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The Unnoticed Revolution

Shortly after the 2012 elections, when all the votes had been collated, it was noticed that the Republicans had won 234 seats out of 435 in the House of Representatives, even though the Democrats had won a slight majority of the vote (50.6%). This in itself was not particularly remarkable. After all, the Republicans had won a House majority in 1952 and 1994 without winning a majority of the vote. These proved to be one-off events. However, we shall argue, what happened in 2012 was different. The result in 2012 was the result of systematic bias produced by the new districts adopted after the 2010 Census.

Furthermore, eight years earlier the Supreme Court decision in the case *Vieth v. Jubelirer* (2004) made challenging a districting plan on grounds of partisan gerrymandering practically impossible. The combination of the Supreme Court effectively permitting partisan gerrymandering and the willingness of many state governments to draw districts for maximum partisan advantage has profound consequences. It will effectively determine control of the House of Representatives for the next decade; it provides a loophole for the egalitarian and democratizing electoral reforms the Supreme Court required in the 1960s; it means that state governments rather than voters can determine the character of a state's congressional delegation; and it challenges the Madisonian principle that at least one part of government should be directly elected by the people.

The Supreme Court's decision in *Vieth v. Jubelirer* (2004) drew little attention in the popular press or even academic circles – certainly there was nothing comparable to the response to the case of *Citizens United* (2010), which reduced restrictions on independent political expenditures.

This is not completely surprising, as its significance was not obvious. It did not overturn the decision of the district court. In response to a complaint of political gerrymandering in the congressional districts of the State of Pennsylvania, the Supreme Court affirmed the decision of the lower court to not overturn the plan. The Supreme Court agreed on this decision 5–4, but it could not agree on a common opinion. Thus technically it did not overturn the court's previous finding in *Davis v. Bandemer* (1986a) that political gerrymandering was *justiciable* – something the Court could rule on. However, writing for a plurality of the Court, Justice Scalia (joined by Chief Justice Rehnquist and Justices O'Connor and Thomas) argued that partisan gerrymandering was a nonjusticiable "political question" – that is, the Court has no business entertaining political gerrymandering cases. A fifth justice, Justice Kennedy, wrote a concurring opinion arguing that although political gerrymandering cases might be justiciable in principle, there currently existed no standard for deciding such cases. Thus, although the Court did not reach a common opinion, this sent a clear signal that a majority of the Court was not inclined to overturn districting plans on grounds of partisan gerrymandering. Unless a new standard for judging cases could be found, the *Vieth* decision *effectively* (though not in principle) made political gerrymandering into a nonjusticiable political question. It was clear that challenges to districting plans on grounds of partisan gerrymandering were highly unlikely to succeed, no matter how egregious the gerrymander.

We now have a remarkable situation. Drawing districts with different population sizes is prohibited by the Constitution. However, achieving the same partisan advantage by cleverly manipulating the shape of the districts apparently is permitted. In the 1960s, the Supreme Court decided that malapportionment – drawing districts that differed in population size – was unconstitutional (*Baker v. Carr* [1962], *Wesberry v. Sanders* [1964a], *Reynolds v. Sims* [1964b]). This was held to violate the principle of "one person, one vote," which could be derived from both Article 1 of the Constitution and the Equal Protection clause of the Fourteenth Amendment. Before malapportionment was outlawed, districts could vary in population by a factor of ten; now districts have to be redrawn every ten years following the Census to ensure they have equal population. This denied the state governments a powerful tool by which they could fix political outcomes. However, if partisan gerrymandering is now permitted, this creates a loophole that once again gives state governments some of this power. It also seriously undermines the egalitarian intentions of the "one person, one vote" jurisprudence of the 1960s.

In this book, we consider the effects of ending the prohibition on partisan gerrymandering. First, there are the electoral consequences. We will see that the effects are substantial. A substantial part of the book is spent analyzing the districts adopted after the 2010 Census and the electoral outcomes these are likely to produce. Before *Vieth*, the conventional wisdom was that political gerrymandering produced only marginal effects – certainly it affected individual races, but the aggregate effects were minor (see, for example, Butler and Cain 1992). However, in the redistricting following the 2010 Census – the first redistricting round after the *Vieth* decision – state government pushed partisan advantage far more strongly than in the recent past. In 2012, the Republican Party won a majority of thirty-three seats, even though it won fewer votes than the Democrats. Our analysis shows that this is not a freak occurrence, but rather the result of a systematic bias that we should expect to be repeated through the next decade.

In addition to these electoral consequences, there are constitutional consequences. We would expect the electoral consequences to persist through the 2020 congressional elections. After the 2020 Census, the districts will be redrawn. Whereas now there appears to be a substantial pro-Republican bias, this may be completely changed with the post-2020 districts. However, the constitutional effects will persist. The composition of Congress will still be determined as much by how the districts are drawn as by how people vote. In most states, the districts are drawn by the state legislature, while the governor has a veto. The Great Compromise at the Constitutional Convention was that the House of Representatives was to represent the people as a whole, while the Senate was to represent the states. It now appears that the composition of the House will also be determined by state governments. This represents an unlikely victory for the Anti-Federalist vision of government.

We first briefly explore the electoral and constitutional consequences of the fact that partisan gerrymandering is now effectively permitted by the courts before asking whether there are grounds for the *Vieth* decision to be challenged in the future.

THE ELECTORAL CONSEQUENCES: A SYSTEMATIC REPUBLICAN ADVANTAGE UNTIL 2022

The results of the 2012 House elections – the first held under post-*Vieth* districts – certainly give the appearance of strong partisan bias, although they do not prove much without further analysis. In 2012, the Republican

Party won 234 seats out of 435, even though the Democratic Party won a slim majority (50.6%) of the popular vote. Between 2010 and 2012, the Republicans lost only eight seats, even though their share of the two-party popular vote fell from 53.5% to 49.4%. However, the Republican Party has won a majority of seats despite winning fewer votes than the Democrats before, in 1952 and 1996. These elections do not appear to have represented massive, persistent bias, but rather appear to have been one-off events. Furthermore, there is reason to be skeptical about drawing conclusions from the popular vote – this can be distorted, for example, by uncontested seats.

However, systematic analysis indicates that the 2010 districting did indeed produce a very significant bias that is likely to persist through the entire decade. This analysis takes account of both uncontested seats and the fact that in any given district in a given year, there may be local factors that are at least as important as the national vote swing. We find that there is a 5% bias toward the Republican Party in close elections – if the two parties win an equal number of votes, the Republicans will win 55% of the seats. Furthermore, the Democrats would have to win around 54% of the vote to have a fifty-fifty chance of winning control of the House. Thus it is not impossible that the Democrats will regain control of the House. However, it will take a performance similar to that in 2008, when many things were very favorably aligned for the Democrats.

When we consider bias at the state level, we see a more dramatic picture. Of the thirty-eight states that have three or more House districts (and thus where bias is possible), twenty are approximately unbiased. Of the remaining eighteen, the level of bias is often quite extreme. In numerous states, there is a 20% Republican advantage when both parties have equal votes, and the Democrats would in some cases need to win almost 60% of the vote to have a fifty-fifty chance of having a majority of the state's delegation to the House of Representatives. This kind of bias means that only one party has a realistic chance of having a majority of the representatives and that it is in effect the state government, not the voters directly, that is dictating the character of the state's congressional delegation.

Of course, it is often argued that while partisan bias does exist, it is not the result of deliberate gerrymandering, but rather the inevitable, unintentional result of demography or geography. The explanations most usually given are the urban concentration of Democratic voters and the need to draw majority-minority districts to satisfy the Voting Rights Act. While it is true that both the geographical distribution of voters and

the Voting Rights Act do significantly constrain what districting plans are possible, it is simply not the case that they make the partisan bias we observe inevitable. We will show that it is quite possible to draw unbiased districts in most states, and if bias is hard to avoid in some states, it is modest compared to the bias in the districting plans actually adopted. If it is possible for a state to adopt an unbiased plan, but it chooses a biased one anyway, then that is a choice it has made, not something imposed on it by demographics. Furthermore, the urban concentration of Democrats and majority-minority districts do not even explain the increase in bias we observe in the 2010 districting round. Most of the states where bias increased did not have additional majority-minority districts, and in most of them it was the geographic concentration of Republican voters that increased relative to that of Democratic voters, not the other way around.

The one thing that does explain where we find partisan bias is politics. Partisan gerrymandering is indeed *partisan*. We will find that statistically significant bias occurs almost exclusively where one party controls the entire districting process. This occurs when districting is done by the state legislatures (often with a gubernatorial veto) and one party controls the legislature and the governorship. Where there is divided government, or districting is done by an independent commission or the courts, we do not find significant bias. However political control does not completely explain the increase in partisan bias between the 2000 and 2010 districting rounds. Partisan bias increased sharply even in those states that the Republicans controlled both in 2000 and 2010. Thus the increase in bias was not simply the result of the Republicans doing very well in state elections in 2010. Rather, after *Vieth v. Jubelirer* (2004), state legislatures were willing to district for partisan advantage far more than they had previously.

THE CONSTITUTIONAL CONSEQUENCES: THE END OF EQUALITY?

The electoral effects we have outlined can only be predicted up through the 2020 congressional elections, after which new districting plans will be adopted; the constitutional effects of the *Vieth* decision, however, may last far longer. After the 2020 Census, all states need to redraw their congressional districts. How they are redistricted will depend on the balance of power in state governments and the redistricting institutions of the various states. If the Democrats have control of the state legislature or governorship in more states, they may redraw districts to erase the current Republican advantage. If they are successful enough at the state

level, they may even be able to gerrymander in their favor. Indeed, now that it is apparent that regaining control of the House probably requires regaining control of state governments, both parties will probably pay a great deal of attention to (and spend a great deal of money on) state elections. Nevertheless, even if the current partisan advantage is erased in the next redistricting round, something about American national elections has fundamentally changed.

What has changed is the balance of power between national and state government. Previously, control of the House of Representatives depended on how people voted in the previous congressional election. Now, given that there are no restraints on the ability to gerrymander for partisan advantage, there are many states where the state legislature effectively determines what the congressional delegation looks like. Furthermore, it is not the state government at the previous election that matters but the state government at the beginning of the decade when the new districts were drawn. This is particularly problematic, as we traditionally think of the House of Representatives as representing the people directly, while the Senate represents the interests of the states.

The debate about the balance between national and state government, of course, goes back to the dispute at the Federal Convention between Madison and the Federalists on one hand and the Anti-Federalists on the other. At the beginning of the Federal Convention, Madison advocated a system of government in which the lower chamber of the legislature would be directly elected by the people on the basis of population, while the upper chamber would be elected by the lower. The Anti-Federalists advocated a legislature chosen by state governments. The eventual resolution, of course, was the Connecticut Compromise: the House of Representatives was to be directly elected by population, while the Senate was to be chosen by state governments, with each state receiving two Senators.

In the reapportionment decisions in the 1960s, the Supreme Court explicitly addressed this constitutional principle. In *Wesberry v. Sanders* (1964a), the Supreme Court stated that the point of the Great Compromise was that the House of Representatives was to be directly elected by the people. Furthermore, they found that this means that all voters must be treated equally – diluting someone's vote by subtle means is as much a violation as denying them a vote. For this reason, they held it was unconstitutional to draw congressional districts with widely varying populations. It would seem that if it is unconstitutional to advantage some voters over others by having districts with differing populations, then

achieving the same end by manipulating the shapes of districts should also be unconstitutional. Indeed, if political gerrymandering is allowed, it would represent a loophole that would allow state governments to get around the intent of *Wesberry v. Sanders* (1964a). However, the Supreme Court did not confirm that political gerrymandering was unconstitutional until *Davis v. Bandemer* (1986a).

Thus *Vieth v. Jubelirer* (2004) did not just challenge *Davis v. Bandemer* (1986a) but also undermined the egalitarian intent of *Wesberry v. Sanders* (1964a). In declaring that the courts could not intervene in cases of political gerrymandering, it gave state governments once again the power to advantage some voters over others. As we will see, the arguments made by Justice Scalia in *Vieth v. Jubelirer* (2004) are very similar to those made by Justice O'Connor in her dissent to *Davis v. Bandemer* (1986a). These in turn echo the arguments of Justice Frankfurter in his dissent to *Baker v. Carr* (1962). The argument in all cases is that districting is a "political question" – that is, the Supreme Court should not intervene, as districting is the business of politicians. In practice, this means leaving districting to state governments. The *Vieth* decision is not simply a technical decision about whether it is possible to detect political gerrymandering, nor is it simply a correction of *Davis v. Bandemer* (1986a). Rather, it strikes at the heart of the right to equal representation that the Supreme Court championed in the 1960s.

CAN THE *VIETH* DECISION BE CHALLENGED?

The main goal of this book is to lay out and understand the effects of partisan gerrymandering. However, given the significance of the *Vieth* decision, it is also important to consider the merits of the decision and, in particular, how it may be challenged in the future. *Vieth v. Jubelirer* (2004) was, after all, something of a split decision, decided by a 5–4 margin. A majority of the Supreme Court agreed that claims of political gerrymandering could not be adjudicated by the courts because no standard for deciding them existed. However, only four Justices out of nine joined with Justice Scalia in arguing that no such standard was possible on principle. The swing voter in the case, Justice Kennedy, agreed that no standard currently existed but held out the possibility that one could be found in the future. Thus the *Vieth* decision is certainly open to challenge.

The task of challenging the *Vieth* decision, however, is a formidable one. In his opinion on *Vieth*, Justice Scalia challenged the argument that partisan gerrymandering was unconstitutional in a fundamental way.

In the reapportionment cases of the 1960s, the Supreme Court had argued that the equal right to vote was protected and that diluting this right by clever means was just as much a violation as simply denying the vote to someone. Hence malapportionment was a constitutional violation and so, it would appear, would be gerrymandering, if it achieved the same goals. Justice Scalia, however, challenges the similarity of the two cases. With malapportionment, there is a clear violation of an individual right – some votes are effectively weighted more than others, and it is easy to observe this. In the case of gerrymandering, however, Justice Scalia argues that no *individual* right has been violated. Rather, what has been violated is a group right – the right of a majority of voters to elect a majority of representatives. The Constitution does not enumerate any such right for parties or groups of voters. Thus to challenge the *Vieth* decision, it is necessary to show either that there is a collective right to representation or that partisan gerrymandering violates an individual right.

In Chapter 7 of this book, we concentrate on the second possibility – that partisan gerrymandering can be shown to violate an individual right. A recent result in mathematical social choice theory – a result published after *Vieth v. Jubelirer* (2004) and *LULAC v. Perry* (2006) – shows that the equal treatment of individual voters logically implies the majority rule principle. That is to say, treating all voters equally means that a majority of voters must be able to elect a majority of representatives. Thus if partisan gerrymandering allows a minority to elect a majority of representatives, then a right to equal treatment by *individual* voters has been violated. Thus it may be possible to connect partisan gerrymandering to a constitutionally protected individual right.

If it is possible to establish that partisan gerrymandering does in fact violate constitutional rights, it is relatively straightforward to measure it. Political scientists have a variety of measures for testing whether a districting plan is likely to advantage one party over another. These can take account of the fact that elections are about candidates as well as parties and the fact that local and incumbent factors are often extremely important. A notable measure is the partisan symmetry measure proposed by a group of political science professors in an amicus brief to *LULAC v. Perry* (2006) – if the Democrats win a certain percentage of the seats when they win a certain percentage of the votes (say, 55%), will the Republicans get the same percentage of seats if they win 55% at the next election? The problem has been that political scientists have proposed these measures to answer political science questions – is a districting as a matter of fact biased toward one party or the other? They

have not grounded any measure in terms of constitutionally protected rights. The social choice results referred to in the last paragraph actually allow us to justify standards such as partisan symmetry in terms of the equal protection of individual voters. This line of argument may provide a means to challenge the Supreme Court's contention that a standard for determining partisan gerrymandering cases does not exist.

THE EXAMPLE OF PENNSYLVANIA

The power of partisan gerrymandering to fix political outcomes becomes far clearer when we consider an actual case. Here we look at the State of Pennsylvania from 1992 through the 2012 elections. As congressional districts need to be redrawn every ten years following the Census, this covers the 1990, 2000, and 2010 redistricting rounds. There are a number of reasons for picking Pennsylvania. It is a clear example of the power of districting. In 2012, the Republicans took thirteen out of the eighteen congressional seats, even though the Democrats actually won more votes. The Supreme Court case *Vieth v. Jubelirer* (2004), which declared partisan gerrymandering unchallengeable in the courts, was the result of a challenge to the Pennsylvania districts following the 2000 Census. Finally, the three districting plans that Pennsylvania adopted over this period illustrate the progression from a more or less unbiased plan to a somewhat biased plan to a strong partisan gerrymander.

We start by considering the Pennsylvania districts that were adopted following the 1990 Census and were first used in the 1992 elections. These are illustrated in Figure 1.1. Justice Scalia noted in his opinion on *Vieth v. Jubelirer* (2004) that no one had challenged these districts for being biased. Indeed, they were the result of a bipartisan compromise – the Democrats controlled the governorship and the state assembly, while the Republicans controlled the state senate. In the elections run under these districts, the result was close to a tie, which reflects the fact that Pennsylvania was (and indeed is) a swing state. From 1992 through 1998, the Democrats won eleven of the twenty-one seats, while the Republicans won eleven of the seats in 2000. When we look at the districts in Figure 1.1, most are relatively compact, and there are fewer oddly shaped districts than we will see in the later districting plans.[1]

It is significant that we see relatively unbiased districts following the 1990 Census, because it proves that this is possible. It has been suggested

[1] In Chapter 4, we will introduce measures that give a precise meaning to "oddly shaped."

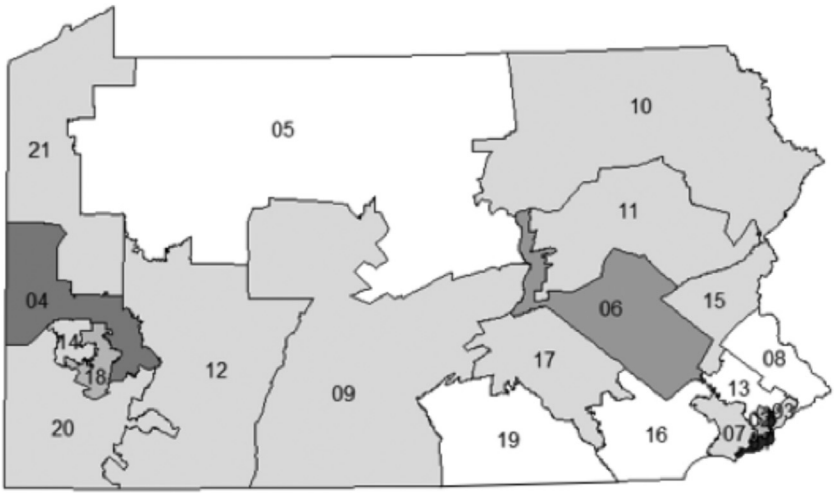

FIGURE 1.1. 1992 Pennsylvania congressional districts.[2]

by some that patterns of partisan bias are the result of demographic factors. For example, it has been argued that because there are large concentrations of Democratic voters (particularly members of ethnic minorities) in urban areas, it is inevitable that Democrats will win these districts by lopsided margins, and this wastes votes. That is, we get a naturally occurring gerrymander. It has also been suggested that the Voting Rights Act and the need to create majority-minority districts may have the same effect. However, it is clearly possible to create districting plans that do not have an obvious partisan bias such as that adopted in Pennsylvania following the 1990 Census. Indeed, as we will show in Chapter 4, the majority of states manage to be approximately unbiased between the parties. As we will argue, if there is strong partisan bias, it is because the people who drew the districts chose to create it or at least chose to tolerate it.

However, we do not wish to suggest that the post-1990 Pennsylvania districts are perfect or even that they are some kind of baseline for appropriately drawn districts. They have the merit of being approximately unbiased between the parties. However, as sometimes happens with bipartisan

[2] Source: Shapefiles provided by the U.S. Census, http://www.census.gov/geo/maps-data/data/cbf/cbf_cds.html. Shading reflects district compactness as measured using ratio of district area to district convex hull area. Darker shading reflects less compact districts. See Chapter 4 for measurements of compactness by state and redistricting plan, and category cut points.