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“Partisan Gerrymandering after *LULAC vs. Perry*: A Proposed New Approach”

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Abstract

Partisan gerrymandering continues to be a controversial practice that undermines democratic participation among the electoral systems of the several American states. Although the United States Supreme Court has ruled that constitutional “equal protection” guarantees apply to electoral districts, it also has been reluctant to apply those standards except in overt cases, particularly involving race or other “suspect categories”—as the 2006 case, originating in Texas, of *League of Latin American Citizens [LULAC] v. Perry* demonstrates. Recently, however, members of the Supreme Court have expressed a desire for a potential test that could be applied to these controversies in order to adduce whether or not certain redistricting plans implemented by states violate federal constitutional standards of “equal protection” for all voters. A promising approach that already has been proffered to the Supreme Court, called the “symmetry” test, could support efforts in federal or, even, state courts to redress this fundamental problem. That test provides a way in which social science can be used to develop non-partisan instruments for future districting decisions, provided that the courts can be persuaded to concur.

Introduction

Partisan gerrymandering is an ongoing controversy of the American political system. The difficulty in addressing it is compounded by other features of that system, including federalism, constitutional constraints, and, especially, the reluctance of its judicial system to rule upon alleged charges of partisan districting in a meaningful way. The 2003 mid-cycle redistricting controversy in Texas was, arguably, a particularly egregious example (though, certainly, not the only one) of this controversial practice and of the relative reluctance of courts to become involved.

The landmark 1962 United States Supreme Court case of *Baker v. Carr* (1962) broke new ground by ruling that federal courts could address overt population malapportionment. The redefinition of the “political question” doctrine provided a means for the judicial branch to promote the democratic cause of electoral fairness. After initial controversy, it is generally agreed to have been one of the Warren Court’s most notable rulings. Unfortunately, it did nothing to address the conditions within the wider American political system that prompts the practice of partisan gerrymandering.

More recent Supreme Court cases have offered opportunities for a more coherent principle to guide this crucial area of the American democratic process. Unfortunately, the courts continue to demonstrate—in cases that include *Bandemer v. Davis* (1986), *Veith v. Jubelirer* (2004), and, most recently, *League of Latin American Citizens [LULAC] v. Perry* (2006)—reluctance to provide that guidance and constitutional stewardship. In addition to refusing to intervene in highly controversial examples of alleged partisan gerrymandering, federal courts continue to show a general deference to the authority of partisan state governments

over determining the boundaries of federal electoral districts—a situation that is, by itself, highly unusual among modern industrial democracies, including federal ones.

Nonetheless, despite the disappointing result of these cases for advocates of non-partisan (or, at least, less overtly partisan) electoral administration, in *LULAC vs. Perry*, members of the Supreme Court (in particular, Justice Anthony Kennedy) have expressed a desire for a potential test that could be applied to these controversies in order to adduce whether or not certain redistricting plans implemented by states violate federal constitutional standards of “equal protection” for all voters (Hall 2003, 485-518). One such test, proposed by Gary King and Bernard Grofman, presents itself as just such a possibility.

This essay will examine the King-Grofman approach and suggest a new and, hopefully, more effective political strategy that its proponents should use in attempting to persuade the courts that it should be adopted. It also will devote attention to the relevance of the Texas Constitution and other state constitutions to partisan gerrymandering as part of this proposed strategy. It will be argued that opponents of partisan gerrymandering should give attention to the much-neglected potential role of state courts in addressing this controversy in relation to congressional redistricting. However, it is necessary to begin by revisiting the various circumstances that have made this controversial practice so difficult to address, let alone redress.

Redistricting, State Constitutional Authority, and American Federalism

Generally, electoral districts of federal systems are determined through institutions of the central government. The sub-unit levels also may be involved in the process, as they are in Australia. But, even within this context, the central government maintains responsibility for ensuring that the drawing of electoral districts is consistent with an overall national standard of legal and constitutional values. The sub-units (such as the American states) might be able to

experiment and, even, improve upon those standards. Ultimately, though, they normally may not deviate from them in a fundamental way (Grofman and Handley 2008, 63-68).

American states (or, currently, 36 of them) are unique in having their respective elected legislatures assume responsibility for the establishment and maintenance of electoral districts. This responsibility and the procedures that guide them frequently are specified within the respective state constitutions—again, a relatively unique feature of the American federal system. This situation has had profound consequences for the American electoral system and has facilitated the practice that has been given the uniquely American sobriquet of “gerrymandering” (Butler and Cain 1991, 92-127).

Consequently, the United States does not have a single process of electoral districting but, rather, 51 distinct systems¹ that are related in terms of basic democratic principles but distinctive in terms of varying commitments to the concept of political “fairness.” Therefore, understanding each state system in its own terms is a necessary component for analyzing the political, legal, and constitutional theme of redistricting as a controversy of the overall American political system—even though this theme has overall national consequences and implications.

An examination of one state constitutional scheme in this respect can, nonetheless, be illuminating in terms of gaining insight into the underlying principles, values, and motivations that have driven American redistricting efforts. Arguably, the most fascinating of these states has been Texas. Aside from its special history, size, and political importance, it also was at the heart of one of the most contentious redistricting schemes in American history. That effort, in 2003, served to reinforce the controversial nature of the state-based scheme of electoral

districting within the United States. Texas has been both typical and singular in this respect and an examination of the state constitutional foundation of that process is a necessary starting point for understanding and assessing it in relation to the theme of partisan gerrymandering (Eaton 2006, 1193-297).

Redistricting Under the Texas Constitution

The Texas Constitution does not provide any express direction regarding the districting of those federal congressional seats that have been apportioned to that state. However, state constitutional direction is provided to guide redistricting efforts in relation to the Texas legislature and, while the relevant section of the Texas Constitution is not binding upon that process in relation to representatives to the United States Congress, it does appear to be instructive in that respect.

The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or

¹ That number of distinct systems applies, provided that territories and other constituencies are regarded as being part of the overall federal jurisdiction, as established in U.S. Const., art.

Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties (Tex. Const., art. III, sec. 26).

The process for determining boundaries for both state and federal legislative districts is found in article III, section 28 of that state constitution. Primary responsibility rests with the Texas legislature, consistent with the general constitutional authority that is delegated to that legislature under section 1 of that article. However, section 28 further delegates that responsibility “in the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment” to a Legislative Redistricting Board of Texas (Tex. Const., art. III, sec. 28). That board consists of the state’s lieutenant governor, speaker of the house, attorney general, comptroller, and land commissioner. It must meet within 90 days of the end of the first regular session of the state legislature following the census report if the legislature fails to produce a redistricting plan (May 1996, 98-101).

Obviously, the constitutional design was not intended to be politically bipartisan or impartial. Indeed, although it is supposed to respond to the empirical direction of an impartially calculated census, it appears to be based upon an assumption that the actual act of redistricting is a prize of a “spoils system” (Snare 2001, 83-97) In contrast, Pennsylvania’s constitutional arrangement specifies that its Legislative Reapportionment Commission “shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them.” It also has a chairman who “shall be a citizen of the Commonwealth other than a local, State or Federal official; holding an

IV, sec. 3 (1787).

office to which compensation is attached” with any vacancies to be filled by the Supreme Court of Pennsylvania (Pa. Const. art. II, sec. 17(b)).

Other state constitutional schemes, such as provided by the Indiana Constitution, permit the state legislature (and, thus, the majority party) to assume responsibility for redistricting. However, unlike Texas, that partisanship has not been constitutionally enshrined but has more resulted from institutional default, as section 14 of the Indiana Constitution intimates (Ind. Const. sec. 14). There have been attempts to create an express (and, at least formally, non-partisan) redistricting commission within Indiana as a result of controversial redistricting following the 2000 census. But in Indiana, as in most states, the partisan nature of redistricting has been implied, though not formally acknowledged.

The Texas redistricting controversy of 2003 in Texas might have appeared to be a particularly conspicuous example of the more notorious consequences of having federal districting fall under the sovereign authority of any state constitution. However, the outcome, especially in terms of partisan gerrymandering, is not unique to Texas, as similar redistricting controversies in other states (particularly Pennsylvania and Indiana) have demonstrated. Nonetheless, the constitutional confrontation between state-level discretion over the electoral process and the responsibility to guarantee voter and representational equality at the federal level has found its most intriguing and significant example in relation to Texas. That federal/state constitutional controversy, both generally and in relation to the 2003 Texas redistricting plan, merits more intense scrutiny. In particular, it is important to note that different states and their respective constitutional traditions are guided by differing beliefs and values (McHugh 2003, 3-9) and this factor both makes a state-by-state approach more challenging and suggests the even greater importance of the adoption of federal constitutional standards in this area.

The Legal Background

Districting, Redistricting and Gerrymandering

That controversial redistricting plan came before the federal courts only because of a shift away from the traditional deference to the sovereign authority of the state level of American federalism in this area. Despite the fact that constitutional authority for congressional districting is delegated to the states, the Fourteenth Amendment to the United States Constitution provides the means through which the federal courts can intervene. However, federal courts generally declined to extend their jurisdiction into redistricting disputes until the middle of the twentieth century. Then, as part of the United States Supreme Court's historic activism in civil rights jurisprudence, the "equal protection" clause of the Fourteenth Amendment provided the impetus and means for this extension through the decision that malapportioned congressional districts violate "voter equality."

Thus in the landmark case of *Baker v. Carr*, the Supreme Court broke new ground, permitting federal courts to deal with overt population malapportionment. The majority opinion, written by Justice Brennan, carefully redefined the "political question" doctrine, converting it from a vague trapdoor method of avoiding controversial issues to a nuanced categorization based on previous usage and constitutional logic (1962, 187-237). In a larger sense, Justice Brennan built on and improved on Justice Frankfurter's vaguer efforts in *Colgrove v. Green* (1946) and, even, in the latter's dissent in *Baker v. Carr* (1962, 267-330). Justice Brennan's opinion goes a long way toward remedying what Bickel calls Justice Frankfurter's greatest failing; his inability to present a coherent theory of when courts should *not* act (Bickel 1978, 34). Of course Justice Brennan's purpose was to enable the courts to intervene more fully but he was far-seeing enough

to recognize that circumscribed power is more likely to endure and be accepted. *Baker* can also be regarded as narrowing, but intensifying, judicial abnegation (Mikva 1995, 683-98).

The opinion provoked strong dissents from Justices Frankfurter and Harlan. In his last written opinion, Justice Frankfurter inveighed against entering this “political thicket.” Justice Harlan argued that the destruction of community and geographical boundaries was imminent and predicted the advent of a court-imposed equal weight of each and every vote. Both Justices suggested other evils would ensue, most of which have not. But Justice Harlan’s prediction of a “one-person one-vote” standard was, in fact, accepted by the Court only a year later in *Gray v. Sanders* (1963, 381).

Criticized as overly-simplistic—even the Court has, subsequently, invalidated finely honed equal-population districts while sustaining somewhat larger deviations—the “one-person one-vote” standard is, nonetheless, a vital part of the continued general acceptance of *Baker v. Carr* (Gardner 2002, 1237-67). It is, to be sure, a judicial “sound bite” but it resonates well with Fourteenth Amendment “equal protection” language and reasoning. More importantly, it gives the original finder of fact in a case a limited footing—a way of establishing “judicial triage”—so that not every case is an adventure into political philosophy, measures of equality, or two (or more) versions of political history.

Analyses of electoral rights continue to revolve and evolve around the general principle of “one-person one-vote.” The provisions of Article One, Section Two of the United States Constitution also are relevant to this interpretation, implying a congressional reach that has been seldom employed. The third clause of that section delegates authority to Congress regarding not only the number of representatives but also the responsibility for ensuring equal representation according to population for the House of Representatives. That delegation, seemingly simple in

concept, has proven to be more difficult in execution, particularly as state governments have been, as a result of congressional action, delegated the authority to make the actual determinations regarding the composition and boundaries of electoral districts.

The Fourteenth and Fifteenth Amendments are, however, the foundation for both congressional and court authority (Perry 1999, 3-14). Underrepresented Congressional districts have been deemed to violate the specific requirement of proportional numbers of eligible voters for each district when their size varies beyond a judicially imposed range. These cases have been based upon population deviation; seldom on the specific drawing of electoral boundaries. Nonetheless, it is necessary to understand the judicial reasoning underlying these more circumscribed electoral controversies in order to appreciate the foundational principles that have affected the constitutional interpretation of gerrymandering.

The link between equal protection and voting rights also has been crucial to judicial responses to gerrymander controversies. Specific judicial decisions and much of the scholarly commentary addressing these decisions also have emphasized the direct commands of the Fifteenth Amendment and the enforcing legislation, such as the Voting Rights Act of 1965. But the general interpretation of equal protection provides an essential foundation for this constitutional interpretation (Crea 2004, 289-304). The fact that all such controversies revolve around institutional responses of the government, including electoral institutions, makes population gerrymandering a controversy that is broadly tied to the general (and, often, vague) principle of equality. *Baker v. Carr* is a judicial success not only because there was a specific demonstrated need—Tennessee had not bothered to redistrict for nearly 50 years and was only slightly extreme on this point. *Baker* also included a masterful and thoughtful reappraisal of the

judicial role by Justice Brennan and a numerical crutch for the District Judges, a bounded role in inquiry and a standard for pre-judgment and post-judgment assessment.

Population discrepancy is not the only form of gerrymandering. The Supreme Court unanimously struck down a racially contrived scheme in *Gomillion v. Lightfoot* (1960) that attempted to change the boundaries of Tuskegee, Alabama, to maintain white political dominance. Justice Frankfurter, who wrote the opinion of the Court, based his ruling on the Fifteenth Amendment and “discriminatory treatment” rather than any issue of “dilution” of the vote under the Fourteenth Amendment in an effort to distinguish his *Colgrove* opinion. Thirty-three years later, a 5-4 majority in *Shaw v. Reno* (1993) invalidated a North Carolina districting plan extracted from the state under the Voting Rights Act of 1965. The plan set up two majority black districts, one of which the court held to be geographically bizarre and could only have been concocted for racial purposes. Although the Court previously had upheld “benign” racial districting—most conspicuously in *United Jewish Organization v. Carey*— (1977) as not having anti-white intent, the districting examined in *Shaw*, in the majority’s opinion, went too far. In previously upholding “benign” racial districts, the Court had strongly relied on the ultimate source of legislative power—the unusual and potent enabling of Congressional power under the Fourteenth Amendment. This authority is, of course, not only unavailable but also illegal for federal authorities. The Court was willing to recognize what was in plain sight in these two cases because it was willing to gaze through the lens of the Fifteenth Amendment and invalidate racial gerrymandering in these, but not other, cases.

In general, the Court has preferred to interpret the Voting Rights Act (1973) in dealing with claims of racial gerrymandering. The act restricts the powers of states where a low percentage of racial minorities participate—largely southern, but also including New York,

whose literacy requirements have hampered Puerto Rican and other Latinos from full participation. Such states must secure approval of electoral changes from the Attorney General or appeal to a specified Court of Appeals panel. The courts then have the benefit of congressional and executive judgment on which to fall back and, therefore, reach constitutional issues, sparingly. Most gerrymanders are not racially based and do not need to create districts of unequal populations. The most common and durable goal of gerrymandering is partisan advantage. It is the clustering of the voters within their district lines that is the crux of the process.

Politicians, like other careerists, seek more control over their futures. State legislators have first-hand power and are tempted to protect their own positions. When establishing congressional districts, they may well protect incumbents but they will almost always protect their party. Apportionment usually involves some partisan favoritism. When does such choice become oppressive, unfair, or excessive? Should courts or legislatures decide the district boundaries? The subject matter—the drawing of district lines—certainly does not lend itself to popular referenda. Other countries, and a few states, utilize more detached commissions with mixed results as to their effectiveness.

Not until 1986, a quarter of a century after *Baker v. Carr*, did the Supreme Court rule that partisan gerrymandering could be the basis for a challenge to apportionment. That decision, *Davis v. Bandemer*, produced neither a coherent standard, nor a majority opinion. Justice White's opinion of the Court upholding the Indiana districting (1986, 113-43)—joined by Justices Brennan, Marshall and Blackmun—depended, in part, on the votes of Justices Burger, O'Connor, and Rehnquist, who argued that partisan gerrymandering was non-justiciable (1986, 143-61). The decision that it was justiciable rested in part on the “dissenting in part, concurring

in part” opinion by Justices Powell and Stevens (1986, 161-85). They would have invalidated the Indiana apportionment under Fourteenth Amendment principles. Justice Stevens, the sole Justice who participated in that decision at that time, never retreated from the notion that the court had adequate tools for adjudicating political gerrymanders. Although he was open to new tests, he has been, basically, unsuccessful in convincing anyone but Justice Breyer that existing case law can deal with gerrymandering.

The plurality opinion in *Bandemer* by Justice White (and joined by Justices Brennan, Marshall and Blackman) is not an unequivocal rejection of partisan gerrymandering. While sustaining the Indiana apportionment, the opinion suggested that other more flagrant gerrymanders were invalid only if there was “continued frustration of the will of a majority of the voters, or a denial to a minority of voters a fair chance to influence the political process” (1986, 133). To emphasize their highly limited view of judicial intervention, the Court limited successful challenges to cases where plaintiffs demonstrated that they were “completely shut out of the political process” (1986, 133). Those stringent comments are not binding because they are the expression of a plurality. Further efforts to follow this Powell-Stevens opinion have produced two decades of frustration and numerous denials of court relief in political gerrymandering cases. Such inquiries are time-consuming and tedious.

In *Vieth v. Jubelirer* Justice Scalia mobilized a four-Justice plurality to call for forthright overruling of *Bandemer* as the only reasonable response to this history. Writing for himself and Justices O’Connor, Rehnquist and Thomas, he found that the record established the fact that no meaningful or manageable judicial standards were possible, not merely that they had not been found (2004, 271-306). Both Justices Brennan and Frankfurter had regarded such standards as basic to justiciability and their absence has now both empirically and conceptually been

demonstrated according to the *Vieth* plurality. Interestingly, this position was underscored by the dissenting Justices' failure in *Vieth* to agree on the basis upon which they would have invalidated the Pennsylvania apportionment.

Justice Breyer's opinion suggests that as dissenters they consciously strove for creative varieties rather than a joint product. But the *Perry* case demonstrates that there were continuing consequential differences between Stevens-Breyer and Souter-Ginsburg. Justice Scalia, for his plurality, argued further that the Constitution and democratic order entrust primary responsibility for apportionment to political branches of government "and that turns out to be root-and-branch a matter of politics." Trying to figure out how much politics is tolerable is a futile exercise. Racial gerrymandering can be established, though not without difficulty, because judges are empowered to interpret such plans under "strict scrutiny" and because the groups harmed by discrimination are independently observable. Party identification is something of a divination—a derivative of voting patterns—and the analysis of discrimination is part-and-parcel of the same basic findings. Even expanding "strict scrutiny" (which the Court is loath to do) will not constrain partisan gerrymandering to a judicially manageable status. Justices Scalia and Thomas would have overruled *Bandemer* and were joined by Justices O'Connor and Rehnquist, two of the three Justices who had objected to the precedent in the first instance (Jenkins 2007, 176-77).

Although he joined the plurality on the merits in *Vieth*, upholding the Pennsylvania apportionment, Justice Kennedy refused to join them in overruling *Bandemer* and, so, preserved it for at least the present (2004, 306-17). His opinion apparently was written with much soul-searching, as he threaded the thin line between an indecisive justice and a swing vote. He obviously was deeply affronted by the blatant legislative partisanship and the boast of a North Carolina legislator that "we are in the business of rigging elections" (2004, 317). Still, he

appeared reluctant to have judges extend further their supervision of the political process. A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process and the Supreme Court, Justice Kennedy argues, is correct to refrain from mounting this substantial intrusion into the nation's political life.

However, Justice Kennedy preserved *Bandemer* with the hope that a measure could be developed, which involves surgical excision of baneful politics while leaving legislatures relatively free rein, the judicial equivalent of "pinpoint bombing." "While understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases" (2004, 306). To achieve this result, Justice Kennedy would require: (1) a set of principles for drawing boundaries that are both neutral and comprehensive and (2) a clear rule that limits the judicial role.

The Texas Gerrymander: Background

These federal cases were possible only because the Supreme Court had determined that the protection of voter equality overruled the authority of state constitutions to determine congressional districting within their respective state boundaries. That state-level constitutional authority had been established as part of the "Great Compromise" that had produced the federal system under the United States Constitution (Rush 1998, 33-35). The prerogative of states in such matters also was defended by the most prominent of the Founding Fathers (Hamilton 1987, 331-35). Nonetheless, states continued to press to retain their own redistricting initiatives under their own state constitutional authority. The most dramatic recent example of this effort and the conflict between state and federal constitutional interpretations in this area occurred in Texas.

League of United Latin American Citizens v. Perry (2006)—originally *Sessions v. Perry* (2006)—was a direct challenge to the entire redistricting promoted by Representative Tom DeLay in 2003. The Court consolidated this case with more specific challenges to the actions of the Texas Legislature in: (1) dismantling a Latino-majority district which seemed on the verge of defeating a conservative Republican Latino incumbent, while creating in compensation, so as not to upset the “no retrogression” rule of the Voting Rights Act, a geographically convoluted district running through much of the length of the state, with an equally solid Latino majority and (2) cracking the Dallas-based district of Representative Martin Frost over objections that it constituted a black-minority district. Congressman Frost, although White, had never been opposed in a primary by a black candidate, so there was considerable ambiguity about the applicability of the “no retrogression standard” (Bickerstaff 2007). It later was established that the Department of Justice specialists concluded that both districts violated the statute. However, they were overruled by the Attorney General, who has the legal authority to approve or deny stated districting in states that have a history of poor voting by minorities as specified in the Voting Rights Act, subject to appeal to a Court of Appeals panel also specified by the statute. The Attorney General’s authority not to heed the advice of his subordinates in these matters is legally clear.²

The basic redistricting was the product of two elements. First, as southern and border states have moved from one-party Democratic control to one-party Republican dominance,

² Ebban (2006), A1. The events were cited in a footnote in the Brief for Appellants in *Jackson v. Perry* but were, at most, relevant to the claims of excessive partisanship and did not figure in any of the court opinions. A good description of the legalities of pre-clearance and, indeed, the legal niceties of reapportionment, generally, is Herbert, Verill, Hirsch, and Smith (2000, 1-66).

voting changes have evolved in stages: presidential allegiance has changed first and local voting habits altered later. Texas has had a strong and scrappy political tradition and, in this party-transfer-evolution, the Democrats used every device, including gerrymandering, to cling to power. With respect to Congress, the Democrats concocted a gerrymander that was “Texas-sized” and which allowed them to retain seats even as their popular vote drastically declined. Michael Barone’s *Almanac of American Politics* characterized it as the cleverest redistricting plan of the 1990’s. In 1994, Republicans received 56-42% of the popular vote but only 11 of 30 seats (Barone and Cohen 2007, 84). The plan was largely the product of Congressman Frost’s office, so his defeat was a special objective of the Republican redistricting, a decade later (2007, n. 11).

The second factor was the growth of computer capacity. Eldridge Gerry’s name was borrowed for the salamander-like district created under his aegis as Governor of Massachusetts in the early nineteenth century but gerrymandering was neither invented by him nor died with him. The key to gerrymandering is that, under the Anglo-Saxon single-member district, votes which increase the winner’s majority beyond the requisite 50% + 1 are positive but unnecessary and, in that sense, “wasted.” Creating large concentrations of your opponent’s voters—“packing”—and modest majorities for your party in as many districts as possible is the essential process, though there are many techniques and possibilities. Distributing pockets of opponents’ votes in safe districts of your own—“cracking”—is the main variant. There have been significant improvements in accessibility of election and census tract data as well. Software programs that facilitate integration of that data into myriad possibilities quickly evaluated have modernized gerrymandering (Monmonier 2001, 64-76).

As the U.S. House of Representatives has become increasingly non-competitive, its membership increasingly determined in redistricting by lines drawn after each census to protect the incumbents of the party controlling the state legislature. In states where parties share power, reciprocal protection of all incumbents may occur (Loomis and Schiller 2005, 54-67). That result also may well be a consequence of protecting one's own seats by conceding a set of districts to the other party. The disappearing competitive districts have been the subject of a large body of political science and constitutional law literature (Kaiser 1968, 208-15; Cox and Katz 1999, 812-41; Hasen 2006, 15-37; Ferejohn 1977, 166-76; Niemi and Jackman 1991, 183-202; Basehart and Comer 1991, 65-79; Mayhew 1974, 293-308; Jacobson 1990, 3-20). Indeed, California, New York, and Texas—about one-quarter of all seats—were projected as having only five genuine contests in 2006 (Eilperin 2005, A16; Toner 2005, D1). Two close observers of the electoral revolt have summarized the matter most dramatically, even melodramatically: “In the original Constitution, the Senate was picked by the state legislators and the House was chosen by ‘the people’ but that after a process of amendment and political adaptation the houses have been inverted; now the people pick the Senate and the state legislatures through gerrymandering pick the House” (Issacharoff and Karlan 2004, 574).

There are, as Justice O'Connor particularly emphasized, two intertwined processes and purposes in political gerrymandering: 1) insulation of incumbents, which may or may not be for partisan advantage; 2) outright partisan districting. The reduction of competitiveness (perhaps involved in protecting incumbents) is clear and indisputable, regardless of its motivations. Because House incumbents already have huge electoral advantages in name recognition, mailing and publicity privileges, and fund-raising access, favorable districting is an added bonus for two more years in office. For the average voter in most House districts, there is little likelihood of

change in their representative short of death, disability, or court proceedings (Loomis and Schiller 2005, 68-73). This incumbency advantage discourages participation, diminishes meaningful influence, and undermines the major argument for the single-member district-system, as voter shifts fail to produce the type of tilts toward a governing majority that proportional representation systems also are unable to produce.

The Texas Case: Redistricting in Mid-Cycle

Texas, with its state constitutional formula, became increasingly aggressive in pursuing its own redistricting agenda. Meanwhile, at the federal level and as the twentieth century drew to its end, the Republican Party regained the majority party status it had lost with the Great Depression. National politics became intensely close and nasty. Charges of impeachment against a President were followed by the 2000 election in which the popular vote went to the Democratic candidate (Rae and Campbell 2004, 1-22). But the Electoral College went Republican with an unprecedented Supreme Court decision determining even that latter outcome (Hasen 2006, 41-46, 65-67).

The Republican House leadership asserted its authority by refusing to let legislation get to the floor unless their own party could deliver a majority, spurning victory through Democratic support. This “rule or ruin” policy was promoted in part by the intensity of the conservative and fundamentalist voters at the core of the party but, also, to ensure dominance of the party caucus and House control by a bare-majority party. The fragility of the House majority was made an instrument for party voting. This approach, in turn, made moderate Republicans a disappearing breed, as they could not make a strong showing in the caucus but were expected to ignore, consistently, their districts’ preferences on major issues—with consequent electoral dangers (Price 2004, 235-36, 243-44).

Still, leadership control was precariously based upon a thin majority. Representative Tom DeLay, the majority leader and the most powerful leader in the House, had a plan to double, roughly, that Republican majority. The Democratic Texas gerrymander already had been modified by court action when the rise in population added two House members to the delegation. Court action was required because of a split in party control of the two houses in the Texas legislature. The three-judge federal court, in *Balderas v. Texas*, had added the new districts in the areas of population growth and, otherwise, had made the minimum changes necessary to the existing apportionment (2002). The effect was, in fact, to create more equitable districts. The state's expert witness indicated that, if anything, the court districting slightly favored the Republicans; the plaintiff's expert concurred. Nonetheless, the Democrats retained a slight majority of the seats, presumably because of the voters' satisfaction with the incumbents. One of the side-benefits of gerrymandering is that it creates an incumbent who may well survive, even after the underlying partisan population is altered.

Representative DeLay realized that more drastic reallocations could not only help capture the seats Republicans could expect on the basis of population but could produce extra seats much as the Democrats had. The key was the capture of both houses of the Texas legislature. In hindsight, DeLay paid a heavy price for his reapportionment maneuver. But for a period of time it looked like a brilliant coup, and it at least temporarily augmented the Republican House majority as planned (DeLay 2007, 156-59). The elections of 2002 resulted in Republicans securing a majority in both chambers of the Texas legislature and, along with the Republican governor; they followed DeLay's strategy of redistricting Texas' congressional districts—the primary purpose being, of course, to benefit the Republicans. They were, however, initially stymied by the Texas custom of requiring a two-thirds vote in the Senate on reapportionment

matters and the minority-Democrats were, still, able to block the redistricting. When the Lieutenant Governor announced he would break custom and not require the special majority, the Democrats announced they would not attend. When the Republican majority voted to compel attendance, the Democrats fled to Oklahoma, where Texas police could not arrest them. DeLay actually demanded and obtained the services of the Department of Homeland Security aircraft to help intercept the fleeing legislators. Eventually, a state Senator became tired of exile, agreed to return, and, as a result, the new Republican gerrymander was put in place. The ensuing election resulted in a Republican gain of six congressional seats (Overton 2006, 26-27, 102).

The Lower Federal Court Opinion

The controversial Texas mid-cycle apportionment (the timing of it having been acceptable under state constitutional standards) had been upheld by a panel containing two of the three federal judges who had ordered the redistricting after the initial legislative deadlock. That decision was appealed to the United States Supreme Court (2004) and the Justices surprised many observers by remanding the case (2004). The real surprise was that reconsideration was ordered in light of the court's decision in *Vieth*.

The three-judge court that dealt with the remand was certainly well acquainted with the issues. Two of the judges had promulgated the House apportionment that was probably the most equitable in Texas history, even though incumbency efforts kept the Republicans from harvesting full immediate returns from some of the new districts. They also had upheld the DeLay-sponsored reapportionment, though Judge Ward had dissented. There was a degree of bemusement about the new consideration demanded by the Supreme Court, but Judge Higginbotham's rigorous and well-reasoned defense of the Texas apportionment impressed even the Justices who rejected many of his conclusions. He observed, in *Henderson v. Perry*, that "the

light offered by *Vieth* is dim and the search for a core holding is elusive (Case no. 203-cv-00354-TJW, at 6).

The judges all assumed that their task was to apply Justice Kennedy's *Vieth* standards as against the *Bandemer* plurality ones, and they generally did not find that *Vieth* grants them greater authority to invalidate. Judge Higginbotham expressly found that the gerrymander sustained in *Vieth* was more egregious in its effects than that in Texas, and rivaled it in overt political motives (Case no. 203-cv-00354-TJW, at 27-30). There was, therefore, no justification for invalidation in Texas as the Pennsylvania redistricting had been upheld. Turning to the question of re-redistricting, he found that such actions were expressly noted as permissible in court decisions and had been common in our early history. He rejected the argument that the population findings of the census were legal fictions taken as reality only by virtue of the express command of the Constitution and re-redistricting required more recent data—an argument that was impressively developed by Texas Law professors and others in an *amicus* brief and, largely, adopted in the United States Supreme Court argument by the plaintiffs (Case no. 203-cv-00354-TJW, at 27-30). Judge Ward concurred “specially,” based on the specific terms of reference of the remand. But, otherwise, he would have reiterated his previous conclusion that the Texas apportionment was a gerrymander, violating *Bandemer* standards (Case no. 203-cv-00354-TJW, pp. 49 ff). The case was appealed. The Supreme Court scheduled oral argument for the consolidated cases for a highly unusual two-hour afternoon session and established procedures for quick implementation so the Court might take action requiring electoral changes in 2006.

The Legal Arguments and The Court's Decision

The anti-climactic nature of the decision was, in large part, a result of an odd decision by the plaintiffs' attorneys to stake their case entirely on the argument that mid-cycle re-districting

(reapportionment for a second time after the decennial census) was *per se* an impermissible political gerrymander under the United States Constitution, despite being acceptable under the Texas Constitution. This tactic is hard to understand but, also, hard to criticize, given the conflicting signals given by the judges (Backstrom, Krislov, and Robins 2006, 414).

Apparently rattled by the unexpected remand to the special District Court (2004), they chose to side-step Justice Kennedy's challenge in *Vieth* to develop any test for excessive politicization (2004, 307-8).³ By urging a simple "bright line" prohibition of redistricting, they avoided a direct revisiting of *Vieth* and adopted a strategy that implied a lack of optimism in their core case. At oral argument, the claim was treated as a non-starter, even by the liberal justices, and Justice Kennedy showed visible annoyance with the plaintiffs.⁴ The Texas Assistant Attorney General, both in his written and oral argument, emphasized the plaintiffs' avoidance of Justice Kennedy's call for a more calculated measure of politicization.

Justice Kennedy had called for "bright-line" parameters. This argument for an *ad hoc* bright-line exclusion of all re-redistricting met part of the criteria. But it opened up vistas of an equitable jurisprudence, with greater court involvement through other *per se* invalidations of the type for which the court's liberals had argued and that Justice Kennedy had been at pains to disavow. Given the colorful background of the process, however, perhaps he could have acquiesced in this argument if written in a constrained way. Still, as the Texas Assistant Attorney General argued in excellent briefs and in oral argument, the plaintiffs had not only failed to meet Justice Kennedy's call but they had ignored it, entirely. In the end, it is probable

³ The State Appellees' brief in the consolidated cases refers to this language as "a mandate," (2004, 25). Obviously, even a "swing" justice has no such authority.

⁴ These observations are made by Samuel Krislov, who was in attendance during the entire two-hour long oral argument.

that the primary plaintiffs' attorneys were seriously worried about losing Justice Kennedy by espousing yet another test he would reject so they made a "long-shot" argument.

That the *per se* rule was not of interest to the justices was quite evident at the oral argument. Usually, there is some ambiguity in oral questioning. But in this case there was no difficulty discerning Justice Souter's and Justice Kennedy's impatience with the argument and (as expected) Justice Scalia's scorn. Even Justice Breyer expressed skepticism, though he similarly probed both sides. Justices Roberts and Alito were muted in their questioning but the Chief Justice actively pursued the argument of the state that the intent of the Latino shuffling was completely partisan and that if it were paradoxically sanitized it from voting rights violations. He characterized the argument as involving "two bites of the apple" and, apparently, enjoyed the lawyering in framing the argument ("*LULAC vs. Perry*: Oral Argument").

This strategy by plaintiffs was rewarded, however, by Justice Kennedy's reassertion of his support for *Bandemer* in his controlling opinion in *League of United Latin American Citizens v. Perry*, which upheld the redistricting except with respect to the violation of the Voting Rights Act as it applied to the Hispanic districts (2006, 408-47). Justice Kennedy's was the dispositive opinion on all issues. The four conservative justices joined him in the basic rejection of a ban on mid-cycle redistricting, as did Justices Souter and Ginsburg. The four liberal justices joined him in invalidating the Hispanic district. The splintering of the Court survived even after the arrival of Justices Roberts and Alito, though they did not join Justices Scalia and Thomas in calling for overruling of *Bandemer*, as their predecessors did in *Vieth*. Chief Justice Roberts reiterated his call for not deciding matters not at issue. Justices Souter and Ginsburg flatly rejected "any challenge to [the] Plan based simply on its mid-decade timing" (2006, 483).

Because there was no coherent “majority for any single criterion,” Justices Souter and Ginsburg treated the broad issue of gerrymandering much as the subject of an “improvident grant of *certiorari*” (548 U.S. 399 (2006), at 483-491). Justice Stevens, writing for Justice Breyer, also rejected any *per se* rule but would have invalidated the Texas reapportionment. Justice Stevens argued that excessive partisanship was well established in the record (2006, 447-82). Both liberal pairs agreed that the Latino and Black districts being contested were invalid, thus creating a 7-2 vote on the overall redistricting, a 5-4 split invalidating the Latino district, and a 5-4 split upholding the Black district in Dallas. The liberals did not achieve a united front in justifying their dissents, and Justice Kennedy was the lynch pin in each and every element of the decision.

Thus the law stands where it previously stood. District judges must consider claims of excessive political gerrymandering (even if a redistricting scheme is considered to be acceptable under state constitutional standards) even though, starting with *Bandemer*, such time-consuming and painstaking ventures have never resulted in an adverse ruling. Racial and ethnic redistricting, on the other hand, have, as in *Perry*, occasionally been found to be improper. The bases for such decisions have been either a violation of the Voting Rights Act (with its intricate provisions) or the “strict-scrutiny” standard required by the Fourteenth and the Fifteenth Amendments. Potentially, the most far-reaching effect of the case lies in the expressions of interest in a potential breakthrough in the “political gerrymandering” quagmire that the federal courts have introduced and which states must consider. Four of the justices recommended, with varying degrees of interest, attention to the approach growing among political scientists known as “symmetry.”

Can “Symmetry” Save Us?

Any solution must take into account both state constitutional interests in upholding state legislative prerogatives and federal constitutional interests in protecting voter equality. A scheme that could be acceptable to both constitutional levels may be most attractive if it is based upon a formula that is designed to ameliorate a desire to avoid a perception of overt partisanship. That approach might offer the most promising potential solution, thus meeting the combined needs, for political purposes, of a national consensus and the sovereign will of 50 separate state constitutional traditions.

Among the *amicus* briefs filed for *LULAC v. Perry* was one by Gary King—a prominent political scientist and applied statistician—and Bernard Grofman—a lifetime analyst of apportionment issues. The brief was explicitly neutral between the parties and the issues and advocated Court adoption of “symmetry” as a standard for appointment equity and King’s method of measuring symmetry as a technique (King, Grofman, Gelman, and Katz 2006, 1-18).⁵

⁵ The authors of the brief may or may not have realized they were atypically returning to the original form of the *amicus* role, which was as a friend and advisor of the Court and not (as it now has become in American jurisprudence) an ally of one side or another (Krislov 1963, 694-721). They clearly sought to avoid identifying with either side in order to pursue the goal of persuading the Court to move in a direction that they have been advocating for some time. Indeed, they noted, pointedly, that they had avoided using their technique to analyze the Texas data, even though it would have been easy to do so using King’s freely available software, *JudgeIt*, and experts on both sides had produced quite similar analysis of the data utilizing symmetry assumptions.

In short, King and Grofman have honed an approach, over time, fitted it to the legal system, enabled others to apply the technique, and moved, modestly, to create Constitutional change.⁶

The symmetry approach involves two related but separable parts: a concept and a technique. The concept of symmetry is a simple one but with profound implications. The authors are fully aware that the single-member district system means that a party that produces large popular majorities is usually rewarded by winning an ever-increasing percentage of seats. The statistical basis is the expectation that, as one gets larger majorities, the likelihood of getting the simple threshold of “50% + one” votes in more districts grows, ever more rapidly. Third parties magnify the bonus. Empirical results in the British and ex-colonial countries that use the single member district system also establish the political science findings. As King has noted, that relationship has been basically, though inexactly, discussed since 1909 (King and Browning 1987, 1251-73).

The system is fully entrenched and defended both because of greater bonding between populace and local representatives, and because it helps parties with large mandates effectively govern. In fact, all proportional representation systems also “cheat,” usually by requiring a party gain a threshold number of seats to be accepted in order to prevent maximum fractionalization and enhance the chances of ruling parties or coalitions to govern (Ferejohn 1999, 40-48). King and Grofman explicitly accept our system as constitutional and having philosophical justification as well (King and Browning 1987, 1255). Critics of anti-gerrymanderers have unfairly labeled them as being crypto-proportional representational advocates. That “red-herring” technique is

⁶ One delineation of the conditions required to transform, or fail to transform, legal doctrine is offered in Krislov (1973, 211-46).

used, for example, in the Texas brief to attack the symmetry approach, even though the *amicus* brief is clear on this point.

Accepting disproportionate representation, the symmetry approach, however, insists that, if one party benefits from the system, it is unfair if the other party does not get the same result if it can achieve the same sort of majority. If, for example, 55% of the vote allows a party to elect two-thirds of the legislators, this result is not unfair if the other party subsequently achieves 55% of the vote and gets the same benefit.⁷ The symmetry approach is simple and beguiling: “what’s sauce for the goose is sauce for the gander.” At root, it is a close relative of the principle of equal protection of the laws and reversibility of roles (symmetry) is a kindred defense of many classificatory systems. Most political scientists who have heard of it have accepted or acquiesced in its conclusions King, Bruce, and Gelman 1995, 85-110). So far as we can determine, the Supreme Court could adopt symmetry as a principle without altering any precedent because district courts regularly hear such comparisons under the innocuous name of “partisan advantage.” To give symmetry legal consequences, the Supreme Court would have to entrench King’s methodology and/or prescribe a standard or limit to discrepancies.

King perfected his program for ascertaining the bias of a system, over time, developing and making the approach most accessible in his current *JudgeIt* software. The basic assumption is that, while electoral units will not, necessarily, fluctuate with the exact same magnitude as others, they will retain their rank order on party propensity. Using an extreme electoral district, a

⁷ The symmetry notion is, perhaps, analogous to the proverb about one person dividing the cake but the other person having the right to choose which piece to take. Similarly (and, perhaps, more profoundly), totalitarian parties that claim the authority to contest elections but eliminate elections once they win are making asymmetrical claims that consistent democrats may reject, as indirectly described in Cassinelli (1962, 111-41).

calculation is made of its “volatility”—the popular vote shift in the system-wide vote that produces a one-percent shift in the district. That propensity is, then, used to help generate the next district’s index. The rank ordering of districts creates an objective starting point. Once each district’s volatility is established, many contingencies can be studied.⁸ The program finds the popular vote necessary for each party to gain a majority and establishes the “seat achievement” that a party will obtain with a given vote. The relative difference in seats produced by a majority of the popular vote for each party is expressed as a measure of system asymmetry or “partisan advantage.” The software calculates these disparate tasks in one printout. The program is data-friendly and data-forgiving. Previous voting patterns obviously are needed but more refined calculation can be made with additional information, such as incumbency and population trends (Grofman and King 2007, n. 48).

The program has been in use for a decade and has been employed in numerous cases. Experts of both sides have reported roughly the same results (Tufté 1973, 540-54; Grofman 1983, 295-327; Gelman and King 1994, 514-54.). The scholarly literature has been united in supporting the symmetry standard as the definition of partisan fairness in electoral systems at least since the clarification of the standard introduced by Gary King and Robert X. Browning (1987, 1251-73). Examples of this literature are numerous (including Thompson 2004, 51 and 53 n. 7; Gilligan and Matsusaka 1999, 65-84; Calvo and Murillo 2004, 742-57; Engstrom and Kernell 2005, 531-49). Presumably the small variations involve small differences in the original

⁸ The history of King’s development of the technique is best found in Grofman and King (2007, 2-35, especially n. 36). Those stages of development proceed through King (1989, 787-824), Gelman and King (1990, 274-82), and, ultimately, Gelman and King (1994, 514-54). The method in the last article is the basis for Gelman and King’s *JudgeIt*, which is an open source and free software program that is described at <http://gking.harvard.edu/judgeit/>.

data utilized. The program can create new minimally-biased districting if given the appropriate data. Because it makes minimum assumptions as to voting stability, it permits sensitive evaluations and predictions about future election outcomes given past voting patterns and different future voting levels. It starts with voters as they are, and permits calculation of the strength of differing influences such as voter location, incumbency, and system distortion. There has been no published critique of which we (or King and Grofman) are aware.

As noted in Grofman and King (2007, 19, n. 3), the assumption of rank-order stability is not infallible, though it often will hold, even under massive realignments. Misgivings—but never formal objections—usually occur over the casual probabalism by which the second order data are reconfigured—principally population trends, incumbency bonuses, and other variables. King argues these make the calculations more stable and seldom alter the fundamental picture. Grofman and King take great pains to answer more specific assertions, especially the inability of the method to deal with the natural geography in relation to voter geography. In ignorance, concerns have been expressed about that point, including by Justice Kennedy (2006, 419-20). It appears, now, that this issue is not a problem, though convincing the justices is, of course, a more important and, probably, more difficult task.

The objection to the assumption of districts moving in rank order becomes more significant if the symmetry method is to be developed into a decision-rule. An acceptable rule-of-thumb system, validated by experience, would look different if accepted as a bright-line test of the type Justice Kennedy seeks. Sharp population shifts, dramatic economic transformations of parties, or ideological shifts may drastically reorder districts with crucial, though small, changes in calculations. Without an underlying theory or some parameters and error rates, it remains something of a “tinkerers’ rough tool,” like exit polls, which work most of the time but

can fail for unknown reasons. In any event, King and Grofman make only modest claims for their approach. They emphatically believe that legal rules are matters for courts and lawyers; not social science. Certainly, the experience of psychiatry trying to impose its definition of mental incapacity strongly supports that approach. Justice Kennedy's expressed dissatisfaction with symmetry because it failed to draw a bright line seems misplaced and will, hopefully, be reevaluated by him.

King and Grofman have always regarded their test as the opening of a judicial inquiry and not as its resolution. The ideal of electoral district symmetry is admirable but we know little about its workability in real systems because the technique has been used, largely, for hypothetical boundary drawing. Courts have been realistic on population equality and should show some awareness that representation in legislatures is a rough-edged tool. King and Grofman also wisely suggest a two-step process (which Justice Breyer, in *Vieth*, and we have suggested) that would help the lower courts in distinguishing between cases in which the partisan gerrymandering is worth the time of the court and those many cases in which the minority party feels aggrieved but does not precisely know the reason (Krislov, Backstrom, and Robins 2006, 414). To King and Grofman, the threshold claim would be "asymmetry." A state would, then, have to show some justification in factors such as respect for existing political subdivisions, geographic lines, political geography or concentration of voters. King and Grofman implicitly suggest that the burden of justification would shift to the state but that shift would occur because of the showing of asymmetry and a need to justify differential treatment of the two parties. We suggest that the state also could meet its burden by developing alternative measures of asymmetry that would have to be validated.

King and Grofman recognize the limitations of their measure and the fact that it cannot stand alone as a bright-line standard. It would, in many instances, produce very odd districting, hence its use as an “opening wedge,” rather than an “acid test,” seems appropriate. This use would render it much less helpful than the talismanic and easily grasped “one person, one vote” standard. At the same time, it would be less sweeping and, therefore, less threatening to the political order. The objective that is being sought is, after all, a check on *excessive* politicization. In such situations, the threat of review and, therefore, the call to legislative self-restraint often is more effective than the actual application of court action. Not only is the primacy of democratic rule maintained but court action is a deterrent and channeled—not a substitute for legislative choice. The modest potential for the test seems tailored to modest expectation for the frequency of use.

Consistent with the *amici curiae* role, the subsequent King-Grofman article devoted eight pages to “options in setting legal thresholds for *prima facie* unconstitutional bias”:

- (1) Require plans with as little partisan bias as practicable;
- (2) Disqualify plans with partisan bias that deviate from symmetry by at least one seat;
- (3) Disqualify only those plans with egregious levels of partisan bias—defined in terms of a specified percentage, such as 10%;
- (4) Disqualify only those plans that can be expected to translate a minority vote into a majority of seats;
- (5) Disqualify only those plans whose partisan bias is more severe than the plan being replaced (Grofman and King 2007, 35-101).

Obviously, any of these standards are defensible and are analogous to standards used in other voting case areas. Additionally, they illustrate, concretely, the reason that choice of criteria should be, and inevitably is, legally and properly the domain of a court and not an issue of science and scholarship. Both state and federal courts have the ability to take the initiative in this respect.

Partisan Gerrymandering After 2012: Possible Solutions

The next struggles over partisan gerrymandering already have emerged as a result of the redrawing of legislative and congressional districts, following the 2010 census. The political climate, especially as a result of the 2012 election and the emphasis upon “change” and “reform” that was pivotal in the first Obama victory in 2008 (Abramowitz 2009, 22-23) may still be favorable in this respect. Although federal judges are not subject to direct voter pressure, a charged political environment (including a great desire for compromise and accommodation) can, very well, affect them (Bickel 1986, 199-243; O’Brien 2008, 165-238). Therefore, these political events ultimately may prove to be very relevant to the redistricting efforts of various states (including congressional redistricting and the response of federal jurists (including the justices of the United States Supreme Court) toward constitutional controversies that may come before them.

For reasons that are not entirely clear, the attitude of the justices of the Supreme Court toward the justiciability of partisan gerrymandering cases has divided among them along traditional so-called “liberal” and “conservative” dimensions⁹ with Justice Kennedy serving, as

⁹ Of course, the use of the designations “liberal” and “conservative” are applied in a colloquial, rather than a strictly scholarly (in terms of political philosophy), sense. Those two designations fall under the true ideological tradition of liberal democracy and all of the justices and judges in these cases express an adherence to its essential core values that include freedom

he has in the past, as the “swing vote.” But the Obama presidency presents a possible change to that dynamic. Any change in the composition of this court (as well as lower federal courts) is very likely to favor advocates of justiciability (Lewis 2008, A4). This administration also should foster a political environment that is more conducive to Justice Kennedy being persuaded that a measure of partisan gerrymandering is acceptable but only if it is imposed in a manner that assumes a semblance of fairness, if not actual equality.

The work of the California Citizens Redistricting Commission is illustrative of the affect that these initiatives can have. This Commission consists of 14 members: five Democrats, five Republicans, and four members who are unaffiliated with either party. The Commission holds public hearings and accepts public comments and its decisions must be approved by at least nine members of the Commission with at least three votes coming from each of the party-affiliated members. In particular, the mandate of the Commission is to “draw the district lines in conformity with strict, nonpartisan rules designed to create districts of relatively equal population that will provide fair representation for all Californians.” (California Citizens Redistricting Commission 2012). Its efforts that resulted in new district maps in August 2011 already has been lauded as having produced some of the fairest and most competitive electoral districts in the country (McGhee and Krimm 2012). The adoption of the symmetry standard as the basis for California’s “nonpartisan rules” could improve this result, immensely, and make the

and equality, as described and explained in Ceaser (1992, 5-10, 203-10) and Macpherson (1990, 93-115). An overview of the development of the “ideological” labels of so-called “liberals” and “conservatives” in relation to contemporary American law and politics can be found in Dolbear and Cummings (2004, 491-503).

California experiment even more attractive as a model for other states to adopt or for the federal courts to impose, should they be inclined to intervene.¹⁰

More importantly for the legal process, a different strategy for the presentation and articulation of the “symmetry” approach is recommended. King and Grofman did not present a symmetry test of the Texas redistricting plan as part of their *amicus curiae* brief because they believed a position of neutrality would make their test seem more persuasive to the Supreme Court. But it can be argued that the reverse assumption is more correct: the court never will adopt a test whose operation and, more importantly, outcome it does not clearly and entirely understand.

The next judicial challenge to partisan gerrymandering on the basis of the symmetry test, in order to be successful, must present an actual analysis of a legislatively-drawn redistricting plan as based upon that test. Only by applying this test to an actual situation can the courts be persuaded of its viability, fundamental fairness, and consistency with constitutional standards in this area. The redistricting that has followed the 2010 census will present many such opportunities, especially given the asymmetrical results noted in relation to the 2012 congressional races in certain states, including Texas, Ohio, and Pennsylvania (Steinhauser 2012, A9).

Ultimately, the solution to partisan gerrymandering rests upon both political and judicial will. If public opinion continues to shift on this matter, the application of non-partisan methods of redistricting can prevail. However, it will require political will, including among judges who

¹⁰ At least one federal court has shown a willingness to address the issue of electoral arrangements that are biased upon the basis of political party advantage, even though it did not specifically address gerrymandering, *Republican Party of North Carolina vs. Hunt* (1996). This precedent offers a possibility

share a belief that partisan gerrymandering should be considered to be as constitutionally unacceptable as racial gerrymandering (Grofman and King 2007, 33). This study can offer no better “solution” than persistence in both rigorous scholarship and determined advocacy. Hopefully, those qualities will continue to grow among public intellectuals, public officials, and voters in general.

Conclusions

A state-based strategy does not preclude additional federal challenges. Indeed, part of its purpose is to create, as widely as possible, a body of case law that can provide relevant precedents for ongoing judicial challenges to partisan gerrymandering. However, a parallel state-based approach may be politically wise; although federal constitutional standards have been firmly asserted in partisan gerrymandering controversies, federal courts have been almost totally restrained in addressing these powers.

Therefore, state-level discretion, under each state’s respective constitutional system, has persisted into the twenty-first century. Successful applications of the symmetry test within state courts, using state constitutional standards, could initiate a reconsideration of the application of that standard at the federal level and (prompted by these interpretations of parallel state constitutional standards) under federal constitutional standards. Whether federal constitutional authority can be further asserted in this way will depend upon the will and actions of the federal judiciary, especially the United States Supreme Court. Nonetheless, the potential clearly exists.

Justice Brennan famously would hold up five fingers of one hand and announce that “this really is all you need to know about the Supreme Court.” It is increasingly likely that court’s basic split will become the focus of the issue and future of political gerrymandering. Justices

of future judicial intervention in this area, though the composition and inclination of the current United

Roberts and Alito have not committed themselves (especially as the *Perry* case did not reopen *Bandemer*, directly) but the tenor of their comments in writing (especially the Chief Justice's questioning during oral arguments) suggest they will fall into the conservative camp on this issue. The avoidance of confrontation by the plaintiffs in the *Perry* case was premised, apparently, on hopes that new personnel will help in the future (Toner 2007, A9). Justice Kennedy appears to be the only real "swing vote" at this time.

"Symmetry" has emerged as a logical, non-controversial standard that open-minded justices might accept without excessive commitment or a sense of entering a morass. The King-Grofman presentation of alternatives is dispassionate and we suggest it can be implemented in stages, allowing District Courts to find workable thresholds through the familiar common law process of trial-and-error. A showing of asymmetry will not doom the apportionment when strong countervailing justifications are present. The real objective should be to induce discipline at the state legislature or commission level to avoid extreme forms of political manipulation and to avoid the costs and complications of litigation.

Meanwhile, state constitutions remain relevant to this area of controversy. The political activity under the Constitution of Texas provides an excellent example of the extreme politicization of congressional redistricting within the United States. The fact that this authority is constitutionally delegated to the sub-unit level of this federal system is a unique source of exacerbation for this problem, especially when compared, internationally (Gallagher and Mitchell 2008, 185-208). Hopefully, an innovative solution (such as the King-Grofman proposal of "symmetry") may well be advanced by additional scholars, embraced by the public, and, eventually, adopted by governments and courts at both levels. Meanwhile, redistricting will

States Supreme Court may indicate otherwise.

continue to be an extremely contentious and volatile area of partisan American politics, as well as federal/state constitutional conflict.

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