How is Partisan Gerrymandering Unfair?

Charles Beitz

Republican-controlled state governments engaged in a coordinated effort of unprecedented scale to gerrymander election districts for state legislatures and the U.S. House of Representatives in the aftermath of the 2010 census. This appears to have magnified the legislative strength of the Republican Party at both state and federal levels and reduced that of the Democratic Party in relation to their shares of the popular vote. The effects of partisan gerrymandering typically dissipate with time, but for various reasons the post-2010 gerrymanders have proved unusually resilient. In the 2016 elections for the House, for example, Republican candidates attracted fewer than 50% of all votes cast and won more than 55% of the seats. Much of the gap seems to have been a product of gerrymandering.

The Supreme Court held that partisan gerrymandering is justiciable as a matter of constitutional law in *Davis v. Bandemer* (1986) but thus far has not found any partisan gerrymander constitutionally insupportable. So it is notable that a federal district court in 2016 found that a gerrymandered districting plan for the Wisconsin state legislature is an unconstitutional partisan gerrymander, a decision subsequently appealed to the Supreme Court and awaiting decision. There is, however, no consensus on the Court about the constitutional

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harm in partisan gerrymandering or about how courts can reliably detect its presence. There is also no consensus on either point among commentators on the Court's election law jurisprudence.

The question of the nature of the constitutional harm is notoriously difficult. Some of the problem arises from the difficulty of fitting partisan gerrymandering into the equal protection framework established by the Court's voting rights jurisprudence. This framing of the constitutional issue has influenced and probably distorted thinking about the nature of the unfairness of partisan gerrymandering. But the subject is independently puzzling when considered as a matter of first-order democratic theory. It is not clear in what respects, if any, the practice is open to objection as a violation of political equality or fair representation. The recent philosophical literature in democratic theory is not much help because the institutional details of political representation tend to be paid so little attention (a serious failure, if what I argue here is correct). In this paper I mostly leave aside the dispute in constitutional adjudication in order to concentrate on the underlying problem of democratic theory. Among other things this means that some of what I say here will be familiar to devotees of the subject of gerrymandering in constitutional law and political science.

Let me describe the problem. Say that a jurisdiction has a legislature to which members are to be elected from single-member territorial constituencies or districts (SMD). Each district is to return a representative to the legislature using a “first past the post” (FPTP) decision rule—each voter votes for one candidate and the candidate with the largest number of votes is declared the winner. The districting system is required to satisfy “one person, one vote” (OPOV) and districts must be geographically contiguous. Imagine a “base” map of the jurisdiction that plots voters

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according to their likely or demonstrated political preferences. Idealizing, think of a policy space with a single dimension along which voters can be situated. Voters are rarely distributed evenly throughout a jurisdiction, so there will likely be local clusters of more-or-less like-minded voters. Partisan voters will therefore not be distributed randomly over the map. Now imagine that we are to create another map, to be superimposed on the base map, plotting the boundaries of legislative districts. The gerrymandering problem arises from the fact that many alternative district maps can be devised that satisfy the OPOV and contiguity requirements. Since like-minded voters are unevenly distributed, the district boundaries on the alternative maps will probably enclose local electorates that vary in the proportions of groups of like-minded voters they contain. The choice among maps will therefore affect the likelihood that any individual voter will succeed with her vote in electing the candidate of her choice in her district. If those responsible for choosing among the alternative maps have a stake in the outcome, it would be a surprise if they were not to choose a map that favors their political interests. That would be political or, if the choosers represent a political party, partisan gerrymandering.

Gerrymandering thus understood is an effort to influence the outcomes of elections to representative bodies by manipulating the territorial boundaries of electoral districts. Its main techniques are “packing” (concentrating voters of one party in a relatively small number of districts) and “cracking” (dispersing voters of one party among a relatively larger number of districts). These techniques can be used, alone or in combination, for various purposes. Most familiarly, they can be used by a dominant party to increase its expected share of legislative seats, packing opposition party voters into a small number of districts in which they constitute large majorities and cracking dominant party voters across a larger number of districts in which they constitute predictably reliable but probably smaller majorities. “Cracking” can also be used in a different way, to spread opposition voters across districts in which they constitute likely losing minorities. Either way, this is “partisan” gerrymandering. “Packing” can also be used to create what is sometimes called a “bipartisan” (or “incumbent-protecting”) gerrymander, which

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9 The standard reference is Guillermo Owen and Bernard Grofman, “Optimal Partisan Gerrymandering,” *Political Geography Quarterly* 7 (1988): 5-22. I leave aside some other manipulations associated with gerrymandering—the “hijacking” of a seat by redrawing boundaries so as to deprive an incumbent of a dependable majority and the “kidnapping” of an incumbent by redrawing boundaries so that two incumbents must compete for the same seat.
seeks to create "safe" seats for incumbents of both parties. Typically this occurs when the parties share control of the state government. Although bipartisan gerrymandering is not my main concern here, we shall want to ask how, if at all, the representational harm(s) it embodies is (are) related to those of partisan gerrymandering.

Before I proceed, let me note—in order to set the point aside—that the election of representatives to a federal legislature like the U.S. House is complicated in a way not shown in our simple model. Members of a federal legislature are elected from state-level jurisdictions. Supposing that each state is divided into single-member territorial districts, although OPOV can be approximated within each state, it almost certainly cannot be satisfied across the entire federal jurisdiction if each state is required to have at least one representative, there are no fractional votes in the legislature, and there is significant variation in population among states. In the reapportionment following the 2010 U.S. Census, for example, the ratio of people per House seat ranged from about 528,000:1 in Rhode Island to about 994,000:1 in Montana. If one believes that OPOV is a requirement of political fairness, this fact is bound to seem problematic. But the problem exists separately from partisan gerrymandering so I abstract from it here.

I

Many people believe that partisan gerrymandering is obviously unfair. It is not easy, however, to describe the unfairness. There are at least three puzzles. The first arises from the fact that sources other than intentional partisan gerrymandering can bring about a similar kind of result. One important factor is differences in the geographical concentration of each party’s voters. It is well known, for example, that in many states voters likely to vote for Democratic candidates tend to be clustered in urban areas whereas voters likely to vote for Republican

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12 Though not all. For example, in his majority opinion in *Gaffney*, Justice White remarks, with acceptance if not outright approval: “The reality is that districting inevitably has and is intended to have substantial political consequences” (412 U.S. at 753). The idea that some amount of political gerrymandering is “to be expected” and thus constitutionally unobjectionable is common in the jurisprudential literature.
candidates tend to be more evenly distributed.\textsuperscript{13} The geographical distribution of Republican voters is in this way more efficient than of Democratic ones: on average, it takes fewer Republican votes to elect a representative than Democratic votes. A jurisdiction in which this is true could manifest “partisan bias” (a condition in which a party with fewer votes than its rival wins more seats)\textsuperscript{14} indistinguishable from what might be produced by an intentional gerrymander. This is sometimes called an “accidental gerrymander.”\textsuperscript{15} The puzzle is that partisan bias arising from differences in the geographic concentration of partisan voters is typically regarded as unproblematic whereas an identical bias arising from intentional gerrymandering seems at least prima facie objectionable. But it is not clear how this contrast can be made sense of, given that both districting plans produce the same kind of difference in the electoral efficiency of each party’s votes. If the objection to partisan gerrymandering has to do with its distorting effect on the representation of the people in the legislature, why should we care whether the distortion is produced intentionally or as a by-product of acting for a nonpartisan aim in constituting the system?

A second puzzle appears once we recognize that partisan gerrymandering is compatible with adherence to OPOV. This fact may not have registered fully at the onset of the “reapportionment revolution” in the 1960s, when it was supposed that redressing malapportionment (that is, violations of OPOV) would also constrain gerrymandering. In fact, the opposite seems to have been the case: by providing a rationale to depart from “traditional” or facially neutral districting standards (e.g., compactness, contiguity, respect for existing political and geographic features such as county lines) the requirement to conform to OPOV may


\textsuperscript{14} This idea of partisan bias derives from the seminal contribution of D. E. Butler, “Appendix III: The Relation of Seats to Votes,” in R. B. McCallum and Alison Violet Readman, \textit{The British General Election of 1945} (London: Oxford University Press, 1947), pp. 285-86. Butler describes it as a “type of injustice.” As I note below, there are today more sophisticated understandings of this idea. A system without bias is said to be “neutral”: “\(v\) percent of the vote results in \(s\) percent of the seats, and this holds for all parties and all vote percentages.” Richard G. Niemi and John Deegan, Jr., “A Theory of Political Districting,” \textit{American Political Science Review} 72 (1978), p. 1304.

have exacerbated the problem. In any case, the fact that gerrymandering can be made to conform to OPOV means that it need not be an offense to political equality in the sense in which that ideal is manifested in equal population standards for legislative districts. Notwithstanding, partisan gerrymandering is often said to "dilute" or "debase" the votes of those who are disadvantaged by it, suggesting that it involves some (other) violation of political equality. The second puzzle is whether there is some morally significant sense in which this might be said to be true. How does gerrymandering treat voters unequally and why, if at all, should we consider the inequality objectionable on grounds of fairness?

The third puzzle is more elementary. According to a familiar picture of the election of representatives, voters decide for whom to vote on the basis of comparative judgments of the past performance and political commitments of the candidates facing them. In a system of district representation, each voter renders these judgments with respect to the candidates on the ballot in her own constituency. If we take this picture seriously, then we might wonder why a disparity between a party's shares of votes and seats that can only be discerned at the level of the jurisdiction as a whole can be the basis of an objection to a district map. If we regard each constituency, so to speak, as having its own contest, why should we think that the appearance of "partisan bias" at the level of the jurisdiction is evidence of anything other than differences among constituencies in the division of voters' judgments of the merits of the candidates facing them?

I consider these puzzles roughly in sequence. As we shall see, however, it turns out that a solution to the first depends on a solution to the second.

II

One response to the first puzzle is that intentional partisan gerrymandering, in contrast to "accidental" gerrymandering, is the product of an abuse of power by the currently powerful acting to entrench their position at the expense of those without power. This idea is sometimes


17 For example, McGrath et. al. hold that partisan gerrymandering "seriously undermines the egalitarian intentions of the 'one person, one vote' jurisprudence of the 1960s." Gerrymandering in America, p. 2.
expressed by saying that gerrymandering objectionably allows the elected choose the electors.\textsuperscript{18}

But this is not very enlightening; any districting process that entitles a legislature to oversee its own redistricting satisfies this description, yet not every such redistricting is typically regarded as an objectionable gerrymander.

A better way to put the objection might be this. Public officials have a general duty to fulfill the obligations attached to their roles. Among these is a duty to act in good faith for the public interest. An official who gives priority to her own individual or partisan interests when they conflict with the public interest violates this duty. Partisan gerrymandering is a clear a violation of this duty.\textsuperscript{19}

But what is the violation? One reply is that officials who gerrymander violate a norm of procedural fairness by taking into account factors that are not relevant to the task at hand. Partisan gerrymandering takes advantage of information about the geographical distribution of partisan voters; if this information is irrelevant to the task, then gerrymandering violates a norm of procedural fairness. The difficulty is that whether this information is irrelevant depends on how one understands the aims of districting. As we shall see, some people believe that districting should aim to minimize partisan bias; others, that it should aim to meet some reasonable standard of responsiveness. If one were to adopt either aim, then access to information about the geographical distribution of voters in the composition of a district map would be essential. A more precise form of the objection is that partisan gerrymanderers make improper use of possibly relevant information in order to gain an advantage their own party.

But now the question is what constitutes an improper use. The only obvious response that does not rely on a substantive view about the aims of districting is that it is a use for which there is no justification other than to gain partisan advantage. However, although this might be sufficient in some cases—for example, those of what is sometimes called "extreme partisan gerrymandering"—it is not obviously necessary. The act of gerrymandering might be a violation


\textsuperscript{19} The thought descends from Locke, who wrote that officials should follow the maxim \textit{salus populi suprema lex} in repairing malapportionment. John Locke, \textit{Two Treatises of Government}, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, ¶158.
of duty even when another facially admissible justification is alleged; then we must ask whether
the justification is a good one, and we are back to the question of the proper aims of districting.

An alternative reply invokes a claim of substantive unfairness. Perhaps officials who
gerrymander for partisan advantage bring about a substantive or outcome-sensitive
representational injustice. If there were no such injustice, then although it might be true that
gerrymanderers act for their own partisan interests rather than for the public interest, it would
not be the case that in doing so they set back the public interest. What, then, is the injustice? Is it
that a districting plan produces more favorable electoral outcomes for the gerrymanderers than
would be produced by a plan designed with the public interest in mind? But now one wants to
ask how such a “benchmark” plan could be recognized in the absence of a diagnosis of
substantive injustice. We would need a response to the benchmark question to make the
violation-of-duty concern stick.

I do not doubt that public officials who gerrymander violate their public duties: they are
blameworthy because they act on an inadmissible intention. But I don’t believe that we get a
sufficient explanation of the unfairness of partisan gerrymandering by confining our attention to
failures of duty by public officials. Intuitively—and in the views of many—at least part of
gerrymandering’s unfairness is that it distorts the representation in the legislature of the
political interests of the people. The objection objection needs refinement, but in any form it
would have to do with the aims and quality of representation, not (only) with the conduct or
motivation of public officials taken independently these concerns.

Let me pursue the question of a benchmark one further step in order to set aside two
responses that might suggest themselves immediately. (I will return to the question later.) One
way to conceive of a benchmark is as a ratio of seats to votes throughout a jurisdiction that
might be considered “natural” in the sense of being the ratio likely to obtain in the absence of
partisan gerrymandering. The first reply to the benchmark question sets this ratio at
proportionality: each party should enjoy the same share of seats as its jurisdiction-wide share of
votes. The proportionality standard is superficially plausible but it not obviously correct. To see
the issue, consider the following objection. It is well known that in two-party systems with
single-member districts, the “swing ratio” (that is, the change in a party’s seat share brought
about by a one percent increase in its vote share) is almost always greater than one.\textsuperscript{20} The only instance in which one might reasonably expect seats/votes proportionality is that in which the votes are evenly divided. Even at that point, however, the claim that it is unfair if seats are not also divided evenly needs a defense.\textsuperscript{21} It is not, for example, entailed by OPOV or by majority or plurality rule in the context of district representation. In this context every successful candidate is elected by a plurality in her district. Whether there is a further violation of OPOV or of majority or plurality rule when the entire jurisdiction is considered as a whole is a further, nontrivial, question that we come to in the next section.

The other reply sets the benchmark at the ratio of seats to votes that would be produced by a hypothetical district map that satisfies “traditional” standards of compactness, contiguity, and perhaps fidelity to existing political or geographical features of the jurisdiction. This response, too, is problematic. For one thing, the traditional standards do not uniquely determine a set of district boundaries, and not only because the traditional standards might reasonably be weighted in various ways. (Indeed, the map found to be an unacceptable partisan gerrymander in the Wisconsin case was claimed to satisfy traditional standards.)\textsuperscript{22} One might be tempted by the more refined idea that the benchmark seats/votes ratio should be set in relation to a plan chosen arbitrarily from among a number of randomly-generated districting simulations for the jurisdiction in question, each designed to satisfy the traditional standards.\textsuperscript{23} This may be a reasonable practical test for gerrymandering and might even suggest a practical method of avoiding its undesirable consequences, but offhand it is hard to see what principle of political fairness it instantiates. The traditional standards are sometimes said to be “neutral” but whatever neutrality they have is superficial. Because the traditional standards are anchored to


\textsuperscript{21} This is controversial. Some regard it as axiomatic that partisan bias is unacceptable even though they seldom explain why we should accept the axiom it is held to violate. See, e.g., ibid., p. 554, and the discussion of “partisan symmetry” in section III, below.

\textsuperscript{22} \textit{Whitford v. Gill}, p. 10.

territory, adherence to them means that the geographical distribution of partisan voters will influence the partisan division of a jurisdiction's delegation to the legislature even in a baseline map generated by the random simulation method. It begs the question why we should give weight to the ostensibly neutral standards even when doing so predictably produces partisan bias. Perhaps the question can be answered, but the answer will not be straightforward. Moreover if, as I suggest later, one desirable feature of a districting system is that it be reasonably responsive to changes in the popular will, then a baseline established according to traditional standards and without reference to the geographical distribution of political preferences could fail to describe an appropriate point of reference.

III

These reflections about the relevant baseline press us to consider in more detail the kind of representational harm done by partisan gerrymandering. Without clarity about this, a response to the first puzzle will be elusive. As I observed earlier, this harm is sometimes understood as a violation of political equality—as a "dilution" or "debasement" of the value or weight of the votes of those disadvantaged by it. The suggestion is that gerrymandering is objectionable because it fails to treat voters as equals. But because gerrymandering is consistent with adherence to OPOV, the sense in which there is or might be such a failure is obscure. This, of course, is our second puzzle.

The most widely held view among social scientists derives from the fact that partisan gerrymandering violates a standard of "partisan symmetry"—a condition in which the number of seats that one party would win with a given share of the vote is the same as the number of seats that the other party would win if it had the same share of the vote. Indeed, Bernard Grofman and Gary King report that there is "virtual[]... consensus" among scholars that partisan symmetry is the appropriate conception of "partisan fairness" in plurality-based American

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24 Part of an answer may be that people tend to cluster geographically on the basis of features related to their political interests (e.g., race, social class, partisan identity) and that drawing districts so that these various clusters can elect members of the legislature will produce a more accurate representation of the diversity of interests in the jurisdiction than, say, assigning voters to non-territorial constituencies at random. See Nicholas O. Stephanopoulos, "Spatial Diversity," *Harvard Law Review* 125 (2012): 1903-2010.
elections.\textsuperscript{25} It should be noted that “partisan symmetry” is a weaker requirement than proportional representation for parties. It would not be a violation of partisan symmetry, for example, if party A won 55% of the seats with 52% of the vote provided that party B could do the same if their positions were reversed.

The problem is that “partisan fairness,” so understood, is not in any clear way a consequence of the more basic value of political fairness or political equality, understood as an ideal concerned with the distribution of political influence among individual citizens. There may be some other reason we should care about “partisan fairness”—a possibility I return to below. But because the idea that gerrymandering is an affront to the political equality of individual voters is so pervasive, it is important, first, to see why that idea is problematic.

The appeal of the “partisan symmetry” standard may trade on its resemblance to the technical condition of symmetry in axiomatic social choice theory.\textsuperscript{26} Let us say that a “profile” (or configuration) of votes is a list of the votes cast by each of the voters. We may then say that a “social decision rule” maps all of the possible profiles onto the set of possible outcomes of a decision—one outcome for each profile. A decision rule is “symmetrical” if the outcome does not change under any permutation of the order of the votes in a profile. If we imagine that each voter in an ordered profile is identified by her place in the order, then under a symmetrical rule the outcome would be the same if any two voters were to change places. Symmetry is sometimes called “anonymity” because the outcome would not change if the names given by places in the profile were rearranged.

There is a natural sense in which symmetry so conceived expresses an idea of political equality or fairness when it is applied to decision rules (for example, in a committee). In a seminal paper on the basis of majority rule, Kenneth May writes that symmetry (or anonymity) is an interpretation of the idea that “each individual [should] be treated the same as far as his influence on the outcome is concerned.”\textsuperscript{27} This seems right. However, it is not much help in grasping the idea of political equality that is expressed when the condition of symmetry is


\textsuperscript{26} For example, Grofman and King present partisan symmetry as a “simple and direct generalization” of the technical condition of symmetry discussed in the text. Ibid., p. 7.

applied to the effects of districting on the partisan division of the legislature—as we might say, to the seat allocation rule rather than to the decision rule. Partisan asymmetry is fully compatible with symmetry at the level of individual constituencies. On the other hand, a districting map can violate symmetry at the level of the entire jurisdiction even in the absence of gerrymandering. This possibility is inherent in single-member districting. So the force of the objection that a map displaying partisan asymmetry is unfair to individual voters does not seem to derive from whatever normative significance symmetry has in connection with decision rules.

A related objection to partisan asymmetry is that it violates majority (or plurality) rule by enabling a party to command a majority (plurality) of seats even when the other party wins a majority (plurality) of the votes. (In the context of social choice, this would be said to violate “neutrality” as distinct from “anonymity.”) When this occurs, it might appear that votes cast for the party that wins the majority of seats have been given more weight than votes cast for the party that wins the majority of the votes, and this may seem to be a straightforward violation of political equality. Once again, however, we must ask what the putative egalitarian objection consists in. We only get a violation of majority rule if we take the entire jurisdiction as the unit of analysis, with the voters considered as a single electorate and the set of winning candidates as, in effect, its single, collective representative. But it is a basic fact about SMD that the

28 Suppose a legislature is elected from three districts, each with 5 voters, and consider these profiles: district 1, AABBB; district 2, AAAAB; district 3, ABBBB. Under majority rule, one A-candidate and two B-candidates are elected. Symmetry requires that the outcome of the election should not change if any two voters change places. The condition is satisfied in each district taken separately. But if the middle (underscored) voters in districts 1 and 2 were to change places, two As and one B would be elected. Symmetry is violated at the level of the jurisdiction. This would be true whether or not the districts were intentionally gerrymandered.


30 For example, Michael D. McDonald and Robin E. Best write that when there is partisan bias, the district lines have been drawn in a way “that [has] not counted all votes equally” or that violates the voters’ “individual right[s] to cast an equally weighted vote.” “Unfair Partisan Gerrymanders in Politics and Law,” Election Law Journal 14 (2015), p. 316.

31 This is assumed in the individual rights-based critique of partisan gerrymandering set forth in McGann, et. al., Gerrymandering in America, ch. 7. The authors’ defense of the assumption does not take account of the difficulty described here. However, their contention that partisan balance in the legislature is relevant to a judgment about the acceptability of the districting system (pp. 208-09) is important even if one is not tempted by the rights-based critique. I return to the substantive point below. See also Anthony McGann, The Logic of Democracy: Reconciling Equality, Deliberation, and Minority Protection (Ann Arbor: University of Michigan Press, 2006), ch. 3, arguing that political equality properly understood requires a form of proportional representation.
competition for seats takes place separately in each district. No candidate or set of candidates contends for votes in the whole jurisdiction. There is no point at which the voters in the jurisdiction as a whole express a preference for one or another slate of candidates for all of the seats in the jurisdiction. This means that the votes actually cast are in a formal and often in a substantive sense responses to the campaigns conducted by individual contenders within the environments of their own individual districts. If in fact it was the jurisdiction-wide total vote that mattered, then campaigns might be conducted differently and might produce a different division of the electorate. Since the actual division of the vote is in this way endogenous to the districting system, the jurisdiction-wide division cannot be assumed to be what would be produced if there were actually a single, jurisdiction-wide campaign. (Parliamentary systems, of course, may have a different dynamic.)

This aside, a more basic observation about the counter-majoritarian objection is that, at the level of individual districts, majority rule is in fact satisfied. If we take that as an element of political equality, then there is no egalitarian objection. If we now apply the same standard at the level of the entire jurisdiction then it would seem that voters are simultaneously treated both equally and unequally. Without more, this is incoherent.

None of this is dispositive, but it does raise the question whether more can be said to make sense of the claim that gerrymandering constitutes an objectionable violation of political equality or fairness at the level of the individual voter. This question subdivides into two: is there a more precise sense in which individual voters are treated unequally in a system with partisan bias? And, if there is, on what basis might it be reasonable to object to this form of unequal or unfair treatment? Both questions are complicated. I address the first in the next section and the second in the section following.

IV

Let us add political parties and a gerrymandered map to the model I described at the beginning. We have a jurisdiction with a legislative body to which members are elected from single-member, territorial districts of roughly equal population size by majority or plurality rule. We continue to idealize by supposing that the political preferences of the voters in the
jurisdiction can be arrayed along a single policy dimension. Each voter's location in the policy space is her "ideal point."  

The jurisdiction has two parties, A and B, whose candidate selection procedures identify the candidates who contend for the voters' votes. The candidates have programs on the basis of which their ideal points can also be located in the policy space. A party's candidates need not have identical programs but, because the parties regulate access to the ballot, we can assume that they tend to cluster. We also assume that voters tend to cast their votes for the candidate they perceive to be nearer to themselves in that space. Those who vote for a candidate can be thought of as coalitions of like-minded voters.

Now suppose that districts have been drawn in such a way that voters whose ideal points are nearer to those of candidates in the party A cluster are concentrated in fewer than half the districts, in which they command substantial majorities (they are "packed"). Voters whose ideal points are nearer to the party B cluster are dispersed over more than half the districts in each of which they command ordinarily reliable but probably smaller majorities (they are "cracked"). In such a system a minority of voters for candidates of party B might command a majority of seats. The system displays partisan bias in favor of party B.

Our problem is to understand the effect of gerrymandering on the weight or value of the votes of those who vote for A candidates. It is said that their votes are "diluted" or that they are not given the same weight as votes cast for B candidates. What might this mean?

The question has two interpretations. The first takes the question's subject to be the value of a vote as a resource for influencing the choice of a district’s representative in the legislature. But of course it would be peculiar to think of this as an end in itself. Presumably a voter's ultimate interest is in influencing the outcomes of the legislative process. This suggests a second interpretation of our question's subject—as the value of a vote as a resource for influencing

32 Political scientists disagree about the explanatory value of spatial models for political behavior. For present purposes we can be agnostic about this disagreement. I use an idealized spatial model here only as an aid in conceptualizing one sense in which partisan gerrymandering might be said to treat individual voters unequally. Stephen A. Jessee summarizes the disagreement in Ideology and Spatial Voting in American Elections (Cambridge: Cambridge University Press, 2012), ch. 1.

33 I discussed gerrymandering as a violation of political equality in PE (see pp. 146-55). The analysis of the kind of unfairness involved in gerrymandering in this paper is different from that expressed in PE in recognizing that the distinction between power and prospects of success, on which I relied in the book, is orthogonal to the distinction between a priori and ex ante perspectives, as these are defined below.
legislative outcomes. For the time being I adopt the first interpretation because it allows a clearer focus on the sense in which gerrymandering might be said to affect the relative values of the individual voters’ votes. Later I ask how things change when we recognize that the election of representatives is the first stage of a multiple-stage process of legislation.

Two sets of ideas from the literature on the measurement of voting power might help to sharpen the question. I use these ideas informally and so sacrifice some precision. The first pertains to the power or value of a vote. When an A-voter casts a vote for an A-candidate, she attempts to become part of a group of voters sufficiently large to elect the candidate (a so-called “winning coalition”). The power of her vote can be conceptualized as its capacity to contribute to the formation of such a coalition. This conception motivates the standard measures of voting power, which can be expressed in terms of the probability that a vote will be “decisive” (or a “swing”)—that is, will make the difference in converting a losing coalition into a winning one (a “minimal winning coalition”). Observe that although a voter might contribute to the election of the candidate for whom she votes even if her vote is not decisive (that is, if the winning coalition is not “minimal”), on standard views the measure of her power is the probability that her vote will be decisive.

Some disagree that the probability of being decisive is always the best measure of the value of a vote. Under some circumstances we may be more interested in the chances that a vote will contribute to bringing about the outcome the voter wants than in the chances that it will make the difference for that outcome between victory and defeat. This thought has led some writers to propose measures of “success” (or “correspondence”) rather than decisiveness. A voter is successful if she gets the outcome she votes for, whether she is decisive or not. We need not...

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34 In this and the following paragraphs I am indebted to the clarifying distinctions presented in Annick Laruelle and Federico Valenciano, *Voting and Collective Decision-Making: Bargaining and Power* (Cambridge: Cambridge University Press, 2008), ch. 3. See also the clarifying remarks about the measurement of voting power in Peter Morriss, *Power: A Philosophical Analysis*, 2d ed. (Manchester: Manchester University Press, 2002), pt. IV.

35 For such a view see Douglas Rae, “Decision-Rules and Individual Values in Constitutional Choice,” *American Political Science Review* 63 (1969), p. 41. Brian Barry’s influential distinction between power and success understands “success” differently. He holds that success is the sum of one’s power (as decisiveness) and one’s “luck.” Someone is “lucky” if he gets the outcome he wants even “if he never does anything.” (“Is it Better to be Powerful or Lucky?”, repr. in *Democracy. Power and Justice: Essays in Political Theory* [Oxford: Oxford University Press, 1989], p. 285.) This, however, is not what “success” usually means in the technical literature. See, e.g., Laruelle and Valenciano, *Voting and Collective Decision-Making*, pp. 54, 67, who, like Rae, conceive of success as getting the
regard a measure of success as in competition with a measure of decisiveness; the two may speak to different analytical or normative interests. Let us try to avoid the dispute about how the value of a vote is best conceived. We might simply ask how gerrymandering affects each dimension of the value of a vote and see what difference it makes if we adopt one or the other.

The second set of ideas concerns the epistemic perspective from which the influence of a vote on any particular outcome might be evaluated. A perspective is “a priori” if the only information available is the size of the decision-making body and its constitutional rules. A perspective is “ex ante” if, in addition, some information is known about the voting behavior or political preferences of the members of the body, so that probabilities can be assigned to each possible profile of votes. A perspective is “ex post” if the outcome of the decision and the actual profile of votes are known. The first two of these will concern us.

The standard measures of voting power are a priori—they purport to measure the distribution of voting power resulting exclusively from the procedural set-up of a decision-making body and its size. Since, in the a priori perspective, we have no basis for predicting how any voter will vote, we assume that each possible profile of votes is equally probable. The measure of a voter’s decisiveness is a function of the fraction of the total number of profiles of those in which she can change the outcome by changing her vote. A parallel measure of a voter’s a priori chances of success is the fraction of the total number of profiles of those in which she votes for the winning outcome.

We can think of a vote’s value from an ex ante perspective as well. This is its power to influence the outcome (or to get the outcome for which it is cast) given some information about outcome one votes for. They associate their conception of success with Barry’s, but that misreads him. (In fairness, some passages in his paper invite the misreading.)

36 For example, as Laruelle and Valenciano argue, success may be the better measure in the case of “take-it-or-leave-it” decisions whereas decisiveness may be better for committees where members engage in strategic bargaining with the prospect of voting in view. Ibid., pp. 67-69, 123-27.

37 If there are n voters, there are 2^n possible profiles. On profiles see p. 11 above.

38 For a technical reason I leave aside, this use of “parallel” is only approximately right. Laruelle and Valenciano, Voting and Collective Decision-Making, pp. 60-63.

39 Some might think it a conceptual error to refer to the phenomenon I call “ex ante power” as a kind of power. The challenge is important, perhaps even basic, for the idea of ex ante power. But for my purposes we need not engage the argument. What I have called ex ante power is essentially what Morriss calls “ableness” as distinct from “ability.” Power: A Philosophical Analysis, pp. 80-85. He remarks that gerrymandering involves both equal “ability” and systematically unequal “ableness” but does not develop the thought (pp. 184, 198).
the likely voting behavior of the voters. It is possible to extend probabilistic measures of a priori voting power to measures of ex ante power by substituting for the assumption that all possible profiles are equally likely a probability distribution over the profiles based on the past voting behavior of the voters in question. Thus, for example, the measure of a voter’s ex ante voting power is the fraction of the total number of profiles, each weighted by its probability, in which she is decisive. In a procedural set-up that affords voters equal a priori voting power, ex ante power might and probably will be unequal.

In the a priori case, the equiprobability assumption ensures that ordinal comparisons of the value of the votes of different voters in terms of decisiveness and of success will coincide. If two voters have equal a priori chances of being decisive they also have equal a priori chances of success. However, in the ex ante perspective, measures of the probabilities of being decisive and successful diverge. A vote is more likely to be decisive the smaller the likely difference in votes cast for two opposing candidates. (Note that this is true of votes cast for both candidates.) However, a vote is more likely to be successful the greater the chances of success of the candidate for whom it will be cast. This points to a further contrast: whereas the total ex ante voting power as decisiveness in the system is not fixed (the combined voting power of voters for candidates in elections likely to be close is greater than in ones likely to be lopsided), the total prospects of success must sum to 1.

How do these distinctions bear on gerrymandering? Because the districting system satisfies OPOV, we can say that it affords all voters equal a priori chances of being both decisive and successful. We see the effects of gerrymandering only when we move from the a priori to the ex ante perspective. (This of course is the perspective of the gerrymanderers themselves.) The question is whether it is possible to generalize about these effects. It turns out that the effects are more complicated than is suggested by the simple notion that gerrymandering “dilutes” the value of the votes of voters for the disadvantaged party.

For a formalization of ex ante decisiveness and success, see Laruelle and Valenciano, Voting and Collective Decision-Making, pp. 57-60.

Thanks to Johann Frick for helping me to make this clear. In contrast to what I say in the text, some contributors to the literature on voting power assume that the measures of the voting power of all voters should sum to one. As a general matter, I believe this is a mistake. See Morriss, Power, pp. 91-92, 157-60.
Let’s return to our hypothetical jurisdiction and consider two districts. District A* contains a large majority of A-voters—voters who were “packed” in the gerrymander. District B* contains a modest but ordinarily dependable majority of B-voters—voters who were “cracked.” We want to know what difference gerrymandering makes to the relative ex ante value of the voters’ votes. Since our model is not fully specified what can be said is conjectural and may not fully generalize. However, the following informal comparisons are plausible for the central range of cases in which the partisan division in the jurisdiction is not too large. For simplicity assume that there are no independents and that turnout rates do not vary across districts.

First, in A*, because it is packed with A-voters, both A- and B-voters have low probabilities of being decisive. By contrast, A-voters have substantially greater prospects of success.

Second, in B*, both A- and B-voters have relatively greater chances of being decisive than in A*. B-voters have modestly greater prospects of success than A-voters.

Third, looking across districts, if what I have said so far is plausible, both A- and B-voters have less power (as decisiveness) in A* than they have in B*. A-voters have greater prospects of success in A* than B-voters have in B* whereas B-voters in A* have lesser prospects of success than both A- and B-voters in B*.

Finally, if there is a meaningful idea of average ex ante voting power throughout a jurisdiction, then it appears that the average ex ante chances of decisiveness of B-voters are greater than of A-voters. We see this by combining the facts that A-voters are more likely concentrated in larger shares in A*-type districts than B-voters are in B* districts and that by hypothesis there are more B*-type districts than A*-type districts and that the overall partisan division is not too great. The average prospects of success of B-voters is greater than that of A-voters, even if more voters cast their votes for A-candidates than for B-candidates. (Put differently, taking the jurisdiction as a whole, B-votes are more efficient than A-votes.)

Have we now found a sense in which gerrymandering might be said, at least under some plausible conditions, to violate political equality? Not quite. Ex ante voting power within a district would be unequal even in the absence of gerrymandering unless the district is equally

42 How can this be? Consider a jurisdiction with 30 voters—17 likely A-voters and 13 likely B-voters. There are three districts of 10 voters each. A-voters are packed in one district (9A, 1 B) and B-voters are cracked in the other two (each 4A, 6B). In this example, 9/17 (53%) of A-voters and 12/13 (92%) of B-voters are likely to “succeed” in getting the outcome they voted for. (Note that with about 43% of the total vote, B-candidates would win 67% of the seats.)
divided between likely A- and B-voters. Moreover, unless voters are distributed randomly across the jurisdiction, geographical variations in the concentrations of like-minded voters will also affect ex ante voting power across districts. So there will very likely be inequalities in ex ante voting power even without gerrymandering. How might we characterize the purported element of distributional unfairness that is added by partisan gerrymandering?

Presumably we are interested in the difference gerrymandering makes in the values of voters’ votes considered in relation to a “natural,” ungerrymandered plan. To expand on an observation I made earlier, one way to simulate a districting plan that responds impartially to the “natural” features of a jurisdiction is to instruct a computer to produce a large number of plans that are constrained to satisfy a list of ranked or weighted facially non-partisan standards (e.g., equipopulation, contiguity, fidelity to existing subdivisions) and randomly choose one of them. Suppose we have such a “natural” plan. Can anything be said about how we might expect the chances of decisiveness and success of voters in the actual (gerrymandered) plan to differ from those in the “natural” plan?

This, again, invites conjecture. One way to describe the aim of partisan gerrymandering is to maximize, subject to various constraints, the gerrymandering party’s expected seat share over the period until the next redistricting. It is possible, of course, that “natural” factors are so favorable to the party-in-control that no intentional gerrymander is required. If we imagine moving away from this “limit” case, then, to the extent that districting standards allow, a competent gerrymanderer would engage in a combination of “packing” and “cracking” so as to increase opposition majorities in a smaller number of districts while creating a larger number of districts likely to produce (probably smaller but) reliable majorities for her own party’s candidates. To return to districts A* and B*, the likely result is that the decisiveness and success gaps separating A- and B-voters in A*-type districts in the gerrymandered plan will be greater than in the voters’ districts in the “natural” plan, whereas both gaps would be narrower in B*-type districts in the gerrymandered plan. If, as before, we allow ourselves an idea of jurisdiction-wide averages, then on our earlier assumptions it seems that the average decisiveness and success gaps would be increased.

These detailed conjectures may be unnecessary, for the upshot is fairly clear. When it is said that partisan gerrymandering “dilutes” the votes of members of the group it disadvantages,
what is usually intended is that it has a comparable effect on the value of the votes of each of those voters. However, when we force ourselves to think about the effect of gerrymandering on the value of each individual voter’s vote, we see that it would be exceedingly unlikely for the effect to be the same for every member of the disadvantaged group. This is because a voter’s ex ante chances of decisiveness and success depend on the composition of her own election district and the composition of districts will inevitably vary. But that is not all. Not every member of the disadvantaged party will be individually disadvantaged: for example, in our model, A-voters in B*-type districts would have greater ex ante chances of being decisive (though lesser prospects of success) than B-voters in A*-type districts. At the level of individual voters, gerrymandering has adverse effects on the ex ante value of the vote of some voters for candidates of both parties while simultaneously disadvantaging all voters for one party, taken as a group, and advantaging those for the other in the jurisdiction as a whole.

V

The fact that vote “dilution” is more complicated than usually recognized does not mean that the underlying, artificially produced differences in the ex ante value of the vote are unobjectionable on grounds of fairness (even if they are unavoidably unequal). On the other hand, one might wonder why we should care about these differences. Assessments of the fairness of the distribution of voting power are usually made from an a priori perspective (or behind a “veil of ignorance”). In that perspective, gerrymandering is not a problem. Why, if at all, should ex ante differences in excess of those that would exist in a “natural” plan be of any interest in assessing the fairness of a districting arrangement? In this section I try to work out one possible reply but do not offer anything like a full justification. My aim is to see if anything can be made of the complaint that gerrymandering introduces variations in the relative values of individual votes that might be regarded as unfair.

The picture we have is the following. Virtually any SMD system with FPTP will produce inequalities in ex ante voting power and prospects of success. Assuming that districts are defined over territory, the magnitude of these inequalities will be further affected by the geographic distribution of partisan voters. Partisan gerrymandering takes advantage of the

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43 As Annick and Laruelle put it; Voting and Collective Decision-making, p. 61. Also, see Niko Kolodny’s remarks about his proposed "compossibility principle" in “Rule Over None II,” p. 322.
structure of SMD in order to exacerbate these differences, in this respect artificially reducing the ex ante voting power of some voters and increasing it for others. The question is why (if at all) we should care about that? 44

It may be illuminating to compare our hypothetical jurisdiction employing SMD and FPTP with jurisdictions using two forms of proportional representation (PR). One jurisdiction uses what I shall call "pure" PR, by which I mean an election system employing an open ballot and the single transferrable vote (STV). Such a system was proposed by Thomas Hare and advocated by J. S. Mill. 45 The other jurisdiction uses party-list PR with FPTP. In that system parties field lists of candidates, voters cast their votes for one of the lists, and seats are assigned to candidates chosen from the lists in proportion to each party's vote share. 46 These systems are importantly different. Without rehearsing the details, in pure PR the role of parties in shaping the electoral agenda and selecting candidates is minimized if not, in practice, eliminated (by design, in the cases of Hare and Mill). A unanimous, equal-sized, self-constituted constituency elects every representative. As a result, under favorable circumstances inequalities in chances of electoral success are minimized because every vote contributes to the election of a member of the legislature (albeit not necessarily the voter's most-preferred candidate). 47 Party-list PR systems can be engineered to approximate some features of pure PR while gaining some of the advantages of legislative party organization, but because candidates are selected by parties, the representation in the legislature of the range of political preferences found in the electorate will not be as accurate as in pure PR.

44 The probabilities in question in ex ante comparisons are epistemic. They depend on the evidence available to the agent making the probability assessment. This might seem to render normative judgments based on these probabilities intolerably perspectival. This is a reasonable worry but I do not believe we need to be troubled by it here. We are interested in probabilities derivable from publicly available information whose interpretation is a matter of professional expertise. Although these probabilities are inevitably perspectival, the relevant perspective is not so arbitrary as to make it objectionable to rely on them in practical judgments about institutional structure and reform. Thanks to Niko Kolodny for pressing this question and to Johann Frick for helpful discussion.

45 I discuss this kind of PR at length in PE. See ch. 6 and the references cited there.


47 This is a familiar observation although it is not often put this way. For example, Ronald Rogowski holds that "fair representation" in a system in which each citizen's "ideal" political preferences are supposed to be equally represented requires that each citizen have equal power "in fact," which is only possible in PR. ("Representation in Political Theory and in Law," Ethics 91 [1981], pp. 410-11.) Equal power "in fact" is essentially what I call equal "ex ante" voting power.
Among the contrasts between these systems and SMD, the one I would like to emphasize involves the dynamic of agenda setting in the legislature. This is important because the effects of the determination of the legislative agenda on the chances of individual voters of getting the legislative outcomes they want most likely swamp those of differences in ex ante voting power. In PR systems, parties do not so much mediate the formation of the legislative agenda as they represent different ideal views of the agenda. As Bingham Powell writes in connection with party-list PR, the system is guided by the aim of producing a legislature in which power is dispersed among representatives of a wide range of political positions. Negotiations over the political agenda begin from a distribution of political interests that typically matches the distribution of interests in the electorate reasonably closely, if not as accurately as in pure PR. In SMD, by contrast, bracketing questions about procedural rules in the legislature, negotiations begin (when they begin at all—a party with a dependable majority may have no need) from a distribution of political interests influenced by the parties’ candidate recruitment and selection practices and by the structure of the districting system. As Powell puts it, SMD aims to produce a legislative majority able to carry through a coherent set of aims at the expense of producing an accurate representation in the legislature of the distribution of political positions in society. To return to the spatial metaphor, the average distance in the policy space between each successful candidate and those who vote for her will most likely be greater in SMD than in party list PR (though this will not be true for some outliers).

This in itself need not be an objection—it is simply a cost of whatever advantages SMD with territorial constituencies offers (e.g., perhaps, that it assigns responsibility for the residents of a geographically-defined community to a specific member of the legislature, a feature missing from most kinds of PR; or—as Powell suggests—that it produces a stable legislative majority capable of governing). Still, it is a cost: it means that voters are less likely than in PR to have a representative in the legislature whose political commitments track their own reasonably closely. This is probably true for most members of electoral minorities but may also be true for members of the majority. As a consequence, for the average voter, the political agenda formed in


50 Ibid.
the legislature is less likely than in PR to identify issues and establish priorities among them in the way that most closely matches the voter's reflective preferences. It is, of course, a further question how this contrast is likely to affect legislative outcomes. But it bears recalling that the capacity to control the legislative agenda can powerfully influence the value of legislative outcomes to voters independently of the legislature's decisions on measures that reach the agenda.

If we think of this as a cost that should be allocated fairly among voters, then we might say that gerrymandering's impact is to induce inequalities in the distribution of this cost that cannot be justified as necessary to achieve the benefits of SMD. On this view, the effect of partisan gerrymandering is to impose an unfair share of the costs of SMD on those whom it disadvantages. This (finally) suggests a possible reply to our second puzzle, about the content of the objection that gerrymandering treats voters unfairly by contributing to differences in the value of the voters of those whom it advantages and disadvantages. The unfairness would lie in imposing an electoral disability on some citizens that cannot be justified in terms of the aims of the system.

Earlier I maintained that a solution to our first puzzle, about the significance of the difference between intentional and "accidental" partisan gerrymandering, depends on how we resolve the second puzzle. Now that we have in view at least a possible solution to that puzzle, let me return to the first. I have been accepting for the sake of argument that there is some basis for respecting traditional districting criteria even in cases in which their use produces partisan bias due to the geographic distribution of partisan voters. But the argument I have just rehearsed might lead us to reconsider. If the differences produced by gerrymandering in ex ante voting power are objectionable because they represent an unfair allocation of the costs of SMD, then it is no longer clear why we should think that "naturally" occurring differences arising from the geography of partisanship are benign. The technology exists to create districting plans that minimize if not always eliminate bias and consequent exacerbation of differences in ex ante voting power arising from the political geography of a jurisdiction. In fact, it may be possible to

51 Although not quite on point, it is worth observing in this connection that in parliamentary systems, it is also more likely in party-list PR than in SMD that legislative outputs will converge on the point of the median citizen. This is a prediction of spatial voting theory confirmed by cross-national comparisons. G. Bingham Powell, "Election Laws and Representative Governments: Beyond Votes and Seats," *British Journal of Political Science* 36 (2006), p. 308.
do so while also giving significant weight to traditional districting standards. It is therefore no longer clear that geographically induced inequalities should be treated as part of the fixed or “natural” background. When a “natural” baseline plan contains partisan bias and there is a feasible and otherwise unobjectionable alternative that reduces it, why not choose that alternative? On this view of gerrymandering’s unfairness, the solution to our first puzzle appears to be that it is a mistake to treat “accidental” gerrymanders differently than deliberate ones. Both might be said to contribute to an avoidable unfairness in the distribution of the costs of SMD.

VI

So far I have been assuming the perspective of the individual partisan voter and asking if partisan gerrymandering might be objected to on the grounds that it adversely influences the value of that voter’s vote. This is consistent with the idea that partisan gerrymandering “dilutes” the votes of those disadvantaged by it and with the desire to grasp the unfairness of gerrymandering as a violation of the political equality of individual citizens. The last two sections illustrate the difficulty in analyzing partisan bias as a violation of political equality for each individual who votes for the disadvantaged party. We found that although some partisan voters of both parties are adversely affected by biased districting, others are not; electoral advantage and disadvantage in a biased system do not fall neatly on partisan groups of voters across a jurisdiction. As I suggested, this might be regarded as a kind of unfairness. But it is plainly not the kind of unfairness that the “vote dilution” critique of partisan gerrymandering intends. The familiar criticism of gerrymandering is that its harm falls equally on voters who vote for candidates of the disadvantaged party throughout a jurisdiction. Does the analysis developed so far shed light on this familiar criticism?

We can conceive of an injustice done to all voters for the disfavored party throughout a jurisdiction only if we consider those voters as a group. In a system that manifests partisan bias,

52 I do not suggest that “accidental” partisan bias can be entirely eliminated by clever redistricting; in some cases a jurisdiction’s political geography makes this infeasible without weakening or abandoning one or more of the traditional criteria. Chen and Rodden demonstrate in detail that this is true of districting for Florida’s congressional delegation and the state legislature, “Unintentional Gerrymandering,” pp. 256-60.

53 For a similar conclusion drawn from a different analysis, see Wang, “Three Tests for Practical Evaluation of Partisan Gerrymandering,” p. 1318.
the group of voters for candidates of the disfavored party can expect to elect fewer representatives than they would in an unbiased system, even though some individual members of the group will have greater voting power and prospects of electoral success than they would have in the relevant baseline. So the question is whether the fact that a jurisdiction-wide group of more-or-less like-minded voters is relatively disadvantaged, even though not all of its individual members are, is a plausible basis of objection to partisan gerrymandering?

As I noted earlier, the predominant view among social scientists is that partisan gerrymandering violates a standard of “partisan fairness” or “fairness to political parties.” They identify partisan fairness with partisan symmetry and argue that partisan asymmetry or bias treats the disfavored party unfairly. A simpler way to put the question I have just posed might then be whether there is a distinctive kind of fairness owed to parties as such?

Parties as they exist in the U.S. are not easily conceived as the kind of group agents of which we might plausibly say that they can be treated fairly or unfairly. Parties in the U.S. are not unified, national-level structures with coherent command-and-control systems. We must distinguish, for example, among parties in the electorate, party organizations, and parties in government (a distinction familiar from V.O. Key). Even the idea of a party in government is crude: it collapses the legislative party (a hierarchically organized body with its own rules and procedures) and the more diffuse group of political appointees in the executive branch. Although legislative parties may seek to advance distinctive policy programs, they have a limited ability to impose these programs on parties in the electorate or on candidates nominated by state and local party organizations. We must also distinguish between national- and state-level legislative parties and party organizations. Coordination between these levels is costly and may not extend to very extensive agreement on policy. This means that the national “brand” may not characterize party programs in the states. And party organizations are likely to differ about policy programs from state to state. So the idea of a party is not simple; in the U.S., “party” refers to a complex and disjointed phenomenon with a limited capacity to function as a collective agent. As a result, when it is said that partisan bias is unfair to the disadvantaged party, it is hard to say precisely which element(s) of the phenomenon “party” is being picked out.

But perhaps our initial question was wrongly put. “Fairness to parties” might be shorthand for “fairness to the candidates of parties.” Indeed, in the same sentence in which Grofman and King hold that “the electoral system [should] treat similarly-situated political parties equally,” they also write that “candidates of each political party should have equal opportunity in translating voter support into the division of legislative seats.” Let us consider the latter formulation, which seeks to interpret fairness to parties as fairness to the parties’ candidates. In what sense are candidates’ opportunities unequal in a system with partisan bias?

The best response seems to me to run parallel to the case of the effect of bias on the power of individual voters. From an a priori perspective (abstracting from information about the partisanship of voters and candidates), candidates throughout the jurisdiction have equal procedural opportunities to win with a plurality of the votes even in the presence of a gerrymander. This follows from the fact that the system satisfies OPOV and FPTP. We discern an inequality only when we allow ourselves to know enough to predict how a candidate of a specific party is likely to fare in a district with a known partisan division—that is, when we take an ex ante perspective. But now, as before, we see that partisan bias does not equally affect all of the candidates of either party. By hypothesis, candidates of the disadvantaged party in the districts in which that party’s voters are concentrated have a greater opportunity to be elected than they would likely have in a non-gerrymandered alternative system. In those districts candidates of the majority party have a reduced opportunity. These positions are likely reversed (although not symmetrically) in the districts with majorities for the advantaged party. As in the case of individual voters, partisan asymmetry does not distribute ex ante differences in opportunities to win elections uniformly over the candidates of each party.

But perhaps “partisan unfairness” is not, after all, unfairness to candidates, but a kind of indirect unfairness to voters. What voters aim for when they vote is not (only) election of the candidate they favor but also advancement in the legislature of the candidate’s political commitments with which they identify. They wish to contribute to the election of a candidate who will in turn contribute to the movement of public policy in the direction of the voters’ ideal points in the policy space. Recall the distinction between parties in the electorate and parties in the legislature. Whereas parties in the electorate are complicated and changing social

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phenomena in which patterns of power can be obscure, parties in legislatures typically have organizational structures that tend to endure. Legislative parties—particularly majority parties—organize the legislature’s agenda, coordinate the framing of legislation, manage negotiations concerning proposed legislation, and try to provide the organizational discipline necessary to move the agenda to acceptance. Of course, for various reasons, they do not always succeed. However, ordinarily (obviously not always) a member wishing to advance her political aims in the legislature will have to rely on the legislative party’s apparatus (and on other members of her party) for help in doing so.\(^{57}\)

This suggests that one determinant of a member’s capacity to get the legislative outcomes she wants is the voting strength and organizational discipline of her party in the legislature. If we accept this, then we might say that partisan bias diminishes the capacity of voters for candidates of the disadvantaged party to get the legislative outcomes they want—that is, their prospects of legislative success—by diminishing their party's representation in the legislature in relation to what it would be in the absence of bias. I call this an “indirect” effect because it is a consequence of the role played by parties in the conduct of the legislature. In contrast to the view we considered in the last section, which turned on the direct impact of gerrymandering on the value of each individual voter’s vote, the present contention is that the indirect impact—the impact due to the effect of gerrymandering on the voting strength of the legislative parties—is the same for the voters for all of the candidates of the disadvantaged party. According to the present view, deviation from “fairness to parties,” understood as partisan asymmetry, is objectionable because it systematically reduces the ex ante prospects of legislative success of all the voters for one party’s candidates as compared to those of voters for the other party's candidates.

It is hardly clear that we should be troubled by this. After all, the ex ante prospects of legislative success of voters for the minority party's candidates would have been unequal to those of voters for the majority party's candidates even in the absence of partisan bias. As

\(^{57}\) A point emphasized by McGann, et al., *Gerrymandering in America*, pp. 208-09. Perhaps this is an overgeneralization. For many years, political scientists understood agenda-setting in the U.S. House of Representatives as a process dominated by its committees rather than by the majority party. This has changed—in the House and in the study of the House—in recent years. David Rohde, "What a Difference Twenty-Five Years Makes: Changing Perspectives on Parties and Leaders in the U.S. House," *Oxford Handbook of American Political Parties and Interest Groups*, ed. L. Sandy Maisel, Jeffrey M. Berry, and George C. Edwards III (2010), DOI: 10.1093/oxfordhb/9780199542628.003.0017.
before, the objection, if there is one, must be that the districting system makes this inequality worse; the exacerbated inequality is an avoidable feature of a districting system that might have been structured differently. We are thus brought back to the idea that although SMD systems unavoidably generate inequalities in voters’ chances of getting the (election or legislative) outcomes they want, not all such inequalities are necessary in order to gain the putative benefits of SMD. Inequalities that are not necessary for this purpose might be seen as an unfair distribution of the costs that accompany the presumed political advantages of systems of single-member territorial districts. 58

This points towards one possible solution to our third puzzle. To recall: from the perspective of a voter in a contested constituency, the choice to be made in electing a legislator appears to be a choice between or among the candidates on the ballot in her constituency. The third puzzle is why the appearance of partisan bias at the level of the system as a whole should have any independent interest for us. The reply we have arrived at is that the indirect effect of partisan bias for voters for the disadvantaged party is an unjustifiably reduced expectation of legislative success for the candidates favored by these voters compared to what they could expect in a system without bias.

VII

Partisan gerrymandering might be objectionable for more than one reason. The reason we have considered is distributional and so might be interpreted as a kind of political unfairness (a kind distinctive to SMD systems). We might think of it as an “input” consideration because it bears on the impact that voters can exert on the system. But a districting system might also be objectionable in virtue of what we might think of as its aggregate or structural properties. By this I mean properties of the system taken as a whole, when regarded as a mechanism for composing a legislature that represents the citizens of the jurisdiction taken as a group. Structural properties of a districting system are obscured when the election of representatives is

58 Niko Kolodny observed that this might imply that we should continually gerrymander in favor of the minority party so as to get as close as we can to a fifty-fifty split in the legislature. It seems to me, however, that, taken by itself, the objection implies instead that we should gerrymander in order to minimize partisan bias. On the account given above, not all inequalities in ex ante prospects of success need be seen as objectionable (because they may be necessary to secure the aims of single-member district systems). I cannot elaborate here, but the remarks about responsiveness in the next section may help.
regarded from the perspective of the individual voter (or candidate). Yet they can have significant consequences for the partisan composition of the legislature whether considered either synchronically or diachronically. We might think of these as “output” considerations.\footnote{59}

A structural property that seems particularly important is a tendency for the composition of the legislature to respond to changes in the popular will (perhaps interpreted as changes in the ideal points of citizens from one election to the next). In order to find this expectation reasonable one need not entertain the unrealistic view (in SMD systems, anyway) that the allocation of seats should change in proportion to changes in the partisan division of the vote. But we might think anyway that in a representative democracy the partisan composition of the legislature should tend to change to some degree in response to changes in electoral outcomes.\footnote{60} Some amount of responsiveness is essential to the idea of democratic representation because it creates incentives for members of the legislature to act for the interests of their constituents.\footnote{61}

We can see this by considering that, in the extreme case, if there were no responsiveness (if the swing ratio were to approach zero), we could not regard the system of representation as a mechanism for the exercise of popular sovereignty at all.

Responsiveness is a property of the districting system. It is a function of the competitiveness of individual districts or, more precisely, of the fraction of districts that are competitive. A district is competitive to the extent that the outcome of elections to the office in question is uncertain. This is usually determined by the partisan composition of the district, typically measured by the partisan division of the vote in a recent election.\footnote{62}

\footnote{59} I argued in \textit{PE} that the value of political equality is irreducibly complex (see ch. 5). The distinction between “input” and “output” considerations is one reflection of this complexity. Thanks to Alan Patten for pointing this out.

\footnote{60} A technical measure of responsiveness is “swing.” See footnote 20 above and the accompanying text. Responsiveness in this sense is to be distinguished from the idea of responsiveness as applied to the likelihood that public officials will alter their policy positions in response to changes in the policy preferences of their constituents expressed in their votes. For this idea, see, e.g., Christopher H. Achen, “Measuring Representation,” \textit{American Journal of Political Science} 22 (1978), pp. 478-80.

\footnote{61} This is a well-known claim of Hanna Fenichel Pitkin, \textit{The Concept of Representation} (Berkeley: University of California Press, 1967); see esp. 232-35.

\footnote{62} I leave aside the details. For a close analysis of the concept of responsiveness and of its relationship to partisan symmetry see Eric McGhee, “Measuring Partisan Bias in Single-Member District Electoral Systems,” \textit{Legislative Studies Quarterly} 39 (2014): 55-85. To operationalize the idea, it is sometimes said that a “competitive” district is one in which the partisan division of the vote is typically 10 percent or less. (If this seems generous, consider that in the 2016 elections for the U.S.}
The competitiveness of districts, and thus the responsiveness of the system, depends on how districts are drawn. This is the basis of a structural objection to partisan gerrymandering that has become prominent in the literature of constitutional theory. The objection draws an analogy to an objection to the cartelization of goods markets. That objection holds that cartelization entrenches the market position of the products of a few dominant firms to the detriment of consumer welfare. Although cartelization can be seen to be the result of an impermissible use of market power—and thus objectionable self-dealing—the objection need not be understood to rest on the intentions of those who bring it about or even on the fact that they benefit from their use of market power. Its basis is the harm to consumer welfare that cartelization produces by increasing prices and restricting the range of choice. In the case of gerrymandering, the parallel objection is based on the reduction in satisfaction of citizens' policy preferences that gerrymandering produces by reducing incentives for legislators to respond to them. An otherwise inexplicable absence of responsiveness to changes in the political preferences of the electorate might serve as evidence that these incentives are insufficient.

The idea of political cartelization evokes the thought of collusion between the parties to create "safe" seats for both sides—that is, seats that are unlikely to change hands unless there is a historically unusual change in the political preferences of the relevant electorate. This would be a "bipartisan" gerrymander. It constitutes a form of collective self-dealing different from the unilateral self-dealing typical of partisan gerrymandering. It also occurs in different political circumstances than partisan gerrymandering (usually when neither party controls both houses of the legislature and the governorship). However, although these are indeed different phenomena, the effects on the responsiveness of the system may be similar. Partisan House, only 33 races [of 435] would qualify as competitive by this standard. Ballotpedia [https://ballotpedia.org/United_States_House_of_Representatives_elections,_2016].

63 The literature is enormous. Among the more influential contributions are Samuel Issacharoff and Richard H. Pildes, "Politics as Markets: Partisan Lockups of the Democratic Process," Stanford Law Review 50 (1998): 643-717 and Issacharoff, "Gerrymandering and Political Cartels." On Issacharoff's view, the analogy to cartels suggests that the best practical judicial solution to partisan gerrymandering would be an ex ante prohibition of redistricting practices carried out by self-interested parties (pp. 645-46).

64 Nancy Rosenblum objects to the cartel metaphor that it fails to register the normative reasons for valuing party competition. To the extent that the metaphor encourages us to see candidates as products and voters as consumers, I agree. However, it seems to me that those extensions are not essential to the use of the metaphor to emphasize the importance of responsiveness. On the Side of the Angels, p. 230.
gerrymandering works through some combination of creating a small number of extremely safe seats (for the opposition party) and creating a larger number of relatively safe seats (for the party in power). Like cartelization taken literally, its effect is typically to reduce the number of competitive districts and so reduce the sensitivity of the system to changes in the popular will. The difference is that partisan gerrymandering is likely to reduce competitiveness somewhat less than true political cartelization. By how much is obviously an empirical question.

When a reduction in responsiveness is a result of intentional (partisan or bipartisan) gerrymandering, it can be seen as taking advantage of a structural feature of SMD in order to defeat one desideratum of a representation system. It is important, however, that the underlying concern does not only arise for intentional partisan and bipartisan gerrymanders but also for “unintentional” gerrymanders that produce relatively safe seats due to the geographical distribution of partisan voters. Like intentional gerrymanders, this might reduce the responsiveness of the system in relation to what it would be in some alternative and otherwise acceptable districting plan. Gerrymandering of all forms might be said to render some legislators less accountable to their constituents than they would be in its absence. If the objection holds against partisan gerrymandering, it should hold against the other forms as well.

One might resist this objection for three reasons (at least). First, the extent to which gerrymandering reduces responsiveness depends on how effectively it minimizes the number of competitive seats. But this depends, in turn, on various further factors: the background geographical distribution of political preferences, the majority party’s willingness to take risks by drawing districts with relatively small partisan majorities, and the likelihood of countervailing pressure from incumbents for greater protection. It also depends on the accuracy of the gerrymanderer’s predictions of election outcomes before the next redistricting. For example, in a future “wave” election won by the party now in the minority, many presently majority districts might swing to the other party. Contrary to the expectation that gerrymandering reduces responsiveness, in such a case it would produce hyper-responsiveness. Someone might think that in view of the contingencies, the responsiveness concern is overstated. (A related belief sometimes heard in the courts is that partisan gerrymandering, perhaps in contrast to racial gerrymandering, is likely to be self-correcting over a series of elections.)
This may be right: as with other complex social processes, it is difficult to be confident about probabilistic judgments. However, it bears observing that the technology of partisan gerrymandering has improved and, as in the Wisconsin case, it is possible to produce gerrymandered district maps in which the probability of majority districts swinging to the other party can be made sufficiently low that the districts remain safe for the majority party even in simulations of “wave” elections favoring the other side.65

Second, concerning the point about accountability, there is disagreement about the efficacy of elections in holding public officials accountable. The primary mechanism is retrospective voting. But some students of electoral behavior, like Achens and Bartels, argue that American voters typically lack the information and competence to be effective in holding incumbents accountable for their actions in office, even in the simplest sense of voting against them if the voters’ welfare has not improved during the legislators’ term.66 Here, again, one might think that the importance of responsiveness—this time as an accountability device—has been overstated.

However, even this relatively skeptical view accepts that voting serves certain democratic goods: for example, it induces relatively frequent turnover in office and establishes incentives for politicians to avoid violating (or anyway to avoid being caught violating) various widely held norms of office and to manage the delivery of widely valued public services effectively.67 These goods describe a decidedly minimalist understanding of popular sovereignty, yet within this understanding the incentive effects of periodic elections clearly play some role. These incentives are more likely to be effective—at least with respect to elections of members of legislatures—if the system is reasonably responsive to changes in the popular will. When gerrymandering reduces responsiveness, it should be regarded as objectionable even from a minimalist perspective.68

67 Ibid., pp. 317-19.
68 Does this point count against the creation of majority-minority districts in order to increase the representation of racial minorities? Perhaps; but it should be borne in mind that the same end can be achieved to some extent by creating relatively competitive (“coalitional”) districts with a significant share (though less than a majority) of minority voters. See Richard H. Pildes, “Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s,” North Carolina Law Review 80 (2002): 1517-73. Thanks to Niko Kolodny for raising the question.
The third reason is that increasing responsiveness by increasing the number of competitive districts may have costs. In the limit, it might seem to maximize the number of voters in competitive districts whose political interests are unlikely to be effectively represented by the successful candidate. And it may increase turnover in the legislature, sacrificing whatever value experience contributes to the legislative process. Someone who accepts these criticisms might argue that competitiveness is an inappropriate structural goal for representation systems; better, perhaps, to create districts packed with likely voters for one or the other party so as to produce a legislature or legislative delegation whose partisan division roughly reflects that in the jurisdiction as a whole.69

Two observations in reply. First, it is easy to exaggerate the costs. For example, the threat that the interests of voters who vote for the losing candidate will not be effectively represented may be offset by the increased incentive for the winning candidate to contend for the support of the median voter in the next election. The efficacy of such an incentive is of course an empirical question. The more substantial point is that whatever are the true costs of competitiveness must be weighed against the advantages of a reasonably responsive system of representation. The cost concern does not challenge the view that there are such advantages.70

As I said earlier, the responsiveness of the system is a function of the competitiveness of districts. However, the value of responsiveness (seen as sensitivity to change in the popular will) is not the only reason why we might consider competitiveness to be a structural desideratum. Earlier I mentioned the agenda-setting role that parties can play by means of their candidate selection procedures and privileged access to the ballot. By defining alternative programs, the parties’ candidates define the choice open to voters. But if a district is uncompetitive, the candidate of the majority party faces a reduced incentive to articulate a program that takes account of voter interests (as well as a reduced incentive to act for that program once elected) and the challenger is likely to have fewer resources available to communicate her views to the electorate. (In the extreme, there may not be sufficient incentive for the minority party even to


70 It is an interesting question—and beyond our scope—whether there is such a thing as optimal responsiveness. For contrasting views see McGann, et. al., Gerrymandering in America, ch. 3, and John F. Nagle, “How Competitive Should a Fair Single Member Districting Plan Be?,” Election Law Journal 16 (2017): 196-209.
As a result, the quality of the information environment produced by the campaign may be reduced and the level of voter engagement in campaign communication suppressed. There is, for example, evidence from elections to the U.S. Senate that voters tend to be more interested in politics and better informed about (and more responsive to) the incumbent’s record in competitive than in uncompetitive states. If one takes seriously that the system should enable voters to execute a responsibility to express informed judgments about the alternatives on offer, then a feature of the system of representation that subverts some of the conditions for the exercise of this responsibility is independently objectionable.

These structural (or “output”) objections to partisan (and bipartisan) gerrymandering suggest another reply to the third puzzle. A districting system can be objectionable for reasons not related to its influence on the relative power of individual votes and even if the rules governing electoral competition within each district are beyond reproach. It is a mistake to think of partisan gerrymandering as a problem that arises at the level of the district; it is pathology of single-member districting systems taken as a whole.

In the legal literature there is an inclination to distinguish structural objections to gerrymandering from objections based on individual rights. That distinction may, perhaps, be compelled by the Court’s jurisprudence, but it is not true as a matter of democratic theory that structural objections may not be founded on the interests of individuals as citizens. There is no incoherence in holding that the interests of individual citizens in exercising a share of control

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71 The phenomenon of uncontested seats is more widespread than may be thought. For example, in the 2016 general elections for the Wisconsin state legislature, there was only one major party candidate in nearly 50% of the races. “Wisconsin State Assembly elections, 2016,” Ballotpedia (/ballotpedia.org/Wisconsin_State_Assembly_elections_2016, consulted 14 April 2017).

72 These effects can be documented in campaigns for the U.S. House. See, e.g., Keena Lipsitz, Competitive Elections and the American Voter (Philadelphia: University of Pennsylvania Press, 2011), ch. 3; and for a review of the evidence, Nicholas R. Seabrook, Drawing Lines: Constraints on Partisan Gerrymandering in U.S. Politics (Ithaca: Cornell University Press, 2017), ch. 5. Seabrook is more sanguine about the effects on competitiveness of partisan than of bipartisan gerrymandering.


74 See the discussion of the interest in what I call “deliberative responsibility” in PE, pp. 113-15.

75 For example, Richard H. Pildes, “Foreword: The Constitutionalization of Democratic Politics,” Harvard Law Review 118 (2004), p. 59 (“[F]amiliar and conventional models of individual rights ... will provide no solace in addressing structural problems concerning the proper allocation of political representation”). There is a substantial literature in the law journals. For a review and a suggestion that it is a mistake to see the choice of approach as dichotomous, see Joseph Fishkin, “Equal Citizenship and the Individual Right to Vote,” Indiana Law Journal 86 (2011): 1290-1360.
over the legislative process are set back when elements of the structure fail to satisfy a condition of adequate responsiveness. One only needs to take account of the instrumental role of legislative parties in converting electoral influence into influence over policy. Indeed, looking at the subject diachronically, some such condition would seem to be essential for the fair and effective representation of citizens.

VIII

Broadly speaking, the most important distinction among systems of representation in large, modern democracies is that between majoritarian and proportional systems. Typically the former employ single-member districts and a first-past-the-post election rule whereas (again typically) the latter employ multi-member districts and preferential ballots. Without asserting a position about the relative merits these systems—a question beyond our scope—I have observed that either choice will have opportunity costs. In the case of SMD, these costs include less accurate representation in the legislature of the range of political preferences among citizens and probably greater inequalities in voters’ ex ante prospects of both electoral and legislative success.

Within this framework I have suggested that partisan gerrymandering in the form prevalent in the U.S. is a pathology of SMD that manifests two features we might consider elements of political unfairness. First, it imposes an unjustifiably large share of the costs of SMD on voters whom it disadvantages. Second, it reduces the capacity of the system to adjust in response to changes in the popular will, thus undermining a feature of district representation ordinarily considered to be among its justifying benefits.

These claims track a view pressed decades ago by Edward Tufte in a seminal analysis of democratic representation. He said that “fair and effective representation” should be “relatively unbiased with respect to party” (thus “fair”) and “responsive to changes in votes” (thus “effective”). Tufte did not argue for these two conditions but I believe he was correct to see that a system of democratic representation should answer to both. Part of the importance of this observation is its recognition that the conditions relate to different dimensions of any overall justification of a system of representation. The first, relating to electoral bias, involves what I

have called the “input” dimension; the second, relating to responsiveness, involves the “output” dimension. The system should afford each participant a fair opportunity to affect legislative outcomes while also ensuring the people at large that a sufficiently large swing in popular political commitment will produce a change in the profile of the representative body. In an already long paper I cannot defend the claim that these two dimensions are irreducibly plural, so I leave it as a challenge to conceive of a more unified view in which these principles might be seen as consequences of a single, more general value.

My main aim has been diagnostic rather than practical so I have not considered alternatives to SMD or remedies for partisan gerrymandering. However, I should note that there are well-understood mechanisms for political districting that can reasonably be expected to avoid the pathologies of partisan gerrymandering without requiring any structural change other than the vesting of redistricting authority in other hands than those of the locally dominant party. Independent districting commissions are the most familiar example. The fact that standards of fair and effective representation are irreducibly plural means that any such mechanism should make room for judgment at the point of application about the relative weights of these standards. This fact may suggest one more argument for relying on independent commissions.

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