

Forty Years in the Political Thicket: Evaluating Judicial Review of the Redistricting
Process Since *Baker v. Carr*

Nathaniel Persily¹

On this fortieth anniversary of the Supreme Court's establishment of the one-person, one-vote rule, it seems a fitting time to evaluate the entire enterprise of judicial involvement in redistricting. This paper attempts to identify consistent themes or tensions in the caselaw in order to bring to the surface the subterranean pressures in the jurisprudence that find periodic expression in Supreme Court opinions. By reconceptualizing redistricting caselaw along these different dimensions, the first part of this paper takes a step back from the doctrinal debates to try to array the many decisions in this area along three principal dimensions: rules versus standards, activism versus restraint, and individual versus group rights. In the second part, I briefly discuss each subset of redistricting caselaw and describe what I think are relatively agreed-upon consequences that have resulted from the courts' involvement in redistricting. I pay particular attention to the following well-documented effects: the effect on representation of certain groups (opposition parties, urban and suburban voters, racial minorities), the effect on intradistrict competition and competition for control of state legislatures, and the effect on the racialization of partisan conflicts.

Several caveats are in order at the outset. First, it is difficult to place sole blame or grant sole credit to the judiciary, as an institution, for any of the consequences that result from the development of redistricting law. Congress, the Executive Branch, and

¹ Assistant Professor of Law and Political Science, University of Pennsylvania Law School.

state governments all play important roles in implementing court decisions, setting the ground rules for judicial intervention (as with the Voting Rights Act), or reacting to court decisions with new methods to achieve political aspirations that remain constant in the face of doctrinal change. This paper is somewhat judiciary-focused, as its task is primarily to discuss the caselaw, but that focus should not detract from the obvious and overarching significance of political actors to the redistricting process. Second, this paper may make the same mistake as many written on this topic: namely, inappropriately grouping a wide array of cases under the heading of redistricting and thereby obscuring the important differences between litigation under the Voting Rights Act, different provisions of the U.S. Constitution, and state laws. Although some of the conclusions herein can be generalized across redistricting law, others may be more properly compartmentalized as specific to the constitutional or statutory provision at issue. Finally, by attempting to fit the caselaw into neat matrices or conceptual boxes this paper may go too far in trying to draw bright lines where there really exist shades of gray. Redistricting law has only gotten more confusing and internally inconsistent in each of the cycles since *Baker v. Carr*. By attempting to generalize about the caselaw in this area, this paper necessarily glosses over some important complexities.

II. The Multiple Dimensions of Redistricting Caselaw

The number of ways to analyze the redistricting caselaw is limited only by the number and ingenuity of law professors seeking to gain tenure by writing in this area. On their own, the redistricting cases have almost come to occupy a subdiscipline in American law. By paying attention to three dimensions of the relevant caselaw, this

paper does not pretend to provide an exhaustive list as to how the cases can be sliced and diced. Other possible arrays would include a liberal-conservative dimension, a textualist-interpretivist dimension, a representation-competition dimension or even a race-party dimension. However, arraying the caselaw along the dimensions chosen here—rules-standards, activism-restraint, individual-group rights—may help portray and explain the divisions on the current Court and situate the current state of the law along jurisprudential continua upon which the Court has shifted ever since it first ventured into this political thicket.

A. Rules versus Standards

In the redistricting area as in other areas of law,² different judges (and therefore different precedents) will gravitate toward hard rules, at one end of the spectrum, or mushy standards, at the other. Whereas those who favor rules might prefer a rigid trimester framework for abortion law, for example, standard-lovers might prefer an “undue burden” standard. Whereas some might prefer a First Amendment rule under which courts strike down laws under the Free Exercise Clause only when they intentionally discriminate against a particular religion, others might prefer a standard in which “substantial burdens” on religious practice require a showing of compelling governmental interest and narrowly tailored means. Indeed, the text of the Constitution itself provides a variety of standards: “republican form of government,” “unreasonable searches and seizures,” “due process,” “excessive bail”, and “cruel and unusual

² See, e.g., Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22 (1992); Carol M. Rose, *Begin Crystals and Mud in Property Law*, 40 *Stan. L. Rev.* 577, 590-93 (1988); Cass R. Sunstein, *Problems with Rules*, 83 *Cal. L. Rev.* 953 (1995); Pierre Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379, 379-430 (1985).

punishment”. It also sometimes provides clear rules: age qualifications for office, the requirement that each state have exactly two senators; requirement of a two thirds vote to overturn a veto, that all criminal trials be done by jury, or that slavery be banned.

So too with redistricting law, a threshold fight in the development of the caselaw is whether to adopt a rule or employ a flexible standard. Should the Court adopt a requirement of perfect population equality (“as equal as practicable” using the “best census data available”) among districts or a seemingly more flexible standard – such as “substantial equality” – to review claims of malapportionment? Should claims under Section Two of the Voting Rights Act be limited by a rule that the minority community must constitute a numerical majority in a single-member district to have a claim or should a more flexible standard that focuses on “minority influence” govern the process of review? Should retrogression under Section Five depend on a mechanical application of a rule that prohibits a decrease in the number of majority-minority districts or on a more flexible standard that gives states greater latitude in preventing a decrease in minority influence, broadly defined? And should partisan gerrymanders be held unconstitutional if they violate some rule of majoritarianism or proportional representation or only if they cannot surmount a flexible standard of “consistently degrades a . . . group of voters’ influence on the political process as a whole”?

There are advantages and disadvantages to both approaches, of course. Rules usually provide for greater predictability, may be cheaper and more efficient to apply, and allow for less discretion or bias to creep into the decision making process. However, rules also run the risk of producing irrational results based on insensitivity to unique applications or inability to adapt to the facts of a particular case. Rule-making may also

be impossible in some areas of redistricting law where crystalline prescriptions may be impossible to formulate ex ante.

Standards allow for greater attention to the facts of a given case and greater flexibility for the decision maker. As a result, they may lead to less uniformity in the caselaw, greater potential for bias, and less predictable results. However, the articulation of a standard may sometimes precede the codification of a rule. In other words, sometimes the Court may dip its toe into the shallow end with a standard before diving head first into the deep end with a rule. The Court's decisions in the one-person, one-vote cases and the constitutional race-based vote dilution cases as described below may illustrate this approach. In the one-person, one-vote cases, the Court moved from an earlier standard of population equality to (seemingly) more rigid rules that forbid any unjustifiable deviations. In the constitutional racial vote dilution cases that preceded the 1983 Amendments to the Voting Rights Act (*Whitcomb v. Chavis*, *White v. Regester*, *Mobile v. Bolden*), the Court moved from a flexible, totality-of-the-circumstances standard to a rule that required a showing of discriminatory intent and effect.

Of course, the rules-standards dimension represents a continuum, not a dichotomy. Many rules in the redistricting arena have some standard-like flexibility built into them. Even the one-person, one-vote rule itself, insofar as it allows for departures from perfect population equality for some legitimate state interests (e.g., protection of political subdivision boundaries) suggests the one-person, one vote "rule" is somewhat more standard-like than its name suggests. That is all the more true in the context of non-Congressional redistricting, as noted below. And insofar as demonstration of discriminatory effect allows for some kind of standard-like evaluation of influence on the

political process, the rule preventing race-based vote-dilution is not as mechanical as one might first expect.

Nevertheless, one can place redistricting precedents, and for that matter, the individual Justices' opinions in these cases, along a rules-standards continuum. It is important to note at the outset, however, that the preference for rules over standards does not fall along predictable liberal conservative lines, nor does a given Justice's preference for rules or standards in one context of redistricting necessarily translate into a preference for the same in another context. Justice O'Connor, for example, whom many see as the queen of judicial standards and case-by-case adjudication, would stick to a hard and fast rule of non-justiciability in partisan gerrymandering cases. And Justice Scalia, who might be the king of rule-bound adjudication, would allow for the new, flexible standard of retrogression under Section Five of the VRA as detailed in *Georgia v. Ashcroft*.

As the discussion of the cases below reveals, in few of the subcategories of redistricting caselaw can we declare a clear winner between rules and standards. Rather, each new case presents a challenge to the courts as to whether to pick the language of standards or rules from the prevailing precedent. Should the one-person, one-vote rule require strict population equality or should reasonable departures be allowed for particular state interests? Is the notion of majority-minority status (i.e., over 50%) of a district in some way dispositive under either Section 2 or 5 of the Voting Rights Act or does a more flexible rule apply? Or in the context of state constitutional provisions that require respect for political subdivision lines, should a state try to minimize the number of split counties or does such a constitutional provision merely represent an aesthetic aspiration as to how a plan should appear? In the context of redistricting litigation, the

challenge for the litigants is to recraft the precedent as more rule or standard-like depending on which approach best suits their position.

B. Activism Versus Restraint

When the Warren Court first decided to get involved in redistricting matters, the debate was phrased principally as one between proponents of judicial activism and judicial restraint. Justice Frankfurter repeatedly warned (in his plurality opinion in *Colegrove v. Green* and then later as a dissenter in *Baker v. Carr*) of judicial submergence in political thickets. The liberals on the Court, such as Warren and Brennan, were activist in this realm as they were with respect to other individual rights claims (criminal rights, privacy rights, and free speech rights, just to name a few examples). Despite no originalist hook upon which to hang judicial involvement in redistricting matters (let alone a right to vote), the activists prevailed and paved the way for later judicial involvement in redistricting even outside the context of malapportionment. With each additional foray into politics, however, one can see a similar (if not as heated) debate concerning whether some new area is one where judges should be involved.

The debate here sometimes parallels the rules-standards debate when the contemplated rule is one of nonjusticiability; however, in most cases this debate falls along different lines drawn according to the judge's perception of the proper role of the judiciary in regulating politics. Fundamentally, the analysis with respect to activism or restraint mirrors those concerns expressed in jurisprudence surrounding the political question doctrine, which (to oversimplify) asks whether there are good reasons for judges

to leave the political branches alone when it comes to interpretation of a particular constitutional provision. Usually, those reasons involve some conclusion that the issue is textually committed to another branch of government, judicially administrable standards are nonexistent, or judicial involvement would disrespect or overly intrude on another branch of government. Advocates of judicial restraint adhere closely to the Framers' notion that the judiciary should be the least dangerous of the three branches of government. Deference to legislatures should be the rule, and even when a constitutional provision is applicable, prudential considerations counsel strongly in favor of upholding a law unless compelling reasons suggest otherwise.

In contrast, judicial activists view the political realm as the paradigmatic context in which the judiciary should be aggressively involved. The *Carolene Products* Footnote, upon which much of the Warren Court jurisprudence and its academic defense were intentionally or subconsciously based, suggested that judicial involvement was particularly appropriate to protect discrete and insular minorities or to reinforce representation when the channels of political change had become clogged. Activists, then and now, view the Court as the only possible check when a majority tyrannizes a minority or when a minority captures the political process and immunizes itself from genuine political competition. In the context of redistricting, evidence of the “discrete and insular minorities” strand might be seen in the race-based vote dilution cases where the white majority enhanced its power at the expense of an African American minority. And the one-person one-vote cases stand as the paradigmatic case of “representation reinforcement” since absent the court’s intervention (the argument goes) the incumbents elected from malapportioned districts never would have an incentive or desire to revamp

the system in favor of equally populated districts. The judiciary, under this view, is perfectly situated to prevent incumbent foxes from guarding the electoral henhouse.

However, activism in the redistricting realm (let alone other areas of constitutional law) has not been limited to liberal defenders of the *Carolene Products* rationales. In the *Shaw v. Reno* line of cases, for example, conservatives discovered an “analytically distinct” claim in the Equal Protection Clause that largely prevented states from drawing majority-minority districts in which race was the “predominant factor,” meaning that race subordinated traditional districting principles. Activism can sprout from textualism and norms of color blindness just as it can from liberal theories of fundamental fairness or individual rights. Activists are primarily distinguished by their willingness to strike down legislation and their lack of deference to the political branches, rather than their adherence to any particular interpretive method.

C. Group Rights v. Individual Rights

This last interpretive dimension for the redistricting cases may be the most difficult to describe, but perhaps most illustrative of contemporary controversies. To some extent this dimension tracks political lines as in controversies over multiculturalism or affirmative action, with conservatives opposing group rights and liberals embracing them, but the fit is not always so neat. At its core, The divergence between group-based or individualist conceptions of the values at stake in the redistricting process concerns whether one views a given redistricting controversy as affecting (or diluting) an individual’s vote or as concerning the underrepresentation of or discrimination against a particular group.

The groupist and individualist conceptions of the values at stake do not always lead to different results in redistricting cases. The one-person, one-vote cases, for example, express both types of values. On the one hand, in *Reynolds v. Sims*, the Court emphasized that “rights allegedly impaired [by malapportionment] are individual and personal in nature.” “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.” Concluding that malapportionment is tantamount to giving one voter 10 votes while giving his neighbor only one, the Court emphasized that the “weight of a citizen’s vote cannot be made to depend on where he lives” and “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.”

In the same opinion, however, the Court recognized the necessarily groupist implications of malapportionment: “in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.” Moreover, just below the surface of the early opinions themselves, lurked the basic controversy that the static malapportioned legislatures overrepresented rural areas and underrepresented cities and suburbs. In other words, those cases were primarily about group power and representation as opposed to some tenuous connection to individual rights. (Indeed, the actual weight of an individual’s vote is more a product of the competitiveness of a district than the number of people living in it: in other words, how valuable or powerful is one’s vote in a district of any size if the winner of the election is preordained?)

When the Court turns its attention to redistricting as a means of representation, it focuses on representation of groups. As Justice Powell’s separate opinion in *Davis v.*

Bandemer explained: “[t]he concept of ‘representation’ necessarily applies to groups: groups of voters elect representatives, individual voters do not.” In cases under section 2 of the Voting Rights Act, for example, the inquiry is necessarily whether members of a particular group have an equal opportunity to elect their candidates of choice. In partisan gerrymandering cases (to the degree *Bandemer* establishes any real barrier), the inquiry is whether “the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole” such that there is “continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”

The fault lines in *Shaw v. Reno* and its progeny also tend to fall along a group rights-individual rights dimension. Here though, it is less clear as to whether the rule of law in *Shaw* itself is about protecting individuals or groups than it is that the Court was particularly troubled by the group-based (*i.e.*, excessively pro-minority) districts the states created. The intentional creation of majority-minority districts, according to the *Shaw* majority, reinforces racial stereotypes and sends a message to representatives from those districts: “When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.” One difficulty with the *Shaw* opinions is that while they attack groupist gerrymandering, they fail to show that individual voters (minority or white, inside the gerrymandered district or outside) are injured by such gerrymanders.³ While the cases themselves attack gerrymandering to enforce group rights, their reliance on

³ See generally Samuel Issacharoff & Pamela S. Karlan, Standing and Misunderstanding in Voting Rights Law, 111 Harv. L. Rev. 2276, 2279-87 (1998).

“expressive harms” (as Rick Pildes terms it) necessarily presumes some kind of society-wide reception of a signal from such gerrymanders, rather than any particularized individual injury.

II. The Redistricting Caselaw: Where We Are and What Have We Done?

Now that the nature of the assorted fights has been crystallized, we can turn to the caselaw to see what the Court has wrought. I try here, as briefly as possible, to describe the current state of the law in the various legal contexts and present the consequences, to the degree we can or have measured them. The basic “story” here, if there is one, is that the Court, with some help from Congress, has erected a massive superstructure of constraints on the redistricting process, many of which are in tension with one another. Each decision often has a significant short-term effect, but to a large extent actors then bargain around these constraints to achieve political motives, which remain constant in the face of doctrinal change. Sometimes the Court softens the effect of its earlier pronouncements by converting rules into standards or hardens standards into rules to create greater predictability and stem the tide of potential litigation.

A. One Person, One Vote

1. The Law

We first got into this mess, of course, when the Supreme Court decided that malapportioned districts could violate Equal Protection. In *Baker v. Carr*, it appeared that something akin to rationality review would apply to district plans: in other words, states needed to find some justification for the lines they drew, but perfect population equality

would not be required. Later the Court clarified the one person, one vote rule to require substantial equality of population in non-congressional districts and population equality “to the extent practicable” for congressional districts. Departures from population equality can be justified, for example, to respect political subdivision lines and the cores of prior districts, to draw compact districts, and to avoid contests between incumbents. However, each population deviation in a congressional districting plan must be justified, while courts will grant greater latitude in non-congressional plans. Until recently, many jurisdictions thought that courts would look the other way in a non-congressional plan so long as the total deviation between districts did not exceed 10%. That dream of a safe harbor defined by a rigid percent threshold was shattered recently in *Larios v. Cox*, when a federal court struck down the Georgia Assembly redistricting plans despite the fact that their total deviation was under 10%. The court concluded that no legitimate justification underlay the 10% deviation.

To say that the one-person, one-vote rule requires either perfect or substantial population equality does not answer the question “equality of what?” Many possible denominators exist: people, citizens, voting age population, eligible voters, registered voters, etc. In *Burns v. Richardson*, the Court upheld a redistricting plan based on equal numbers of registered voters. However, in *Karcher v. Daggett*, the Court suggested in the context of a congressional redistricting plan that “[a]dopting any standard other than population equality, using the *best census data available* . . . would subtly erode the Constitution’s ideal of equal representation.” At the time of redistricting, the census only provides voting age population (VAP) and aggregate population data (along with race data). However, with *Burns* still on the books, the question (academic though it may be

given every current jurisdiction's use of census data) remains whether jurisdictions may comply with one person one vote while using something other than the aggregate population totals of the census.

2. The Consequences

Early studies of the one-person, one-vote cases found few systematic policy effects.⁴ Some, like Edward Tufte⁵, argued that the reapportionment cases (or more properly the decennial redistricting they ordered) contributed to the incumbency advantage and vanishing marginals. Others disagreed and pointed out that marginals began to vanish much earlier,⁶ incumbents in redrawn districts were not safer than

⁴ Those that found little public policy change include Herbert Jacob, *The Consequences of Malapportionment: A Note of Caution*, 43 *SOCIAL FORCE* 256-261; Thomas Dye, *Malapportionment and Public Policy in the States*, 27 *J. POL.* 586-601; Richard Hofferbert, *The Relation Between Public Policy and Some Structural and Environmental Variables in the American States*, 60 *AMER. POL. SCI. REV.* 73-82; David Brady & Douglas Edmonds, *One Man, One Vote—so what?*, 4 *TRANS-ACTION* 941 (1967); Bryan R. Fry & Richard F. Winters, *The Politics of Redistribution*, 64 *AMER. POL. SCI. REV.* 508 (1970); Robert Erikson, *Reapportionment and Policy: A Further Look at Some Intervening Variables*, 219 *ANNALS OF THE NEW YORK ACADEMY OF SCIENCES* 280 (1973); William E. Bicker, *The Effects of Malapportionment in the States – A Mistrial*, in Nelson W. Polsby, ed., *REAPPORTIONMENT IN THE 1970S* (1971) (critiquing the relevant literature). Those finding minor policy effects include Allan Pulsipher & James Weatherby, *Malapportionment, Party Competition and the Functional Distribution of Governmental Expenditures*, 62 *AMER. POL. SCI. REV.* 1207 (1968); Roger A. Hanson & Robert E. Crew Jr., *The Policy Impact of Reapportionment*, 8 *LAW AND SOCIETY REVIEW* 69 (1973); H. George Fredrickson & Yong Hyo Cho, *Legislative Apportionment and Fiscal Policy in the American States*, 27 *WESTERN POL. Q.* 5 (1974).

⁵ See Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 *AMER. POL. SCI. REV.* 540, 551-53 (1973). See also Robert S. Erikson, *The Partisan Impact of State Legislative Reapportionment*, 15 *MIDWEST J. POL. SCI.* 57 (1971); Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 *AMER. POL. SCI. REV.* 1234 (1972); Gallagher & Weschler, *California*, in *IMPACT OF REAPPORTIONMENT ON THE THIRTEEN WESTERN STATES* 86 (E. Bushnell ed. 1970); Albert D. Cover & David R. Mayhew, *Congressional Dynamics and the Decline of Competitive Congressional Elections*, in *CONGRESS RECONSIDERED*, Lawrence C. Dodd and Bruce C. Oppenheimer, eds. (2d ed. 1981).; Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 *AMER. POL. SCI. REV.* 1234 (1972); Richard Born, *Generational Replacement and the Growth of Incumbent Reelection Margins in the US House*, 73 *AMER. POL. SCI. REV.* 811 (1979); James L. Payne, *The Personal Electoral Advantage of House Incumbents, 1936-1976*, 8 *AMER. POL. Q.* 465 (1980); Charles S. Bullock III, *Redistricting and Congressional Stability*, 37 *J. POL.* 569 (1975).

⁶ See James C. Garand & Donald A. Gross, *Changes in the Vote Margins for Congressional Candidates: A Specification of Historical Trends*, 78 *AMER. POL. SCI. REV.* 17 (1984); WALTER DEAN BURNHAM,

incumbents in districts not redrawn,⁷ and that the unredistricted Senate enjoyed a similar rise in incumbency over the same period.⁸ In the past few years, however, those who have turned back the clock and looked at the data have found some dramatic effects.

Gary Cox and Jonathan Katz's recent book, *Elbridge Gerry's Salamander*, argues that the one person one vote cases (and perhaps more importantly, their initial enforcement by Democratic-leaning judges and timing during the 1964 Democratic landslide election) helped reduce the Republican bias in non-Southern congressional elections that existed into the 1960s and also gave rise to the vanishing marginals in congressional elections. They point out that decennial redistricting now has allowed challengers to time their entry and incumbents to time their exits to coincide with the redistricting cycle. As a result, the incumbency advantage has grown because vulnerable incumbents resign and ambitious challenger bide their time, often for an open seat caused by redistricting.

Steve Ansolabehere, Alan Gerber & Jim Snyder have demonstrated that the one person one vote cases enhanced representation of urban areas.⁹ This rectification of the rural bias caused by static lines that did not keep up in some states with a near-century of

CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970); Donald A. Gross & James C. Garand, *The Vanishing Marginals: 1824-1980*, 46 J. POL. 227 (1984).

⁷ John A. Ferejohn, *On the Decline of Competition in Congressional Elections*, 71 AMER. POL. SCI. REV. 166 (1977); Charles S. Bullock III, *Redistricting and Congressional Stability*, 37 J. POL. 569 (1975); Albert D. Cover, *One Good Term Deserves Another: The Advantage of Incumbency in Congressional Elections*, 21 AMER. J. POL. SCI. 523 (1977).

⁸ Warren Lee Kostroski, *Party and Incumbency in Post-War Senate Elections: Trends, Patterns and Models*, 67 AMER. POL. SCI. REV. 1213 (1973). See also Benjamin Highton, *Senate Elections in the United States, 1920-94*, 30 BRIT. J. POL. SCI. 483 (2000); Michael Krashinsky & William J. Milne, *The Effects of Incumbency in U.S. Congressional Elections, 1950-1988*, 18 LEG. STUD. Q. 321 (1993).

⁹ Stephen Ansolabehere, Alan Gerber, and James M. Snyder, Jr., *Equal Votes, Equal Money: Court-Ordered Redistricting and the Distribution of Public Expenditures in the American States*, *American Political Science Review*, 2002; Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Realignment In The American States*, *U. Penn. L. Rev.* (forthcoming). See also Mathew D. McCubbins & Thomas Schwartz, *Congress, the Courts and Public Policy: Consequences of the One Man, One Vote Rule*, 32 *American Journal of Political Science* 388 (1988) (finding that congressional ballot allocations were less biased in favor of rural areas after 1964).

population shifts led to a greater number of representatives from urban areas. They also estimate serious public policy effects from the reduction of such a bias: specifically, a redistribution of approximately seven billion dollars to more populous counties. While they identify a shift in electoral power in favor of liberals, specifically on issues of civil rights, they do not find systematic partisan effects because the rural bias operated differently with respect to the two parties across the country.

Concerning the effect on state legislatures, my own work with Thad Kousser and Patrick Egan¹⁰ confirms the finding that the reapportionment revolution did not have systematic partisan effects. However, in particular states the partisan effects were quite substantial. We also find that state Houses and Senates became more alike in terms of their partisan composition following these cases, perhaps an unsurprising finding (even if a new one). We also found that while legislatures were more likely to change hands in the first ten years following the first post-*Baker* redistricting, previously malapportioned legislatures were not more likely to change party control immediately following the redistricting than were more equitably apportioned legislatures. Finally, in an attempt to prove a whimsical counterfactual, we overlaid the pre-*Baker* districts for the four states on the *Reynolds v. Sims* docket onto current political data to figure out what might have happened had the ancient districts stayed in place. We find that in most cases such lines would lead to more accurate representation of the underlying partisan composition of the given electorate than do the current equitably apportioned lines.

There are certainly other, less measurable effects that one can identify as flowing from the one person, one vote cases. The mere availability of the claim allows partisan

¹⁰ Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person One Vote on Political Competition and Representation*, 80 NORTH CAROLINA LAW REVIEW 1299 (2002).

groups who lose in the political arena to try to take a second bite at the apple in court – successfully arguing that a deviation of 17 people between Pennsylvania Congressional districts, for example, violated the Constitution. Courts, as a result, necessarily have waded further into the political thicket, sometimes drawing their own plans. One person, one vote has made electoral administration more difficult, as precinct boundaries need to be completely redrawn every ten years and the inevitable disrespect of political subdivision boundaries that results leads to voters being members of many different, non-coinciding jurisdictions at once.

B. Political Gerrymandering

1. The law

In contrast to the sharp bite of the one person, one vote cases, the Court's regulation of partisan gerrymandering has been largely toothless (at least for the moment). As stated above, *Davis v. Bandemer*'s "test" requires opposition parties to be completely shut out of the political process. However, the lower courts have interpreted the standard such that almost any evidence of existing political power for the out-party will suffice to insulate a plan from a *Bandemer* claim. Although partisan gerrymandering claims are justiciable under *Bandemer*, they never win the day. Indeed, in *Easley v. Cromartie* (the last incarnation of *Shaw v. Reno*) the Court specifically decided that the district in question was not an impermissible racial gerrymander because it was drawn for partisan reasons. The Supreme Court will soon decide *Veith v. Jubilerer*, a case that revisits *Bandemer* and threatens to plunge the Court into what Peter Schuck has described as "the thickest thicket."

Political gerrymandering is not always partisan, however. Politics can dominate the redistricting process without having lopsided partisan effects. The Court seems also to have given its blessing to bipartisan and incumbent protecting gerrymanders (which are often not inconsistent with partisan gerrymanders, as the 2002 experience suggests). Bipartisan gerrymanders divide a state into politically more homogenous constituencies with districts that heavily favor either the Democrats or Republicans. In *Gaffney v. Cummings*, the Supreme Court specifically permitted the drawing of districts that favored one or the other party under the theory that proportional representation (i.e., drawing lopsided districts that will produce a delegation that will accurately reflect the underlying partisan predisposition of the electorate) was a legitimate theory of redistricting.

Incumbent-protecting gerrymanders, as their name suggests, consist of districts drawn to favor their respective incumbents. Although the Court has not dealt with a specific challenge to incumbent gerrymanders, in the one person one vote and *Shaw* line of cases, the Court has named incumbent protection as a legitimate state interest. Therefore, much to the chagrin of some legal theorists,¹¹ the Court has not embraced an antitrust model of politics wherein its role would be to regulate cartel behavior of entrenched parties or incumbents who try to insulate themselves from competition and make elections meaningless.

2. The Consequences

As might be expected, the non-involvement of the judiciary in policing political gerrymanders has naturally led to politics dominating the process in most states. Thus, for states in which one party controls the redistricting process and stands to benefit from

¹¹ Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

packing its opponents and spreading its supporters more efficiently, partisan gerrymanders are frequent. In other states with divided control of the redistricting process, incumbent protecting gerrymanders are the norm. Many see the effect of judicial noninvolvement in the bias of certain state legislatures or congressional delegations in favor of the party controlling the redistricting and in the lack of competitive congressional districts. One other consequence frequently mentioned is a rise in polarization due to the creation of more ideologically homogeneous districts.

Sam Hirsch has demonstrated quite convincingly that, at least in the current round of redistricting, Republican control in competitive states has led to a Republican bias in Congressional elections.¹² Of course, several states continue to have a Democratic bias in their redistricting plans, and many more had such a bias in the 1970s and 1980s, when a greater share of the population was Democrat and Democrats controlled a greater number of states. Nevertheless, as the recent Texas re-redistricting has demonstrated, judicial non-involvement in this area has left majority parties feeling that they can redraw districts to their advantage with abandon. And it seems a fair inference that political parties in control of the state legislative redistricting process may be better able (due to judicial noninvolvement and the effectiveness of partisan gerrymanders) to prevent changes in control.

With respect to bipartisan and incumbent-protecting gerrymanders, most observers argue that they have produced less competitive elections and increased polarization in the U.S. House of Representatives and state legislatures. I was probably the last hold out when it came to questioning the effect of gerrymandering on district

¹² See Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 *Election L. J.* 179 (2003).

level competition.¹³ However, the data on the level and location of noncompetitive elections in 2002 elections suggests that gerrymandering has had a more dramatic effect on competition than it once did. Nevertheless, one cannot ignore the fact that the unredistricted U.S. Senate continues to have incumbent reelection rates close to 90%, so redistricting cannot be the principal cause of low levels of incumbent defeat.

Others point to bipartisan gerrymanders as producing ideologically homogenous districts and thus, more legislators at the political extremes than at the center. The argument suggests that the median voter in a bipartisan gerrymandered district is far to the left or right of the median voter in the state or nation. As a result, the primary election becomes the dispositive election in such politically lopsided districts and the politicians who cater to these selected constituencies are more likely to be extreme as well. No doubt the parties-in-the-legislature are farther apart from each other than they have been for perhaps a century, and they are also more cohesive (*i.e.*, the ideological distance between legislators of the same party is smaller than it once was). Is redistricting to blame?

I tend to think the effect of redistricting on polarization has also been overblown. The unredistricted Senate has seen a parallel rise in polarization over the same period. Also, it is not abundantly clear that representatives from ideologically homogenous constituencies are voting in a markedly different way from those elected from more balanced ones. If I had to guess, organizational changes within the chambers, which produce greater hierarchy within the party, are more responsible for this polarization, as well as, perhaps, centralized control of the parties' campaign money, which may allow

¹³ See Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 115 Harv. L. Rev. 593 (2002).

leaders to extort compliance from members. Moreover, the electorate is more polarized and partisan as well (as measured by consistency in voting behavior and declines in split-ticket voting, even if a third of the electorate continues to identify as independent). So a polarized legislature is not so surprising. At least in theory, however, such a relationship between gerrymanders and polarization has intuitive appeal, even if the data may not yet demonstrate that such a relationship exists.

When trying to explain the renewed fervor and success of partisan gerrymandering, observers tend to point to the new technology that allows redistricters to carve up jurisdictions into predictable voting blocs. However, the technology would be useless for these purposes if voters were not becoming more predictable in their voting behavior. Partisan and incumbent protecting gerrymanders are successful because a linedrawer can now count on voters (*i.e.*, census blocks and precincts) to behave in particular ways, whereas in previous redistricting cycles voters might routinely defy predictions. Although the tools we use to redistrict have become more sophisticated, fundamentally a gerrymander is only as reliable as the voters it seeks to place into districts.

C. Racial Gerrymandering

1. The Law

Before *Shaw v. Reno*, racial gerrymandering usually meant the use of the redistricting process to overrepresent the racial group in power and underrepresent the racial group out of power. The test for proving unconstitutional racial gerrymandering, as codified in *Mobile v. Bolden*, was the same as that for other violations of the Equal

Protection Clause: the plaintiff must prove discriminatory intent and effect. In other words, the plaintiff must show that those in power were intentionally using the redistricting process to minimize the power of his racial group and they succeeded in doing so.

Shaw v. Reno created an “analytically distinct claim” from a *Mobile* race-based vote dilution claim. *Miller v. Johnson* clarified that so-called *Shaw*-claims could arise when race was the “predominant factor” in the drawing of a district. To prove a *Shaw* claim plaintiffs, who live in an allegedly unconstitutional district, need to prove that traditional redistricting principles, such as compactness, contiguity, respect for political subdivisions and communities of interest, and avoiding incumbent pairings, were subordinated to race in the construction of a district. Once the plaintiff has demonstrated the predominant use of race it then falls to the state to justify the predominant use of race as necessary and the district as narrowly tailored to avoid a violation of the Voting Rights Act. If it cannot do so, then a court will strike down the district as an unconstitutional racial gerrymander.

2. The Consequences

Perhaps the greatest effect of the *Shaw* cases has been environmental – due to the many trees that were slaughtered to produce the volumes of law review commentary critical of *Shaw* and its progeny. Critics view *Shaw* as adhering to a racial double-standard, as departing from normal rules of constitutional injury and standing, and as doctrinally incoherent. As a result of *Shaw*, redistricting plans in certain jurisdictions, such as North Carolina, spent much of the 1990s in court being whipsawed back and forth and up and down to the Supreme Court and lower courts. Most people predicted

that the 2000 round would evince a litigation avalanche due to the ambiguous and malleable *Shaw* standard, which seemed ripe for manipulation by partisan actors and for endless confusion in the courts. The floodgates never opened, however, and the Supreme Court has not even considered in any written opinion a single district from the 2000 round under *Shaw*.

Why didn't the torrent of litigation emerge? Although we cannot be completely sure why this dog didn't bark, there are several possible explanations. First, fewer strangely shaped, majority-minority districts were drawn. Although the Court, in *Miller v. Johnson*, suggested shape was not essential in proving a *Shaw* claim, many jurisdictions operated on the (probably quite appropriate) assumption that squiggly minority districts were more likely to be struck down. As a result, many jurisdictions took the cue that if one needed to draw bizarre shapes to accomplish the varied purposes of a gerrymander, it was best to make the bizarre districts the largely white districts. The *Shaw* standard, despite its many ambiguities, also turned out not to be as difficult to apply. Despite the Court's admonition that this was not an area regulated by an "I-know-it-when-I-see-it" jurisprudence, most redistricting officials knew a *Shaw* violative district when they saw it, so they found ways not to draw it.

Second, the push by the Department of Justice, interest groups, and some politicians for the creation of majority-minority districts in the 1990 redistricting was heavily diminished in the 2000 round. No congressional plan was denied preclearance in the 2000 round and as a result of some other Supreme Court decisions described below, DOJ's quasi-maximization strategy from the 1990s (by importing Section 2 of the Voting Rights Act into Section 5, among other means) was seen as exceeding its preclearance

mandate. Furthermore, the NAACP Legal Defense Fund, which was at the forefront of redistricting planning and litigation during the 1990s, did not vigorously participate in the drawing of maps and challenging of plans in the 2000 round (in large part, I imagine, because so many minority opportunity districts survived into the 2000 round and because the minority elected officials from those districts could defend their own interests). Also, as a result of suspicions and social science that suggested the creation of super majority minority districts in the early 1990s contributed to the Republican takeover of the House of Representatives, minority elected officials (many of whom were elected pursuant to the intentional creation of their 1990 districts) were willing to give up some of their voters for the good of the Democratic party. Now that they enjoyed incumbency advantages, moreover, these Democratic incumbents did not need overly concentrated minority districts in order to be reelected, whereas such percentages may have been necessary to elect a minority from an open seat. In the end, jurisdictions did not feel the internal or external pressure to maximize the number majority-minority districts that they did ten years prior.

Finally, the last chapter in the story of the Supreme Court's micromanagement of North Carolina's congressional districts during the last round seemed to provide some cover for jurisdictions seeking to defend majority-minority districts. On the eve of the 2000 redistricting, the Supreme Court, in *Easley v. Cromartie*, finally upheld a set of North Carolina congressional districts for the 1990s. Justice O'Connor joined the four more liberal Justices to hold that the congressional district in question was predominantly based on partisan considerations, not race, and therefore strict scrutiny was not triggered. In other words, if a majority-minority district (or "its functional equivalent", to quote a

cryptic phrase from the last paragraph of the opinion) can be credibly described as a reliable Democratic district (and intentionally and predominantly drawn as such), then party, not race, “predominated” in the construction of that district. As a result of *Easley*, then, the task for linedrawers and all those whose statements or intentions are potentially relevant in the face of a *Shaw* challenge is to describe and demonstrate that minority voters are the most reliable Democrats and that heavily Democratic districts, which just so happen to be majority-minority, were drawn for partisan, not racial, reasons.

D. Section Five of the Voting Rights Act

1. The Law

Section Five of the Voting Rights Act requires certain covered jurisdictions to submit their redistricting plans for preclearance by the Department of Justice or the U.S. District Court for the District of Columbia. Preclearance should be granted (and ordinarily is) so long as the redistricting plan does not have a retrogressive purpose or a retrogressive effect. Retrogression occurs when a redistricting plan makes minorities worse off than they were under the extant “benchmark” plan (actually, the last legally enforceable redistricting plan). The million dollar question, then, for retrogression analysis is how do you know when a plan makes a racial minority group worse off?

Before answering that question it is worth clarifying the law on retrogressive purpose. Retrogressive purpose does not mean discriminatory purpose. As the Court explained in *Reno v. Bossier Parish II*, a districting plan can be intentionally discriminatory without being purposefully retrogressive. Desire or success in discriminating is not enough under the purpose prong of Section 5; the jurisdiction must

actually intend to make minority voters worse off. Also, as the Court explained in *Reno v. Bossier Parish I*, preclearance cannot be denied because of a violation of Section 2 or other constitutional infirmities. DOJ must preclear even an illegal or unconstitutional plan so long as there is no backsliding in minority voting power.

The standard for what constitutes retrogression underwent a significant reformulation last year in the Supreme Court's decision in *Georgia v. Ashcroft*. Prior to that decision, many may have thought (following *Beer v. U.S.*) that the Section 5 retrogression inquiry was primarily concerned with the reduction in the number of majority-minority districts, or perhaps significant reductions of the minority percentages within such districts. *Georgia v. Ashcroft* establishes that a jurisdiction may offset a diminution in either the number or minority racial percentages in majority-minority districts through the creation of districts in which minorities do not control the outcome, but in which they have significant influence. From the opinion itself we do not really know what constitutes a credible influence district which could justify diminution in the majority minority districts; at different times the Court refers to districts that are 20%, 25%, and 30% black voting age population. Of course, the percentage of minority voters needed in a district to ensure minority "influence" is a context-specific empirical question. The important lesson from the decision, however, is that Section Five does not reify majority-minority districts, per se, and jurisdictions can choose between a greater number of districts in which minorities have influence and fewer districts in which they exercise control.

2. The Consequences

There can be no doubt that the Department of Justice's aggressive enforcement of Section Five of the Voting Rights Act led to an unprecedented number of African American and Hispanic representatives elected to the U.S. House of Representatives and state legislatures in the 1990s. Indeed, it was this aggressive enforcement that also led to *Shaw v. Reno* and its progeny's reining in of DOJ. Moreover, the creation of these districts, many argue, accelerated the decline of the Democratic Party in the South and contributed to Republicans' takeover of the U.S. House and several state legislatures, as white Democratic representatives saw some of their most reliable partisans taken from their districts. In dramatic revisionist (and I believe untrue) history, some observers now speculate as to an unholy alliance between Republicans, the George H.W. Bush DOJ, and racial minorities to force the creation of districts in the 1990s that injured the Democratic Party. Some continue to level similar charges to this day, suggesting that the Ashcroft Justice Department in a rare employment of its preclearance authority, asked for more information on a Mississippi congressional plan, such that a federal court plan favoring Republicans then went into effect.

In sum, there can be no doubt but that the unique statutory scheme of Section Five, with its remarkable intrusion on state sovereignty, has had the intended effect of securing (at least descriptive and perhaps substantive) representation to racial and language minorities. *Georgia v. Ashcroft* defangs Section Five considerably though, and it is too early to tell whether the effect will be the intended flexibility in dealing with apportionment plans that sacrifice control for genuine influence or rather the unintended consequence of looking the other way when state legislatures break up minority districts into substantial but ultimately uninfluential 20% to 30% districts. If the Texas re-

redistricting is any indication of the future, covered jurisdictions controlled by Republicans are likely to continue to adhere to the *Beer* standard (which remains a valid option after *Ashcroft*) and continue to make heavily minority districts the only safe Democrat districts. Democratic jurisdictions, on the other hand, will take advantage of *Ashcroft* and try to spread their most reliable supporters most efficiently to retain as many seats as possible. DOJ, which has been relatively silent this go round, may be even more muted next time, now that covered jurisdictions have a larger buffet of redistricting options to choose from in order to avoid retrogression.

E. Section Two of the Voting Rights Act

1. The Law

Minority vote dilution can occur either through overconcentration of the minority community into a few districts (packing), excessive dispersion (cracking) of the minority community among too many districts, or submergence of a minority in a multimember district (stacking). Congress amended Section Two of the Voting Rights Act in 1983 to eliminate the intent requirement set forth in *Mobile v. Bolden* and to replace it with a pure effects test. The earliest cases brought under Section Two (like *Bolden* itself) targeted multimember, at-large schemes that submerged a minority community (stacking) such that it could not elect a single member of a local governing body, for example. In *Thornburgh v. Gingles*, the Court attempted to synthesize or winnow down the various Senate Factors behind the 1983 Amendments and established a three-pronged test for challenges to such multimember districts:

- (1) Is the minority community sufficiently large and geographically compact to constitute a majority in a single member district?
- (2) Is the minority politically cohesive?
- (3) And does the white majority vote consistently as a bloc to enable it usually to defeat the minority's preferred candidate at the polls?

I think it is fair to say that the subsequent lower court cases implementing the *Gingles* “prongs” have failed to agree on some important definitions of what each prong means (and I admit to glossing over large swaths of caselaw here),¹⁴ but nevertheless, throughout the 1980s and 1990s, courts forced the creation of majority-minority districts in most jurisdictions where plaintiffs requested such districts could be created and met the *Gingles* prongs.

Johnson v. De Grandy attempted to clarify whether the satisfaction of the *Gingles* prongs was necessary, sufficient, or both when plaintiffs were challenging, not multimember districts which completely shut them out of the political process, but single-member districting schemes that allegedly underrepresented the plaintiff's minority group. From *De Grandy* we received the additional wrinkle that proof of the *Gingles* factors alone might not be sufficient to show illegal vote dilution in a single member districting scheme. In particular, evidence that the share of majority-minority districts in the jurisdiction was roughly proportional to the minority's share of the population is a factor counseling against a finding of a violation of Section Two. As the *DeGrandy* Court added, failure to maximize cannot be the measure of Section Two.

Among the many important lingering questions surrounding Section Two is the relevance of influence districts either as a shield to such claims or as a sword to force

¹⁴ For a review of those questions and the relevant caselaw, see J. Gerald Hebert, Donald v. Verilli, Paul M. Smith, and Sam Hirsch, *The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls* 25-49 (2000).

their creation. As a shield against a Section Two claim, a jurisdiction might argue, as did New Jersey in *Page v. Bartels*, that the creation of a majority-African American or majority-Hispanic district is unnecessary (and would perhaps reduce minority voting power) given the number of effective influence districts that exist under the plan. Such an argument fits within *Gingles* itself, in that the implication is that such influence districts “work” because voters are willing to crossover or form coalitions with the members of the protected class. The more interesting question is whether, despite *Gingles* emphasis on majority-minority districts,¹⁵ minorities can sue for the creation of an influence district (however one defines it). Contrary to other courts that have entertained this question, the First Circuit recently said yes in *Metts v. Murphy*, but emphasized that the hurdles were high for a group to show both that racial bloc voting prevented it from electing its candidates of choice and at the same time that an influence district was a necessary and effective way of achieving substantial influence.

2. Consequences

There is much more to say on the morass of Section Two litigation. To overgeneralize, however, I think it is fair to say that, as with many of the other claims mentioned thus far, Section Two has been largely hijacked by the political parties as just one more weapon in their arsenal to attack plans that disadvantage them politically. To be sure some “genuine” Section Two claims often present themselves, but the newest cases represent attempts primarily from losers in the political process to attempt a second bite at the apple. Thus, when Republicans felt shafted by the New Jersey legislative plan,

¹⁵ In a much overlooked footnote in *Gingles*, however, the Court was careful not to foreclose the possibility that claims could be brought by some groups that did not constitute a numerical majority in a hypothetical single member district.

they alleged dilution of black and Hispanic votes, and the Democrats, incensed by the Republican gerrymander occasioned by the Texas re-redistricting, said (not completely without cause) it also diluted minority votes. Fundamentally, however, these were political fights being waged through the dangerous proxy of race-based arguments in court. To be sure, the mere fact that a gerrymander is partisan does not immunize it from Section 2's effects test (as it might a *Shaw* claim per *Easley*, for example). However, we should all be concerned by the necessarily poisonous rhetoric that seeks to tag partisan gerrymanders as racist, when in reality, they are *merely* greedy attempts to undermine democracy, inhibit competition and misrepresent communities.

III. Conclusions

The state of the law for those who draw redistricting plans is as follows. The plans you draw must abide by the rule of population equality, but in some cases you might be able to depart from it depending on how legitimate and authentic your reasons for doing so are. Also, make sure that you do not overly concentrate (pack) or overly disperse (crack) minority communities, else you might run afoul of the Voting Rights Act. And while paying great attention to race as you attempt to navigate between the twin dangers of packing and cracking, make sure race does not become the predominant factor in the creation of a district. Of course, in the event you are charged with using race predominantly, be prepared to say that the Voting Rights Act made you do it or, alternatively and contradictorily, your primary intent was partisanship all the while and compliance with the Voting Rights Act was, well, pleasantly inadvertent. Of course, beware of choosing that latter route because in a nearby thicket lay the Supreme Court,

perhaps with a new rule against partisan gerrymandering that will force you back to the drawing board.