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Reconsidering the Rule of Law: Reflections on Power, Politics, and Partisan Gerrymandering

Yasmin A. Dawood

In April 2004, the Supreme Court handed down a highly anticipated decision on partisan gerrymandering in *Vieth v. Jubelirer*. As defined by the Court, partisan gerrymandering is “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.”

For this reason, argued the plurality, the redistricting plan was formulated and adopted. In a 5-4 decision, the Supreme Court rejected the partisan gerrymandering claim, effectively leaving in place Pennsylvania’s “egregiously partisan congressional districting map.” Although a majority of the Court agreed on the final result, the justices did not agree on the rationale. A four-member plurality, led by Justice Scalia, held that there was a lack of “judicially discoverable and manageable standards” for deciding whether Pennsylvania’s redistricting plan violated the Constitution. For this reason, argued the plurality, partisan gerrymandering constituted a non-justiciable “political question” and therefore fell outside the purview of the courts. Justice Kennedy, who provided the fifth vote for the majority, agreed that a constitutionally appropriate standard was not available in *this* case, but disagreed with the plurality’s judgment that such a standard would never be found.

The “judicial Power” created by Article III, § 1 of the Constitution is not whatever judges choose to do, or even whatever Congress chooses to assign them. It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by rules. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

According to Scalia, judicial decisions “must be governed by standard, by rule” and “must be principled, rational, and based upon reasoned distinctions.” Legislatures, by contrast, can pass laws that are “inconsistent, illogical, and ad hoc.” In other words, the legislature may be governed by the “rule of men,” but the judicial branch must adhere to the “rule of law.”

Justice Scalia insisted, however, that constitutional standards simply did not exist for deciding partisan gerrymandering cases. In reaching this holding, he relied upon the Court’s
“political questions” doctrine. Political questions are those issues that are not appropriate for the judicial branch to decide. In *Baker v. Carr*, the Supreme Court developed a six-part test for identifying political questions. In *Vieth*, Justice Scalia relied primarily upon the second factor of the *Baker* test, under which an issue is a political question if there is “a lack of judicially discoverable and manageable standards for resolving it.” In his opinion for the plurality, Justice Scalia held that there were no judicially discoverable and manageable standards available, and that partisan gerrymandering therefore fell outside the purview of the courts. Deciding a case in the absence of principled standards would, according to this reasoning, violate the rule of law.

Justice Scalia’s position, however, is not entirely persuasive. His claim about the unavailability of constitutional standards is based in large part on his assessment of how the lower courts have interpreted *Davis v. Bandemer*. In *Bandemer*, the Supreme Court held for the first time that partisan gerrymandering was a justiciable issue. Lower courts, however, have not upheld a single partisan gerrymandering claim since *Bandemer* was decided in 1986. As Justice Scalia put it, “[e]ighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application.” This assessment, however, leaves out the crucial fact that lower courts interpreted *Bandemer* to require the finding that the political group in question “had essentially been shut out of the political process.” Given the stringency of this requirement, it is hardly surprising that the lower courts did not uphold any political gerrymandering claims.

Furthermore, as the dissenting justices pointed out, constitutionally acceptable standards for adjudicating redistricting claims already exist. The Supreme Court has been deciding racial gerrymandering claims based on a constitutional standard developed (by almost the same majority of the Court) in *Shaw v. Reno* and *Miller v. Johnson*. In other words, judicially discoverable and manageable standards have been used by judges in a similar context for over a decade. There would be no rule of law violation if the Supreme Court were to apply standards that have been tested by judges across the country.

**Two Objectives of the Rule of Law**

The availability of well-tested standards makes it unlikely that judicial intervention in partisan gerrymandering would violate the rule of law. Indeed, I wish to suggest that the *failure* of the judicial branch to intervene in partisan gerrymandering constituted a violation of the rule of law. To see this, we have to focus not so much on the definitions of the rule of law as the purposes of the rule of law.

What does the rule of law achieve? The most familiar purpose of the rule of law, and the one implicitly at work in Justice Scalia’s opinion, is that the rule of law allows people to plan their affairs. As Scalia wrote in his article on the rule of law,

> ... another obvious advantage of establishing as soon as possible a clear, general principle of decision ... predictability. Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes ... As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean.

According to Justice Scalia, the rule of law is designed to promote predictability, efficiency, and consistency in public and private conduct. A stable set of general and public rules, as described by the formal approach to the rule of law, is indispensable for enabling individuals to coordinate their activities and make plans for the future.

In singling out “predictability,” Justice Scalia identifies an important objective of the rule of law. His conception, however, largely overlooks the most important purpose of the rule of law — protecting citizens from the abuse of power by the government. In other words, the primary objective of the rule of law is not predictability; it is protecting citizens from the arbitrary and tyrannical exercise of state power. Our common understanding of the “rule of law” as being opposed to the “rule of men,” is based on a similar intuition: the ideal of the rule of law means that the law, rather than the whims of powerful individuals, will govern us.

Advocates of the rule of law have emphasized the vital importance of protecting citizens from state tyranny. In the *Second Treatise on Government*, John Locke elaborated a defense of the rule of law based on a fear of the tyrannical and oppressive effects of arbitrary government. He stated that:

*Freedom of Men under Government,* is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man.
According to Locke, freedom exists only when the law is common to all within society, and when no individual is subject to the arbitrary will of another. Arbitrariness is the antithesis of law; indeed, for Locke, “Where-ever Law ends, Tyranny begins.”

Locke defined tyranny as “the exercise of Power beyond Right, which no Body can have a Right to.” Tyranny occurs when a ruler “makes not the Law, but his Will, the Rule” and when “his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.”

For Locke, the primary purpose of the rule of law is to prevent tyranny. Tyranny occurs when the ruler governs according to his will, rather than according to the law. And when a ruler governs according to his will, he makes decisions that advance his own “Ambition, Revenge, Covetousness, or any other irregular Passion,” rather than the interests of the community. Tyranny is associated with the self-interested, power-enhancing, and wealth-maximizing actions of the ruler. By contrast, when the power of the ruler is constrained by the rule of law, his actions are non-tyrannical and non-arbitrary.

In a similar fashion, Montesquieu thought that the rule of law had the purpose of protecting the ruled from the oppression of the rulers. According to Judith Shklar, Montesquieu viewed the rule of law as promoting one vital aim: “freedom from fear.” For Montesquieu, various institutional restraints — constitutionalism, the separation of powers, an independent judiciary — were indispensable for preventing state tyranny and upholding the rule of law.

The judiciary plays a particularly important role in protecting the rule of law. The rule of law can exist only if the government is also subject to the law.

Partisan Gerrymandering and the Abuse of State Power

In Pennsylvania, the Republican party used partisan gerrymandering to further entrench itself in power. As Locke pointed out, tyranny results when a ruler makes self-interested and power-maximizing decisions at the expense of the interests of the community. Rather than passing a general law that applied equally to all, Republican legislators passed a law that was self-interested, non-neutral, and geared to maximize the power of those already in control. In so doing, the Republican Party eliminated critical limitations on governmental power. In particular, the regular democratic mechanism for redress, that is, electing new candidates, no longer offered a viable solution because a politically gerrymandered political system is designed precisely to weaken that option.

In addition to heavily skewing the state’s representation in favor of the Republican party, the redistricting map also reduced the number of truly competitive districts by creating “safe seats” for incumbents. Partisan gerrymandering poses serious hazards to the health of a democratic system by stifling competition and pre-ordaining election results. Rather than having voters choose their representatives, a gerrymandered system allows representatives to choose their voters.

The plurality opinion in Vieth v. Jubelirer, however, completely ignored the abuse of power orchestrated by the Republican Party acting in the capacity of the state. It did so in spite of the fact that partisan gerrymandering constitutes a quintessential abuse of state power. Instead, the Vieth plurality declined to adjudicate the case, citing rule of law concerns. In so doing, however, the Court violated the rule of law by failing to prevent the Pennsylvania legislature from abusing its power.

Furthermore, there are important precedents for the idea that the Supreme Court should intervene in the event that state legislatures abuse their power. The Court’s reapportionment decisions from the 1960s provide a helpful comparison to the partisan gerrymandering context. As with partisan gerrymandering, legislators from malapportioned districts had a vested interest in maintaining their power base, and were therefore unwilling to distribute representation in a fair manner. Citizens who lived in the urban areas (and whose representation in the legislature was far lower than their actual numbers would warrant) could not remedy the situation through the electoral process because their representatives formed a permanent minority in the legislature.

It was for these reasons that the Supreme Court decided in Baker v. Carr and Reynolds v. Sims to adjudicate reapportionment cases. In justifying its decision to enter the “political thicket,” the Court relied in part upon the rule of law. It stated that in a representative government, “the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.” According to the Court, this principle “is an essential part of the concept of a government of laws and not men.”

The Court concluded that “[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.”
A critical protection against the abuse of governmental power is an independent judiciary, one that will intervene to uphold the rule of law. As Justice Stevens aptly put it in his dissenting opinion, the Court’s decision represented “a failure of judicial will to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.” By refusing to intervene in Vieth v. Jubelirer, the Supreme Court violated, rather than upheld, the rule of law.

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Endnotes

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6. Id., at 70–71 (Kennedy, J. concurring).


10. Vieth, at 23.


13. Vieth, at 27.


15. Vieth, at 70.

16. Bandemer, at 139.

17. Vieth, at 99–102 (Stevens, J., dissenting).


20. Scalia, supra note 7, at 1179.

21. Justice Scalia does note that courts are sometimes required to “stand up to what is generally supreme in a democracy: the popular will” and to “protect the individual criminal defendant against the occasional excesses of that popular will.” Scalia, supra note 7, at 1180. Although Justice Scalia alludes to the abuse of power by the government here, he generally describes the role of law as providing consistency, certainty and predictability.


24. Id. at 398–399.

25. Id.

26. Id.


31. The argument that partisan gerrymandering amounts to an abuse of state power should be distinguished from the “political markets” critique of partisan gerrymandering. According to the political markets theorists, the major political parties use legal rules to “lockup” political institutions, thereby forestalling competition. On this view, courts should treat with suspicion the efforts of insiders “to manipulate and capture the ground rules of political competition so as to freeze out serious challengers.” Issacharoff, Samuel & Richard H. Pildes. 1998. “Politics as Markets: Partisan Lockups of the Democratic Process,” 50 Stanford Law Review 643, 644. Rather than focusing on the violation of individual rights, political markets theorists argue that courts should focus instead on the structure of partisan competition. Id. at 648. The role of the Supreme Court is to destabilize these anti-competitive lockups in order to ensure a more accountable representation. Id. at 644.


34. Id. at 557.
35. Id. at 568.
36. Id.
37. Vieth, at 132 (Stevens, J., dissenting).