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ESSAY

THE TEMPORAL DIMENSION OF VOTING RIGHTS

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MODERN voting rights scholarship agrees on one thing: voting rights are aggregate rights. The right to vote is important, of course, for a variety of individualistic reasons. It may be constitutive of citizenship, central to the inculcation of civic virtue, and so on. But contemporary scholarship begins with the premise that the right to vote is meaningful in large part because it affords groups of persons the opportunity to join their voices to exert force on the political process. On this account, the fairness of a legal rule affecting voting rights cannot be determined by focusing solely on an individual voter; a resolutely individualistic focus makes it impossible to determine how the rule affects the ability of groups of voters to exercise political influence.

The aggregate nature of the right to vote presents special problems for any effort to evaluate voting rights claims. To the extent that voting rights are aggregate rights, one cannot evaluate voting rights claims, or the fairness of an electoral system, without establishing the boundaries of appropriate aggregation. The literature has recognized this fact, but it has failed to recognize the breadth of the aggregation dilemma. Its focus has been principally spatial, and the debate has centered on identifying instances where it is appropriate to aggregate across persons located in different places for

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purposes of evaluating the fairness (or constitutionality) of a voting rule. A common question, for example, is whether the existence of a majority-minority electoral district in one part of a state is relevant to a voting rights claim brought by minority voters in a different part of that state. Missed by the scholarship, however, is the existence of another dimension altogether in which one could aggregate the collective treatment of individual voters for purposes of evaluating a voting rule's fairness: the temporal dimension.

The harms and benefits of a voting rights regulation can be aggregated over time in the same way they can be aggregated spatially. Whether a voting regulation causes a cognizable injury often depends on how broadly one draws the temporal frame within which one evaluates the regulation. To see this, imagine a hypothetical voting rule that burdens the voting rights of a group in time period one, but then benefits that group in time period two. If members of the group challenge that rule, a court's evaluation of the merits of the claim may turn on how broadly the court aggregates the right to vote in the temporal dimension. If the court selects a narrow temporal frame that includes only time period one, it will conclude that the rule burdens the group's voting rights. But if the court selects a broader temporal frame that includes both time periods one and two, it can offset the burden in period one against the benefit in period two. Accordingly, the court may conclude that the plaintiffs have a viable voting rights claim if it selects the narrow temporal frame, but it may reject the plaintiffs' claim if it selects the broader temporal frame.

The possibility of temporal aggregation is often implicated by the facts of voting rights controversies. Partisan gerrymandering cases regularly raise the question whether a gerrymander is more constitutionally acceptable if it is designed to offset a previous political gerrymander by the other party. Minority vote dilution cases under the Voting Rights Act raise similar questions. Voting Rights Act doctrine often elevates the importance of whether minority voters have achieved representational "proportionality." But the doctrine leaves unspecified the time period over which one should measure proportionality. Should minority plaintiffs be able to point to a lack of proportionality over time as evidence that a current re-districting plan is insufficient, even if the plan achieves proportionality with respect to the next set of elections? Or, on the flip side,

should defendants be able to raise proportionality in past election cycles as a defense to a plaintiff's claim that a current districting plan will create disproportionality in an upcoming election cycle?

While these temporal aggregation questions are nearly always present in voting rights litigation, they are invariably overlooked by courts. This does not mean that the temporal dimension does no doctrinal work. To the contrary, courts often must select some temporal frame within which to evaluate a voting rights claim. In practice, therefore, judges often implicitly shrink or expand the temporal frame of a voting rights claim—either permitting or disallowing aggregation along the temporal dimension—in the service of a particular conclusion about the constitutionality of a voting rights regulation. Narrow or broad temporal frames thus often lie undiscussed in the background of judicial reasoning.

What should be the appropriate time period within which courts evaluate the fairness (or constitutionality) of a voting regulation? This is a difficult question that admits no categorical answers. Selecting the appropriate extent of inter-temporal aggregation depends crucially on our underlying theory about what the right to vote is designed to vindicate in a particular context—or, in other words, what harms we are trying to prevent. It also depends on which institutions are going to be responsible for enforcing the right to vote.

That said, it is hard to see a basis for categorically rejecting the possibility of temporal aggregation—so long as one agrees that the right to vote is in part an aggregate right. Both spatial and temporal aggregation require that one accept the possibility of identifying representational injuries by examining the treatment of two or more people, rather than by locating all injuries in the treatment of an individual voter. In spatial aggregation, we examine the treatment of two or more voters together, even though they live in different places (and perhaps belong to different electoral districts), because they have certain characteristics in common, such as a political party or race. In temporal aggregation, we likewise might examine the treatment of two or more voters together, even though they vote in different points in time, because they have certain characteristics in common. There is broad consensus that it is *sometimes* appropriate to identify injuries by aggregating across persons in different places. Given that aggregation in the temporal

dimension is not different in kind from spatial aggregation, it would be a mistake to reject inter-temporal aggregation in all contexts.

Recognizing the temporal dimension of voting rights has important implications for a number of concrete disputes in voting rights theory and doctrine. For example, voting rights law has often struggled to develop mechanisms for incorporating minority voices into democratic decisionmaking bodies. Capitalizing on the temporal dimension can expand the strategies available for promoting diversity in democracy.

Consider recent discussions of first- and second-order diversity. First-order diversity ensures that the demographic characteristics of a decisionmaking body match the demographic characteristics of the population as a whole. Second-order diversity takes a different approach to promoting minority representation: for disaggregated decisionmaking bodies like juries, it permits each individual body to deviate from proportionality, while ensuring that the bodies' aggregate composition still matches the population's. Second-order diversity has several strengths. One apparent weakness, however, is that it seems to be limited to special cases involving disaggregated decisionmaking bodies. Identifying the temporal dimension makes clear that this weakness is illusory. Any existing democratic decisionmaking body can be disaggregated across time. Temporal disaggregation would therefore allow us to create second-order diversity in a state legislature, in Congress, or in any other democratic institution. In short, recognizing the temporal dimension of voting rights can dramatically expand the possibilities for democratic design.

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