2018

Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty

Jacob Eisler
Florida State University College of Law, jeisler@law.fsu.edu

volumes, delivering the drafting process on a platter to the interested reader who can access them. But that is the key here: an 18-volume outcome does rather strain affordability as well as portability; and although a huge asset for research, is less likely to find use as a teaching aide or any other function entailing a brief consultation. At £325.00 and 2,580 pages the ICESCR *travaux* are also not your average commuter's read, but they can be carried about and worked through in a relatively efficient way.

Helping that possibility along is Saul's detailed list of contents, in which the title of each document is accompanied by a keyword summary of the issues covered in it. Most usefully, this list further identifies documents that have not been reproduced but might be relevant; a title and keyword summary are also provided for these documents. There is no separate index. There would have been added benefit to arranging the keywords of the list of contents into one, but the list in itself does offer valuable guidance. Of value also is Saul's succinct introduction, which explains the texts that preceded and were influential upon the drafting of the ICESCR, and contains an account of the drafting process, including of moments at which the inclusion of economic and social rights in a binding legal agreement became a matter of debate. The whole is a short yet nuanced overview of the chain of events that shaped the ICESCR. It whets the reader's appetite to know more, and also paves the ground for the more intricate record of deliberations that is provided via the materials selected as the *travaux*.

In short these volumes of the *travaux* are timely and well compiled. The editor has made thoughtful presentation decisions that will facilitate the use of the volumes at various level of engagement (here it is also worth acknowledging the design elements; especially the clean, well-spaced layout of the text). An immensely valuable resource in themselves, we should now hope that their publication will also catalyse the complete electronic transcription (and free online availability) of the full record of ICESCR's preparation.

SURABHI RANGANATHAN
KING'S COLLEGE, CAMBRIDGE

Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty. By ANTHONY J. MCGANN, CHARLES ANTHONY SMITH, MICHAEL LATNER and ALEX KEENA [Cambridge University Press, 2016. vi + 261 pp. Paperback £24.00. ISBN 978-13-16507-67-4.]

Writing a book that intervenes in a topical debate while making a lasting scholarly contribution is a high-wire act. Authors must comment on a transient state of affairs while establishing a durable truth. In commenting on the manipulation of legislative districts for political gain and the appropriate standards to proscribe such practice, the authors of *Gerrymandering in America* have identified a topical debate. Partisan gerrymandering is one of the most sharply contested issues in the American federal courts and in the American legal academy. However, the book's most intriguing contributions are discrete observations, and the potential impact of these observations will be undermined by the facts that the law is complex and changing quickly and the scholarship is fast-moving.

The authors' main claim is that the US Supreme Court case of *Vieth v Jubelirer*, 541 U.S. 267 (2004) and its impact on US democratic representation have been broadly ignored. This claim might have been tenable at the time the book was

conceived and, had partisan gerrymandering and its consequences since *Vieth* been overlooked, the text might have been a call to action. It is painful to find fault in authors for declaring their book to be ground-breaking when developments have overtaken it before the ink of the first print run is dry. However, while the great interest of scholars in partisan gerrymandering ensures that the scholarly literature moves quickly, many of the most salient scholarly contributions in fact pre-date *Gerrymandering in America*. The book vividly if briefly engages with the scholarship that has proven to be fulcrum of the current headline-grabbing American litigation over partisan gerrymandering, specifically the work of Nicholas Stephanopolous, Eric McGhee, Jowei Chen and Jonathan Rodden. Those scholars have offered analytic frameworks that radically depart from pre-existing treatments of the topic, and the claim of novelty by the authors of *Gerrymandering in America* might have been vindicated by a methodology that likewise challenges established approaches. However, the book primarily critiques districting practices in reliance upon partisan bias - which, as the book recognises, was pioneered in the 1980s and received significant attention in the Supreme Court (*League of United Latin American Citizens v Perry*, 548 U.S. 399 (2006)) and in a subsequent wave of scholarship more than a decade ago.

The most novel contribution of *Gerrymandering in America* is to categorise state districting plans using two characteristics - degree of responsiveness to voter preference and partisan bias - and to apply this categorisation to the 2000 and 2010 state legislative districtings and subsequent elections. The authors' core observation is that partisan bias increased following the 2010 districting. They then map these findings onto various other political conditions, such as the differing means by which states allocate responsibility for redrawing district lines, and how states differ based on the competitiveness of their elections. The analytic framework and the authors' results are compelling, but would benefit from greater scrutiny of the legal and democratic norms which the authors invoke. These norms are whether battles for political seats should be highly competitive (that is, if ejecting the incumbent or incumbent party is a desirable feature in a districting plan) and whether districting plans should be permitted to favour a given party. The validity of those norms is debated. For example, the Supreme Court in *Gaffney v Cummings*, 412 U.S. 735 (1973) accepted that a bipartisan gerrymander that produced proportional representation by party identity is permissible. The federal bench has thus apparently rejected the value of responsiveness independent of partisan bias. Likewise, the conditions under which bias towards a party becomes normatively undesirable or legally unacceptable remain contested. Some have proposed that, absent a constitutional mandate for proportional representation, a "victory bonus" in representation for a party that has won the right to draw district lines may be democratically legitimate. The authors engage little with the issues that underlie these questions, forgoing the opportunity to lay a path towards a new interpretation of American representation.

Over-broad claims undermine some of the authors' conclusions, including some that are derived from this intriguing quantitative framework. The book suggests that the *Vieth* decision bears significant causal responsibility for increased bias in state districting plans. The authors identify various alternative explanations for the increased partisan bias. However, their non-committal conclusion as to what cause is ultimately responsible for the fractious condition of legislative redistricting is not satisfying. This is significant given the importance the book broadly attributes to *Vieth*.

Likewise, significant attention is dedicated to the question of whether the "natural" distribution of Democrat and Republican voters tends to favour Republicans

in the districting process. The authors say that legislative intention is responsible for partisan bias, and then acknowledge that Democrats have a natural (sometimes insurmountable) disadvantage in districting owing to geographical factors. The most theoretically interesting question is evoked by this problem: what is the normative responsibility of legislatures with regards to districting by partisan identity when there are conditions that facilitate certain biases and may naturally benefit certain factions? Rather than address that question, the authors fall back on a semantic distinction. This is between forms of geographic favourability which they call "strong" (inevitable due to natural voter distribution) and "weak" (granting legislatures the *opportunity* to benefit one party over the other). They argue that only the "weak" form is present, and that this is sufficient to show that bias should be attributed to the legislature. This claim may be correct in the most literal sense, as state legislatures are the agents that implement district plans. However, the argument becomes circular: when districts are biased, that is because legislatures have drawn biased districts. The authors ignore the fact that any districting plan will balance multiple competing factors, and that any entity responsible for districting must make trade-offs. Such discretion *does* create the opportunity for self-serving partisan line-drawing. How should such self-serving conduct be evaluated? The book helps one to see that this is the question, but does not fully explore it.

Various subtle but important aspects of the case law are also underappreciated in the authors' analysis. The book boldly treats *Vieth* as a complete judicial disavowal of intervention in partisan gerrymandering. In fact only the conservative plurality so held. Justice Kennedy famously refused to conclude that partisan gerrymandering is necessarily non-justiciable, leaving open the possibility that future developments could enable appropriate judicial intervention. The authors recognise that the prior law under *Davis v Bandemer*, 478 U.S. 109 (1986) produced little direct judicial nullification of gerrymanders and was generally seen as ineffective. However, they still maintain that *Vieth* was decisive in changing legislative behaviour and increasing partisan bias. The book's structure thus depends upon an overly simplified view of the law and its impact upon legislative behaviour. The treatment of other leading decisions is also somewhat cursory. For example, the Supreme Court decision *Karcher v Daggett*, 462 U.S. 725 (1983) indicates the appropriate factors that a districting may take into account (such as contiguity of communities or existing geographic features). These factors (whose normative validity is a separate issue) might contribute to the "weak" sense of geographical partisan bias, or at least complicate any conclusion that the "weak" tendency towards bias is the result of intentional legislative action. But *Karcher* receives limited attention, as does the fact that intrinsically superior baseline principles for districting are yet to be found and broadly accepted.

The latter half of the book offers a series of historical and theoretical commentaries on the legal character of partisan gerrymandering. While each of these commentaries provides a provocative perspective, they are not integrated with the quantitative core of the book, and each provides a brief take on issues of great complexity and depth. For example, one of the chapters argues that *Vieth*, by enabling states to shape national representation through gerrymanders, realises the Anti-Federalist preference for a weak national government. This is an interesting observation regarding how partisan gerrymandering gives state legislatures an additional political lever. However, as a description of the hydraulics of power it is inaccurate: the districting that led to the *Vieth* litigation itself was partly induced by the *national* Republican Party's instruction to the Pennsylvania Republicans to punish the Democratic Party for advancing democratic gerrymanders in other states. If politicised districting serves to benefit any class of political actor, it would seem

to be party elites. The question of how courts should intervene to regulate party-voter interaction is a thorny question as thoroughly entangled with issues of race and wealth as with the one-person, one-vote principle. Likewise, the book's key claim that equal protection doctrine requires a principle of majority rule by party identity hangs on unspoken substantive assumptions. For example, the book requires one to assume that party identity is sufficiently fixed to deserve treatment as an equal protection category, or that personal party identity has moral or legal status analogous to the individual right expressed by one-person one-vote.

The book thus raises more questions than it answers, particularly from a legal perspective. Given the fast-paced transformation of law and scholarship surrounding partisan gerrymandering, this may dampen its impact. Its most interesting and defensible assertions are discrete, and would do better as stand-alone arguments advanced with a targeted focus. This is particularly true of its core quantitative analysis, which is a strong a candidate for illuminating the practical effects of partisan gerrymandering.

JACOB EISLER
JESUS COLLEGE

Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law. By MEG RUSSELL and DANIEL GOVER. [Oxford University Press, 2017. xii + 324 pp. Hardback £50.00. ISBN: 978-01-98753-82-7.]

We are taught that Parliament is central to law-making. Yet, at Westminster, the majority of Bills which become law are drafted by the Government. People often doubt Parliament's importance in the legislative process. Is Parliament really central if the Government's Bills nearly always succeed? Does Parliament really scrutinise government Bills? Is Parliament little more than a "talking shop"? The question of how central Parliament is to the legislative process is the subject of Meg Russell and Daniel Gover's book, which injects some much needed empirical analysis into debates about Parliament's influence on law-making. Through an analysis of parliamentary amendments to government Bills, the authors contend that Parliament exerts greater influence over the law-making process than is commonly supposed.

Amendments are proposals made by parliamentary actors to change the text of a Bill by adding to, removing or replacing some of its content. A parliamentary actor is an individual or a collective group who occupies an institutionally defined role within the Westminster law-making process. The amendment of Bills can involve a range of different parliamentary actors – government ministers, the opposition, government backbenchers, non-partisan parliamentarians within the House of Lords, select committees and cross-party working groups – who each may, at various stages of the law-making process, desire changes in a Bill's content. Russell and Gover's convincing analysis demonstrates that parliamentary influence is both visibly and obscurely exerted through amendments. They identify what they label as the multiple "faces of parliamentary power", some visible and others less so. Parliament's visible "faces" include power to change Bills through the amendment process. Significantly, Russell and Gover adopt a broad understanding of how this power is exercised in practice. They view this power as being exercised in two ways: through the recognised approach of focusing on proposed non-governmental amendments which formally succeed, and through those amendments which formally fail, but which in substance are taken up later in the process through