate who receives above a certain share of the vote, the “threshold of election,” is guaranteed election. For instance, in a three-seat race, any candidate who receives the support of 25 percent of voters is guaranteed election. Under some variations, candidates may win election with lower shares of the vote. As a result, the majority still wins the most seats, but minority groups also have the power to elect candidates of their choice.

Fair voting methods have a long history in the United States and are used in more than 100 jurisdictions across the country. Illinois adopted fair voting for its state legislature shortly after the Civil War to ameliorate severe partisan polarization in the state. Illinois voters successfully used fair voting methods for more than 100 years and have recently been fighting for its reinstatement. Cambridge, Massachusetts and Minneapolis, Minnesota use ranked choice voting to elect city councils and school boards. In both areas, fair voting has increased minority representation. Fair voting methods have also been successfully implemented to remedy racial minority vote dilution in Alabama, California, New York, North Carolina, and Texas.

Fair voting methods would effectively combat both pillars of political gerrymandering without succumbing to the SWD dilemma. Unlike SWDs, fair voting methods do not rely on districting to remedy vote dilution or increase electoral competition. Instead, fair voting methods rely on electoral systems to resolve these problems. Fair voting methods promote competition by using MWDs, meaning that candidates do not have to finish “first” to win their seats. MWDs increase competition as candidates can represent smaller groups of voters, not just the largest voting bloc. Fair voting methods also remedy vote dilution by fairly representing multiple groups in a single district—most seats to the majority and a fair share to everyone else. Each fair voting method allows a distinct group of voters to elect each candidate. As a result, voters effectively “self-district” based on their candidate preference. A large group cannot be “packed” because it will simply elect more representatives in the multi-winner district. A smaller group cannot be “cracked” because the larger districts will remove opportunities to easily divide them with district lines.

Fair voting methods offer a common sense solution to the problem of political gerrymandering. Using fair voting, courts and legislatures are able to address both vote
dilution and electoral competition concerns while also providing voters a greater chance to elect a candidate of choice.

b. THE JUDICIAL IMPASSE

For nearly thirty years, the Supreme Court has struggled to define a workable standard for unconstitutional partisan gerrymandering. The Court’s difficulties arise from its inability to envision an electoral system outside of the SWD paradigm. Likely as a result of its continual encounters with minority vote dilution in at-large elections, the Supreme Court has consistently favored SWD remedies in voting rights challenges.31 Ironically, this preference is what keeps the Court trapped within the political thicket. As long as the Court continues to view gerrymandering through the lens of SWDs, it will be required to make conscious decisions between fostering competition and promoting fair representation. These decisions, in turn, create the impression that the Supreme Court has made a value judgment favoring one side of a partisan dispute. As a result of its unwillingness to look outside the scope of SWDs, the Supreme Court is compelled to remain embroiled in the zero-sum partisan battle foreseen in Colegrove.

This is not to say that courts should not recognize a cause of action for the most flagrant abuses of the SWD system. For example, the Court corrected a major injustice by requiring districts be drawn with substantially equal population per representative. The failure of these “one person, one vote” cases to achieve the sort of equality of voting power that they promised does not change that.32 Similarly, a standard might be developed that could prohibit one political faction from gerrymandering another out of representation entirely or prohibit a minority faction from controlling an entrenched majority of seats. Doing so would correct an injustice, but it would leave untouched many of the most egregious gerrymanders, and it would require the Court to make a judgment as to which sorts of manipulations rise to the level of a constitutional violation, and which do not.

The path of escape is plain. Members of the Court have acknowledged the use and benefits of multi-winner elections in the past.33 Were the majority to acknowledge the promise of multi-winner elections using fair voting methods, they would no longer have to choose between electoral competition and fairness in representation. The Court could escape the political thicket and return to assessing the constitutionality of election processes rather than outcomes. However, given the Court’s present disagreement over the justiciability of partisan gerrymandering claims, as well as the significant ideological shift it has undergone in the past fifty years, the it will not likely undertake the significant structural reforms inherent in transitioning from the SWD paradigm to fair representation voting methods.

c. THE NEED FOR CONGRESSIONAL ACTION

The United States Congress must act to implement fair voting methods to remedy the harms of political gerrymandering. Congress has the authority under Article I, Section 4 of the Constitution to dictate the method by which its members are elected. Were Congress to require that states elect senators and representatives using fair voting methods, states would have an incentive to implement them at the state and local level as well.

The anti-competitive effects of political gerrymandering have led to a marked decline in the competitiveness of congressional elections. The ability of state legislatures to effectively choose winners and losers through redistricting has led to unprecedented polarization in the House of Representatives.34 However, Article I, Section 2 of the Constitution gives the “People” of the United States the right to “fair and effective
representation,” meaning that the states have no authority to dictate the membership in the House.\textsuperscript{35} If, as we have seen, the Supreme Court is unwilling to provide a framework in which political gerrymanders can be found unconstitutional, Congress must set the example.

Congress has the authority to require fair voting methods for congressional elections. The Supreme Court has stated that the Elections Clause, Article I, Section 4 of the Constitution, does not grant states the “power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”\textsuperscript{36} Thus, where states effectively dictate who wins and who loses through a political gerrymander, Congress has the ability and the impetus to act. The only obstacle standing in its way is the need to repeal its 1967 mandate for the use of SWDs, originally adopted to promote proportionality in representation.\textsuperscript{37} Requiring the use of fair voting methods to elect members of congress would effectively combat the influence of political gerrymandering and set a national standard for fairness in representation.

IV. CONCLUSION

For more than fifty years, the Supreme Court has been lost in the political thicket, unable to corral district maps drawn to dilute minority voting power or entrench the political status quo. Solving political gerrymandering first requires understanding its dual purposes. From that understanding comes the realization that no elections system reliant on single-winner districts can adequately remedy political gerrymandering. Fair voting methods provide the only path for the Supreme Court to extricate itself from the thorns of the political thicket. However, the unwillingness of the Court to explore alternative election methods necessitates Congressional action. Congress has the power to require fair voting methods for congress and doing so would combat gerrymandering, set a national precedent, and provide the Supreme Court with a framework for “fairness in representation.”

\begin{itemize}
\item[1] 328 U.S. 549 (1945).
\item[2] Id. at 556.
\item[8] The confusion seen when dealing with vote dilution and entrenchment may result from the fact that they are really two separate purposes achieved using the same mechanism, namely using the districting process to fracture cohesive voting blocs.
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Republican and Latino); 25 number of competitive seats).

the limited number of majority (2012) remedy for voting right (1994) (Thomas, J., concurring) (noting the shortcomings of single upon geographically determined constituencies…

"Gerrymandering is a natural product of the single (objective…

efficient and straight voting and other non multi-

Co., Inc.) (1998) (containing results of historical congressional elections indicating the frequent use 22

of the Supreme Court on appearances alone in Representation" &


23 See Holder v. Hall, 512 U.S. 874, 912 (1994) (Thomas, J., concurring) ("In principle, cumulative voting and other non district-based methods of effecting proportional representation are simply more efficient and straight-forward mechanisms for achieving what has already become our tacit objective…"); Richard L. Engstrom, The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation, 1975 ARIZ. ST. L.J. 277, 282 (1976) ("The essential problem is that any districting system, when combined with winner-take-all elections is discriminatory to some extent because some vote dilution will inevitably result from residential dispersion or concentration of a group’s voting strength."); Rush, supra note xiv, at 683 ("Gerrymandering is a natural product of the single-member plurality system of representation built upon geographically determined constituencies…"); see also Holder v. Hall, 512 U.S. at 908-12 (1994) (Thomas, J., concurring) (noting the shortcomings of single-winner district elections as a remedy for voting rights violations).

24 See Bruce Cain, Redistricting Commissions: A Better Political Buffer?, 121 YALE L. J. 1808, 1828 (2012)(noting that California’s Citizen Redistricting Committee map received criticism about both the limited number of majority-minority Latino districts as well as minimal improvement in the number of competitive seats). See also Zieja, supra note xv at 20.

25 See id. at 1824 (noting criticism of California’s Citizen Redistricting Committee map from Republican and Latino); Id. at 1829 (noting the presence of partisan suspicion of California’s Citizen
Redistricting Committee despite the lack of evidence of bias and extraordinary safety measures undertaken).


28 Id.


33 See *Holder v. Hall*, 512 U.S. 874, 908-912 (1994) (Thomas, J., concurring) (discussing the disadvantages of majority-minority districts when compared to multi-winner districts and using cumulative voting as an example).


37 Richie & Spencer, *supra* note 29 at 1008.