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# How the Efficiency Gap Might Ruin the Fun of Stealing American Elections

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*Partisan gerrymandering is one way legislative districts can be drawn to the electoral advantage of a political party in the U.S. Building a judicial standard around the efficiency gap might put an end to that, but it might have other implications as well.*

Imagine you have a seat in the House of Representatives of the hypothetical U.S. State of West Carolina. You are one of the Republicans so you are part of the majority. Unfortunately, many West Carolinians vote for the Democrats and it looks like the Republicans may lose their House majority at the next election. You do not care for this prospect, but what can you do? One option would be to propose some good old-fashioned partisan gerrymandering to get your party an electoral advantage. In this contribution, I will explain what partisan gerrymandering is exactly, why the “efficiency gap” could inform a judicial standard for it, and what the implications of using such a standard would be in the U.S.

To understand partisan gerrymandering, one first needs to understand plurality voting. This electoral system characterises most, if not all, legislative elections in the U.S. It divides all voters into several districts with only one representative each. This is the candidate who manages to win most votes in her or his respective district (*i.e.* a plurality). The other candidates, no matter how many votes they get, are left empty-handed. These are winner-take-all elections ([Davis v. Bandemer](#)).

So how could an opportunist West Carolinian politician such as yourself create a successful partisan gerrymander? Look no further than Stephanopoulos and McGhee’s article (see references below) for the instructions. You should draw a redistricting map that concentrates as many voters for the opposing party as possible in as few districts as possible (*i.e.* packing). They would then win those districts with unnecessarily large pluralities. The (many) remaining voters for that party would be spread over the other districts in such a way that they could no longer form any plurality in them (*i.e.* cracking). It is in those other districts that your party would then win modest but more pluralities. Given a certain number of votes, your party could then win more seats simply because of the way districts are drawn.

It is still unclear if and how plaintiffs can bring a successful action against such a practice. One problem is that the Supreme Court has not (yet) accepted any standard for what constitutes an unconstitutional partisan gerrymander.

To fill that lacuna, Stephanopoulos and McGhee propose building a standard around the efficiency gap. This measure starts from the concept of “wasted votes”. This includes every vote “cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail”. The efficiency gap is then “the difference between the parties’ respective wasted votes, divided by the total number of votes cast in the election”. Basically, the efficiency gap indicates whether or not a party wastes many more votes than the other party. If so, there

is a partisan gerrymander to the disadvantage of the former. The normative implication is that a redistricting map should be drawn in such a way that both parties waste about as many votes.

Now, what if there were variations in voter turnout across the districts? And what if a party had a tendency to win those districts that include more voters? That party would then be at a disadvantage as it would need more votes to win the same number of seats. The opposite would be true for a party winning in districts with fewer voters on average. Yet, the efficiency gap I described would suggest the former party is at an advantage while the latter is at a disadvantage. Clearly, then, this measure could be problematic, as McGhee admits.

However, McGhee argues that other versions of the efficiency gap do correctly take into account both partisan gerrymandering and the advantage or disadvantage that comes with winning in districts with lower or higher turnouts respectively. They then reflect the overall (dis)advantage of a party. Districts should then be drawn that keep this (dis)advantage to a minimum. An elaboration on this goes beyond the purpose of this contribution however.

Adopting one of those versions of the efficiency gap as the basis for a judicial standard may result in the need to neutralize the advantage or disadvantage of winning in districts with fewer or more voters respectively. To that end, a State may feel the need to limit the variations in turnout across the districts. Of course, turnout is not known in advance and can therefore not be a basis for redistricting. Yet, districts could be drawn that are equal with respect to a proxy like voter-eligible population. Traditionally, however, districts contain equal *total* populations. The question would then arise whether or not the “one person, one vote” principle would allow a departure from this settled practice. The Supreme Court expressly refused to answer this question in its [Evenwel v. Abbott](#) judgment two years ago.

A standard centred around one of the comprehensive versions of the efficiency gap could also provide perverse incentives. Imagine a situation in which one advantaged party tends to win in districts with smaller turnouts, while the other party is advantaged by (unintentional) partisan gerrymandering. Instead of eliminating both advantages altogether, it may be easier for those drawing the redistricting map to try and make one balance the other out. Overall, neither party would then have an advantage over the other. This could however lead to more partisan gerrymandering or more variations in turnout across the districts, depending on the situation. The former would defeat the purpose of the judicial standard. It would also lead to voters living in more cracked and packed districts where their votes are intentionally wasted. And the Supreme Court seems to recognise that such votes are diluted ([Gill v. Whitford](#)). The latter would also be problematic. Indeed, turnout variations lead to inequality in vote weight, as the Supreme Court implicitly admits in [Gaffney v. Cummings](#).

Then again, the Supreme Court may decide that that is what it takes to have fair elections in which no party is at a particular advantage. That could already have happened in [Gill v. Whitford](#). Unfortunately, the plaintiffs failed to demonstrate standing so the Court did not come to a decision on the issue. However, the Court will probably get another opportunity to consider the merits of a standard built around the efficiency gap. Yours truly is already looking forward to that moment.

References:

Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 *Legislative Studies Quarterly* 55 (2014).

Nicholas Stephanopoulos and Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 *The University of Chicago Law Review* 831 (2015).

Eric McGhee, *Measuring Efficiency in Redistricting*, 16 *Election Law Journal* 417 (2017).