An Overview of Partisan Gerrymandering Litigation in the Last Twenty Years

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I. THE PROBLEM OF PARTISAN GERRYMANDERING

Partisan — sometimes referred to as political — gerrymandering is the drawing of district lines in a manner that discriminates against a political party.¹ After each decennial census, a state is assigned the number of representatives that it will be permitted in the United States Congress. Due to population changes, the number of representatives allocated to a state may change after any given census. When the allocation of representatives changes, the state’s legislature must re-draw the district lines throughout the state in order to correspond to the new number of representatives. A partisan gerrymandering claim arises when a political party asserts that the state legislature has drawn the lines in a manner that is more favorable to one particular political group. The claim alleges a violation of the Equal Protection Clause.

II. BEFORE VIETH

Before 1986, the Supreme Court gave little more than a nod to the issue of partisan gerrymandering.² When the Court did address the issue, the focus was most often on population equality.³ In the 1960s, the Court declared that the Equal Protection Clause would not be violated by multi-member districts, provided that the number of voters in single member districts was proportionate.⁴ In 1969, the Court held that the standard for population deviation among districts must be limited to “as nearly as practicable.”⁵ In setting forth the “nearly as practicable” rule, the Court refused to accept the argument that any de minimus population deviation

¹. Black’s Law Dictionary defines partisan gerrymandering as “the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” BLACK’S LAW DICTIONARY 696 (7th ed.1999).
³. See Reynolds v. Sims, 84 S.Ct. 1362 (1964); Fortson v. Dorsey, 85 S.Ct. 498 (1965) (holding that voters in multi-districts counties were not denied equal protection); Burns v. Richardson, 86 S.Ct. 1286 (1966) (holding that equal protection clause does not require single member legislative districts).
⁴. Id.
⁵. Kirkpatrick, 89 S.Ct. 1227-1230.

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would be constitutionally acceptable and stated that equal representation required the use of the best census data available in order to achieve population equality. The Court has continued to enforce the equality rule, refusing to accept population deviations that are even less than one percent.

It was not until Davis v. Bandemer that the Court declared by a 6-3 vote that partisan gerrymandering was a justiciable issue. The Court held that partisan gerrymandering would be an Equal Protection Clause violation if there had been both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. The Court noted that the first prong of intentional discrimination should not be difficult to meet if the redistricting plan had been done by the legislature. To fulfill the second prong, a plaintiff would need to demonstrate that the particular political group had "been unconstitutionally denied its chance to effectively influence the political process." To meet this threshold, there must be evidence "of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." The Court's requirement of such evidence rejected the District Court's holding that any interference with a voter's ability to elect a representative of choice would be sufficient for an equal protection violation.

Proportional representation was also squarely rejected by the Court in Bandemer when it affirmed its decision in Whitcomb, which had considered a claim of racial gerrymandering. The Court stated that failure of a minority to have proportionate representation in the legislature is not alone sufficient for an Equal Protection violation. There must also be proof that the complaining party had less of an opportunity to participate in the political process. This proof may be infringement on the right to vote,
III. VIETH V. JUBELIRER

When the Court noted probable jurisdiction to hear Vieth in June 2003, it seemed unlikely that the reason the Supreme Court was considering the case was simply to reaffirm Bandemer. Rather more plausible was one of two possibilities: the Court was going to replace the Bandemer two prong test with a more workable standard, or the Court was going to set aside Bandemer altogether and declare the issue of partisan gerrymandering to be nonjusticiable on the basis of the political question doctrine. The Court chose the latter.

Under the 2000 decennial census, Pennsylvania lost two of its twenty-one congressional seats. In response, the General Assembly enacted a redistricting plan, commonly referred to as Act 1. The plan was crafted by a Republican controlled legislature and signed by Pennsylvania's Republican governor, Mark Schweiker.

Democratic plaintiffs brought an action in the district court to have Act 1 declared unconstitutional. The complaint alleged that the districts were drawn in a "meandering and irregular" way and that "all traditional redistricting criteria, including the preservation of local government boundaries" had been ignored for the purpose of partisan advantage. In response to the defendant's motion to dismiss, the plaintiffs alleged that the General Assembly's redistricting plan guaranteed that thirteen of the nineteen Pennsylvania congressional seats would be filled by Republicans, despite the fact that 53.6% of the voters registered with a major party were registered as Democrats. The district court labeled the plaintiff's line of reasoning as a thinly veiled argument for proportional representation, which had been firmly rejected by the Supreme Court in Bandemer. Furthermore, the court noted that a voter who casts his vote for a losing candidate cannot subse-

27. Vieth, 124 S.Ct. at 1773.
29. Vieth, 188 F.Supp.2d at 546.
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intimidation to prevent voter registration, restrictions on freedom to associate with the party of one's choice, or exclusion from party candidate selection.\textsuperscript{17}

While the Court enunciated the two prong test in its plurality decision, it failed to define what would be sufficient to meet the requirements of an actual discriminatory effect. The Court did state that "relying on a single election to prove unconstitutional discrimination" would be unsatisfactory.\textsuperscript{18}

However, since Bandemer, lower courts have struggled with the discriminatory effect threshold. The courts have most often opted to apply Bandemer in the most vigorous manner. It may be argued that if it was the Supreme Court's purpose to require a heightened showing of discriminatory effect in an effort to discourage the lower courts' scrutiny of an area that is clearly political in nature, then Bandemer has been a success. Bandemer essentially requires one of the two major political parties to demonstrate that they have been shut out of the political process; thus, it is an almost impossible standard to meet.\textsuperscript{19} If the Court's purpose was to render partisan gerrymandering nonjusticiable, then the case should be considered a judicial victory, given that no lower court has found a district plan to be a violation of the Equal Protection Clause based on partisan gerrymandering since Bandemer.\textsuperscript{20}

In reaction to the failure of partisan gerrymandering claims under Bandemer, some plaintiffs have since brought actions asserting that a congressional district is unconstitutional based on a violation of the one person, one vote mandate of Article I, Section 2 of the Constitution. These claims have been largely successful. Additionally, some district plans have been invalidated under the Voting Rights Act. Recognizing the need for clarification on the issue, in 2004 the United States Supreme Court considered its second partisan gerrymandering case, Vieth v. Jubelirer.\textsuperscript{21}

\begin{thebibliography}{9}
\bibitem{17} Id.
\bibitem{18} Id.
\bibitem{21} 124 S.Ct. 1769 (2004).
\end{thebibliography}
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The plaintiffs further claimed that the plan would impede the Democratic party's ability to secure candidates, thus shutting the party out of the political process. The court rejected this argument, stating that the complaining group was the Democratic voters; therefore the success of the Democratic party was irrelevant. The court acknowledged that even if a redistricting plan makes it more difficult for a party to elect a congressional representative, this alone will not be sufficient to declare the plan unconstitutional. In order to prevail, the plaintiffs must establish that citizens had been prevented from registering to vote, banned from associating with other like-minded voters, from raising funds on behalf of candidates, from voting, from campaigning, or from speaking out on matters of public concern.

The district court granted the defendant's motion to dismiss on all counts except the plaintiff's one person - one vote claim. The court ordered the legislature to submit a modified plan that would pass constitutional muster as to this issue. The General Assembly responded with Act 34.

In turn, the plaintiffs filed a complaint with similar counts to the action filed regarding Act 1 and filed a motion requesting that the court impose remedial districts in place of the districts created by Act 34. In a three judge panel opinion, the district court upheld Act 34 as a constitutional alternative to Act 1. The court stated that the plaintiffs had established the first prong of intentional discrimination against an identifiable political group, but had failed to demonstrate an actual discriminatory effect on the group required to meet the second prong of Bandemer. The per curiam opinion stated that there was no evidence that the legislature was relying on any information other than the population data from the census bureau when it enacted a re-districting

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30. Id.
31. Id.
32. Id.
33. Id.
34. Vieth, 188 F.Supp. 2d at 532.
35. Id. at 549.
38. Id. at 485.
39. Id. at 484.
Furthermore, the court indicated that the legislature’s reliance on the census demonstrated its good faith effort to redraw district lines in a manner that would not provide for even a \textit{de minimus} population deviation. Thus, the court held that the plaintiffs had failed to establish a partisan gerrymandering claim.

In \textit{Vieth v. Jubelirer}, the United States Supreme Court failed to reach a majority opinion. The plurality opinion, written by Justice Scalia, held that partisan gerrymandering claims were nonjusticiable. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas. Justice Kennedy concurred in the result. The plurality opinion first analyzed and rejected several standards for partisan gerrymandering claims before concluding that the issue fell within the limits of the political question doctrine since no judicially manageable standards could be ascertained.

Relying on several cases that had previously applied the political question doctrine, the Court declared that even though it is the judiciary’s responsibility to declare what the law is, sometimes the judiciary “has no business entertaining a claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” The Court went on to cite the six categories of political questions as outlined in \textit{Baker v. Carr}:

\begin{itemize}
\item [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
\item [2] a lack of judicially discoverable and manageable standards for resolving it; or
\item [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
\item [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or
\item [5] an unusual need for unquestioning adherence to a
\end{itemize}

\begin{itemize}
\item 40. \textit{Id.}
\item 41. \textit{Id.}
\item 42. \textit{Vieth}, 241 F.Supp.2d at 485.
\item 43. \textit{Veith v. Commonwealth}, 124 S.Ct. at 1770.
\item 44. \textit{Id.} at 1772.
\item 45. \textit{Id.}
\item 46. \textit{Id.}
\item 47. \textit{Id.} at 1776. See also \textit{Nixon v. United States}, 113 S.Ct. 732 (1993); \textit{Pacific States Telephone and Telegraph Co. v. Oregon} 32 S.Ct. 224 (1912); \textit{Baker v. Carr}, 82 S.Ct. 691 (1962).\end{itemize}
political decision already made; or [6] the potentiality of embar-
rassment from multifarious pronouncements by various depart-
ments on one question.48

The Court stated that the partisan gerrymandering was in-
cluded in the category of “a lack of judicially discoverable and
manageable standards for resolving” an issue.49

The plurality went on to examine several proposed standards
for partisan gerrymandering. The Court first examined the Ban-
demer standard that had been applied by lower courts in recent
years. However, after examining the inconsistencies of the test,
the Court rejected Bandemer, stating that the “standard was mis-
guided when proposed, has not . . . improved in subsequent appli-
cation, and is not even defended before us today by the appellants;
[therefore] we decline to affirm it as a constitutional requirement.”50

The Court also considered a test proposed by the plaintiffs,
which modified Bandemer to require that the predominant intent
of the legislature in forming the districts be to have a partisan
advantage.51 The second prong of the plaintiffs’ test required a
redistricting plan to be invalidated when it prevented a majority
of the electorate from electing a majority of the representatives.52
The Court rejected the proposed test on several grounds. First,
the Court reiterated that the Constitution did not require propor-
tional representation; thus, the second prong of the test was not
constitutionally warranted. Additionally, the Court stated that
the test would not be judicially manageable because it is difficult if
not impossible to ascertain what party holds the majority.53

Justice Kennedy, as the swing vote, agreed that partisan ger-
rymandering may be a constitutional violation, but also agreed
that there was no workable judicial standard.54 However, his opin-
ion may be distinguished from the plurality in that he was unwill-
ing to assert that there may never be a workable standard, so as
to allow partisan gerrymandering to be justiciable.55 He bolstered
his hope that a standard may be reached at a later time by ac-
knowledging that the Court had been willing to wander into the

49. Id.
50. Id. at 1780.
51. Id.
52. Id. at 1781.
53. Vieth, 124 S.Ct. at 1782.
54. Id. at 1784-1785.
55. Id. at 1793. (Kennedy, J., concurring).
one person - one vote arena — an area that was historically designated as a nonjusticiable political question; thus, it has become more difficult to justify labeling other areas of political matters, such as partisan gerrymandering, as nonjusticiable. Justice Kennedy went on to acknowledge the differences between political and racial gerrymandering, stating that in the latter, classification was constitutionally infirm, but in the former classification based on political party is acceptable. Thus, the classification only becomes impermissible when the legislature chooses to classify based on an improper motive, such as furthering the interests of a political party. But after reiterating the problem with the current standard, he failed to propose a replacement.

IV. POST-VIETH: PARTISAN GERRYMANDERING CLAIM ALTERNATIVES

At first glance, Vieth appears to resolve nothing. However, Justice Kennedy seemed to leave some light at the end of the tunnel for partisan gerrymandering claims when he stated that the fact that “no such standard has emerged in this case should not be taken to prove that none will emerge in the future.” But in the end, Vieth leaves litigants with little guidance on whether or not to once again try what may be another fruitless partisan gerrymandering claim.

In the alternative, there may be a more viable forum for partisan gerrymandering claims. A plaintiff may bring an action in state court based on the rights created by the state's constitution. A state constitution is an independent source of law and need not be interpreted identically to the U.S. Constitution, even if the language is nearly identical. Thus, state courts are not bound to interpret their Equal Protection Clause in the same manner as a federal court applying the U.S. Constitution.

Furthermore, state constitutions often provide greater protections for individual rights. For instance, the Pennsylvania constitution has been interpreted to provide for greater protection from unlawful searches and seizures than is available under the

56. Id. at 1795. (Kennedy, J., concurring).
57. Id. at 1793. (Kennedy, J., concurring).
58. Vieth, 124 S.Ct. at 1795.
60. Gardner, supra note 59, at 645.
61. Id.
Fifth Amendment of the U.S. Constitution. Other state constitutions' search and seizure clauses have been interpreted to prohibit canine sniffs and aerial searches, even though the Supreme Court has never held that the U.S. Constitution prohibits these types of searches.

Another reason that state courts may be a favorable venue for partisan gerrymandering claims is that, typically, state constitutions contain many more mandates for the electoral process. Most state constitutions create a right to vote in any person that meets the requirements of age, citizenship, and residency. Moreover, state constitutions often specifically regulate apportionment. In contrast, the U.S. Constitution does not affirmatively provide the right to vote for any office and only minimally addresses political life. The U.S. Constitution only provides for equal treatment in the voting process and then leaves the creation of specific voting rights in the hands of the states.

State court rulings have a unique opportunity to shape the development of federal law. The Supreme Court has often adopted a state court standard, particularly when the standard has been adopted by several state courts. This has occurred most often in the context of criminal procedure and due process. In this way, a series of state constitutional rulings may influence the making of federal constitutional law. Perhaps in the not so distance future the arena of partisan gerrymandering may also be suitable for the Supreme Court's adoption of a state-created judicial standard.

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62. See PA CONST. ART. I, § 8.
63. Gardner, supra note 59, at 646.
64. Id. at 648.
65. Id.
66. Id.
67. Id. at 647.
68. Gardner, supra note 59, at 646.
69. Id. at 646-647.