

Authors' Response to elj.2017.0461—Values and Validations: Proper Criteria for Comparing Standards for Packing Gerrymanders

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ABSTRACT

We explain why Eric McGhee's criticisms of our effort to establish a standard for detecting packing gerrymanders sometimes misapprehends and other times misunderstands the proper evaluation criteria.

Keywords: gerrymander, vote dilution, efficiency gap

WE APPRECIATE ERIC MCGHEE (McGhee 2017) taking time to comment on our article (Best et al. 2017), and we thank the editors for this opportunity to respond. In the interest of economy, we focus our attention on two points. McGhee misapprehends the conceptual, value-based premise of the analysis we undertook, and he misunderstands the elements and reasoning required to check the validity of proposed standards for identifying packing gerrymanders.

VALUES

McGhee mistakenly asserts we offer no definition of partisan gerrymandering which, in turn, leads him to think mistakenly that we use shifting value-based critiques of the five standards we evaluate. We expressly rely on *Black's Law Dictionary* as quoted by Justice Scalia in *Veith v. Jubelirer*:

“[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give a political party an unfair advantage by diluting the opposition's voting strength.”¹

McGhee misapprehends the normative harm from gerrymandering that the definition implies. The fundamental action in the definition is the vote dilution that in turn leads to partisan advantage (and potentially to odd shapes). Vote dilution is also grounded in jurisprudence on voting rights (e.g., *Thornburg v. Gingles*²) and it is the Fourteenth Amendment claim made by the plaintiffs in *Gill v. Whitford*.³ In his critique, however, he wants to focus on the consequence of vote dilution, the unfair seat advantage one party enjoys.

This effort to redirect attention from the first-order effect (vote dilution) of a packing gerrymander to the second-order effect (unfair partisan seat advantage) causes trouble because it leads analysts from the relatively straightforward analytical issue of detecting vote dilution to the more uncertain terrain of defining an unfair translation of votes into seats. We have shown elsewhere

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¹*Vieth v. Jubelirer*, 541 U. S. 267, 271 n.1 (2004) (quoting BLACK'S LAW DICTIONARY 696 (1999)).

²478 U.S. 30 (1986).

³Brief of Appellees, *Gill v. Whitford*, No. 16-1161, 2017 WL 3726003 (Aug. 28, 2017).

that concentrating on seat results rather than vote dilution is a problem in and of itself (McDonald and Best 2015) and is a primary reason why political science has made so little progress in providing a manageable and effective standard for the courts (McDonald et al. 2017). The distinction between seat-denominated and vote-denominated indicators is important. In the space afforded us here, we cannot rearticulate all the reasons why vote-denominated indicators of gerrymanders are superior. Given McGhee's criticisms, however, we repeat the central conclusion of our article: all five standards we consider address vote dilution in some way or another, but vote-denominated standards more accurately identify whether a jurisdiction was subjected to a harmful gerrymander.

VALIDATION

McGhee criticizes our empirical analysis of state senate districts in North Carolina and Iowa in ways that misunderstand the purpose of this exercise. Our goal is to observe whether each of five standards "reliably" detects a gerrymander in a state where one is suspected (North Carolina) and another state where one is not (Iowa). We do not interpret the results yielded by each standard beyond whether they detect a gerrymander. In other words, this is a straightforward effort to validate these standards on their own terms. McGhee's objection that no court would simply assume a state is gerrymandered or not is obviously correct, but it merely underscores the need to create a manageable and effective standard.

Aside from using these two states as criterion groups, McGhee also objects to using statewide elections as opposed to state senate elections. Three simple reasons stand behind our reliance on statewide elections. First, legislative electoral competition is endogenous to the lines drawn. Candidate and campaign quality vary depending on where the lines are drawn, including the important fact that many districts go uncontested. Second, to evaluate gerrymandering at the time lines are proposed, there is no sensible way of compiling the data by rearranging legislative votes from prior legislative elections. Third, even after legislative elections have occurred, there is no sensible way to rearrange the legislative votes to evaluate the extent, if any,

to which residential patterns contribute to vote dilution.

In the context of validating these standards, analyzing statewide elections is especially advantageous precisely for the reason McGhee objects to them: the variety of outcomes in these contests. Beyond the question of whether a standard correctly identifies North Carolina and Iowa, there is also the matter of whether it consistently reaches the same conclusion about the same set of districts under varying electoral conditions. We believe—and we are fairly certain that most others share our view—that it should. That is, evidence of vote dilution should be observable across a series of elections (excepting landslides). If not, this suggests that the effects of gerrymandering are transitory and easily undone by the voters.

When applied to North Carolina and Iowa, the difference between the standards we consider is stark. Three of the five, including McGhee's efficiency gap (EG), yield inconsistent (and unexpected) results for the same set of districts in different elections. In the case of the efficiency gap, this instability seems to be a matter of design (McGhee's response [2017]: "A plan can have a balanced or imbalanced EG in one election but fall in or out of balance as vote shares rise and fall"). He is correct about his own efficiency gap standard, and it is on this basis that we question whether it effectively detects gerrymanders. By contrast, both seat- and vote-denominated symmetry standards reliably identify gerrymandering in these states, but the latter—the median-mean difference—is more manageable by the criteria discussed by Justice Kennedy in *LULAC v. Perry*.⁴

By adopting a straightforward, legally grounded, and empirically practical definition of gerrymandering and engaging in a conventional effort to validate five proposed standards, we believe that our article offers new insights into the project of creating a manageable and effective standard for the courts and fellow scholars.

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