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## Is It a Dragon? No, It's a Salamander. The Supreme Court's Effort to Slay the Partisan Gerrymander

Tim Harris

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*Is it a Dragon? No, It's a Salamander!*  
*The Supreme Court's Effort to Slay the Partisan Gerrymander*

Tim Harris has completed the requirements  
for Honors in the Government Department  
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## Abstract

The Supreme Court sits on the precipice of undertaking major action to limit the strength and scope of partisan gerrymandering. The Court has never struck down a partisan gerrymander. Although the Court appears to possess the authority to invalidate an unconstitutionally discriminatory districting plan, it has never decided on what indicates unconstitutional discrimination in districting. It has never settled on a workable standard to judge whether or not a specific partisan gerrymander is unconstitutional. In November 2016, a lower court in Wisconsin struck down a partisan gerrymander and put forward what it claims is a workable standard to judge the constitutionality of a districting plan. The appeal of that case and the lower court's standard are now before the Court in *Gill v. Whitford*. This thesis makes two arguments: first, the Supreme Court is likely to uphold both the lower court's ruling and the lower court's standard. Analysis finds the proposed standard incorporates the jurisprudence of moderate Justice Anthony Kennedy in order to attract the support of a five-member Court majority. Second, the effects of the Supreme Court upholding the lower court's standard are likely to be more limited than many anticipate, and for the better.

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# Introduction

## Partisan Gerrymandering 101: The Dark Side of Cartography

The 2018 political landscape will be remembered for many things: political polarization, a controversial President, a potential North Korean summit, and growing national movements against sexual assault and gun violence. In what may prove to be the “most important political development of our time” (Toobin 2018), the partisan gerrymander appears doomed. Partisan gerrymandering—the drawing of legislative district boundaries to favor, magnify, and perpetuate the power of the incumbent political party—has a distinguished 270-year history in the United States. Partisan gerrymandering, unlike negative racial gerrymandering, is generally allowed under Supreme Court precedent on the grounds that no judicially manageable standard exists to evaluate partisan gerrymandering claims. However, in 2018 this precedent is being challenged at an extraordinary pace.

Public and legal outrage over the partisan drawing of political boundaries has reached an all-time high. Since the start of the year, partisan-drawn congressional maps in Pennsylvania and North Carolina have been struck down by the Pennsylvania Supreme Court and a U.S. District Court, respectively. Additionally, two separate cases are currently before the Supreme Court. The standard used by the lower court to invalidate North Carolina’s congressional districts is being heard in *Gill v. Whitford*, a case that arose out of a challenge to Wisconsin’s partisan-drawn state legislative districts. A challenge to Maryland’s congressional districts using a different standard, *Benisek v. Lamone*, also sits before the Court. The process by which electoral districts are drawn has significant consequences for American democracy, and that process is likely to experience serious revisions in the immediate future. This thesis seeks to identify the

likelihood and consequences of a Supreme Court decision in favor of a workable judicial standard aimed at eliminating the most extreme partisan gerrymanders.

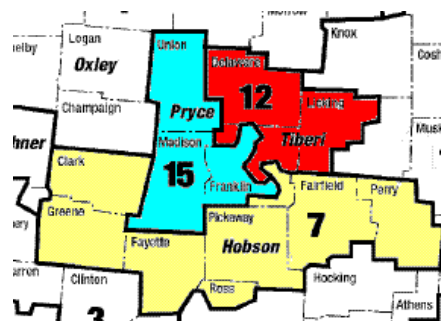
### **Strategies, Tactics, and Causes of Gerrymandering**

American lawmakers are generally elected from single member districts in winner-take all elections, which can make partisan map drawing highly effective. Following the decennial census states must redraw Congressional and state legislative district boundaries. This process is called redistricting. Maps are typically drawn in the state legislature and approved by the governor. States must comply with constitutional equal population requirements and Section 2 of the Voting Rights Act. Congressional seats are apportioned to the states based on population and the Reapportionment Act of 1929. Aside from these requirements, and any additional requirements the state may choose to impose, states are free to draw districts as they see fit. Historically, a party with total control of the redistricting process designs the next map of districts to suit its own electoral interests. With these distorted intentions, it is no surprise maps begin to look distorted. The purpose of redistricting develops into an attempt to maximize the effect of one's supporters' votes and minimize the effect of opponents' votes. If this attempt is successful, a partisan gerrymander is the result.

The consequences of redistricting are enormous. A districting plan determines the way in which votes are translated to legislative seats. A party that receives fewer votes may still win a majority of seats with a beneficial districting scheme. Districting plans often determine what interests are best positioned to promote policies. A party with a disproportionate share of seats can enhance the influence of the interest groups, organizations, and individuals which support it. Beyond determining party control of a legislature, districting can effect the racial, ethnic, and geographic diversity of a legislature. The racial composition of a legislature can have important

political consequences. African-American legislators are more likely than white legislators from districts with significant minority populations to introduce or promote legislation with a racial component (Bullock 2010; Gay 2003; Hajnal 2009). Likewise, representatives of different religious or geographic backgrounds are liable to support differing policies when from similar districts (Bullock 2010).

Gerrymandering occurs most commonly through “cracking” and “packing”, but also via “hijacking” and “kidnapping.” “Cracking” spreads a particular group of voters among multiple districts in order to prevent them from forming an adequate bloc to elect a proffered candidate in any district. The map below displays a section of Ohio’s Congressional plan drawn by the Republican Party after the 2000 census. The three districts “cracked” predominantly Democratic Columbus, at the center of Franklin County, into three districts with more rural and suburban Republican voters (full citations for all the maps will be provided in a table at the end of the thesis).

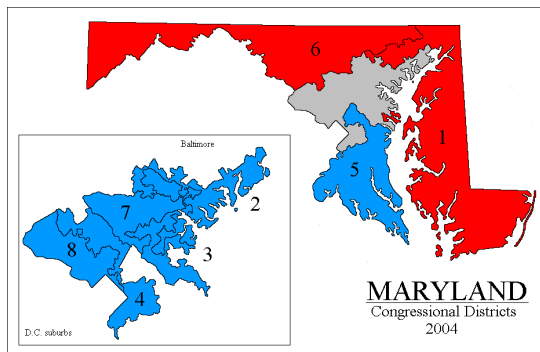


(Source: Wikipedia)

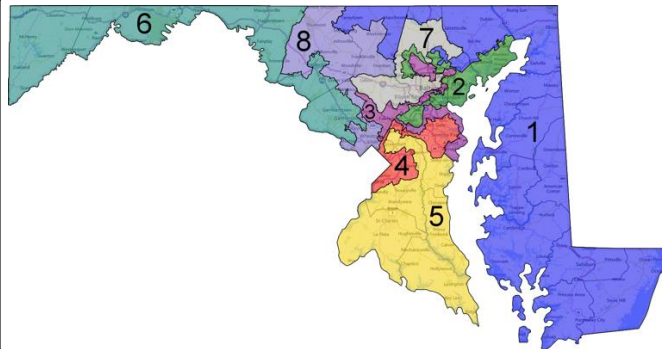
“Cracking” is also commonly used by the Democratic Party to enhance the electoral influence of urban areas. The map below (on the right) shows Maryland’s 2012 Congressional plan that “cracks” liberal urban areas to increase the number of seats held by Democrats. Note the changes between Maryland’s Congressional plan for the 2000s (below on the left), and the



new Maryland plan. The Maryland partisan gerrymander succeeded in changing the Sixth district's representation from Republican to Democrat.

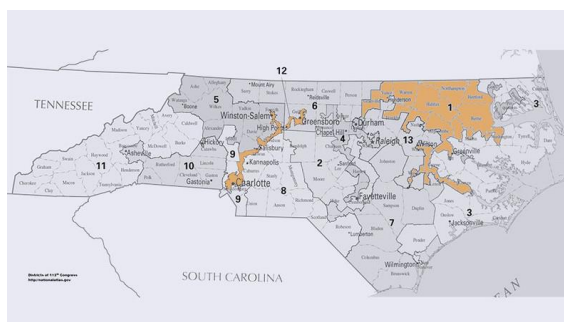


(Source: RangeVoting.org)

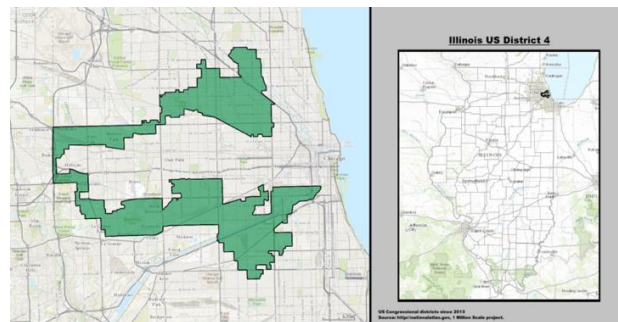


(Source: DailyKos)

“Packing” concentrates similar voters into a single electoral district to diminish their influence in other districts. The map below on the left shows North Carolina’s 2011 Congressional plan highlighting the districts that pack minority voters. The Supreme Court struck down these districts as unconstitutional racial gerrymanders in *Cooper v. Harris*, 581 U.S. \_\_\_ (2017). “Packing” may be done in compliance with Section 2 of the Voting Rights Act to guarantee representation for a cohesive community of common interest, as in a majority-minority district. The map on the right shows Illinois’ Fourth Congressional district, which legally packs two Latino communities in Chicago in order to ensure their representation. Illinois’ Fourth Congressional district is an example of an affirmative racial gerrymander. The defendants of the 2011 North Carolina plan claimed it was an affirmative racial gerrymander, but in *Cooper* the Supreme Court found it was really a negative racial gerrymander.

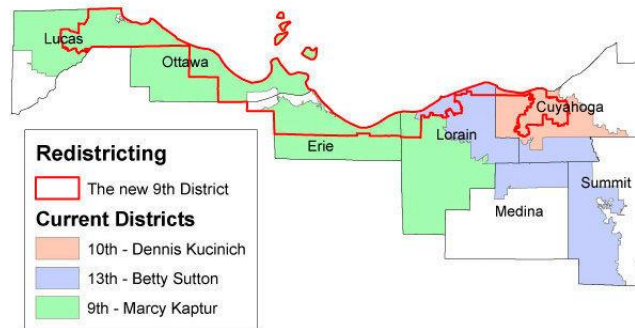


(Source: RT.com)



(Source: Nationalatlas.gov)

“Hijacking” —the redrawing of two districts that forces two incumbents to run against each other in one district—guarantees one will not be reelected. “Kidnapping” —or moving one incumbent into an unfamiliar district—decreases an incumbent’s chances of reelection. The map below displays the 2011 modification to northern Ohio’s Congressional districts. Ohio’s redistricting forced incumbent Democratic Congressman Dennis Kucinich to retire rather than run in a district fellow Democratic incumbent Marcy Kaptur had represented since 1983. Kucinich was both “hijacked” and “kidnapped.” Kaptur was also “hijacked.”



(Source: MSNBC.com)

Typically, “cracking,” “packing,” “hijacking,” and “kidnapping” are used together to result in the candidates of the districting party winning by small majorities in several districts. The candidates of the minority party win in fewer districts but by large majorities.

### History and Growth of Gerrymanders

Partisan redistricting is nearly as old as American representative democracy. It predates the ratification of the Constitution. Patrick Henry and the Anti-Federalists in the Virginia House of Delegates drew Virginia’s Fifth Congressional District in an attempt to keep James Madison out of the first Congress. As early as 1732, two members of His Majesty’s Council reported to the King of England that the Governor of the Province of North Carolina had redrawn the

districts of North Carolina's Lower House in order to fill it with his supporters (*Vieth v. Jubelirer*, 541 U.S. 267 (2004)). The tradition of partisan gerrymandering has remained alive and well ever since. In recent years it has grown even stronger.

Famously the term gerrymandering was coined in 1812 after a particularly egregious partisan redistricting in Massachusetts. Detractors of Massachusetts Governor Elbridge Gerry's new plan claimed one state senate district that stretched through Essex County, Massachusetts looked particularly like a dragon or a salamander. The district contorted to favor Gerry's Democratic-Republican Party candidates over the Federalists. Federalist newspapers reacted by blending Gerry's name and the word salamander to label the district a Gerry-mander. The famous Federalist cartoon satirizing the district is shown below.



(Source: Wikipedia)

Gerry's gerrymander was a success, in a sense. The redistricted state senate stayed under Democratic-Republican control, but the unpopularity of the map cost Gerry his reelection in 1814 (Martis 2008).

Despite Gerry's fate, partisan redistricting has remained a common feature of American politics. In 1852, the Whigs redrew the boundaries of future President Andrew Johnson's Tennessee district. Johnson's "kidnapping" removed him from Congress (Castel 1979). Prior to

*Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court decision that declared electoral districts must be composed of an equal population; sometimes the easiest way to gerrymander was by avoiding redistricting altogether. Areas that grew in population often were not apportioned additional districts. This led to a situation in the 1960s in which a number of plans provided for districts with 1000 times the population of other districts. When laws maintaining equal population requirements were not in effect rural parties often benefitted disproportionately.

Since the 1960s partisan gerrymandering has aided both political parties. Research by Nicholas Stephanopoulos and Eric McGhee finds partisan redistricting post-*Reynolds* originally favored Democrats but now benefits Republicans. Congressional plans in the 1970s were fairly balanced averaging a 0.10 seat advantage for Democrats. In the 1980s, Congressional plans favored Democrats by a 0.27 seat advantage. In the 1990s the trend reversed, Republicans benefitted by a 0.27 seat advantage. In the 2000s, that advantage grew to 0.72 seats. Plans passed since 2010 have heavily favored Republicans by 1.21 seats. State legislative plans show a similar trend. The Democrats maintained a 1.52 percent advantage in translating votes into state legislative seats in both the 1970s and 1980s. Republicans gained a 1.04 percent advantage in the 1990s, which grew to 2.11 percent in the 2000s, and 3.67 percent this decade. Note that these advantages are all relatively small on aggregate (Stephanopoulos and McGhee 2015, 871-872).

Partisan gerrymanders are growing more effective. According to Stephanopoulos and McGhee, the average Congressional plan in both the 1970s and the 1980s showed a votes to seats translation disparity of 0.94 seats. In other words, the average Congressional plan in the 1970s and 1980s resulted in nearly a one seat advantage for the party in control of redistricting. In the 1990s and 2000s, this advantage grew to 1.09 seats. Since the 2010 redistricting cycle, the advantage has increased to 1.58 seats. The average districting plan for the lower house of

nationwide state legislatures provided a 4.76 percent seat advantage for the districting party in the 1970s and 1980s, 5.10 percent in the 1990s and 2000s, and 6.07 percent since the 2010 redistricting cycle (Stephanopoulos and McGhee 2015, 836-837). Legislators and parties are taking full advantage of modern information, technology, and mapping systems to create unprecedentedly partisan maps.

### **Consequences of Gerrymandering**

Extreme partisan gerrymanders are alleged to have severe deleterious effects on American democracy. Gerrymandering can decrease electoral competition, increase incumbent advantage and campaign costs, provide for less descriptive representation, decrease political participation, and increase political polarization. Some contend that partisan gerrymandering is primarily responsible for current American political polarization. They reason that partisan gerrymandering generally results in the creation of safe districts—districts the incumbent party will always win—for both parties. In safe districts, the party primary takes on greater importance than the general election. Safe seats give incumbents a strong incentive to cater to the views of their party's most extreme voters. Extreme voters are the most active in primary elections. Incumbents in safe seats have no incentive to moderate their views or reach out to swing voters. In this way, partisan districts breed political extremism. Political extremism reinforces political gridlock (Dews 2017; Mann 2005).

Evidence suggests that while partisan gerrymandering exacerbates political polarization it is probably not overwhelmingly responsible for contemporary American polarization. Other aspects of the political environment—especially residential self-sorting, the primary process, and the selection of congressional leaders—have far more effect on political polarization (Dews 2017; Enten 2018). Seth Masket notes gerrymandering sometimes leads to more competitive

racism as legislatures “pack” select districts with minority party votes and distribute other minority party votes across competitive districts that the majority party is likely to win (Masker 2014). A 2009 study done by professors at Princeton University, University of California, and New York University found partisan gerrymandering barely affects political polarization. The authors of this study demonstrated that elected officials were relatively as partisan as their state. Redistricting reform that led to the election of Congressional representatives at a statewide level would only bring partisan ship levels back to the mid-1990’s (McCarty et al. 2009). Research conducted in the mid-2000s suggested elected officials from politically heterogeneous districts deviate from the center more than those from homogenous ones. In order to be elected from more moderate districts, politicians need to drive partisan turnout at a higher rate than those from safe districts (Gerber and Lewis 2004).

Gerrymandering may not be the primary driver of political polarization in the United States, but its practice likely contributes to the decline in trust and confidence in American political institutions (Dews 2017). Lack of trust and confidence in the political system has an adverse effect on political participation. The “cracking” of cohesive voting groups in order to dilute their vote can destroy faith in political institutions to provide effective representation. When citizens are denied descriptive representation—a representative that shares politically relevant characteristics—they lose faith in the political system (Azavea 2010; Mann 2005). Safe districts reduce electoral participation. Voters often turn out at much lower rates when an election is uncontested or perceived to be safe. Safe districts are often the product of gerrymandering to minimize incumbent risk (Azavea 2010, Balinski 2008; Dews 2017).

Drawing legislative boundaries to minimize incumbent risk is known as incumbent gerrymandering. Incumbent gerrymandering can be partisan or bipartisan. It is not necessarily a

bane to democracy, though in some cases it can be. Familiarity and knowledge of one's representative makes most voters—and especially minorities—more likely to contact their representative and hold positive views of democracy (Bullock 2010; Gay 2003; Hajnal 2009). Too much gerrymandering, and some citizens may lose track of who their representatives are altogether. Most partisan gerrymanders include an element of incumbent protection. They protect the districting party's incumbents, except for on the rare occasion when a representative has angered party leaders. The prospect of being “kidnapped” or having one's district “hijacked” may incentivize elected officials to be more responsive to party concerns than constituent ones (Azavea 2010; Mann 2005).

Tailoring districts to an incumbent official's advantages can drastically increase his or her chances of reelection. Incumbent politicians in strangely shaped or expansive districts may be better prepared to win reelection. The gerrymandering of odd or expansive districts can increase campaign costs. Incumbents in perceived safe seats are likely to secure more campaign money from donors. With more money to spend, they are better able to travel and advertise across larger or elongated districts (Azavea 2010; Mann 2005). Michel Balinski's 2008 study of gerrymandering and incumbent protection found incumbents won in tailored Congressional districts 98 percent of the time in 2004, and 94 percent of the time in 2008 (Balinski 2008; Issacharoff et al. 2012). When representatives choose their voters rather than voters choosing their representatives, the accountability of representative democracy is called into question.

### **Potential Remedies for Partisan Gerrymandering**

Many perils of partisan gerrymandering are historically well known and accounted for by states. Additionally, citizens are beginning to notice the increasing dangers of leaving the drawing of legislative boundaries in the hands of legislators. Traditional districting principles

that ensure pleasing districts and generally more effective representation have been adopted by many states. Traditional districting principles include compactness, contiguity, preservation of counties and political subdivisions, and preservations of communities of similar interest. These redistricting criteria supplement the federal constitutional requirements concerning population and anti-discrimination.

Compactness requirements seek to ensure the minimum distance between all parts of a constituency. Compliance with compactness requirements generally prevents snaking districts that “crack” and “pack” voters. Contiguity—a very old districting principle often mandated by Congress in the 19<sup>th</sup> and 20<sup>th</sup> century—requires a district is entirely connected. Preservation of political subdivisions demands town, city, or county boundaries are not split up or crossed by district boundaries if possible. Preservation of communities of similar interest mandates that residents of common political interests are not divided when their boundaries do not necessarily coincide with those of a political subdivision. Some states employ additional districting principles that mandate the preservation of cores of prior districts, and not taking the address of incumbents into account. Arizona and California laws require districting bodies seek to create competitive districts. Arizona, California, Iowa, and Florida prohibit line drawers from using partisan data to redraw districts (Bullock 2010; Duchin 2017; National Conference of State Legislatures 2017).

In most states, the legislature remains responsible for passing a new districting plan with the governor’s consent. Thirty-seven state legislatures have primary control over their own district lines. Forty-two state legislatures, including five states with one Congressional district, have primary control over Congressional district boundaries in their state (Bullock 2010; Levitt 2018). Three states—Connecticut, Maryland, and North Carolina—do not grant the governor a



veto over either Congressional or state legislative lines, though in Maryland the governor submits the plan for state legislative lines to the legislature. Mississippi simply does not grant the governor a veto over state legislative boundaries (Levitt 2018).

A number of states have taken steps to reduce the role of the legislature in redistricting. Thirteen states designate responsibility for Congressional and state legislative redistricting to independent or bipartisan redistricting commissions. Seven of these states—Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio, and Pennsylvania—have specially selected political officials draw redistricting plans for the state legislature. Six of these states—Alaska, Arizona, California, Idaho, Montana, and Washington—use independent commissions for both state and federal districts. Alaska and Montana only have one Congressional representative. If they were to be apportioned more seats an independent commission would design their federal districts.

Six states—Iowa, Maine, New York, Rhode Island, Vermont, and Virginia—grant independent advisory commissions the power to submit redistricting plans but the plans must be approved by the state legislature and governor. The commissions are also subject to partisan appointment. Seven states—Connecticut, Illinois, Maryland, Mississippi, Oklahoma, Oregon, and Texas—grant backup commissions the ability to influence state legislative districting plans if the state legislature does not successfully pass a plan. If Kansas' state legislature does not pass a redistricting plan within a certain time frame, then a court draws the map. Connecticut and Indiana use backup commissions for Congressional districts. Connecticut and Maine both require supermajorities in the state legislature to pass a redistricting plan (Bullock 2010; Levitt 2018).

The limits placed on legislative control of the redistricting process make partisan gerrymandering significantly more difficult to accomplish. Limits, however, only exist in thirteen states. Substantial limits only exist in the six states that give bipartisan or non-partisan

commissions total control over the process: Alaska, Arizona, California, Idaho, Montana, Washington, and possibly Iowa. Even the restrictions imposed by the use of an independent commission may be bent in certain cases. Democrats appointed the majority of Alaska's independent commission in 2000. When Republicans gained control of the Alaskan districting process in 2010, they responded by appointing the entire commission (Levitt 2018).

As partisan gerrymanders grow more efficient and precise with the advent of modern Geographic Information Systems technology and the development of elaborate voter databases, calls for reform have grown. Potential reformers seek to promote neutral redistricting criteria, install alternative voting systems, or shift redistricting responsibility to independent non-partisan commissions. Independent non-partisan commissions were upheld as constitutional by the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. \_\_\_ (2015). These types of reform require legislators and parties to sacrifice control over their own electoral fortunes in what is liable to be a long and difficult, if not impossible, operation (Bazelon 2017).

Litigation may provide a faster and more durable path to resolving extreme partisan gerrymanders. The Supreme Court has made previous forays into the districting process to prevent malapportionment, provide districts of an equal population, and evaluate districts based on the requirements of the Voting Rights Act. No partisan gerrymander has ever been struck down by the Supreme Court. Partisan gerrymandering, unlike racial gerrymandering or malapportionment, is generally allowed under Court precedent on the grounds no judicially manageable standard exists to evaluate partisan gerrymandering claims. Two potentially workable justiciable standards are currently before the Court in *Gill* and *Benisek*. A decision by

the Court later this year in favor of a judicially manageable standard could eliminate at least the most egregious partisan gerrymanders.

Chapter I of this thesis examines whether or not the Supreme Court has sufficient Constitutional justification and direction for striking down a partisan gerrymander, and why taking such action would be highly controversial. Chapter II details the Court's struggle to articulate an objective and manageable standard for adjudicating partisan gerrymandering claims, the established divisions on the current Court, and what it would take for a majority of the Court to rule in favor of a standard. Chapter III evaluates the likelihood that the Court adopts the three-part test for identifying unconstitutional partisan gerrymanders proposed in *Gill v. Whitford*. Chapter IV investigates the potential effects of the Court upholding the lower court's ruling in *Gill* and declaring the three part-test is a judicially manageable, objective, standard for arbitrating partisan gerrymandering claims.

# Chapter I

## How to Tame a Dragon: Constitutional Justification and Direction for Resolving

### Gerrymandering

The Supreme Court has never struck down a district map down due to political discrimination. Nor has the Court come close to settling on a means of adjudicating a partisan gerrymander. The two most important partisan gerrymandering cases—*Davis v. Bandemer*, 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004) —left the Court highly fractured. These cases appeared to reaffirm the notion that invalidating a partisan gerrymander requires either an arbitrary or impossible judgment of a plan’s bias, and is therefore an improper step for an unaccountable judicial body to take. The Court is not directly provided oversight of districting issues by the Constitution. Moreover, the standards the Court has applied to resolve other representation based cases, such as *Reynolds v. Sims*, 377 U.S. 533 (1964) and racial gerrymandering cases, are not readily applicable to partisan gerrymandering cases. Thus, reaching a standard a court can use to strike down a partisan gerrymander faces an enormous obstacle: limited Constitutional direction.

The Court needs both theoretical justification and a sound mechanism, or standard, if it will have the ability to strike down extremely gerrymandered districts. This chapter examines how constitutional justification for striking down a partisan gerrymander is derived. Looking at the original Constitution, it is clear the judicial invalidation of districting plan would run contrary to original Constitutional text and the intentions of the framers. The modifying power of the Fourteenth Amendment can be interpreted as directing the judiciary to invalidate a district map that effectively denies votes, dilutes votes, or discriminates.

Conservative Justices credibly contend that the Constitution offers no theory of representation, and gives the judiciary neither a manageable standard nor any authority to strike down a districting map. Liberal Justices argue that the Fourteenth Amendment offers a theory of representation. Landmark cases of the 1960s—*Baker v. Carr*, 369 U.S. 186 (1962), which ruled districting claims presented justiciable issues, and *Reynolds*, mandating equality of representation through “one person, one vote” —were decided on an Equal Protection basis. *Reynolds* requires government officials not discriminate against citizens in representational map drawing by creating districts of unequal population. Inter-district population disparities dilute votes. Vote dilution denies citizens the equal protection of the laws guaranteed in the Fourteenth Amendment. Those in favor of striking down partisan gerrymanders assert vote dilution can be accomplished just as easily via “packing” and “cracking” of voters in gerrymanders as it can through the creation of districts unequal in population. *Reynolds* abolished district population disparities so the Court can nullify other forms of vote dilution. The history of American representation, districting, and Supreme Court jurisprudence establishes that the Supreme Court has some Constitutional direction for invalidating a partisan gerrymander. The Court will be hard-pressed to discover a sound mechanism compatible with that already-limited direction.

### **The Original Constitution and Representation**

Redistricting oversight is not originally or directly assigned to the courts by the Constitution. The Constitution provides Congress with the power to “make or alter” federal districts in Article I §4, but it confers no such power over state legislative districts. Article I §4, referred to as the “Times, Places, and Manner” clause, reads,

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article III of the Constitution, which delegates power to the judiciary, makes no mention of redistricting or even the electoral process. The original Constitution gave state legislatures clear authority to prescribe the form of electoral system and empowers them to draw state legislative district lines however they may choose. State legislative lines or electoral systems were not subject to Congressional or judicial review under the original Constitution. If an issue with Congressional district boundaries exists, Congress is responsible for providing a remedy.

The overriding purpose of the “Times, Places, and Manner” clause was to negate the potential for states to abuse the power to set the times, places, and manner of federal elections. Alexander Hamilton noted, “Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures would leave the existence of the Union entirely at their mercy” (*Wesberry v. Sanders*, 376 U.S. 7-8 (1964)). The framers neither specify the method by which representatives are to be apportioned, nor implement a means of electing representatives. The clause granted Congress power to make and alter federal (Congressional) districts, but, at least prior to the Fourteenth Amendment, it gave no conclusive power to the federal government to regulate state legislative districts.

At issue in *Gill v. Whitford* is the Wisconsin state legislative districting plan, not the Congressional districting plan. The more important, overarching, issue is where the Court derives its power to hear a districting case or strike down any districting plan either Congressional or state legislative. It is unquestionably within the purview of Congress to establish a threshold-style standard of partisanship over which a Congressional districting plan would be illegal. It is not clear Congress could mandate a similar standard for state legislative plans, as the Court now considers doing in Wisconsin. A Constitutionally assigned power that lays dormant in the hands of one branch of government is not automatically transferred to

another. The Court does not inherit Congressional power to regulate districting because Congress refuses to regulate. This begs the question where does the Court find its power to adjudicate districting claims?

The judiciary might have used the Guarantee Clause of Article IV §4 to claim authority over districting issues. Article IV §4 guarantees to every state in the Union a republican form of government. Theoretically, a particularly egregious partisan gerrymander could result in a non-republican form of government. For example, by entrenching a minority in legislative power. Why does the Court not use Article IV §4 to strike down a sufficiently undemocratic electoral system or plan? The Guarantee Clause is useful in so far as it confirms the already well documented intentions of the framers, but it is held to implicate political non-justiciable questions. The clause came before the Court in *Luther v. Borden*, 48 U.S. 1 (1849). *Luther* arose from a dispute over which government of Rhode Island was legitimate. The original King's colonial charter government of Rhode Island restricted voting rights to property owning white men and was alleged to be un-republican. Detractors attempted to set up an alternative government in the Dorr Rebellion and appealed to the Supreme Court to rule the charter government illegitimate.

The Court avoided the issue. It declared questions of rebellion and political legitimacy are inherently political, and thus outside the purview of the Court. The Guarantee Clause, like Article I §2, may articulate a very basic theory of republican representation, applicable to the states, but the Court has no authority to enforce such a claim. For pre-Fourteenth Amendment theories of Constitutional representation one must look beyond Constitutional text. Even then, no evidence suggests many, if any, framers would have wanted to empower courts to invalidate

district plans. Those who claim the Court has the power to strike down a partisan gerrymander necessarily imply the Fourteenth Amendment secures a theory of equal representation.

### **Equal Representation and the Framers**

The founding fathers did not commit the nation to any specific theory or method of representation. They even declined to ensure the method of representation now used in the vast majority of American elections. Three electoral systems, or methods of representation, were in widespread use at the founding: multi-member at-large districts, plural-member districts, and single member districts. No system provided for modern equal representation. Single-member districts are and were commonly considered the most representative electoral system possible within a plurality based voting scheme. James Madison, and other framers, considered plural member and multi-member at large districts inferior to single member districts due to their large dilutive effect on minority representation. Bare majorities in multi-member at large elections often achieve a totality of the representation. A large plural-member district that elects several representatives can be nearly as dilutive as an at-large district (Flores 1999; Zagarrri 1987). Madison appeared to assume states would use a system of geographic representation by single member districts of a similar population in the Federalist Papers. He and other framers, however, regarded state power to choose an electoral system as more important than mandating a system of equal representation via single member districts. The original Constitution did not set forth the specificities of the method of representation Madison outlined in Federalists 56 and 57.

Madison's appeal for the use of single-member districts stems largely from a desire to match the interests of Congress to the interests of the entire population. Madison likely assumed states would use single member districts. Madison wrote in Federalist 56, "divide the largest state into ten or twelve districts and it will be found that there will be no peculiar interests which



will not be within the knowledge of the Representative of the district.” Issues of commerce, taxation, and the militia require local knowledge, wrote Madison. He was adamant about avoiding the experience of Great Britain, in which vastly unequal bodies elected representatives to the House of Commons. Vastly unequal electoral bodies generated false representation, representatives who were more frequently the instruments of the executive than the guardians of popular rights. Madison believed the success of a republic as vast as the United States would be inextricably linked to the trust of constituents in their government. If representatives are to be trusted guardians of national interest, they must be elected from constituencies similar in population and reflect the geographic and commercial interests of all Americans (Federalist 56; Federalist 57; Mast 1995).

In Federalist 57, Madison indirectly supposed a method of single member district representation. Using Philadelphia as an example, he noted that because it contains between 50 and 60 thousand people it would form nearly two districts of 30 thousand people for the election of Congressional representatives. While he avoided arguing directly in favor of single member districts, he appears to consider it the most well suited to binding the interest of legislators to their constituents. Madison was not alone among the founders in his preference for single member electoral districts. George Mason and Alexander Hamilton made statements in favor of districts at the Constitutional Convention, and New York ratifying convention, respectively (Federalist 57; Flores 1999; Mast 1995; Zagari 1987).

The Constitution did not set forth the specificities of the method of representation Madison outlines in Federalists 56 and 57. It apportioned representatives to the states for every thirty thousand inhabitants, as Madison supposes, but left states responsible for determining how these representatives will be elected. States were not required to draw districts of an equal

population, though several did. The minority inclusivity benefit of single member districts was superfluous to several smaller states at the founding. Smaller states lacked the regional and partisan diversity of interests found in larger states. Moreover, small states desired to send unified delegations to Congress in order to match the influence of the larger states. It is unlikely they would have supported the imposition of a single member district electoral system on the states. They would have viewed any attempt to secure single member representation as a power grab by interests in larger states. In fact, smaller states were already fairly skeptical the “Times, Places, and Manner” clause conferred too much power on the larger states (Flores 1999; Mast 1995; Zagarri 1987).

It is evident the framers preferred single member electoral districts but left the Constitution uncommitted to them, believing states had the right to choose their own electoral system (Flores 1999). Madison himself displayed this sentiment, writing,

Whether the electors should vote by ballot, or viva voce, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district... would depend on the (state) legislatures (Zagarri 1987, 106).

In Federalist 59, Hamilton explained the nature of Congressional control over districting,

(The Framers) have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety (Flores 1999).

It is unclear if Madison or Hamilton considered the possibility that the “Times, Places, and Manner” Clause would be used to secure a preferred method of representation absent an emergency. A majority of the original thirteen states declined the advice of Madison and other framers, using multi-member, at-large, districts in the first Congressional elections. None used

proportional systems, which had yet to be developed. In the first Congress, 46 percent of the House was elected using multi-member at-large districts.

Support for the principle of equal representation was common in the early republic, even if it was not Constitutionally guaranteed. The Constitution apportioned representatives on the basis of one per 30 thousand inhabitants, but it did not demand one district per 30 thousand inhabitants. Placing voters in districts of an equal population was common practice in post-revolutionary America. Sentiments favoring equality of representation are evidenced throughout the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, and echoed at the Philadelphia Convention, Federalist Papers, and State ratifying conventions (Hacker 1964, 6-14; Hayden 2003, 217-220).

Thomas Jefferson consistently criticized the 1776 Virginia Constitution for not guaranteeing apportionment on the basis of population, writing in 1816, “A government is republican in proportion as every member composing it has his equal voice in the direction of its concerns... by representatives chosen by himself...” And in 1819, “Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified” (*Reynolds v. Sims*, 377 U.S. 533 (1964), at Footnote 53).

Many of the framers intended for members of the House to be elected by people with equally weighted votes and to embody the will of the majority (Hayden 2003, 217-220). In Federalist 39, James Madison wrote, “The House of Representatives will derive its powers from the People of America; and the People will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state.” The Northwest Ordinance of 1787 echoes the same guarantee, noting inhabitants of the Northwest Territory, “shall always be entitled to the benefits... of a proportionate representation of people in the legislature.” Many

scholars insist a plethora of evidence exists to support the claim many of the founders intended to ensure equality of vote. Regardless, they secured no such system, though they made one plausible via Congressional regulation pursuant to the “Times, Places, and Manner” Clause (Hacker 1964, 6-14; Hayden 2003, 217-220; McGann et al. 2015).

For the first half a century of the American republic, the creation of unrepresentative or unequal districts was a decision that only the state legislatures exercised any authority over. The controversial passage of the Apportionment Act of 1842 limited the states’ freedom to draw their own Congressional districts and mandate their own electoral systems. The Apportionment Act of 1842 marked Congress’ first use of the “Times, Places, and Manner” Clause to institute a single member district system for Congressional elections. Congressional regulation over the state use of Congressional districts and electoral systems became gradually accepted (Denvir 2015; Flores 1999; Hacker 1967; Mast 1995; Zagarrri 1987).

### **The Watershed Moment of 1842 and Congressional Regulation of Districting**

The rampant partisan unfairness in 19<sup>th</sup> century multi-member at-large elections makes modern political gerrymanders look comparatively tame. In states where one party had a statewide majority it usually won a totality of the seats (Hacker 1967). In the elections of 1828, Connecticut, Georgia, New Hampshire, New Jersey, and Rhode Island all held at multi-member elections in at-large districts. None of the 27 seats from these states were carried by a member of the particular state’s minority party. The Democratic Party, aligned with Presidential candidate Andrew Jackson, won none of the 12 seats in New Hampshire and New Jersey, despite Jackson winning 45.9 percent of the vote in New Hampshire and 47.9 percent of the vote in New Jersey.

States using multi-member statewide districts continually sent unrepresentative delegations to Congress. In 1840, Alabama, Mississippi, Missouri, and New Hampshire

combined to send 14 Democrats and zero Whigs to Congress, even though Whig Presidential candidate William Henry Harrison won at least 43 percent of the vote in each of the four states. Georgia and New Jersey sent 11 Whigs and no Democrats to Congress despite Democratic President Martin Van Buren winning 44 and 48 percent of the vote in each state, respectively.

Elected officials were highly aware of the disproportionate sweep effect and implications of the at-large system. Any party which won a statewide majority could usually win all the seats in a state's congressional delegation, while a significant share of the state's constituents would be left devoid of ideological or geographic representation. Smaller states, however, clung to the at-large method of representation because it allowed them to send politically unified delegations to Congress to match the influence of states with more population (Zagarri 1987).

Some legislators were disturbed by the large number of citizens who cast, what are now called, "wasted votes." They attempted as early as 1800 to amend the Constitution in order to alleviate the "wasted votes" problem (Flores 1999). New Jersey Senator Mahlon Dickerson proposed a single member district amendment regularly from 1817 to 1826. Dickerson's amendment passed the Senate three times but went no further. Rosemarie Zagarri, in her 1987 work *The Politics of Size*, notes Dickerson's efforts were unsuccessful outside the Senate for three reasons. (1) A majority of Congress assumed the states had constitutional authority to determine how to elect their representatives and (2) state legislators were better positioned to make such a decision than Congress. (3) More importantly, roughly a third of the membership in the House came from states that elected those Representatives via the at-large system. The push for single-member district elections disappeared for 15 years, but re-emerged suddenly in 1842 (Flores 1999; Zagarri 1987).

The sudden revival of the push for single member districts was largely precipitated, like many shifts in national politics, by events in Alabama. Prior to the election of 1840, Alabama switched from a single member district system to a multi-member at large one. As a result, the state elected a uniform delegation of five Democrats to Congress in 1840. The loss of two seats in Alabama frightened the Whigs who argued this was the first step towards national multi-member at-large elections. Worried that large states might switch to the at-large system and form a cohesive bloc within the House, many representatives began to advocate a districting mandate. Representative Garrett Davis of Kentucky even supposed a hypothetical situation under which Massachusetts, New York, Pennsylvania, Ohio, and Indiana could seize control of the House's legislative power by adopting the at-large system (Flores 1999; Zagarri 1987).

Alarm over multi-member at-large elections arose at the same time Congress was undertaking its decennial apportionment duty. Representative John Campbell a Democrat from South Carolina tacked the following amendment onto the 1842 apportionment bill,

And be it further enacted, that in every case where a state is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts, composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled; no one district electing more than one Representative (1842 Congressional Globe, 348; Flores 1999).

Prior to 1842, Congress had passed an apportionment act every decade but it had never regulated the manner of federal elections. Many viewed the amendment as destructive of state power, contrary to the will of the founders, and beyond the power of the “Times, Places, and Manner” clause. President John Tyler only begrudgingly signed the act. None of the states using at-large systems changed their electoral systems until 1848, but in the meantime their Representatives were allowed to maintain their seats. The single member district provision was dropped following the 1850 census (Flores 1999; Zagarri 1987). Although the requirements

imposed in the Apportionment Act of 1842 did not stick, Congressional action supported by the “Times, Places, and Manner” clause set the stage for future acts of districting legislation.

Until the 1920s, Congress routinely imposed districting requirements on the states, using its regulatory power to secure a desirable form of Congressional representation. The Apportionment Act of 1842, mandated that Representatives be elected from contiguous districts. Congress reiterated this requirement in the Apportionment Act of 1862 and further demanded in the Apportionment Act of 1872 that districts “contai(n) as nearly as practicable an equal number of inhabitants.” In 1901, Congress dictated a compactness requirement. In 1911, Congress reaffirmed requirements of contiguity, compactness, and equality of population. The 1911 requirements were neither repealed nor restated in the subsequent 1929 Apportionment Act. The 1929 Act gave little direction to states on how to district, allowing states to draw Congressional districts of varying size and shape and, in some cases, return to an at-large system.

Congressional failure to maintain single-member districts, equality of population, and traditional districting requirements led to an explosion of malapportionment, a different method of political gerrymandering. States did not anticipate the rural depopulation that occurred during the first half of the 19<sup>th</sup> century. With the urbanization and industrialization of the United States, the state legislatures hesitated to redistrict and Congress was reluctant to impose districting requirements. A general fear existed within the politically empowered groups in the country that redistricting to ensure equal population would undermine the power of business interests that controlled state and city governments. Moreover, districts of equal population could give urban voters the power to enact wealth redistribution (Rodden 2011). In the era of the Great Depression and the first Red Scare, only seven of the then forty-eight states redistricted after both the 1930

and 1940 censuses. In some states, apportionment was fixed by the state constitution. Other states simply chose not to redistrict for forty, fifty, or even sixty years.

The original Constitution did not establish a theory of representation nor a barometer for an unconstitutionally dilutive districting scheme. It gives authority to Congress to regulate Congressional districting and elections. In the absence of Congressional regulation, it was believed that states retained the power to draw district lines however they decided. Additionally, states possessed unbridled authority over their own legislative electoral system. Urban voters had no legal, and only limited political, recourse to fight malapportionment until the Supreme Court made the landmark determination in *Baker v. Carr* 369 U.S. 186 (1962) that districting issues were within the purview of the Court. The Court's ruling in *Baker* that districting plans could violate the Equal Protection Clause of the Fourteenth Amendment gave it authority over not only the Congressional, but also the state legislative districting process. *Baker's* progeny established a theory of Constitutional representation and applied that theory to malapportionment claims.

### **The Fourteenth Amendment, the Judiciary, and Districting**

It is unlikely anyone involved in the passage of the Fourteenth Amendment in 1868 intended for it to, or believed it would, affect federal control over districting. Prior to *Baker*, and certainly at the passage of the Fourteenth Amendment, districting claims ran afoul of the political question doctrine. The political question doctrine holds that some questions can not be legal questions. Certain determinations like impeachment or foreign policy decisions are political in nature, not legal. In other situations, a lack of neutral and manageable standards exist for arbitrating a case. Political questions must be decided by an accountable body. Cases implicating political questions can not be decided by a court. The radical Republicans who passed the Fourteenth Amendment may have intended to fundamentally alter the relationship between the



states and the federal government, but they were not so radical as to confer upon the judiciary the power to decide political questions. Thus, the ability for the Court to strike down political gerrymanders depends on its ability to distinguish political gerrymanders from political questions.

The Fourteenth Amendment limits discrimination by governmental bodies. Most relevant to districting is the text of Section I:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause extends to state districting plans, which are official pieces of state legislation. A districting plan which denies to any person the equal protection of the laws can be invalidated by the courts (Annotated Constitution, 2207). This principle appears fairly straightforward, but under further consideration it raises a host of questions.

What degree of equality are districting plans to provide? Is equal protection of the laws limited to guaranteeing districts of equal population, or does it also mandate voters will not be placed in gerrymandered districts which subvert the political will of the majority? Does the Equal Protection Clause, naturally extended, require a proportional system of representation? If the Equal Protection Clause is read to command absolutely no variations from “one-person, one vote,” might it be used to invalidate the Senate’s apportionment scheme? Who is to draw the lines? What criteria are line drawers to apply? How might the line-drawers abuse their power? If the line-drawers abuse their power is there any check on them? And perhaps most importantly, what is being represented? Many insist these questions, and others, are better left answered by political, accountable, branches of government. Since the questions raised by districting often

appear inherently political or are better left answered by political branches, many insist they are non-justiciable or not within the jurisdiction of the courts.

### **The Evolution of Justiciability from *Marbury* to *Baker***

Over time the Supreme Court has developed a means of determining which questions are too political in nature to be decided by the judiciary. The political question doctrine has evolved and expanded to define a greater number of issues, including districting issues, as justiciable. Note that this process is fundamentally about the Court choosing which issues it has the power to decide. The political question doctrine arises out of the historic Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (1803).

*Marbury* resulted from a petition to the Supreme Court by William Marbury. Marbury had been appointed Justice of the Peace in the District of Columbia by Federalist President John Adams shortly before Adams left office. Marbury's commission was not delivered. The incoming Democratic-Republican Jefferson Administration refused to deliver Marbury's commission. Marbury petitioned the Supreme Court to make Secretary of State James Madison deliver his commission by writ of mandamus. In *Marbury*, Chief Justice John Marshall wrote,

The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the executive, can never be made in this court (*Marbury v. Madison*, 5 U.S. 170 (1803)).

The Court held it could not order Madison to deliver Marbury's commission. Marshall argued "it is emphatically the province and duty of the judicial department to say what the law is" (*Marbury v. Madison*, 5 U.S. 177 (1803)). The provision of the Judiciary Act of 1789 that allowed Marbury to petition for a writ of mandamus was unconstitutional. It conflicted with Article III of the Constitution outlining the Court's jurisdiction. Thus, Marshall spurned the

power to decide political questions but claimed for the Court the considerable authority to review executive and legislative statutes.

In cases like *Marbury*, the judicial department has no prerogative to entertain the claim of illegality because the question is delegated to a different branch or involves no judicially enforceable rights (*Marbury v. Madison*, 5 U.S. 170 (1803); *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Scalia, J. plurality opinion). Theoretically, there are some issues the Court can not decide in a democracy. Practically, there are some areas in which a Court ruling would be impossible to enforce. For these reasons, some allege the legality of a political gerrymander is non-justiciable.

Prior to *Baker*, the Court held districting claims presented non-justiciable political questions. Many believed districting claims implicated the Guarantee Clause, which *Luther* held to be non-justiciable. The Court explained,

It rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not... And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

In *Luther*, the Court decided some Congressional matters constituted political questions, just as it had decided some executive matters constituted political questions in *Marbury* (Cole 2014, 3). Just as it is the executive's prerogative to provide commissions of office, it is Congress' prerogative to decide if a state government is un-republican. The Court can not overrule either prerogative with its own decision. Such a decision would inherently be an unconstitutional political decision based on how well the Court believes another branch performs its duties. Even if the other branch is performing its duties poorly, as in the case of partisan gerrymandering, or not at all, as was the case in *Marbury*, *Colegrove*, and *Baker*.

A 4-3 majority in *Colegrove v. Green*, 328 U.S. 549 (1946), held the judiciary had no power to interfere with districting issues. *Colegrove* arose from Illinois' failure to redistrict since 1901 despite counties of 1,000 and 100,000 people having equal Congressional representation. Districting issues were considered by a majority to be non-justiciable, legislative, matters. Justice Frankfurter noted Congress is expressly designated the, "exclusive authority" to determine if state legislatures fulfilled their duty to secure fair representation to their citizens. If Congress fails to exercise its prerogative, then its power is not transferred to the Court. Justice Scalia later made a similar argument in *Vieth*, contending the Congressional power to regulate districting "has not lain dormant" (*Vieth v. Jubelirer*, 541 U.S. 272-275 (2004)).

Justice Frankfurter, and the *Colegrove* majority, believed the remedy for gerrymanders and malapportionment lies with the people, not with a body directly excluded from involvement by the Constitution. Justice Frankfurter wrote,

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts, because they clearly fall outside the Conditions and purposes that circumscribe judicial action. (*Colegrove v. Green*, 328 U.S. 556 (1946)).

He noted that never before had the Court mandated Congress undertake its Constitutional duty to conduct a census and apportion Representatives, or questioned glaring district disparities in prior Apportionment Acts (*Colegrove v. Green*, 328 U.S. 54-556 (1946)).

In the sixteen years after *Colgrove*, malapportionment and poor districting only worsened. This led the more liberal and assertive Warren Court to step in. In *Baker v. Carr*, 369 U.S. 186 (1962), a seven-member Court majority overturned *Colgrove* and declared districting issues did provide justiciable questions. Justice Brennan writing for the majority, reformulated the political question doctrine the Court had previously applied to redistricting based claims in

cases like *Colegrove*. Justice Brennan set forth six traits useful in determining what constitutes a political question. A case that is political in nature and not for the judiciary to resolve possesses at least one of six distinguishable factors.

(1) Textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) A lack of judicially discoverable and manageable standards for resolving it; (3) The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.; (5) An unusual need for unquestioning adherence to a political decision already made; (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question (*Baker v. Carr*, 369 U.S. 217 (1962)).

If the case is not marked by one of these characteristics, Justice Brennan writes it can not be dismissed on grounds of non-justiciability. He claimed partisan gerrymanders are not necessarily marked by any of these characteristics.

Political questions primarily arise out of the need for separation of powers. The viability of the republic depends on the constitutionally enshrined system of checks and balances. For the Court to take command of adjudicating an issue constitutionally committed to a coordinate political department, would be for the Court to usurp the power of the other politically accountable branches. If the Court were able to rule on political questions defined under Justice Brennan's first factor, the government would risk soon devolving to an oligarchy of nine.

Court rulings must be governed by legal doctrine; they must apply manageable standards to a case in order to resolve it. A manageable standard is understandable, analytical, determinative of injury, administers predictable and consistent results, conducive to a remedy, and able to be administered without exceeding the Court's constitutional or practical capabilities (Fallon Jr. 2006, 1282-1287). The Court is not merely a body of nine legislators. Courts, in democratic nations, do not exist to make initial policy determinations. As Chief Justice John Marshall wrote in *Marbury*, "the province and duty of the judicial department to say what the

law is,” not create the law. Courts may weigh legislative policy determinations against the Constitution in order to confirm a law does not conflict with the Constitution. When Courts stop using manageable standards to resolve cases they necessarily begin making unpredictable and inconsistent decisions, if not undemocratic and unconstitutional policy determinations.

Impeachment, foreign policy, and war, are examples of non-justiciable political questions. The power to impeach, control foreign policy, and wage and declare war are all textually committed to branches of the government. Given the problems of holding a war illegal, illegitimizing a state government, or allowing the Supreme Court control over the impeachment process, it is reasonable these questions are considered non-justiciable. Not only are these powers textually committed to the non-judicial branches government, but any judicial resolution concerning the use of these powers also expresses a lack of respect to the coordinate branches. Certain circumstances, such as war, call for unquestioning adherence to political decisions unless one agrees the Constitution ought to be a suicide pact (*Gilligan v. Morgan*, 413 U.S. 1 (1973); *Nixon v. United States*, 506 U.S. 224 (1993); *Korematsu v. United States*, 323 U.S. 214 (1944); *Sosa v. Alvarez-Machain*, 542 U.S. 733 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Cole 2014, 11).

Many contend districting cases are marked by the first three of Justice Brennan’s six distinguishing factors. In partisan gerrymandering cases, common contentions of non-justiciability revolve around (1) textual commitment of districting issues to Congress and state legislatures in Article I §4. (2) A lack of judicially manageable standards for deciding how much partisanship in a districting plan is unconstitutional and a lack of judicially manageable standards for determining partisanship in a districting plan. (3) Since it is difficult to derive a standard from the Constitution, it is argued the burden falls on Congress to make an initial policy determination

of a kind for non-judicial discretion. Congress made such a policy determination in passing the amended Voting Rights Act to prevent racial gerrymandering. If the people want to stop partisan districting, then Congress ought to determine the appropriate preventative policy (*Davis v. Bandemer*, 478 U.S. 144, 147-161 (1986), O'Connor, J. Concurring; *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Scalia, J. plurality opinion). *Baker* ruled districting issues do not necessarily implicate any of these three distinguishing factors. *Reynolds* ruled malapportionment issues do not implicate any of the three factors. The Justices on the current Court, who wish to strike down highly partisan districting plans, must say partisan gerrymanders do not implicate any of the three factors.

In *Baker*, the Court explained that challenges to districting plans could be brought under the Equal Protection Clause without implicating political questions (Cole 2014, 5). The roots of the *Baker* decision, to enter the political thicket Justice Frankfurter admonished against, are present in the *Colegrove* dissent. Notably, in *Colegrove*, a majority agreed the District Court had jurisdiction in the subject matter (*Baker v. Carr*, 369 U.S. 202 (1962)). Justice Black's *Colegrove* dissent argued the Equal Protection Clause prohibits the discrimination evident in not revising the 1901 Illinois Apportionment Act to account for population shifts. Legislation that expressly gave citizens half a vote and others a full vote would be prohibited by the Equal Protection Clause. The substantial effect of the 1901 Illinois Apportionment Act in the next election will be to give some one-ninth of the vote of others, thus violating the Equal Protection Clause. As for the issue of justiciability, Justice Black wrote, all the Justices were asked to do was declare a state apportionment bill invalid. He held the bill is invalid because it denies the effective right to vote guaranteed by the Constitution (*Colegrove v. Green*, 328 U.S. 570-574 (1946)).

The *Baker* plaintiff (Charles Baker) claimed the Tennessee districting plan, which had not been revised in the fifty years since 1901 and now provided for districts one-tenth the size of the plaintiff's, violated his right to receive equal protection of the laws. Baker's claim was facially the same as the equal protection claim leveled by the plaintiffs in *Colegrove*, which was only directly addressed by the *Colegrove* dissent (*Colgrove v. Green*, 328 U.S. 570-574 (1946)). Justice Brennan used the lack of attention the Court paid to the *Colegrove* plaintiffs' equal protection claim to contend the District Court in *Baker* misinterpreted the *Colegrove* decision. Rather than rewrite *Colegrove*, Justice Brennan distinguished the case from *Baker*. He asserted the *Colegrove* precedent did not deny the justiciability of Charles Baker's Equal Protection Clause claim, only the justiciability of his Guarantee Clause claim (*Baker v. Carr*, 369 U.S. 209-210 (1962)).

The Court distinguished Guarantee Clause claims (that implicated political questions) from Equal Protection Clause claims (which did not implicate political questions) on two grounds (*Baker v. Carr*, 369 U.S. 209 (1962)). First, cases brought under the Guarantee Clause concerned the relationship between the "judiciary and the coordinate branches of the federal government, and not the judiciary's relationship to the states" (*Baker v. Carr*, 369 U.S. 211 (1962)). Second, the Guarantee Clause provided no judicially manageable standards a Court could use to determine a state's legitimate government. Standards, "under the Equal Protection clause were well developed and familiar" (*Baker v. Carr*, 369 U.S. 226 (1962); Cole 2014, 5). Justice Brennan determined the only significance of the *Luther* and *Colegrove* rulings to be that the Guarantee Clause is not a source of judicially manageable standards a court could use to illegitimate a state government or throw out a state districting plan (*Baker v. Carr*, 369 U.S. 223-224 (1962)).



*Baker* held that none of the six distinguishable characteristics of a political question are inherently present in redistricting cases (*Baker v. Carr*, 369 U.S. 226-229 (1962)). The Fourteenth Amendment gives courts the authority to hear an allegation that a state districting plan denies the Equal Protection Clause. The Equal Protection Clause may offer judicially manageable standards for resolving at least some districting questions. The initial policy determination of a kind for non-judicial discretion was made by the passage of the Fourteenth Amendment. Expounding the logic of *Baker*, the Court found manageable standards for adjudicating malapportionment claims.

### **Expounding *Baker* and the Fourteenth Amendment**

Escaping from the shadow of the political question doctrine and the explicit assignment of redistricting oversight to Congress in the Constitution via the torch of the Equal Protection Clause, the *Baker* Court opened the door for the judicial consideration of all districting claims. On its surface, *Baker* was a narrow ruling concerning only the right to challenge districting statutes. The Court held the plaintiff's claims of equal protection denial presented a justiciable question under the Fourteenth Amendment, but did not rule on the case. Instead, the case returned to the District Court to be reheard (*Baker v. Carr*, 369 U.S. 237 (1962)). In subsequent cases, the Court used the *Baker* precedent to impose equal population requirements on districting plans.

Within two years, the Court ruled that state plans that established population disparities between districts were incompatible with the Constitution. In *Gray v. Sanders*, 372 U.S. 368 (1963), the Court sided with the plaintiff, James Sanders, who argued Georgia's County Unit System of deciding statewide primary elections was unconstitutional. The Court struck down the Georgia County Unit System because it gave more votes to rural counties than urban ones. Justice Douglass—writing for an eight-member majority—articulated the one-person one-vote

doctrine, “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote” (*Gray v. Sanders*, 372 U.S. 381 (1963)). A year after *Gray*, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court established “one person, one vote” as the first basic standard and guideline for determining the Constitutionality of a districting plan.

*Reynolds* arose from a challenge to the Alabama State Senate plan, which had not been redistricted in sixty-three years since 1901. The Alabama plan modeled the apportionment of the United States Senate in providing one state senator per county. In practice it created population variances as high as 41 to one from one senate district to another and firmly entrenched rural, white, control over the state legislature. Chief Justice Earl Warren, writing for an eight-member majority, reaffirmed the *Baker* decision that the Equal Protection Clause provided “discoverable and manageable standards for use in determining the constitutionality of a state legislative apportionment scheme” (*Reynolds v. Sims*, 377 U.S. 557 (1964)). Using the manageable standard that districts must be of roughly equal population size, the Court struck down the Alabama state legislature’s apportionment scheme.

The Court derived a standard of equal representation from the notion that districts of an unequal size dilute individual votes, rendering individual votes ineffective. *Reynolds* declared that for a state’s apportionment scheme to constitute a violation of rights asserted in the Equal Protection Clause, the impaired rights must be “individual and personal in nature.” The right to vote is personal, as the Court declared in *United States v. Bathgate*, 246 U.S. 220 (1918). Chief Justice Warren cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), at 370, in which the Court specified voting is, “a fundamental political right, because preservative of all rights.” He further noted, “Legislators represent people, not trees or acres.” This distinction is not made in the

original Constitution, but mandated by the Equal Protection Clause. Districting schemes that provide the same number of representatives to vastly unequal numbers of constituents have the same effect as a law that renders some votes worth one, two, or forty-one times the amount of others. One's right to vote in such a system is not the equivalent of another's in a different district. The Equal Protection Clause protects the equal participation of all voters in the election of state legislators. Thus, districting plans unequal in population violate the Fourteenth Amendment (*Reynolds v. Sims*, 377 U.S. 561-566 (1964)).

Do *Reynolds* and the other *Baker* progeny entail that the Court ought to strike down partisan gerrymanders? Liberal Justices argue based on *Reynolds* the Constitution requires formal and substantial equality among voters. They claim partisan gerrymanders have the same effect as malapportioned districts: both dilute votes based on political affiliation, rendering some votes substantially unequal (*Vieth v. Jubelirer*, 541 U.S. 267 (2004), Souter J. Dissenting Part III Section A). The faction most in favor of using a proportionality based standard to strike down partisan gerrymanders contends *Reynolds*, and the other *Baker* progeny, articulate the basis for a standard of near-proportional political representation (*Vieth v. Jubelirer*, 541 U.S. 267 (2004), Stevens J. Dissenting Part III; *League of United Latin American Citizens v. Perry*, 548 U.S. 447-467 (2006)). If the Constitution prohibits legislators from drawing district lines that diminish the value of individual votes by packing them into overpopulated districts, then might it also naturally prohibit the diminishment of votes via political gerrymandering?

Chapter Two of this thesis discusses the liberal and conservative interpretations of the *Baker* progeny in detail, but it is important to consider that *Reynolds* held the right to vote was explicitly individual. The denial of the effective individual right to vote violates the Equal Protection Clause. *Reynolds* does not extend that theory to political groups that are the natural

targets of partisan gerrymanders. Articulating a standard of partisan proportionality in districting, some liberal Justices conflate individual representation with group representation. It is not so clear that the *Reynolds* Court would make such a conceptual leap. Moreover, it is fairly clear no right to proportional representation is in the Constitution. A right to a degree of group representation does exist for minorities. The protection of the minority right to a degree of group representation is how the Court justifies striking down racial gerrymanders. The circumstances of how the minority right to group representation was derived, however, mean the right does not apply to other political groups or justify striking down a partisan gerrymander.

### **The Right to Group Representation and Racial Gerrymandering Claims**

A certain type of group representation, minority representation, is given special voting rights protections. The denial and dilution of the minority right to vote are prohibited by § 2 of the Voting Rights Act of 1965, amended in 1982 (Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437). The Court acts pursuant to the amended VRA to prevent racially dilutive districting schemes. Regarding minority representation, vote dilution encompasses a much broader range of districting malpractices than the malapportionment remedied by *Reynolds*. Districting plans that propose districts of an equal population but are found to dilute the power of minority voters to elect representatives of their choice, through “packing” and “cracking” techniques, are unconstitutional (Tokaji 2006, 691-692). Partisan gerrymanders dilute political group representation in the same way. Partisan gerrymanders and negative racial gerrymanders can not be confused in the quest for remedying the former. The litigation of racial gerrymanders is based on statute law. No statute like the VRA exists to base the litigation of partisan gerrymanders on. The litigation of racial gerrymandering claims, however, demonstrates the effect of a

proportionality-based standard for districting claims and has subtle implications in designing a manageable standard for partisan gerrymandering cases.

Racial gerrymandering claims avoid running afoul of the political questions doctrine. Congress made an initial policy determination with the 1982 amendments to the Voting Rights Act to prohibit racial vote dilution. Section 2 of the Voting Rights Act prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in a specified language minority group (Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437). It was amended after nationwide outrage to the Supreme Court's decision in *Mobile v. Borden*, 446 U.S. 55 (1980). In *Mobile*, the Supreme Court ruled that discrimination needed to be invidious and purposeful to support a claim of racial discrimination in voting procedure (*Mobile v. Borden*, 446 U.S. 55 (1980)). The amended version affirmed discrimination did not need to be purposeful to violate the act. It also outlawed racial vote dilution, which occurred via intentional or unintentional racial gerrymandering.

Unlike partisan vote dilution cases, Courts have a manageable standard for resolving racial vote dilution cases, which the Supreme Court has altered and refined. Courts use a three-part test emanating out of the Supreme Court decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986) to decide if an at-large election system or a redistricting plan dilutes minority votes. The *Gingles* test requires plaintiffs—minority voters who contend an election system or redistricting plan voids their ability to elect preferred candidates—to demonstrate the existence of three conditions. First, a compactness condition, the racial or language minority group must be “sufficiently numerous and compact to form a majority in a single member district.” Second, the minority group must be politically cohesive. Its members must vote similarly. Third, “the

majority votes sufficiently as a bloc to enable it... usually to defeat the minority's preferred candidate" (*Thornburg v. Gingles*, 478 U.S. 30 (1986); Bullock 2010).

If the plaintiff proves these conditions exist they must then demonstrate, using the the nine enumerated factors in the Senate Judiciary Committee report associated with the 1982 Voting Rights Act Amendments and other evidence, that under the "totality of circumstances," the redistricting plan or election system diminishes the ability of the minority group to elect its preferred candidates (*Thornburg v. Gingles*, 478 U.S. 30 (1986); Bullock 2010; Mulroy 1998; Tokaji 2006). The 1982 amendments explicitly refrain from guaranteeing protected minorities a right to proportional representation, yet they guarantee minorities the proportional opportunity to elect their candidates of choice (*Johnson v. De Grandy*, 512 U.S. 1013-1014 (1994); Mulroy 1998, 33).

The adjudication of racial gerrymandering claims is prone to the same difficulties that potentially plague the adjudication of partisan gerrymanders. Redistricting based on race must meet strict scrutiny. Even supposedly affirmative racial gerrymanders can be struck down. Any district lines drawn on account of race must serve a compelling government interest, such as compliance with the Voting Rights Act, and be narrowly tailored using the least restrictive to achieve that interest or goal (*Shaw v. Reno*, 509 U.S. 630 (1993)). North Carolina's creation of majority-minority districts has run afoul of strict scrutiny several times in the last twenty-five years. Beginning with *Shaw v. Reno*, 509 U.S. 630 (1993) and occurring as recently as in *Cooper v. Harris*, 581 U.S. \_\_\_\_ (2017), North Carolina Republicans have unsuccessfully attempted to justify the creation of an additional majority-minority district. The Court ruled in *Shaw* that a district must be explainable on grounds other than race, and in *Cooper* that racial considerations

can not predominate the creation of districts. Thus, the state Congressional maps at issue in *Shaw* and *Cooper* were held to be negative racial gerrymanders rather than affirmative ones.

The Court has no metric or threshold-style standard for determining when a districting plan fails to meet strict scrutiny. Detractors claim that without an objective standard of compactness any ruling about whether or not other districting factors had been subordinated to racial considerations is arbitrary. The Court's threshold for racial gerrymanders appears similar to the "I know it when I see it" test for obscenity espoused by Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Alienkoff and Isacharoff 1993, 624). Districting on the basis of political affiliation could never automatically trigger strict scrutiny since most agree some use of political classifications is necessary in districting, and theoretically less injurious than the use of racial classification. The determination of an objective threshold for partisan gerrymanders is essential in order to strike one down.

The difficulties the Court faces in adjudicating racial gerrymandering claims are minor compared to those it would face in adjudicating partisan gerrymandering claims. Racial gerrymandering claims avoid conflation with political questions for three reasons. First, the Fourteenth Amendment was more evidently intended to combat racial, rather than political, discrimination. Second, Section 2 of the the amended Voting Rights Act provides courts with direction to ensure against minority vote denial and dilution. Third, the Court employs the manageable *Gingles* test to determine the existence of unlawful vote dilution and strict scrutiny to determine if race-based districting serves a compelling interest. Court action to resolve political gerrymanders would look fundamentally different than what the Court does to remedy racial gerrymanders. In solving one the Court is performing a different function than in solving the other. The Court acts pursuant to a federal law, the Voting Rights Act, in striking down

racially dilutive districting plans. No legislative prohibition of politically dilutive districting plans exists. Thus, the Court is forced to treat partisan gerrymanders as an issue solved separately from racial gerrymanders.

### **Conclusion**

The Court claimed the power to set representation requirements in *Baker*, and used the power most famously in *Reynolds*. Whether or not the Court has this power depends on a reading of the Fourteenth Amendment that is likely contrary to that Amendment's intent and only became widely accepted relatively recently in our national history. The Court has used its power to ensure against dilutive plural member and unequal districts. Congressional direction further guards against multi-member at-large districts and dilutive racial gerrymanders. Let us assume—along with every Justice on the current Court except quite possibly Justices Thomas and Gorsuch—that the Court's hold on the power to set representation requirements is strong. The essential question remains: Does the possession of such a power entail the Court strike down partisan gerrymanders? Liberals argue yes, so long as the Court can find a manageable standard for striking them down. Conservatives argue no, and contend no manageable standard can be found.

Five members of the Supreme Court—Justices Ginsburg, Breyer, Kagan, Sotomayor, and possibly Kennedy—appear to see districting schemes that dilute the effectiveness of votes based on politics as an extension of the dilutive evil of malapportionment. The Court remedied the malapportionment in *Reynolds* with the simple “one person, one vote” standard. The Court has never overturned a partisan gerrymander because it lacks a manageable standard for resolving such cases. Determining when a partisan gerrymander becomes unconstitutionally dilutive is not so easy as determining when inter-district population disparities exist, or when a districting plan



unconstitutionally dilutes the votes of a racial minority. Conservatives contend the lack of an easily discoverable judicial standard denotes a political question, not for the Court to resolve. As long as the Court lacks a sound mechanism—a Constitutionally discoverable and judicially manageable standard—it can not strike down a partisan gerrymander even if a majority supports doing so. The next chapter will examine the Court’s struggle to articulate a Constitutional standard of representation that limits partisan gerrymandering but avoids running afoul of the political question doctrine.

## Chapter II

### A Tale of Two (or Three, or Four) Courts

Partisan gerrymandering claims are different than any of the districting claims the Supreme Court has already resolved. The Equal Protection Clause applies to claims of vote dilution on the basis of location or political affiliation, but only if it begets manageable standards for resolving such claims. The Equal Protection Clause does not provide manageable standards the same way it offers “one person, one vote” to resolve malapportionment claims like *Reynolds* and *Wesberry*. Additionally, no federal law exists to prohibit general vote dilution, only minority vote dilution. The standards used for racial gerrymandering would also prove unmanageable if applied to partisan gerrymandering claims. Race is unlike political affiliation in many ways. For the Court to strike down a partisan gerrymander, it must do two things. First it must objectively determine what level of partisan discrimination that makes a partisan gerrymander Constitutionally infirm. Second, the Court would need to articulate a judicially manageable test for when a district plan exceeds a Constitutional level of partisan discrimination.

#### **Attempts to Express an Objective, Manageable, Standard in *Bandemer* and *Vieth***

The Court’s struggle to adopt a manageable standard for identifying and striking down partisan gerrymanders has played itself out primarily in two cases: *Davis v. Bandemer*, 478 U.S. 109 (1986) and *Vieth v. Jubelirer*, 541 U.S. 267 (2004). No opinion in either case earned a majority of the Court’s support. A third case, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), offers useful information on what the creation of a manageable standard might entail. The Supreme Court’s ruling in *Bandemer* applied the *Baker* decision to political gerrymandering, holding 6-3 that partisan gerrymandering violated the Equal Protection Clause. Six justices in *Bandemer* were “not persuaded” that there are no standards for deciding political

gerrymandering cases (*Davis v. Bandemer*, 478 U.S. 123 (1986)). The majority in *Bandemer* could not agree on a standard. Four Justices, led by Justice White, proposed one standard, two set forth another in an opinion by Justice Powell. The *Bandemer* Court ruled 7-2 to uphold the Indiana districting plan in question. The Indiana plan did not meet the plurality-proposed threshold of an unconstitutional partisan gerrymander.

The *Bandemer* plurality's standard proved unwieldy, unmanageable, mechanisms. Justice White's plurality standard declared a partisan gerrymandering claim could succeed only where plaintiffs proved "both intentional discrimination against an identifiable political group and actual discriminatory affect on that group" (*Davis v. Bandemer*, 478 U.S. 127 (1986)). Applying Justice White's standard, lower courts refused judicial intervention for two reasons. (1) Intent of the legislature to discriminate is rarely hard to prove; it is generally to be expected. (2) Discriminatory, dilutive, effect is very challenging and perhaps impossible to prove. The *Vieth* plaintiffs declined to defend Justice White's standard instead opting to propose their own (*Vieth v. Jubelirer*, 541 U.S. 267 (2004), at Part III, Scalia, J.).

In *Vieth*, writing for a four-member conservative plurality of the Court, Justice Scalia sought to reverse the *Bandemer* precedent. He held that no judicially discoverable and manageable standards exist for resolving partisan gerrymandering claims. Without a judicially manageable standard, partisan gerrymandering claims may be appropriately characterized as non-justiciable political questions. Justice Kennedy disputed Justice Scalia's view in his concurring opinion, believing that a yet undiscovered manageable standard may exist. The Court's four liberal justices dissented from Scalia. They agreed partisan gerrymandering claims were justiciable, but disagreed on a standard.

### **The Theories of Representation Behind the Proposed *Bandemer* and *Vieth* Standards**

Out of *Bandemer* and *Vieth* sprang four currents of judicial thought on the adjudication of partisan gerrymandering claims. The four factions appear to remain in place on the current Court, though they may have consolidated into three positions. The first, conservative, faction articulates its views in Justice O'Connor's *Bandemer* concurrence and Justice Scalia's *Vieth* plurality opinion. It holds no judicially manageable standards exist to decide partisan gerrymandering claims. The conservative theory of districting jurisprudence has remained largely the same since *Bandemer*, though Justice Scalia perhaps overstated the position in *Vieth*. The non-conservative factions each present a theory of Constitutional representation and a corresponding standard.

The liberal approach to partisan gerrymandering cases is divided into two factions. One, the Justice White plurality in *Bandemer* and Justice Breyer's dissent in *Vieth*, argues districting plans that *unjustifiably entrench* a minority in power are unconstitutional. The second liberal group demonstrates an eager willingness to strike down partisan gerrymanders that violate a certain standard of *proportionality*. This opinion is displayed in Justice Powell's *Bandemer* dissent joined by Justice Stevens, and in *Vieth* by dissenting Justices, Stevens, Souter, and Ginsburg. Between the liberal and conservative approaches lies the lonely fourth approach of Justice Kennedy who as of *Vieth* believed that no judicially manageable standard for adjudicating partisan gerrymandering claims existed, yet one might appear.

#### *(A) The Conservative Approach*

The conservative standard for adjudicating partisan gerrymandering claims is unique in its clarity, consistency, and simplicity. Justice O'Connor's *Bandemer* concurrence joined by Chief Justice Burger and Justice Rehnquist, and Justice Scalia's *Vieth* plurality opinion joined by Justices Rehnquist, O'Connor, and Thomas, argued partisan gerrymandering claims are not

justiciable. In *Bandemer*, Justice O'Connor criticized the opinions delivered by the plurality on the grounds that the standards proposed are unmanageable, and their opinions rest on political preference for proportionality. Justice O'Connor argued that if the Court were to protect members of major political parties from vote dilution then it would have to protect members of every identifiable group that possesses distinctive interests and votes as a block. No stopping point for hearing partisan gerrymandering claims exists, short of securing a system of proportional representation.

Conservatives declare the Fourteenth Amendment was intended to have no effect on partisan gerrymandering. Judicial intervention on behalf of political parties (rather than individuals) was neither intended by the Fourteenth Amendment, nor demanded by federal law. The *Vieth* plurality echoed Justice O'Connor's *Bandemer* opinion. Reviewing the standards set forth by Justice White and Justice Powell in *Bandemer*, the appellants' standard in *Vieth*, and the dissenters' standards in *Vieth*, Justice Scalia concluded no judicially manageable standard for evaluating partisan gerrymandering claims can or will exist. Moreover, the unusable *Bandemer* plurality standard emphatically demonstrates a lack of judicially discoverable or manageable standards. Falling into Justice Brennan's second category of political questions, partisan gerrymandering claims are non-justiciable (*Davis v. Bandemer*, 478 U.S. 144, 147-161 (1986), O'Connor, J. Concurring). Justice Scalia wrote, Justice O'Connor's prediction that Justice White's standard "will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality," was "amply fulfilled" (*Davis v. Bandemer*, 478 U.S. 155 (1986); *Vieth v. Jubelirer*, 541 U.S. 279-284, 290-291 (2004)).

Justice Scalia critiqued the *Vieth* appellants' proposed standard as not Constitutionally derived. He wrote the appellants' standard of (1) predominant partisan intent, (2) systematic

cracking of a party's voters, and (3) a party's inability to translate a majority of votes into a majority of seats, would only invalidate districting plans that prevent "a majority of the electorate from electing a majority of representatives." The standard is not discernable in that it does not stem from a Constitutional violation, but rather a political preference that groups are entitled to proportional representation. The Constitution guarantees equal protection of the laws, not equal representation to groups. A standard based on majority party status would depend on the only determinative factor in voting behavior being political affiliation, which is not true (*Vieth v. Jubelirer*, 541 U.S. 284-290 (2004)).

The conservative position declares a standard of majority control would effectively be an unconstitutional standard of proportional representation. Even if the majority party could be identified, it would be impossible to guarantee in any situation that a majority party wins a majority of seats without radically changing the American electoral system to ensure proportional representation. All the tests of the other justices and the plaintiffs in *Bandemer* and *Vieth* implicitly appeal to proportionality. Justice Scalia vigorously contends a proportionality standard or theory of representation can not be gleaned from the Constitution. The Court has no right to impose one (*Vieth v. Jubelirer*, 541 U.S. 292-301 (2004); *Stephanopolous and McGhee* 2015, 839).

Conservatives also make the argument that districting claims display the first of Justice Brennan's six distinguishable factors determinative of political questions outlined in *Baker*. Districting is textually committed to Congress and state legislatures by the Constitution. Article 1 §4 extends to Congress the authority to check partisan gerrymandering of Congressional districts. In *Vieth*, Justice Scalia asserted the Congressional power to regulate political gerrymandering, "has not lain dormant." He noted, five bills to regulate gerrymandering were

introduced between 1980 and 1990. None of these bills, nor any subsequent ones, passed. The Brennan Center for Justice's tracker for redistricting reform finds eleven Congressional bills, and 150 state legislative bills, addressing districting were filed in 2017 alone.

No Congressional bills have been filed by the majority party, one has a singular co-sponsor from the majority party, and none are any likely to make it out of committee. Aside from the Uniform Congressional Districting Act of 1967 (Pub. L. 90-196, 81 Stat. 581) —mandating the use of single-member Congressional districts in order to prevent the dilution of minority representation via multi-member at-large or plural member districts— Congress has not used its power to regulate political gerrymandering since 1911. Congressional inaction leads others to conclude the Congressional power provided in Article I §4 has lain emphatically dormant. Justice Scalia would likely contend Congress has made the political decision not to regulate.

The essential problem identified by the O'Connor concurrence in *Davis* and the Scalia plurality in *Vieth* is that the Court has no objective basis for identifying a partisan gerrymander. In other words, there is no objective way to judge how much partisanship in districting is too much. The conservative argument is undeniably strong in its rejection of a proportionality standard. Even Justice White, in *Bandemer*, agreed the Constitution certainly does not provide a theory of proportional representation. If a lack of proportionality between votes and representation can not be an objective basis for striking down a districting plan, then determining objective basis for invalidating a partisan gerrymander becomes more complex.

The conservative position contains one key flaw: it is irreconcilable with the position of *Baker* and its progeny. The arguments of Justices O'Connor and Scalia driven to their logical conclusion, imply the Constitution does not provide any theory of representation. The claim that partisan gerrymandering is not for the Court to solve because of textual commitment of the issue

to other branches of government or a permanent lack of manageable standards, harkens back to *Colegrove* and indicates that *Baker* plus all of its progeny are also wrong. On the current Court, it is likely Justice Thomas and Justice Gorsuch doubt the validity of *Baker*. They doubt the Fourteenth Amendment provides a constitutional theory of representation. As long as the conservative position does not deny the validity of *Baker* and *Reynolds* it enables proponents of Court action to look past it and read theories of representation into the Constitution. The liberal Justices are proponents of Court action but they diverge on what the constitutionally mandated properties of a districting scheme are. Some say a Fourteenth Amendment violation occurs when an electoral system is arranged to consistently degrade the influence of certain voters. Others say it can exist if partisan discrimination results in a large enough divergence between the votes a party receives and the seats it holds.

*(B) The Consistent Degradation or Minority Entrenchment Faction*

The *Bandemer* plurality agreed the Constitution does not require proportional representation, representation issues do not automatically implicate political questions, and that certain methods of representation can be unconstitutional. In opposition to Justice O'Connor's *Bandemer* opinion expressing skepticism of justiciability, Justice White argued that none of the identifying characteristics of political questions outlined in *Baker* were present in *Bandemer*. No coequal branch of government could more properly decide the question of unconstitutional vote dilution. No risk of foreign or domestic disturbance exists. Justice White was, "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided" (*Davis v. Bandemer*, 478 U.S. 123 (1986)). Justice White does not substantially distinguish the claim in *Bandemer* from the claim in *Reynolds*. The claim in *Bandemer* that "each political group in a state should have the same chance to elect



representatives of its choice as any other political group” remains, like *Reynolds*, a representation claim (*Davis v. Bandemer* 478 U.S. 124 (1986)).

The author of the *Bandemer* plurality opinion, Justice White, put forward a standard of intentional and effective discrimination against an identifiable group. He discussed at length the Constitutional grounding of this standard—and what constitutes effective unconstitutional discrimination—but offered no objective measure for proving discriminatory intent or effect. As discussed, this standard creates a recurring problem because while intent is often to be expected, effect is difficult to define. (*Davis v. Bandemer*, 478 U.S. 110-112, 126, 140-143 (1986)).

Justice White’s theory of when political gerrymandering becomes unconstitutionally discriminatory was not necessarily contingent on proportionality. He argued unconstitutional discrimination only occurs when the electoral system is arranged to consistently degrade a voter’s or a group of voters’ influence in the political process as a whole. The power of a group to influence the political process is not unconstitutionally diminished simply by an apportionment scheme that makes winning elections more difficult. He noted a districting plan that “operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population” raises a constitutional question, but the mere existence of such a plan does not determine its unconstitutionality (*Davis v. Bandemer*, 478 U.S. 119 (1986)).

According to Justice White, equal protection violations occur when a large degree of vote dilution persists for a long amount of time. The question, notes Justice White, “is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process” (*Davis v. Bandemer*, 478 U.S. 132-133 (1986)). An Equal Protection Clause violation is found where an electoral system continually frustrates and disadvantages the opportunity of certain voters to effectively influence the political process. Justice White

suggested a finding of unconstitutionality must be supported by the existence of an electoral system that consistently does not represent the will of the majority, or one which effectively denies the minority influence. Even in cases with seemingly unrepresentative electoral systems, the state must be given a chance to justify its interest in the plan (*Davis v. Bandemer*, 478 U.S. 132-134, 138-139, 143 (1986)).

It is helpful to think of Justice White's standard as one which would likely prevent only partisan gerrymanders that repeatedly frustrate the majority will. Gerrymanders that prevent a majority of the people from controlling a majority of legislative seats frustrate the republican principle of majoritarian control over legislative power. Justice White might have articulated a manageable standard on the principle that consistent denial of majoritarian rule constitutes unconstitutional degradation and discriminatory effect. His standard, however, extended to include gerrymanders that did not deny the will of the majority. He further confused the matter by refraining from invalidating Indiana's plan, which frustrated the majority will on one occasion. In practice, Justice White's standard proved confusing and unmanageable (*Vieth v. Jubelirer*, 541 U.S. 284-290 (2004); Stephanopoulos and McGhee 2015, 839).

Justice Breyer, dissenting in *Vieth*, concludes similarly to Justice White that districting plans that entrench a minority are unconstitutional. Justice Breyer views the American Constitution as creating and protecting a "basically democratic" workable government. In order to accomplish that fundamental purpose of the Constitution, there must be "a method for transforming the will of the majority into effective government" (*Vieth v. Jubelirer*, 541 U.S. 358-359 (2004), Breyer, J., Dissenting). If a districting plan denies the people that method of transforming their will into effective government by entrenching a minority government in power then that plan is unconstitutional (Driver 2005, 1173).

Justice Breyer agreed with the conservative branch of the Court that within the single member district system the act of drawing district lines can not, and should not be, “politics free.” Boundaries represent a series of political and principle based compromises. Even the choice of a single member district electoral system is a political and principle based compromise over the virtues of accountable, easily identifiable, and stable representation. A legislature’s consideration of politics and political effects when districting neither demonstrates an intent to discriminate nor violates of the Equal Protection Clause. Other, “desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation,” can normally justify any injury caused to members of one party by the use of purely political districting factors (*Vieth v. Jubelirer*, 541 U.S. 358-359 (2004), Breyer J., Dissenting). Only when the use of purely political factors entrenches a minority in power does it become unjustified abuse.

Justice Breyer claimed unjustified entrenchment can be identified by judicially manageable standards. By unjustified entrenchment, Justice Breyer meant, a situation in which a minority party has held political power purely as the result of partisan district manipulation and no other factors (*Vieth v. Jubelirer*, 541 U.S. 360 (2004), Breyer J., Dissenting). Other factors leading to minority entrenchment can be justified, such as sheer happenstance, the existence of more than two major parties, unique constitutional requirements of the Senate, or reliance on traditional districting criteria. When entrenchment is purely political it not only undermines the Constitution and the democratic process, but also violates the Equal Protection Clause. Justice Breyer quoted Justice Brennan in *Reynolds*,

Logically in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses the denial of

minority rights that might otherwise be thought to result. Since 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 (*Reynolds v. Sims*, 377 U.S. 565 (1964)).

*Reynolds* appears to justify a standard of minority entrenchment in so far as it notes minority control of state legislative bodies denies majority rights. Justice Breyer insisted minorities entrenched in legislative power because of partisan manipulation can be identified (*Vieth v. Jubelirer*, 541 U.S. 360-365 (2004), Breyer J., Dissenting; Driver 2005, 1173).

Justice Breyer set forth three scenarios tending to unconstitutional entrenchment. (1) A districting plan that does not radically depart from traditional districting principles has led to a situation in which the party receiving a majority of the votes has twice failed to obtain a majority of legislative seats. If the minority entrenchment cannot be explained in a neutral way, then it would be unconstitutional. (2) A districting plan is alleged to radically depart from traditional districting principles, the departure cannot be justified except as an effort to obtain political advantage, and the party winning a majority of the seats has once failed to obtain a majority seats. *Gill* likely falls into this second category of cases. (3) A districting plan is redrawn at an unusual time, but the supposed entrenchment harm has not yet occurred because no election has been held. It is clear the boundary-drawing criteria depart from traditional principles and it is likely the plan will frustrate the will of the majority. In this third circumstance, Justice Breyer believed a Court could find the map to violate the “Constitutional line” in question (*Vieth v. Jubelirer*, 541 U.S. 365-368 (2004), Breyer J. Dissenting; Driver 2005, 1173).

The *Vieth* plurality agreed with Justice Breyer that “our Constitution sought to create a basically democratic form of government.” Justice Scalia contended, however, that concluding the “judiciary may assess whether a group somehow defined has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent

unjustified political machinations (whatever that means),” is also incompatible with the basically democratic government the Constitution sets forth (*Vieth v. Jubelirer*, 541 U.S. 299 (2004)).

*(C) The Proportionality Position*

A total of four justices in *Bandemer* and *Vieth* believed deviance from varying degrees of proportional representation presents a Constitutional violation. The first time a Justice explicitly mentioned partisan gerrymandering came in *Karcher v. Daggett*, 262 U.S. 725 (1983). The Court resolved *Karcher* using the “one person, one vote” standard. Justice Stevens contended the New Jersey congressional plan at issue in *Karcher* was an unconstitutional partisan gerrymander because it violated a principle of proportionality. Three years later, in *Bandemer*, Justice Powell, joined by Justice Stevens in dissent, put forward a more detailed Constitutional theory of proportional representation and a corresponding standard.

Justice Powell’s standard supposed if a plan violates a principle of proportionality for intentional partisan gain then it is unconstitutional. Essentially, Justice Powell believed a lack of proportionate election results mark a violation of the Equal Protection Clause (*Davis v. Bandemer*, 478 U.S. 161-185 (1986), Powell, J., Dissenting). Justice Powell held partisan gerrymanders are extensions malapportionment corrected in *Reynolds*, “the essence of a gerrymandering claim is that members of a political party as a group have been denied their right to ‘fair and effective representation’ (*Davis v. Bandemer*, 478 U.S. 162 (1986), Powell, J., Dissenting, Quoting *Reynolds v. Sims*, 377 U.S. 565 (1964)). Moreover, the Equal Protection Clause guarantees to citizens that their state will govern them impartially (*Gaffney v. Cummings*, 412 U.S. 751 (1973); *Chapman v. Meier*, 420 U.S. 17 (1975)). Political gerrymanders violate the principle of impartial governance when they treat voters differently for their political beliefs and party affiliation in deciding where to draw district boundaries.

The proportionality position rests on a specific reading of *Reynolds* as indirectly applicable to group representation. The *Reynolds* Court made two important conceptual declarations relevant to representation and districting. First, it noted that the Equal Protection Clause guarantees equal representation and requires states to aim for “fair and effective representation for all citizens” (*Reynolds v. Sims*, 377 U.S. 565-566 (1964); *Gaffney v. Cummings*, 412 U.S. 748 (1973)). Justice Powell interpreted fair and effective representation to imply a right to group representation. He wrote, “the concept of representation necessarily applies to groups: groups of voters elect representatives, individual voters do not” (*Davis v. Bandemer*, 478 U.S. 167 (1986), Powell, J., Dissenting). The *Reynolds* Court also identified a number of neutral criteria that should guide a legislature in redistricting and, “deter the possibilities of gerrymandering” (*Reynolds v. Sims*, 377 U.S. 580-581 (1964)). In this way, Justice Powell believed *Reynolds* left the door open to a number of neutral factors not limited to “one person, one vote,” which serve to articulate, “the Constitutional mandate of fair and effective representation” (*Davis v. Bandemer*, 478 U.S. 167 (1986), Powell J., Dissenting).

Justice Powell’s alternative standard required courts to consider legislative intent to discriminate and dilute the votes of the party out of power. If appellants can prove discrimination against members of a political group and dilutive effect, as the District Court in *Bandemer* found, then a partisan gerrymander would be struck down. Justice Powell believed courts should look at the nature of legislative proceedings surrounding redistricting, intent behind redistricting, practice of good districting principles, and evidence of vote dilution. The lower court in *Bandemer* conducted each of these evaluations and concluded the Indiana plan in question violated the Equal Protection Clause. Unlike the *Bandemer* plurality, or Justice Breyer in *Vieth*, Justice Powell would invalidate a plan after just one election showing disproportionate results.

He would affirm the lower court's decision to strike down the Indiana plan as an unconstitutional partisan gerrymander (*Davis v. Bandemer*, 478 U.S. 138, 181-185 (1986)).

The one Justice in agreement with Justice Powell in *Bandemer*, Justice Stevens, authored a dissent in *Vieth*, which contends the issue in racial and political gerrymandering cases is the same. The fundamental issue in either racial or partisan gerrymandering cases is “whether a single non-neutral criterion controlled the districting process to such an extent that the Constitution was offended” (*Vieth v. Jubelirer*, 541 U.S. 336 (2004), Stevens, J., Dissenting) The Court treats this question as justiciable in racial gerrymandering cases subject to strict scrutiny, like *Shaw*. Justice Stevens claimed there is no “persuasive reason” to distinguish the justiciability of partisan gerrymanders from that of racial gerrymanders. If the two are not distinguishable, then the solution to partisan gerrymanders might be the same test the Court uses in racial gerrymanders. Justice Stevens believed several manageable standards exist for identifying unconstitutional partisan influence. He endorsed Justice Powell's *Bandemer* approach and the *Vieth* approaches of Justices Souter and Breyer. He declared the Court could either hold that every district boundary must possess a neutral justification or apply the predominant motivation standard the Court uses in racial gerrymandering cases (*Vieth v. Jubelirer*, 541 U.S. 334-336 (2004), Stevens, J., Dissenting; Driver 2005, 1172).

Justice Souter in *Vieth*, joined by Justice Ginsburg, claimed that “one person, one vote” is only satisfied if votes cast are substantially equal. Partisan gerrymandering can dilute votes. Districting plans that intentionally dilute votes on the basis of partisan affiliation are unconstitutional. Justice Souter supposes a plaintiff alleging an unconstitutional partisan gerrymander pass a five-part test. (1) The plaintiff is a member of a cohesive political group. (2) The plaintiff's district of residence must have been drawn without consideration of traditional

districting principles. (3) The plaintiff must prove the district's deviations from traditional districting principles correlate with the distribution of the plaintiff's group. (4) The plaintiff would need to propose a hypothetical districting scheme using traditional districting principles that alleviated the dilution of his group's vote and did not pack or crack another. (5) The plaintiff needs to show the map-drawers acted with partisan intent to manipulate the shape of his or her district (*Vieth v. Jubelirer*, 541 U.S. 345-352 (2004), Souter J. Dissenting; Driver 2005, 1172).

Even if Justice Souter's framework were distilled to be more manageable it would still rest on an indeterminable notion of fairness. Arguing that courts must intervene when partisan competition reaches an "extremity of unfairness," Justice Souter's standard demands lower courts make arbitrary rulings based on political judgments of what is, or is not, proportionally fair. Note Justice Scalia's criticism of Justice Souter's standard, "upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards" (*Vieth v. Jubelirer*, 541 U.S. 296 (2004)). The standard also assumes the same violation of the Equal Protection Clause found in *Reynolds* is accomplished via the vote dilution of a group rather than dilution of an individuals' vote (Driver 2005, 1175)

### *The Liberal-Conservative Division*

The liberal Justices who favor judicial intervention appear to look entirely past the arguments of the conservative Justices who do not, and vice versa, almost as if they view two irreconcilable Constitutions. The judicial disconnect on what the Constitution authorizes the Courts to do regarding representation claims resurfaced in the *Gill* oral argument. Justice Gorsuch made the point that minority entrenchment claims implicate the Guarantee Clause and that the Constitution textually assigns issues of representation to Congress not the Courts. Justice



Ginsburg replied to Justice Gorsuch indirectly, by invoking *Reynolds*, “where did ‘one person, one vote’ come from?” (Gill v. Whitford Oral Argument, 59-60)

It is nearly impossible to claim the original Constitution grants the Courts any authority to adjudicate districting claims. It is just as difficult to contend the application of the Fourteenth Amendment to malapportionment cases in *Baker* and *Reynolds* could never extend to partisan gerrymandering cases. One may reasonably contend either *Baker* and *Reynolds* were wrongly decided and no Fourteenth Amendment right to equal representation exists, or *Baker* and *Reynolds* were rightly decided but no manageable standards exist for arbitrating partisan gerrymandering cases. Arguing that no manageable standard could ever exist appears to foreclose history, if not indirectly challenge *Baker*. With four justices unwilling to adjudicate and four willing to mandate some form of proportionality based standard, the fate of the Court’s role in partisan gerrymandering hinges on the man in the middle, Justice Kennedy.

### **Moving Towards a Standard: Criteria that Might Please Justice Anthony Kennedy and a Majority of the Court**

If the Court is to find a standard for invalidating a partisan gerrymander it will come from Justice Kennedy joined by the four liberal justices. In authoring *Vieth*’s controlling opinion, Justice Kennedy concurred with the judgment of the plurality that no judicially manageable standard existed for adjudicating partisan gerrymandering claims. He disagreed with the plurality that no judicially manageable standard could ever emerge (*Vieth v. Jubelirer*, 541 U.S. 306 (2004), Kennedy J., Concurring; Driver 2005, 1173-1174). Based on Justice Kennedy’s opinions in *Vieth* and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), proponents of a standard have worked to develop and propose several theoretically neutral means of adjudicating partisan gerrymandering claims.

Justice Kennedy began his *Vieth* opinion by noting the two obstacles courts face when presented with a claim of injury from a partisan gerrymander. The first obstacle is a lack of truly neutral districting principles. Even principles that seem unbiased often have biased effects. The second obstacle is the absence of rules or manageable standards to, “limit and confine judicial intervention” (*Vieth v. Jubelirer*, 541 U.S. 306-307 (2004), Kennedy, J., Concurring; *Driver* 2005, 1173). The absence of manageable rules or standards led Justice Kennedy to uphold the Pennsylvania districting plan under review in *Vieth*, but he argued a remedy might emerge in the future (*Vieth v. Jubelirer*, 541 U.S. 311 (2004), Kennedy, J., Concurring).

Justice Kennedy offered his own interpretation of the judiciary’s role in districting. Constitutional text leaves states primarily responsible for districting. Congress may also determine requirements. Court precedent recognizes the Court has an important, albeit secondary, role when a districting plan is alleged to violate the Constitution. Without neutral principles the courts risk assuming political responsibility if they intervene in districting. Thus, it can not act until it has neutral principles. None of the liberal Justices, or the appellants, provided neutral principles (*Vieth v. Jubelirer*, 541 U.S. 308 (2004), Kennedy J. Concurring).

Justice Kennedy declined to support the standards of Justices Stevens and Souter because he contended the mere application of political classifications by the state legislature does not prove the unconstitutionality of a districting plan. He wrote determining legislative intent to discriminate on the basis of political affiliation, “must rest instead on a conclusion that the classifications, though generally permissible, were applied in an *invidious* manner or in a way unrelated to any legitimate legislative objective” (Emphasis Added, *Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring; *Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 43-

44). Likewise, Justice Kennedy found the minority entrenchment principle to be neither Constitutionally derived nor judicially manageable:

The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept. Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption, there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights. (*Vieth v. Jubelirer*, 541 U.S. 308 (2004), Kennedy, J., Concurring).

He gave weight to the plurality's argument of non-justiciability, but viewed the plurality's opinion as not so weighty as to immediately bar future partisan gerrymandering claims from being heard (*Vieth v. Jubelirer*, 541 U.S. 308 (2004), Kennedy, J., Concurring).

Justice Kennedy suggested the First Amendment could offer better guidelines for a partisan gerrymandering standard than the Equal Protection Clause. If political classifications were used to burden a group's representational rights the Court might find a First Amendment violation, "unless the state shows compelling interest." He explained that no one's representational rights ought to be burdened because of ideology, beliefs, or political association. The plaintiffs in *Gill* and *Benisek v. Lamone* have each incorporated a First Amendment claim into their arguments (*Vieth v. Jubelirer*, 541 U.S. 314 (2004); *Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 44-45; Stephanopoulos and McGhee 2015, 839).

Justice Kennedy's *Vieth* concurrence challenged plaintiffs and lower courts to determine a judicially manageable mechanism for evaluating claims, but demanded courts refrain from intervention until such a standard emerges (Issacharoff et al. 2012). A potential mechanism came before the Court in *League of United Latin American Citizens (LULAC)*. *LULAC* arose from a controversial mid-decade redistricting to replace a court drawn plan in Texas after Republicans gained control of the state legislature in the 2002 election. Plaintiffs sued on the grounds that the

plan was both an unconstitutional partisan and racial gerrymander. The Court found just one district violated the Voting Rights Act.

The *LULAC* appellants neither offered a reliable standard for deciding partisan gerrymandering claims nor proved an undue burden on their own representational rights. Justice Kennedy, joined by Justices Ginsburg, Souter, and the Court's conservative wing, rejected the *LULAC* plaintiffs' argument that the Texas plan was an unconstitutional partisan gerrymander. In rejecting the plaintiff's claim, Justice Kennedy suggested, "A successful claim attempting to identify unconstitutional acts of partisan gerrymandering must... show a burden, as measured by a reliable standard, on the complainants' representational rights" (*LULAC v. Perry*, 548 U.S. 418 (2006)). This sentence was heralded as judicial direction to future plaintiffs to develop a standard that reliably measures the burden of a gerrymander on representational rights (Anand 2014; Grofman and King 2007; McDonald 2009; Stephanopoulos and McGhee 2015, 841).

#### *Justice Kennedy and a Partisan Symmetry Based Standard*

*LULAC* amici briefs introduced a concept of partisan symmetry that might lend itself to the creation of a reliable and manageable standard. Justice Kennedy did not believe partisan symmetry was a reliable standard for measuring a burden on representational rights, but he did not "altogether discount its utility in redistricting planning and litigation" (*LULAC v. Perry*, 548 U.S. 420 (2006)). Partisan symmetry was devised to be the basis for a reliable standard for determining an unconstitutional burden or discriminatory effect. It measures a plan's partisan bias in translating votes into seats and contains the foundation for the Efficiency Gap standard now before the Court in *Gill*. The developers of the Efficiency Gap, Nicholas Stephanopoulos and Eric McGhee interpret Justice Kennedy's *LULAC* and *Vieth* opinions, "The unspoken predicate is that if such rules were brought to his attention he would be willing to consider

adopting them” (Stephanopoulos and McGhee 2015, 839). In addition to the four liberal justices, Justice Kennedy was surprisingly receptive to partisan symmetry in *LULAC*, however, he expressed doubts about the use of partisan symmetry alone as a judicial standard.

Justice Kennedy raised four concerns about a partisan symmetry test. (1) It would be necessary to estimate the results of elections prior to when they occur. This would be controversial and prone to inaccuracies. Estimation would require a degree of assumption about how many voters would switch from one party to another and how many independents would vote for each party in each district’s race. Estimating vote switches is particularly difficult when candidate characteristics and charisma are unaccounted for. (2) In order to avoid most hypotheticals, a partisan symmetry claim would have to be litigated after an election. (3) The Court has no data to determine how much partisan asymmetry is too much. Without data on the asymmetry of current or historical plans a bias standard, like Justice Stevens’ proposed 10 percent, is arbitrary and subjective. (4) Justice Kennedy writes, “asymmetry alone is not a reliable measure of unconstitutional partisanship.” Asymmetry can result from variables other than desire to disadvantage political opponents, including the geographic distribution of party supporters and compliance with traditional redistricting criteria (*LULAC v. Perry*, 548 U.S. 420 (2006); Stephanopoulos & McGhee 2015, 831-833).

Justice Kennedy’s *LULAC* opinion supplies the potential for the Supreme Court to determine objective basis for identifying a Constitutionally infirm partisan gerrymander. A neutral Court test to determine an unconstitutional partisan gerrymander would need to test for the “invidious” intent mentioned by Justice Kennedy, and the effect of a burden on representational rights. Measures of partisan symmetry could play a key role in determining discriminatory effect. A Justice Kennedy sanctioned partisan symmetry threshold must not be

vulnerable to slight or predictable changes in demographics or levels of party support, nor rely on the estimation of election results. The threshold would need to demonstrate probable entrenchment of one party in government against the will of the people, be based on election results, and not be based on partisan symmetry alone. Moreover, a historically, statistically, and legally derived numerical threshold needs to be presented to the Court for answering Justice Kennedy's essential question of "how much partisan dominance is too much" (*LULAC v. Perry*, 548 U.S. 420 (2006); Stephanopoulos & McGhee 2015, 831-833).

### **Conclusion**

In *Vieth* and *LULAC*, Justice Kennedy reformed the challenge that faces lower courts. Lower courts need not establish that excessive consideration of partisan ties can violate the Equal Protection Clause; the *Baker* and *Reynolds* precedents establish that it can. The challenge for lower courts is to determine when the degree of partisan consideration becomes excessive and offensive (130 Harv. L. Rev. 1954 (2017)). Without an unbiased principle to measure discriminatory effect, or perhaps even with one, the Court faces a potential political decision in choosing a partisan symmetry based standard (*LULAC v. Perry*, 548 U.S. 420, 468 (2006); Stephanopoulos & McGhee 2015, 841-842).

None of the *LULAC* standards provided the neutral principles, or an unbiased threshold of excessive partisanship, necessary for the Court to take action. Justice Kennedy, however, refused to rule out the usefulness of a partisan symmetry metric in testing for discriminatory effect. The standard before the Court in *Gill* is largely developed out of Justice Kennedy's *Vieth* and *LULAC* opinions. It is designed to alleviate his concerns about using a partisan symmetry-type metric to determine a burden on representational rights. If the new standard satisfies Justice Kennedy's

neutral principles criteria, it is likely Justice Kennedy and the Court's four liberals will adopt a standard for adjudicating partisan gerrymandering claims in *Gill*.

## Chapter III

### Something's Rotten in the State of Wisconsin: *Gill v. Whitford* and the New Standard Before the Court

Partisan gerrymandering claims remain stranded in a peculiar dimension. The Supreme Court has said these claims are justiciable—the Court will entertain them— but it has not yet agreed upon any standard by which to adjudicate them. In other words, a majority of the Court agreed in *Bandemer* and *Vieth* that partisan gerrymandering is a problem it can remedy, but it has not yet determined how it should remedy the problem. As evidenced in Chapter II, the central problem is that the Court needs a judicially manageable standard for identifying unconstitutional partisan gerrymandering. The Court will decline to invalidate districting plans until it has a clear and principled standard that can be consistently and predictably applied. Justice Kennedy is likely to decide when the Court has a workable standard. Two partisan gerrymandering cases are before the Court this term: *Gill v. Whitford* and *Benisek v. Lamone*. In order to persuade Justice Kennedy, and thus the Supreme Court, to strike down a partisan gerrymander, it appears the plaintiffs in either of these cases must prove both unconstitutional “invidious” *intent* to discriminate and simultaneous unconstitutional discriminatory effect.

Workable standards for determining “invidious” intent and discriminatory effect have proven elusive. The Court has long acknowledged that some degree of partisan motivation is acceptable in districting. Partisan motivations can serve relatively democratic ends (*Vieth v. Jubelirer*, 541 U.S. 358-359 (2004), Breyer J., Dissenting). The challenge with determining a standard for intent is determining when acceptable levels of partisanship in the districting process become discriminatory and unconstitutional. A workable standard for determining a questionable districting plan’s discriminatory effect is much more difficult to establish. No



natural baseline exists against which one can measure discriminatory effect. Moreover, it is not clear what constitutes evidence of a gerrymander's effect. Some would consider evidence of a gerrymander's effect to be a lack of proportionality in the translation of votes into seats, entrenchment of the legislature, or a change in representation.

Justice Kennedy has indicated what he might consider to constitute invidious intent and discriminatory effect. In *Vieth*, he noted unconstitutional intent occurs when generally permissible political classifications are “applied in an invidious manner or in a way unrelated to any legitimate legislative objective” (*Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring). In *LULAC*, Justice Kennedy held that a gerrymander's unconstitutional discriminatory effect could be proved by a plaintiff who demonstrated “a burden, as measured by a reliable standard, on the complainants' representational rights” (*LULAC v. Perry*, 548 U.S. 418 (2006), Kennedy, J., Concurring). Justice Kennedy's jurisprudence, however, does not reveal what the “reliable standard” is supposed to measure apart from a burden.

The lower court ruling that is currently being appealed in *Gill* adopted a three-part test for determining the existence of an unconstitutional partisan gerrymander. The test substantially derives from Justice Kennedy's jurisprudence. The core of the lower court's test for discriminatory effect revolves around one metric, the Efficiency Gap, in a way that minimizes the four concerns raised by Justice Kennedy about a partisan symmetry test. This chapter looks at the *Gill* lower court's standard with the goal of establishing if it will be accepted by the Supreme Court as judicially manageable. The examination of the lower courts standard is broken down into four parts; first, a general overview of *Gill* complete with an outline of the district court's three pronged standard; second, an investigation of the measures, including the Efficiency Gap, used by the lower court to determine discriminatory effect; third, an analysis of the potential

problems with the lower court's standard. All things considered, Justice Kennedy, and the Court's liberal wing, are likely to uphold the lower court's decision and invalidate the Wisconsin districting plan as an unconstitutional partisan gerrymander.

### **Part I: Overview of *Gill v. Whitford***

*Gill* arises out of a challenge to Wisconsin's 2011 redistricting act. In 2011, using the 2010 census data, Wisconsin Republican legislators redrew the Wisconsin State Assembly districts in an explicitly partisan manner. They developed a model for evaluating voters' party preferences, calculated the likely winners of each district, and consulted with a political science professor who confirmed the Party's model was accurate and postulated "that Republicans would maintain a majority under any likely voting scenario" (130 Harv. L. Rev. 1954 2017). The plan passed both houses of the legislature and was signed into law by the governor as Act 43 on August 23, 2011. Act 43 passed in a uniformly partisan manner as was typical of districting plans in states where one party controlled both houses of the legislature and the governorship during the 2011 redistricting cycle.

The plan worked as Wisconsin Republican legislators hoped. In the 2012 election, Republicans carried 60 of the Wisconsin State Assembly's 99 seats, even though they won just 48.6 percent of the statewide vote. In 2014, Republicans won 63 seats with 52 percent of the statewide vote. After these elections, registered Wisconsin voters from across the state who "almost always vote for Democratic candidates" challenged the plan. The plaintiffs alleged that Act 43 "purposely and discriminatorily diluted Democrats' votes statewide" (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 67-70; 130 Harv. L. Rev. 1954 2017). Plaintiffs accused the state of using "cracking" and "packing" techniques that "wasted" Democrats' votes by spreading some into districts with clear Republican majorities and concentrating others as to limit the

number of winnable seats. They contended this strategy violated the First and Fourteenth Amendments (130 Harv. L. Rev. 1954 2017).

The plaintiffs recommended the district court adopt and apply a new measure for determining the discriminatory effect of political gerrymanders, the Efficiency Gap (EG) (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 17). They included the EG in their proposed three item test for an unconstitutional partisan gerrymander. The three-part test began with the plaintiffs first establishing state intent to “crack” and “pack” voters for partisan advantage. Second, the plaintiffs would need to prove partisan effect, which they suggested could be accomplished using the EG. Any plan with an EG exceeding a certain numerical threshold, which the plaintiffs proposed to be 7 percent based on historical analysis, would be presumed unconstitutional. Finally, the burden would be placed on the state to refute the presumption of unconstitutionality by demonstrating the plan is either “the necessary result of a legitimate state policy, or inevitable given the state’s underlying political geography” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 18). If the state can not prove the plan has a legitimate purpose or motivation, then it is unconstitutional.

The plaintiffs claimed their three-part test establishes that Wisconsin Act 43 is an unconstitutional partisan gerrymander. They contended Act 43 “treats voters unequally, diluting their voting power based on political beliefs, in violation of the Fourteenth Amendment’s guarantee of equal protection,” and “unreasonably burdens their First Amendment rights of association and free speech.” The state made two major claims in defense of the plan. First, the defendants contended the EG was over-inclusive and highly sensitive to “vote switchers” in swing districts. Just a few voters in the right swing districts changing their votes for any number of reasons can lead to a dramatically different EG. Moreover, the EG is analogous to the

proportional representation standard, rejected by the Supreme Court in *Vieth*. Second, the defendants argued Wisconsin Democrats were naturally packed into large cities (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 17-21).

### *The District Court's Decision*

A majority of the three judge panel of the U.S. District Court for the Western District of Wisconsin sided with the plaintiffs. Writing for the majority, Judge Kieth Ripple, an appointee of President Reagan, joined by Judge Barbara Crabb, an appointee of President Carter, began with a lengthy interpretation of Supreme Court precedent on the matter of representation. Judge Ripple noted that the Court faced “a significant analytical problem,” in resolving the case. He highlighted the paradoxes and varied interpretations of Court precedent discussed in Chapters I and II of this thesis. Judge Ripple noted that partisan gerrymandering cases before the Supreme Court establish that “an excessive injection of politics is unlawful” (*Vieth v. Jubelirer*, 541 U.S. 293 (2004), but fail to determine a “judicially manageable or discernible test for determining when the line between ‘acceptable’ and ‘excessive’ has been crossed” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 30-31).

Judge Ripple articulated three principles emanating from Court precedent that, in his view, stand beyond dispute. First, state legislative apportionment is a prerogative of the political branches of the state government. Any court that intrudes in such an area must “recognize the delicacy of intruding on this most political of legislative functions” (*Davis v. Bandemer*, 478 U.S. 143; *Vieth v. Jubelirer*, 541 U.S. 306 (2004), Kennedy, J., Concurring). Second, the fact that political classifications were applied is not enough to rule a plan unconstitutional (*Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring) Third, “the mere lack of proportional

representation will not be sufficient to prove unconstitutional discrimination” (*Davis v. Bandemer* 478 U.S. 132 (1986)).

In order to determine what type of redistricting scheme the Constitution prohibits, Judge Ripple looked further to *Reynolds*, *Fortson*, *Gaffney*, and *Bandemer*. He concluded it was clear that the First Amendment and the Equal Protection Clause protect a citizen against state discrimination in the weight of his or her vote due to that citizen’s political preferences. Judge Ripple quoted *Reynolds*, “Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination as to the weight of their votes, unless relevant to the permissible purpose of legislative apportionment” (*Reynolds v. Sims*, 377 U.S. 565 (1964)). This principle applies to not only population disparities, but also any aspect of districting that “operates to minimize or cancel out the voting strength of racial or political elements of the voting population” (*Fortson v. Dorsey*, 379 U.S. 439 (1965)). The Court noted in *Gaffney* that districting plans that intentionally minimize the voting strength of “political groups” “may be vulnerable” to challenges (*Gaffney v. Cummings*, 412 U.S. 754 (1973)), because as Justice White articulated in *Bandemer*, “each political group in a State should have the same chance to elect representatives of its choice as any other political group” (*Davis v. Bandemer* 478 U.S. 124; *Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 55-56). In fashioning a standard for invalidating a partisan gerrymander, Judge Ripple combined the above precedent from *Reynolds*, *Fortson*, *Gaffney*, and *Bandemer* with Justice Kennedy’s *Vieth* and *LULAC* jurisprudence.

#### *The District Court’s Three Part Test*

Judge Ripple announced the district court’s three-part test derived from Court precedent and principles of representational jurisprudence:

The First Amendment and the Equal Protection Clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of

individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 56).

The first component of the district court’s standard is taken directly from Justice Kennedy’s opinion that application of political classifications alone does not signal unconstitutional intent. “Invidious” application of political classifications denotes legislative intent to discriminate (*Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring), which the court defined as an intent to entrench one party in power for the duration of a districting plan. As far as invidious intent to discriminate against individuals on the basis of political affiliation, the district court concluded that the evidence, which is copious, establishes that one purpose of Act 43 was to entrench the Republican Party in power.

The purpose of securing Republican control of the State Assembly “under any likely future electoral scenario for the remainder of the decade” was largely accomplished via the invidious application of political classifications to impede the effectiveness of votes cast by individual, non-Republican, citizens (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 71). Intent to entrench was proven in the eyes of the district court majority. It is plausible that Justice Kennedy would uphold the district court’s standard of invidious intent as it is rooted in his own jurisprudence.

The district court’s anti-entrenchment test offers, what the Harvard Law Review deemed to be, “a discernible dividing line between inherent and invidious gerrymandering” (130 Harv. L. Rev. 1954 (2017)). The court’s assessment of a partisan gerrymander is based on likely electoral outcomes over the next decennial period, the likely duration of the districting plan, using election results that occurred under the alleged gerrymander. Anti-entrenchment, as defined by the *Whitford* majority, is a neutral and narrow principle. A party must be expected to maintain

control, “under any likely future electoral scenario for the remainder of the decade” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 44; 130 Harv. L. Rev. 1954 (2017)). Such a narrow standard may not encompass as many partisan gerrymanders as some wish, but it is manageable. Criticizing Justice Breyer’s *Vieth* standard, Justice Scalia wrote that Courts, legislative line drawers, and voters need to be able to identify, “precisely what (courts are) testing for, (and) precisely what fails (this) test” (*Vieth v. Jubelirer*, 541 U.S. 300 (2004); 130 Harv. L. Rev. 1954 (2017)). The principle that a districting plan that entrenches one party for its duration will be held unconstitutional appears both clear and manageable

The second component of the district court’s test, determining entrenchment, is where the plethora of standards before the Court in *Gill* come into play. The lower court quantified entrenchment via “the combination of the actual election results for 2012 and 2014, the swing analyses performed by Professors Gaddie and Mayer, as well as the plaintiffs’ proposed measure of asymmetry (the EG)” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 74). The district court majority ruled that the plaintiffs satisfied Justice Kennedy’s requirements for demonstrating discriminatory effect. They were able to “show a burden, as measured by a reliable standard, on [their] representational rights” (*LULAC v. Perry*, 548 U.S. 418 (2006); *Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 74). Using these measures, plaintiffs proved that Wisconsin’s Republican gerrymander was likely to entrench the party in power under any likely electoral scenario.

Turning to part three of its test, the majority found that the Wisconsin plan could not be justified on other, legitimate, legislative grounds. The district court felt it important to give the state a chance to defend its plan as resulting from “legitimate state prerogatives and neutral factors that are implicated in the districting process” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis.

2016), at 90). Members of the Supreme Court have required or argued for this chance at various points in political gerrymandering case law. Most importantly, Justice Kennedy declared in *Vieth* that:, “A determination that a gerrymander violates the law must rest... on a conclusion that (political) classifications... were applied in... a way unrelated to any legitimate legislative objective” (*Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring); likewise he wrote in the *Bandemer* plurality, “If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings” (*Davis v. Bandemer*, 478 U.S. 141 (1986); *Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 91).

## **Part II: Assessing The Measures Used by the Lower Court**

All of the measures used by the lower court are now before the Supreme Court. Other supplemental measures of burden on representational rights, proposed by political scientists, are also before the Court, including the Extreme Outlier standard, the Bernard Grofman and Ronald Kieth Gaddie partisan symmetry test, Michael McDonald and Anthony McGann’s measure for identifying the strength of a partisan gerrymander, and Jowei Chen and Jonathan Rodden’s formula for detecting partisan gerrymanders based on historical entrenchment. Further investigation of these measures is necessary to demonstrate how much of a burden or discriminatory effect the district court’s three-part standard can reliably show.

### *(A) Swing Analysis*

Swing analysis supports the district court’s emphatic declaration that the legislators who intended for the districting plan to work to the advantage of the GOP succeeded in their efforts. Professor Kenneth Mayer created a histogram which demonstrated Republican voters to be distributed over a larger number of districts with the effect of securing a greater number of seats, “Republicans are distributed in a much more efficient manner than Democrats” (*Whitford v. Gill*,



No. 15-cv-421 (W.D. Wis. 2016), at 74). Professor Mayer’s swing analysis predicted only 15 packed Republican districts compared to 25 districts in which Democrats had been packed into “safe” Democratic districts. Swing analyses are used to estimate a plausible outcome given different statewide votes such as what might occur if there is a notable pro-Democratic or pro-Republican swing.

Professor Gaddie’s swing analysis estimated the electoral outcome for each proposed redistricting map based on a GOP statewide vote percentage ranging from 40 to 60 percent. Professor Gaddie estimated that in order to maintain a 50 seat majority in the State Assembly, Republicans needed to win only 47 percent of the vote. Democrats would need at least 54 percent of the vote to obtain that many seats. Republicans could control a two thirds super majority of the State Assembly with just 53 percent of the statewide vote (See Below in Table 1). Professor Mayer focused only on likely electoral scenarios. Looking at electoral outcomes since 1992, he determined the highest statewide vote share the Democrats received was 54 percent in 2006, and the lowest was 46 percent in 2010. Using the 2012 election results, Professor Mayer predicted Democrats would win 39 seats with 46 percent of the vote and only 45 seats with 54 percent of the vote. The actual election results in 2012, 2014, and 2016 suggest that Act 43 is better at translating Republican votes into seats than either Professor Gaddie or Mayer predicted (Whitford v. Gill, No. 15-cv-421 (W.D. Wis. 2016), at 77-79).

Table 1

% Vote Received (D)	Seats Won (D)	% Votes Received (R)	Seats Won (R)
47	33	47	50
48	35	48	48
49	39	49	54
50	41	50	56
51	43	51	60
52	45	52	64
53	49	53	66
54	53	54	67

In *Bandemer*, the Court asserted that plaintiffs could not determine a constitutional violation based “on a single election” (*Davis v. Bandemer*, 478 U.S. 135 (1986)). The district court maintained that its use of two elections and substantial swing analysis answers “the shortcomings that the *Bandemer* plurality identified.” The *Gill* plaintiffs persuasively contend, “it is not the case that ‘an additional few percentage points of the votes cast statewide’ for the Democrats will yield an Assembly majority” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 79, quoting *Davis v. Bandemer*, 478 U.S. 135 (1986)). If a districting plan that approximately reflects the proportions of state party power is less likely to serve as a vehicle for partisan discrimination, as Justice Kennedy suggests in *LULAC*, then a plan that does not reflect the distribution of party power indicates potential discrimination (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 79 quoting *LULAC*, 548 U.S. 419 (2006)). Swing analysis is a useful indicator of a plan’s bias but it still problematically relies greatly on the estimation of election results; by contrast, the Efficiency Gap does not.

*(B) The Efficiency Gap*

The plaintiffs in *Gill* accuse Act 43’s drafters of employing “packing” and “cracking” techniques against Wisconsin’s Democratic voters in order to diminish their electoral power. The EG is a measure of how much “packing” and “cracking” takes place in a district plan based on election results. It is a measure of “wasted votes” —votes that do not help elect a candidate— for each party. The makers of the EG understood that all elections in single member districts produce large numbers of “wasted votes.” Voters who cast ballots for losing candidates are “cracked.” Voters who cast ballots for winning candidates in excess of what their preferred candidate needs to win are “packed.” A partisan gerrymander is a districting plan that causes one party to waste more substantially more votes than its opponent. More wasted votes result in the

less efficient translation of votes into legislative seats. The EG quantifies the disparity between two parties in translating votes into seats (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 80-81; Stephanopoulos and McGhee 2015, 835-839).

Calculating the EG is a fairly straightforward, three-step process. It requires totaling the number of votes cast for the losing candidate in each district and the number of votes cast for the winning candidate in excess of 50 percent. The resulting number is the total number of wasted votes by party. The EG is the difference between the parties' wasted votes, divided by the total number of votes cast in the election. For example, take the election results from a hypothetical five district state with 100 voters in each district seen below in Table 2.

**Table 2**

District	D Votes	R Votes	Result
District 1	75	25	D Wins
District 2	60	40	D Wins
District 3	43	57	R Wins
District 4	48	52	R Wins
District 5	49	51	R Wins
Total	275	225	

Determine the number of votes each party wasted in the election. Using the results from above, the victorious party needed only 51 votes to win. Any votes over 51 are wasted. All losing votes are wasted. Calculate the total number of votes for each party and find the net wasted votes. In this case, the Democrats had a net waste of 101 votes ( $173-72=101$ ). Thus they wasted 101 more votes than the Republican Party. These steps are seen below in Table 3.

**Table 3**

District	D Votes	R Votes	D Wasted Votes	R Wasted Votes	Net Wasted Votes
District 1	75	25	24	25	1 R
District 2	60	40	9	40	31 R
District 3	43	57	43	6	37 D
District 4	48	52	48	1	47 D
District 5	49	51	49	0	49 D

Total	275	225	173	72	101 D
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Finally, calculate the efficiency gap by dividing the net wasted votes by the total number of votes. The net number of wasted votes was 101. A total of 500 votes were cast. Thus, the efficiency gap is 20% ( $101/500=.202$ ). In this example, the Republican Party won 20 percent more seats than they would have if both parties wasted the same number of votes (Stephanopoulos and McGhee 2015, 835-839).

The Wisconsin EGs in 2012 and 2014 were 13 percent and 10 percent, respectively. Wisconsin Republicans won 13 and 10 percent more seats than they would have if each party had wasted the same number of votes. Professor Simon Jackson conducted three analyses looking at trends in efficiency gaps across 786 state legislative elections over the last 40 years. He found an EG generally maintains itself over the life of a districting plan. He found that plans with EGs greater than 7 percent in any districting plan's first election year subsist for the duration of the plan in 95 percent of studied cases. Plans with an EG greater than 7 percent will continue to favor one party even if the vote share changes by 5 percent, suggesting Wisconsin Republicans would maintain a majority of the seats in the State Assembly with just 43.6 percent of the vote (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 80-81).

Based on research on EGs in state legislative and Congressional plans from 1972 to 2012, Stephanopoulos and McGhee suggest that an EG of 8 percent for state legislative plans or one that approaches an asymmetry of two Congressional seats demonstrates effective entrenchment. A gap of 8 percent would place a state legislative plan in the most dilutive 13 percent of plans since the post *Reynolds* reapportionment revolution. A gap of two seats would place a Congressional plan in the worst 10 percent of plans over the same era. Such gaps are indicative of not only "uncommonly severe gerrymandering" but also gerrymanders that are unlikely to

come undone (Stephanopoulos and McGhee 2015, 871). Stephanopoulos and McGhee considered recommending a ten percent threshold standard for state legislative plans, but such a gap would place a current plan in the worst 5 percent of prior plans. Stephanopoulos and McGhee's research was not before the *Gill* district court but is now before the Supreme Court (Stephanopoulos and McGhee 2015, 871).

The Efficiency Gap is not without its limitations, which were highlighted extensively by the defendants in *Whitford*. Unexpected results begin to emerge when one party receives more than 75 percent of the statewide vote (Cost 2017). This flaw can be corrected by flagging elections in which a party received at least 75 percent of the statewide vote and 100 percent of the seats. Elections this lopsided are very rare. No party has received 75 percent of the statewide vote in state legislative elections since 1982 and only 18 such cases out of 800 Congressional elections exist. In these states the majority party did not win 100 percent of the seats, leading one to believe this is not an issue relevant to practical adjudication of redistricting claims (Stephanopoulos and McGhee 2015, 25-26).

Second, the metric sensitive to electoral fluctuations. The gap can vary over election cycles. As noted by the defendants in *Gill*, the EG is liable to vary depending on national waves in the electorate. It may also vary if one party runs a spate of highly likeable candidates and eeks out wins in several competitive districts, or due to a party's tactical failure. For example, in 2012, Democrats won one Congressional Seat in both Utah and West Virginia. This resulted in temporary barely pro-Democratic EGs for both state Congressional plans. When Republicans swept the Utah and West Virginia Congressional elections in 2014 and 2016 both Congressional plan EGs became significantly pro-Republican.

The hypothetical election results displayed in Table 2 can provide another hypothetical example of the EGs sensitivity to electoral fluctuations. Suppose Districts Four and Five are generally competitive districts that voted slightly Republican due to a charismatic Republican candidate, unpopular Democrat, or a wave Republican election. If two voters in District Five switched their votes from the Republican to the Democratic candidate the EG would drop nearly in half to 10.4 percent. If a Democrat also prevailed with 51 votes in District Four, the EG would decrease to 1 percent. A plan with truly competitive districts is unlikely to demonstrate a high efficiency gap after two or three election cycles because competitive seats are likely to change parties over that time.

Sean Trende, Senior Elections Analyst for RealClearPolitics, in his expert report to the lower court noted, “that if the Democrats engaged in a ‘modestly better effort’ to get out the vote, and secured just 600 more votes in Districts 1 and 94, the ‘EG falls by more than two points off these modest shifts to 9.466” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 88). In the context of a different districting plan this shift might matter, but in the case of Wisconsin Act 43 the EG would remain above the proposed seven or eight percent threshold. The instability of the EG is a property of elections, not the measure itself. The sensitivity of the EG to electoral fluctuations might be seen as a benefit if it ensures only the most durable gerrymanders get struck down. Many gerrymanders do not come undone or evaporate. Stephanopolous and McGhee suggest supplemental sensitivity testing, such as swing analyses, can be used to determine the likely durability of a gerrymander with a large EG (Stephanopoulos and McGhee 2015, 25-27).

The third, and perhaps most significant, problem with the EG is its sensitivity to the treatment of uncontested seats (Cost 2017). Uncontested races rely on the assignment of vote

shares that estimate or reflect how voters might have cast their ballots if they had been given a choice. In their analysis, Stephanopoulos and McGhee used Presidential vote share data at a district level, controlled for incumbency status, to estimate the vote share an opposing party would have received had it run a candidate in an uncontested district. For uncontested state legislative races, they ran a multi-level model using contested election results that controlled for incumbency, presidential election years, states, and districts. They caution that if one drops uncontested races from the EG computation or treats them as if they produced unanimous support for a party, the EG metric falls apart (Stephanopoulos and McGhee 2015, 856-859).

The fourth, and final, issue with the EG is its slight bias towards Democratic partisan gerrymanders. Democratic gerrymanders are slightly less likely to violate an EG based threshold due to political geography. The *Gill* defendants alleged that Wisconsin's political geography made Act 43 less of a gerrymander than the EG makes it appear. The defendants relied on Sean Trende as an expert witness. Trende explained the political geography of the United States favors the Republican party. Democratic voters are heavily concentrated in urban areas. The heavy concentration of Democrats in urban areas hurts the Democratic Party in Congressional elections, which generally favor parties with spread out coalitions.

The naturally "packed" dispersion of Democrats makes it difficult to draw Democratic districts outside of cities. Trende analyzed Wisconsin's political geography using a measure called the "partisan index" (PI), which determines the "partisan lean of political units. Analyzing all of the wards in Wisconsin, Trende concluded that "the Democratic Party's influence was strengthening in areas 'that already leaned Democratic,' but was contracting geographically." Trende did not offer an opinion on how much of the EG could be attributed to geography (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 27-28).

A more valid criticism of the EG is that it is slightly biased towards maps drawn by Democrats but by no more than one to three percentage points. The EG's bias stems from the inefficient distribution of Democratic voters. Even an unbiased districting plan is likely to have an EG of one to three percentage points in favor of the Republican Party. Democratic legislators using the EG might have more room to gerrymander than their GOP counterparts. The EG's bias towards a party with urban support can be accounted for, as it was by the *Gill* district court, using supplemental measures.

*(C) Supplemental Tests: The Extreme Outlier Standard and Measures of Geographic Support Distribution*

The defendants contended that any districting plan in Wisconsin would result in an EG favoring the Republican Party, and that therefore Act 43 was not an unusual plan. The supplemental research and tests before the Supreme Court in *Gill* dispute this contention. The Extreme Outlier Standard proposed by Eric Lander, mathematician and former co-chair of President Obama's Council of advisors on Science and Technology, finds that Act 43 has a greater partisan bias than 99 percent of all possible comparable plans. By examining a very large representative sample of alternative plans, and calculating the partisan bias of each, one can determine whether or not a questionable plan remains unconstitutionally biased after a state's political geography is controlled for. In a sample consisting of 19,184 potential redistricting plans for Wisconsin, evaluated using precinct level data from the 2012 State Assembly election, Act 43 was found to be a more extreme GOP gerrymander than 99.4 percent of plans. Simulations of a similar size found Act 43 remained as extreme an outlier in 2014 and 2016. Lander and plaintiffs suggest if a plan exceeds the Court established EG threshold and is reliably



within the 90<sup>th</sup> to 95<sup>th</sup> or higher percentile of comparable plans, in terms of partisan effects, then it demonstrates a likely burden on representational rights.

Jowei Chen and Jonathan Rodden offer another method of accounting for the Democratic Party's less efficient geographic support distribution, which could supplement the EG. Chen and Rodden's approach simulates the drawing of district lines as to protect political subdivisions and communities of interest. In the case of Congressional districts, they consider important political subdivisions and communities of interest to include counties, municipalities, and majority-minority Voting Rights Act districts (Chen and Rodden 2015, 335-336). Using the districting of Florida's 27 Congressional districts as an example, Chen and Rodden modified their simulation algorithm to require that each simulated districting plan preserves the state's (at the time) three Voting Rights Act districts and the same 46 counties and 384 cities. These counties and cities form building blocks, forced to lie entirely within the same district, while the Voting Rights Act districts are held fixed through the simulations. Each Florida simulation procedure begins with 7,349 building blocks with the goal of creating 24 districts of an equal population. The simulation then combines building blocks based on geographic proximity until each district has a population within one percent of the ideal district population (Chen and Rodden 2015, 336).

Chen and Rodden's approach can be applied to supposed gerrymanders to determine whether or not a districting plan's large EG is a product of a state's political geography. Chen and Rodden created 1,000 different simulated Florida districting plans, all of which earned higher Convex Hull Roeck compactness scores than the Florida Legislature's enacted Congressional plan. The enacted Congressional plan yielded 17 Republican-won districts and 10 districts won by a Democrat. Using 2008 Presidential Election results by precinct, Chen and Rodden found none of the 1,000 simulated plans produced 17 Republican representatives. Nearly

64 percent of the plans yielded 14 Republican representatives, 29.8 percent of the plans yielded 13, 2 percent yielded 12, 4.1 percent yielded 15, and 0.4 percent yielded 16 (Chen and Rodden 2015, 338).

Due to the comparative lack of district compactness in the enacted Florida plan, and the extremely abnormal number of Republican representatives produced, Chen and Rodden concluded the biased effect of the Florida plan was not a result of political geography (Chen and Rodden 2015, 336-340). If a large Efficiency Gap suggested a districting plan was an unconstitutional partisan gerrymander, Chen and Rodden's simulation based approach would help ensure the gap was not a product of political geography. In other words, such a supplemental approach would ensure a partisan gerrymander stemmed from conditions other than inefficient geographic support distribution.

The third prong of the district court's standard ensures that a state's political geography will not be neglected or ignored. In the case of Wisconsin, the lower court found even a neutrally drawn plan would slightly favor the Republican Party and produce an EG of around 2 percent for the 2012 elections. The court concluded, however, that no plausible amount of inefficient political distribution, however, can explain the EG produced by Act 43. Political geography in other states has serious implications for the adjudication of partisan gerrymanders. Chapter Four addresses these implications, but for now it is important to realize the extreme bias of the Wisconsin plan in question makes political geography considerations contextually irrelevant (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 90-104).

The Court's use of the Efficiency Gap avoids the four concerns Justice Kennedy raised about a partisan symmetry test. It does not necessitate the estimation of election results. EG-centric claims would need to be litigated after an election, but only the most reckless map-

drawers would put forward a district plan likely exceed the level the Court decides constitutes discriminatory effect. Stephanopoulos and McGhee, as well as Jackman and Mayer, offer fairly conclusive data on the EG and historical plans so that the Court might choose a numerical level at which an EG demonstrates discriminatory effect without making an arbitrary decision. The EG only forms one component of a judicial standard in the test put forward by the plaintiffs and accepted by the district court. Furthermore, other supplemental tests exist to ensure asymmetry is a product of partisan discrimination rather than political geography or a strange election. Thus, the manner of its use placates Justice Kennedy's fourth concern that "asymmetry alone is not a reliable measure of unconstitutional partisanship" (*LULAC v. Perry*, 548 U.S. 420 (2006); Stephanopoulos and McGhee 2015, 879-882). The lower court's three pronged standard has raised additional concerns. These additional concerns could dissuade Justice Kennedy from accepting the lower court's standard.

### **Part III: Analysis of Problems with the Lower Court's Standard**

Three common criticisms of the lower court's test have been raised before the Supreme Court in *Gill*. (1) The use of the EG in the lower court's standard looks like a proportionality threshold. (2) The standard does not require a map to contain distorted districts—typically indicative of a gerrymander—to be held unconstitutional. (3) The circumstances of *Gill* and *Bandemer* appear very similar. (4) The standard misunderstands the nature of political affiliation and political influence, particularly the degree of political influence protected by the Fourteenth Amendment. Analysis finds criticisms one and two are flawed. Criticism three is not so much flawed as it is easily dismissed. Criticism four may make Justice Kennedy hesitate to uphold the lower court's standard.

*Criticism (A): The District Court's Test Sets an Unconstitutional Proportionality Threshold*

Many objections to the lower court's test stem from a flawed interpretation of either the EG or the district court's use of the EG. Beginning with Judge Griesbach's lone dissent from the *Whitford* majority, critics of the district court's ruling have relied strongly on arguments unlikely to appeal to more than the four conservative Supreme Court Justices. Most commonly, critics assert that the district court's test is simply a proportionality measure. The proportionality criticism of the test is unlikely to dissuade Justice Kennedy from upholding the lower court's ruling.

It is essential to view the district court majority's standard as composed of three distinct elements that check and balance one another. Some fixate on the EG as the only component of the standard that matters. Judge Griesbach picks apart and attacks the three-part test one component at a time (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 119-159, Griesbach, Dissenting). This tactic will inevitably display the structural failure of each component in isolation. The only way to evaluate the standard is by evaluating the three parts as a whole. The EG is the standard's cornerstone, but it is not the standard itself. It is merely the largest component of the standard's second test for a burden on representational rights. Parts one and three of the standard's three-part test supplement and balance the issues within the EG, as do the other metrics now before the Supreme Court like swing analysis, the Extreme Outlier Standard, and Chen and Rodden's simulation based test.

Critics of the district court majority's three-part test primarily allege that it is a proportionality test. It is evident the Constitution does not provide a right to proportional representation. The district court's test is far from Justice Powell's *Bandemer* standard, which

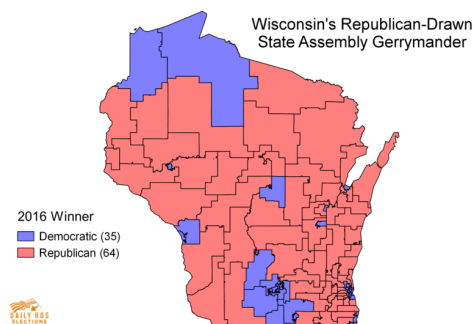
would have found unconstitutional any plan that violated a principle of proportionality. The use of the EG in the district court's test is not akin to a proportionality threshold. The EG is intended to be used pursuant to Justice Kennedy's *LULAC* logic that, "a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority" (*LULAC v. Perry*, 548 U.S. 419 (2006), Citing *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973)). A plan above the EG threshold does not automatically violate some obscure Constitutional principle of proportionality. The inclusion of the EG does not mean that a districting plan that diverges from a degree of proportionality will automatically be struck down.

The EG is a measure, not a standard. It gauges a districting plan's asymmetrical outcome in the translation of votes to seats on the basis that a highly asymmetrical plan is likely to produce entrenchment. If the resulting EG appears so biased as to indicate likely entrenchment of one party in power, then the court would use that measurement to help determine if a districting plan intentionally, and effectively, places a burden on the plaintiff's representational rights. A highly asymmetrical plan, as measured by the EG, could survive the three-part test for a number of reasons. Indeed, Chapter IV demonstrates that a number of asymmetrical plans would likely survive the lower court's test. If an invidious intent to entrench can not be proven, or if the EG stems from either compelling state interest or an uncontrollable factor (such as political geography), a highly asymmetrical districting plan would be upheld. As long as the EG and other supplemental measures are used to help identify a burden of entrenchment, not demonstrate a burden of asymmetry, they are employed pursuant to Justice Kennedy's jurisprudence.

*Criticism (B): A Gerrymander Needs Distorted Districts*

The Wisconsin plan does not possess certain characteristics Justices on the *Bandemer* and *Vieth* Courts believed indicated unconstitutionality: for example, Act 43 does not disregard traditional districting principles and it does not establish any bizarrely shaped districts. Even the Justices who took the proportionality position in prior cases argued a gerrymander need violate traditional districting principles to be unconstitutional (*Vieth v. Jubelirer*, 541 U.S. 345-352 (2004), Souter J. Dissenting). The district court's standard does not address the fact that Act 43 passes the political gerrymandering eye test. The argument that a lack of distorted districts means a plan can not be a gerrymander is flawed but merits some consideration.

Wisconsin's plan generally follows traditional districting principles on its path to frustrating the will of Democratic voters. This not to say Act 43 contains no examples of questionable districting decisions. Plenty of districts pack or crack Democratic voters, and the outer Milwaukee area is rife with odd districts, but the violations of traditional districting principles are slight. Bizarrely shaped districts are not readily apparent in the Wisconsin districting plan (seen below).



(Source: Daily Kos)

Judge Griesbach believed the mapmakers' respect for principles of compactness and contiguity should prevent Act 43 from being invalidated. Some argue that compactness and contiguity are legitimate legislative objectives. Thus a map like Act 43 that incorporates compactness and contiguity can not be invidiously designed or "unrelated to any legitimate

legislative objective” (*Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring). Judge Griesbach’s opinion, however, ignores much of what Justice Kennedy wrote in *Vieth* and *LULAC*. It neglects to mention that Justice Kennedy believes a potential standard needs to be primarily based on effect and not intent. (*LULAC v. Perry*, 548 U.S. 418 (2006), Kennedy, J., Concurring).

Judge Griesbach raises a reasonable claim that districting is not gerrymandering without “bizarre shapes,” but takes it to an untenable extreme. He makes the dubious claim that were Act 43 substituted for the plan in *Vieth*, the *Vieth* Court would have upheld Act 43 by a vote of 9-0. Judge Griesbach argues that in *Vieth* all four liberal justices viewed distorted districts as a necessary element of a gerrymander. His claim has some merit: based on the five opinions in *Vieth* it is possible nine Justices would uphold Act 43 had it been heard in the same context as the Pennsylvania Act in question. Such a claim is indicative of the lack of attention Justice Griesbach pays to *LULAC*. If one considers what the Justices on the *Vieth* Court wrote in *LULAC* it is quite apparent that at least Justice Stevens, and possibly Justices Breyer, Souter, Ginsburg, and Kennedy would strike Act 43 down.

A gerrymander is more than the drawing of odd districts. It is the denial of effective representation. Bizarre districts might be evidence of a gerrymander but the lack of bizarre districts does not prove a gerrymander has not occurred. The denial of effective representation does not occur when one is drawn into an unusual district. In fact, federal courts have ordered the drawing of unusual districts to create effective representation. Illinois’ Fourth Congressional District looks like a pair of earmuffs but according to the Justice Department, Federal Courts, and local residents it provides effective Congressional representation for two groups of Latino

voters in Chicago. The manipulation of districts, “gerrymandering,” is about diluting or defeating effective representation.

Gerrymandering does not require odd districts. The Court has recognized effective representation can be denied via all sorts of electoral systems. At-large or multi-member electoral systems can discriminate and deny effective representation without odd shapes, as can districts of unequal population (*Reynolds v. Sims*, 377 U.S. 533 (1964); *White v. Regester*, 412 U.S. 755 (1973)). Oddly shaped districts might be more accurately perceived as indicators of legislative intent to gerrymander, plenty of which exists in *Gill* without the presence of bizarre districts. It is highly improbable that Justice Kennedy would require a potential gerrymander to pass an arbitrary eye test in order to be upheld.

*Criticism (C): The Facts of Gill Look a lot like the Facts of Bandemer*

The circumstances of *Gill* and *Bandemer* appear very similar. The Indiana districting plan in *Bandemer* also lacked obviously distorted districts. Like Act 43, it provided the incumbent districting party with a majority of legislative seats in one election where it received a minority of the votes. In another election it provided the party that had drawn the map with a disproportionate share of votes. Perhaps because the mapmakers complied with good districting principles or because the the plaintiffs’ claim was statewide and not confined to a single district, the *Bandemer* Court upheld the Indiana districting plan 7-2. None of the Justices currently on the Court were on the *Bandemer* Court. Moreover, the *Bandemer* standard proved unmanageable. In any case, Court precedent from *LULAC* likely overrides the relevance of *Bandemer*.

The *Bandemer* plaintiffs submitted a statewide claim similar to that of the *Gill* plaintiffs in that the alleged gerrymander displayed disproportionate election results but complied with traditional districting principles. The *Bandemer* plurality concluded that no disadvantage to the



plaintiffs could be shown beyond disproportionate election results. Justice White wrote that a mere lack of proportionality in election results alone can not determine an unconstitutional electoral system. As discussed in Chapter II, an invalid districting plan must be “arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole” (*Davis v. Bandemer*, 478 U.S. 141-143 (1986)). In *Bandemer*, however, disproportionate election results alone were not enough for Justice White to strike down the Indiana districting plan in question. Perhaps if the Indiana districting plan had also not complied with traditional districting principles, then the *Bandemer* plurality would have invalidated it.

Five members of the *LULAC* Court appeared at least somewhat open to a claim like the one in *Gill*. Justices Stevens and Breyer argued the entire Texas plan was unconstitutional. Justices Souter and Ginsburg joined Justice Kennedy, who noted his four issues with a statewide partisan symmetry challenge but presumed such a challenge could be litigated “if and when the feared inequity arose” (*LULAC v. Perry*, 548 U.S. 419 (2006)). Thus, the *Gill* plaintiffs have standing. A statewide partisan gerrymandering claim is possible to make, especially using a partisan symmetry metric like the EG, but it remains not entirely clear that such a claim can be successful. *Bandemer* was decided on a standard derided by the entire *Vieth* Court as flawed. *Bandemer* did not produce a workable precedent for adjudicating partisan gerrymandering claims. Thus, the *Bandemer* holding has little direct sway over how the Court will rule in *Gill*.

#### *Criticism (D): Alleged Misinterpretations of Political Influence and Affiliation*

The *Gill* defendants and several notable amici—including the Republican National Committee and the Wisconsin State Senate—contend the district court’s standard misunderstands political affiliation and political influence. Voting is not the only way to influence the political process and political affiliation as an immutable characteristic. The

defendants argue the district court's standard is rooted in the false premises that winning an election is the only way to influence the political process and political affiliation is not affected by circumstance. Specifically, they claim the EG—or perhaps any metric—can not adequately account for the complexities of American representative democracy. The defendants make many valid points regarding the three-part standard's treatment of political influence and affiliation, but none that would appear likely to seriously undermine Justice Kennedy's opinion of the standard's manageability. If Justice Kennedy considers the lower court's test a manageable standard for determining a First Amendment violation, rather than a Fourteenth Amendment violation, concerns about the standard's misinterpretation of political influence and affiliation nearly disappear.

The critics argue that the political process does not stop once a candidate is elected, and therefore no votes are truly wasted. Legislators represent all the constituents in their district, even if they represent some more than others. Individuals, parties, and interest groups all affect the public policy decisions of an elected official. Voters who support losing candidates are not deprived of representation. Legislators provide a service to their constituents that is often unrelated to their political party, especially at the state level. Political party affiliation is not permanent. This is one of the reasons why a standard for racial gerrymanders exists and a standard for partisan ones does not. Many voters base electoral decisions on candidate characteristics, positions, and nationwide factors over party affiliation. In 2016, President Trump carried 47 more Wisconsin counties than Senator McCain in 2008. A standard reliant on the Efficiency Gap and similar metrics of partisan bias treats electoral success as a function of partisan affiliation. Thus, detractors say the district court's standard is flawed in that it can not

account for the complicated realities of American representative democracy. In its simplicity, the district court's standard can not predict the predictable volatility of our electoral system.

The Court has considered how a partisan gerrymandering standard might misunderstand representation. In *Bandemer*, Justice White wrote that courts, “cannot presume... that the candidate elected will entirely ignore the interests of those voters (who voted for another candidate)” (*Davis v. Bandemer*, 478 U.S. 132 (1986)). In *Vieth*, Justice Breyer wrote that even if a minority party were to indisputably entrench itself in the state legislature, “the majority should be able to elect officials in statewide races—particularly the governor—who may help to undo the harm that districting has caused the majority’s party,” by influencing future districting or vetoing harmful legislation (*Vieth v. Jubelirer*, 541 U.S. 362 (2004), Breyer, J., Dissenting). Many contend the structural check provided by the governor is preferable to a judicial check “based on questionable justifications and unadministrable tests” (*Gill* Amici Brief of the Wisconsin State Senate, 18).

Justice Breyer argued that in a case of an extreme gerrymander—that functionally eliminates any non-judicial check on entrenchment—Court intervention would be justified and manageable. It is unclear, though plausible based on his *Vieth* concurrence, that Justice Kennedy might agree with Justice Breyer and accept the elimination of all non-judicial checks on entrenchment as a standard for invalidating a gerrymander. As partisan as Act 43 is, it only borders on being so extreme as to functionally eliminate non-judicial checks on entrenchment. Act 43 may hinder the ability of Wisconsin Democrats to win elections, but it creates very few districts that the right Democratic candidate in a favorable political climate could not win.

The Wisconsin districting plan verges on potentially awarding a minority a legislative supermajority capable of overriding any non-judicial checks on entrenchment. A 66-vote-

supermajority of the Wisconsin State Assembly would be necessary to override a gubernatorial veto of a districting plan. The Republican Party won 60 seats with 48.6 percent of the statewide vote in 2012. In 2014, it won 63 seats with 52 percent of the vote. Swing analyses suggest the GOP could win 66 seats with 53 percent of the vote. It also came within two votes of a two thirds majority in the state senate as recently as 2017. The fact that the potential exists for a Republican minority to win a legislative supermajority probably does not bode well for Act 43's legality.

When the *Gill* defendants claim the district court's standard misunderstands political influence and affiliation, they contend the Fourteenth Amendment only provides a right for equal individual representation. If the Constitution only protects equal individual representation, then a partisan gerrymander does no harm if it maintains equally populated districts. A partisan gerrymander abides by "one person, one vote." No individual is discriminated against, or denied the equal protection of the laws, unless one claims the individual has a Fourteenth Amendment right to effective representation beyond equal participation in elections. The *Gill* defendants, and many conservatives, argue the Fourteenth Amendment does not provide that right. For a moment let us assume this criticism is valid—that the fair and equal representation *Reynolds* declared the Equal Protection Clause provides goes no further than "one person, one vote;" even so, a partisan gerrymander might still violate the First Amendment.

Justice Kennedy argued in *Vieth* that the burden imposed by partisan gerrymanders may be a First Amendment burden rather than a Fourteenth Amendment burden (*Vieth v. Jubelirer*, 541 U.S. 314-316 (2004) Kennedy, J., Concurring). The First Amendment protects citizens from being subjected to a state imposed burden due to their political associations (*NAACP v. Alabama*, 357 U.S. 499 (1958)). A districting plan engages in unconstitutional viewpoint discrimination against individuals if it is specifically drawn to injure those of a particular political persuasion.

Claiming a gerrymander violates the First Amendment, rather than the Fourteenth Amendment, avoids thorny issues about what degree of political affiliation and influence the Fourteenth Amendment protects. The *Gill* plaintiffs submit both First and Fourteenth Amendment Claims but the plaintiffs in *Benisek v. Lamone* allege only First Amendment discrimination. The *Benisek* and *Gill* standards could be combined to determine if a questionable partisan gerrymander violates the First Amendment.

The *Benisek* plaintiffs allege Maryland's Congressional districting plan subjected citizens in Maryland's Sixth Congressional district to a burden based on their political association and voting history. Maryland legislators drew districts to limit the representation of Republicans. In *Vieth*, Justice Kennedy wrote that partisan gerrymandering claims implicate the "First Amendment interest of not burdening or penalizing citizens" due to their political association, expression, or participation (*Vieth v. Jubelirer*, 541 U.S. 314-316 (2004) Kennedy, J., Concurring, citing *Elrod v. Burns*, 427 U.S. 347 (1976)). Representative democracy requires citizens to form strong bonds of association based on political views (*California Democratic Party v. Jones*, 530 U.S. 567, 174 (2000)). Justice Kennedy maintained,

First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters representational rights (*Vieth v. Jubelirer*, 541 U.S. 315 (2004) Kennedy, J., Concurring).

The standard before the Court in *Benisek* appeals to Justice Kennedy's considerations of a First Amendment interest in *Vieth*. They suggest a three-part test:

(1) Did the state consider citizens' protected First Amendment conduct (party affiliation) in deciding where to draw district lines? Did it do so with the intention of diluting the future votes of these citizens? (2) Did the map dilute the votes of the citizens whose protected conduct was taken into account so that it burdened them in a concrete practical way? (3) Is there a constitutionally acceptable explanation for the map's effects,

independent from the intent to discriminate on the basis of political belief? (Brief of *Benisek* Appellants, 35)

Parts one and three of the *Benisek* test can be applied to *Gill*. They are fairly similar to parts one and three of the *Gill* district court's three-part test. Wisconsin map drawers considered citizens' party affiliation with the intent of diminishing the electoral power of Democratic voters. The *Gill* district court found no constitutionally acceptable explanation for the map's effects, apart from intentional discrimination.

Part two of the *Benisek* test finds no concrete burden on the *Gill* plaintiffs, but the *Gill* and *Benisek* tests can be reconciled. The *Benisek* plaintiffs define a concrete practical burden as the deliberately changed electoral outcome of a reconfigured district. The *Benisek* test eschews a partisan symmetry standard like the efficiency gap, but it does not reject the notion that the EG can demonstrate a practical First Amendment burden. The *Benisek* plaintiffs argue, "partisan gerrymanders can inflict concrete burdens in multifarious ways" (Brief of *Benisek* Appellants, 40). They do not address a statewide burden. They merely state "a partisan gerrymander *most obviously* inflicts an injury" when it intentionally changes the outcome of an election (Brief of *Benisek* Appellants, 41 Emphasis Added). The Supreme Court has the power to define other measures of practical First Amendment burdens on representation. A Justice Kennedy-led majority could merge the *Gill* and *Benisek* tests and use the EG to find Wisconsin Act 43 has an intentionally discriminatory effect on citizens whose protected First Amendment conduct was examined in redistricting. Turning the lower courts test into a First Amendment standard would negate the criticism that the current test misunderstands the degree of political influence and affiliation that the Fourteenth Amendment protects.

### **Conclusion and Prediction**

Justice Kennedy's decision boils down three considerations. First, does the district court's standard accurately gauge whether political classifications were "applied in an invidious manner or in a way unrelated to any legitimate legislative objective" (*Vieth v. Jubelirer*, 541 U.S. 307 (2004), Kennedy, J., Concurring)? Second, are the Efficiency Gap and supplemental measures reliable measures of a potential First Amendment burden, a Fourteenth Amendment burden, both, or neither? Third, if the district court's standard is a reliable measure of a burden (discriminatory effect) on either representational rights or rights of political association, then does Wisconsin Act 43 produce that burden?

The facts of *Gill* suggest Justice Kennedy is likely to answer the first consideration affirmatively. The district court's standard accurately gauges the invidious application of political classifications. Moving to the second consideration, Justice Kennedy's jurisprudence does not rule out his acceptance of the measures used by the lower court to determine a burden. The EG appears to adequately address his four concerns about a statewide partisan symmetry challenge raised in *LULAC*. He is unlikely to be swayed by the defendant's claims that a gerrymander needs to look like a gerrymander or violate traditional districting principles to be a gerrymander. Justice Kennedy is likely to recognize political affiliation is impermanent. He might contend the district court's standard misunderstands the degree of political influence one is entitled to in the legislature. If he finds Act 43 does not deny equal representation or does not impose an unlawful Fourteenth Amendment burden, he could find a First Amendment burden exists on the plaintiffs' representational rights.

Justice Kennedy's analysis of a First Amendment burden would concentrate on, "whether the legislation burdens the representational rights of complaining party's voters for reasons of ideology, beliefs, or political association" (*Vieth v. Jubelirer*, 541 U.S. 316 (2004), Kennedy, J.,

Concurring). He could determine Act 43 and similar gerrymanders impose a First Amendment burden by creating a discriminatory inefficiency for voters of one party to translate their votes into legislative seats. If the state lacks legitimate reasons for that inefficiency, and the insidious intent of the legislature to either entrench a party in power or systematically frustrate voters of a certain political association is apparent, Justice Kennedy would likely hold a partisan gerrymander unconstitutional.

Predicting the result of any Supreme Court case, let alone a districting case, is prone to error. The facts of *Gill*, the reliability of the lower court's standard, and the standard's conformity to Justice Kennedy's jurisprudence lead one to believe Justice Kennedy will accept the district court's test—or a variation of it—and strike down Wisconsin Act 43 as an unconstitutional partisan gerrymander. The next chapter examines the potential effects of that decision.



## Chapter IV

### Mind The Gap: The Effects of the Supreme Court Invalidating Wisconsin Act 43

Many suggest that a Court ruling prohibiting at least some partisan gerrymanders could reshape the American political landscape (for example, Blinder and Wines 2018). A Court-accepted standard would affect the political arena in two ways: first, if Democratic claims about the number of extreme Republican gerrymanders are accurate, one would expect a ruling against partisan gerrymanders would increase Democratic Party power; second, because partisan gerrymandering is alleged to have deleterious effects on electoral participation and polarization such a ruling might enhance the vitality of American democracy. This chapter examines the ramifications of the Court striking down Wisconsin Act 43 on Congressional Representation, the balance of political power in state legislatures, partisanship and polarization in American politics, and affirmative racial gerrymandering.

Contrary to the general assumption, it is unclear that the Court ruling against Wisconsin Act 43 would cure the ills attributed to gerrymandering. A Supreme Court ruling that adopts the *Gill* district court's three-part test's would likely affect very few districting plans. Moreover, adopting that standard would likely have few immediate effects on American representation and party power. Adopting the lower court's standard, however, could have serious ramifications for the future of districting and minority representation.

#### Consequences for Congressional Representation

The *Gill* standard requires the presence of three things to overturn a districting plan. First, the standard requires legislative intent "to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation." Second, legislative intent must result in actual discriminatory effect measured by the efficiency gap and other

supplemental metrics. Third, the districting plan can not be justified on “other, legitimate legislative grounds” (*Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. 2016), at 56). One can determine which plans are liable to be struck down under the *Gill* standard by assessing legislative intent, discriminatory effect measured by the EG, and legitimate alternative reasons for a plan’s bias.

Intent can not exist when a state passes a bipartisan or non partisan districting plan. Only the districting plans in the 24 states where the districting process was under one party control must be examined for signs of discriminatory effect. Plans drawn in a bi-partisan or non-partisan fashion inherently avoid violating the *Gill* district court’s first component. Thus, they can be safely disregarded in the investigation of which current districting plans violate the *Gill* district court’s standard. The *Gill* standard suggests an EG of greater than 7 percent for a state legislative plan denotes the plan is likely to entrench one party in power for its duration, under any likely electoral scenario. Thus, districting plans drawn by one party that exceed the 7 percent threshold for state legislative plans and the corresponding two seat asymmetry threshold for Congressional plans, demonstrate unconstitutional discriminatory effect. The evaluation of a partisan drawn state plan that exceeds the threshold for unconstitutional discriminatory effect is incomplete without assessing whether or not the districting plan’s bias can be justified on “legitimate legislative grounds.”

Total control of the districting process requires one party to possess either both houses of the legislature and the governorship or enough seats in the legislature to override the veto of the governor. The districting process in the following twenty-four states was under the complete control of one party (the controlling party is indicated in parentheses): Alabama (R), Arkansas (D-Congressional only), Florida (R), Georgia (R), Illinois (D), Indiana (R), Kansas (R),

Louisiana (R), Maryland (D), Massachusetts (D), Michigan (R), New Hampshire (R-by legislative supermajority), North Carolina (R), Ohio (R), Oklahoma (R), Pennsylvania (R-Congressional only), Rhode Island (D), South Carolina (R), Tennessee (R), Texas-(R), Utah (R), Virginia (R), West Virginia (D), and Wisconsin (R). Note that the process for drawing Congressional and state legislative lines is not always the same. Some states, like Arkansas and Pennsylvania, give an elected Secretary of State, Attorney General, or a balanced commission a role in the state legislative districting process.

The premise of the *Gill* district court's Efficiency Gap based standard is that beyond a certain threshold of asymmetry gerrymanders prove exceedingly unlikely to come undone. Recall that the creators of the EG, Stephanopoulos and McGhee, concluded that districting plans with EGs of eight percent or higher were likely to entrench a party in power for their duration. They recommended an eight percent threshold for state legislative plans or an asymmetry of two seats for Congressional plans (Stephanopoulos and McGhee 2015, 884). Stephanopoulos and McGhee's work was not before the *Gill* district court, but other analysis suggested a seven percent threshold for state legislative plans. If the Court uses the *Gill* district court's EG oriented standard to strike down Act 43, then it may apply an EG oriented standard to the Congressional gerrymander in *Benisek*. If the Court decides *Benisek* by alternative means, but accepts an EG standard for adjudicating state legislative claims, then an EG standard will soon be proposed in the litigation of a potential Congressional gerrymander. In either situation, a two seat asymmetry signifies a Congressional plan is unlikely to come undone. Thus, a two seat asymmetry suggests a Congressional plan's unconstitutionality.

Evaluating the EGs of Congressional plans passed under one party control using election results from 2012, 2014, and 2016 reveals that at the start of 2018 only four plans, Texas,

Pennsylvania, North Carolina, and Michigan possessed seat asymmetries higher than two. In early 2018, the Pennsylvania Supreme Court ruled the Pennsylvania plan incompatible with the state constitution. In 2017, the Supreme Court struck down the North Carolina map used in the 2012, 2014, and 2016 elections as a racial gerrymander in *Cooper v. Harris*, 581 U.S. \_\_ (2017). In 2018, a federal court ruled the redrawn North Carolina plan was an unconstitutional partisan gerrymander, but the Supreme Court stayed the ruling, keeping the redrawn map in place until after it decides *Gill*.

As detailed in the Chapter III exposition of the Efficiency Gap, some EGs are difficult to calculate due to uncontested races. EGs in states with uncontested Congressional races in 2012 and 2016 could be estimated using 2012 and 2016 Presidential election results by Congressional district. Data for 2012 and 2016 Presidential election results by Congressional district is made available by DailyKos. Estimation of vote totals in uncontested races accounts for the vote difference between a party's Presidential candidate and the same party's Congressional candidate. As an example of this estimation, in 2016, no Republican ran in Virginia's 11<sup>th</sup> Congressional District. Results were estimated using the formula of (Trump Votes)-(Democrat Candidate's Votes-Clinton Votes). In the case of the Virginia 11<sup>th</sup>, the formula (98,222 Trump Votes)-(247,818 Democratic Candidate Votes-238,982 Clinton Votes) results in the rough estimate of 89,386 Republican votes had the Republican Party ran a candidate. This methodology is not perfect. It tends to underestimate the hypothetical vote total for the party that failed to run a candidate compared to historical election results. For example, in 2012, Republican Congressional candidate Christopher Perkins received 117,902 votes in the Virginia 11<sup>th</sup>, nearly thirty thousand more than estimated for 2016. Considering Donald Trump received nearly 10 percent fewer votes in the Virginia 11<sup>th</sup> than Mitt Romney did in 2012, the estimation

may not be drastically inaccurate. A better estimation would control for additional factors such as incumbency status, down ballot effects of Presidential candidates, and historical district results as Stephanopoulos and McGhee suggest in their overview of the EG. Crucially, this analysis avoids dropping the calculations for uncontested districts altogether.

The EGs of twenty of the twenty-four Congressional plans adopted under one party control of the districting process are shown below in Table 3 sorted by seat asymmetries. Note that some 2014 Congressional election results are not available. Congressional seat asymmetry is the equivalent of a state's average EG in terms of Congressional seats. For example, Michigan's average EG for the 2012, 2014, and 2016 is 18.7 percent. Michigan has 14 Congressional districts. Each seat in Michigan is 7.14 percent of the state's total Congressional delegation. Thus, Michigan's seat asymmetry is 18.7 divided by 7.14, which equals 2.62. The Republican Party benefits from an efficiency gap equivalent to 2.62 Congressional seats in Michigan.

**Table 3: Congressional Seat Asymmetry**

<b>State</b>	<b>Estimated EG in 2016</b>	<b>Estimated EG in 2014</b>	<b>Estimated EG in 2012</b>	<b>Avg. EG</b>	<b>Congressional Seat Asymmetry</b>	<b>Favored Party</b>
Texas	12.0%	N/A <sup>1</sup>	9.4%	10.7%	3.84	Republican
Pennsylvania <sup>2</sup>	15.8%	17.3%	22.5%	18.5%	3.34	Republican
North Carolina <sup>3</sup>	19.3%	20.9%	22.8%	21.0%	2.73	Republican
Michigan	16.3%	18.9%	21.0%	18.7%	2.62	Republican
Ohio	11.3%	9.7%	22.3%	14.4%	2.30	Republican
South Carolina	18.5%	N/A <sup>1</sup>	23.4%	21.0%	1.64	Republican
Florida <sup>4</sup>	5.2%	N/A	N/A	5.2%	1.41	Republican
Indiana	14.7%	10.1%	21.3%	15.4%	1.39	Republican
Virginia <sup>5</sup>	12.4%	N/A	N/A	12.4%	1.32	Republican

Maryland	12.2%	19.5%	6.9%	12.9%	1.03	Democratic
Wisconsin	14.5%	8.1%	14.7%	12.4%	0.99	Republican
Alabama	10.2%	N/A <sup>1</sup>	13.3%	11.8%	0.82	Republican
Arkansas <sup>6</sup>	16.4%	N/A <sup>1</sup>	23.6%	20.0%	0.80	Republican
Kansas <sup>7</sup>	20.3%	23.7%	9.6%	17.9%	0.72	Republican
New Hampshire <sup>8</sup>	51.7%	6.8%	47.8%	35.4%	0.71	Democratic
Oklahoma	11.3%	N/A <sup>1</sup>	17.1%	14.2%	0.71	Republican
Georgia	6.7%	N/A <sup>1</sup>	2.0%	4.35%	0.61	Republican
Rhode Island	23.1%	28.0%	36.3%	29.1%	0.58	Democrat
West Virginia <sup>9</sup>	18.3%	37.5%	1.1%	18.2%	0.55	Republican
Utah <sup>9</sup>	19.5%	21.6%	7.2%	11.3%	0.45	Republican

<sup>1</sup> Too many uncontested races to reliably apply the efficiency gap.

<sup>2</sup>This plan was struck down by the Pennsylvania Supreme Court as an unconstitutional partisan gerrymander in January 2018. A new court-drawn plan is in effect for the 2018 elections.

<sup>3</sup>See page 3.

<sup>4</sup> Florida's current Congressional districting plan took effect in 2015 after its old plan was struck down by the Florida Supreme Court as an unconstitutional partisan gerrymander in 2015 (Dixon 2015).

<sup>5</sup> Similar to Florida, Virginia's 2012 districting plan was found by the Eastern Virginia Circuit Court to be an unconstitutional racial gerrymander. The appeal by GOP lawmakers reached the Supreme Court in *Wittman v. Peronhubullah*, 578 U.S. \_\_ (2016), but the Court ruled that the appellants lacked standing. A map drawn by the lower court replaced Virginia's Congressional map in 2016 (Wheeler 2016).

<sup>6</sup>Arkansas' map was drawn by Democrats but Congressional Democratic candidates were unable to capitalize, resulting in a EG that slightly favored the GOP.

<sup>7</sup>Kansas' plan was drawn by a three judge panel after the state legislature failed to redistrict by the end of its legislative session (Hanna 2012).

Similar to Arkansas, New Hampshire's Congressional plan was passed by the Republican Party but displays a pro-Democrat EG. In two out of three election years Democrats won both Congressional districts.

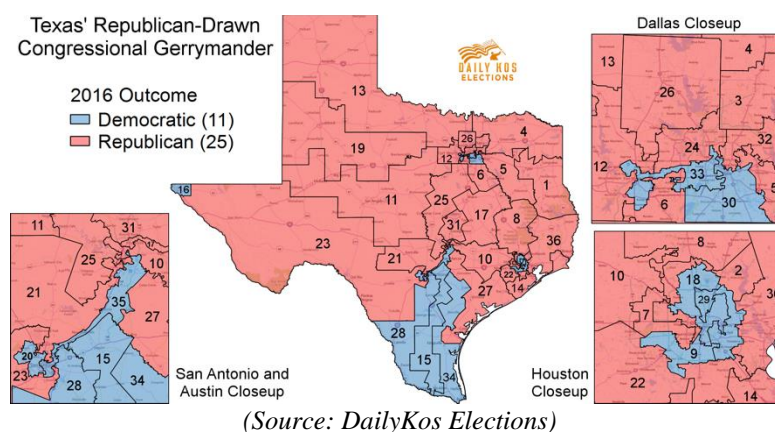
<sup>8</sup>Utah's and West Virginia's Congressional plans displayed a pro-Democrat EG in 2012 but pro-Republican EGs in 2014 and 2016.

<sup>9</sup>Excluded from this table are Illinois, Louisiana, Massachusetts, and Tennessee which display negligible EGs.

Five districting plans appear to exceed the Efficiency Gap threshold for Congressional plans proposed by Stephanopoulos and McGhee. As noted above, the Pennsylvania and North Carolina plans have already been invalidated and significantly altered. No election data for the new Pennsylvania or North Carolina plans exist to calculate an EG. If the Supreme Court upholds the ruling of the *Gill* district court it is likely to keep North Carolina's redrawn map intact. Calculating the new North Carolina map's EG would require the estimation of election results, which Justice Kennedy did not approve of in *LULAC* (*LULAC v. Perry*, 548 U.S. 420 (2006); Stephanopoulos & McGhee 2015, 841-842). An excessive EG is not directly indicative of unconstitutionality. While the EG can demonstrate effect, that effect must be intentional and not result from legitimate legislative grounds. Texas' Congressional map, which the EG finds to be the most extreme Gerrymander, would probably survive the *Gill* district court's standard.

### *Texas*

The Texas plan, and many districting plans in Table 3, can be justified on other legitimate legislative grounds. The creation of majority-minority districts in compliance with the VRA justifies the partisan bias of the Texas Congressional plan shown below.



Texas contains seven majority Latino districts, two districts with Latino pluralities, one district with an African-American plurality, and one additional district with a Latino majority

and an African-American representative (See Table 4). In compliance with the Voting Rights Act, which requires states, provide an equal opportunity for all citizens ‘to participate in the political process and to elect representatives of their choice,” state legislators create majority minority districts to ensure at least some minority voters can elect their preferred candidates (Harvard Law Review 2003, 2208). Majority-minority districts are not required by the VRA but are viewed as one way to comply with the VRA (*Voinovich v. Quiller*, 507 U.S. 146, 149 (1993); *Bush v. Vera*, 517 U.S. 952, 956-957 (1996); Harvard Law Review 2003, 2208).

**Table 4: Texas Congressional Districts with Minority Representatives**

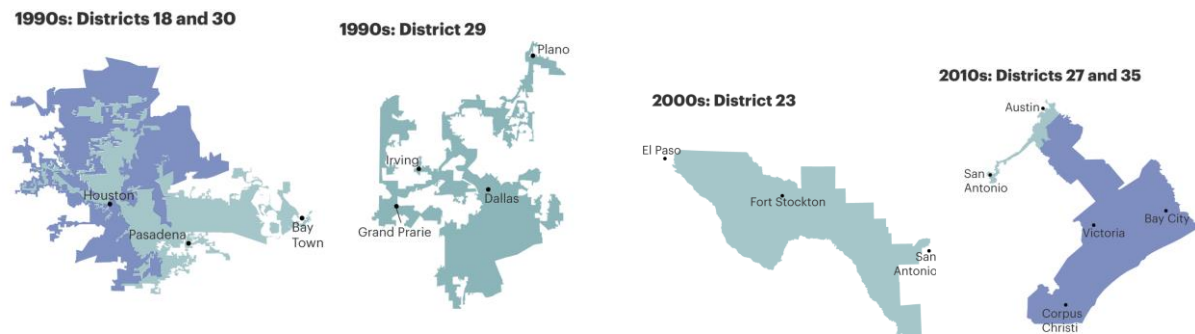
<b>District</b>	<b>Largest Minority Group Percentage of Population</b>	<b>Largest Minority Group</b>	<b>Party of Representative</b>
15	82.5%	Latino	Democrat
16	81.5%	Latino	Democrat
28	78.9%	Latino	Democrat
29	76.0%	Latino	Democrat
27	73.2%	Latino	Republican
20	71.5%	Latino	Democrat
33*	66.9%	Latino	Democrat
23	66.4%	Latino	Republican
30	43.6%	African-American	Democrat
32	42.4%	Latino	Republican
9	38.0%	African-American	Democrat
18	36.4%	African-American	Democrat
19	33.8%	Latino	Republican

\*Represented by African-American Marc Veasey. African-Americans comprise 15.7 percent of the 33<sup>rd</sup> District’s population.

Majority-minority districts, or plurality-minority districts, have the effect of packing Democratic voters. They create a high EG, but for a purpose the Supreme Court, the Department of Justice, and minority groups themselves recognize as legitimate. Texas’ seat asymmetry stems from compliance with the Voting Rights Act and the public interest in keeping communities of shared interest intact. Majority-minority districts may be struck down if they are found to dilute



the electoral influence of minority communities. In each of the last three decades, Texas has had one or two districts that pack minority voters invalidated in racial gerrymandering cases. These districts are shown below. The drawing of majority-minority districts has partisan political implications, which will be explored later in this chapter, but it also justifies Texas' Congressional plan under any likely standard for adjudicating partisan gerrymanders.



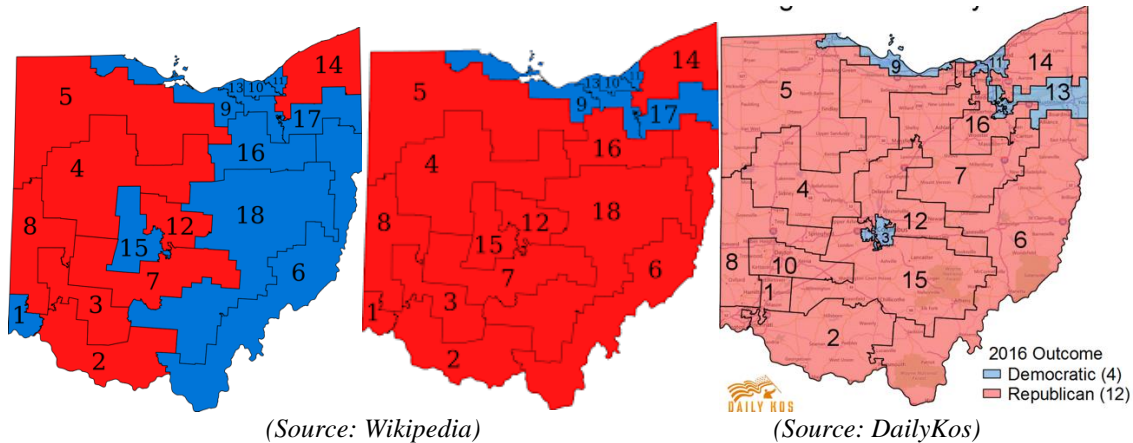
(Source: Pierce and Rabinowitz 2017)

If the Supreme Court upholds the *Gill* district court's ruling, only Michigan and Ohio appear to possess Congressional plans that could be struck down. No other plans currently surpass the two seat asymmetry threshold. Moreover, the asymmetries in many of the plans close to surpassing the hypothetical threshold do not result from legislative intent or are the product of legitimate state interest. Florida and Virginia's maps are court approved or court drawn, respectively. If challenged, South Carolina, Alabama, and Georgia would all successfully claim their plans' high asymmetries result from compliance with the Voting Rights Act.

### *Ohio*

Ohio can also make a Voting Rights Act claim. Ohio's Congressional plan contains one majority-minority Congressional district, the 11<sup>th</sup> District, represented by Congressional Black Caucus Chairwoman Marcia L. Fudge, and one district with a large African-American minority population and an African-American representative: the 3<sup>rd</sup>. Ohio's Congressional map is shown below. The maps on the left and center show Ohio's Congressional districting plan in use from

2002-2012. The map on the left displays election results for 2008, a wave Democratic year. The map in the center displays election results for 2010, a wave Republican year. The map on the right displays Ohio's current Congressional districts, whose partisan electoral outcome has not changed since Ohio's current district plan took effect.



The Ohio Congressional plan's seat asymmetry appears unrelated to the clustering of minorities in its 3<sup>rd</sup> and 11<sup>th</sup> districts. In fact, the 3<sup>rd</sup> and 11<sup>th</sup> districts have wasted more Republican votes in Congressional elections since 2012 than Democratic votes (See Table 5). The state's pro-Republican EG slightly increases if the both districts are removed from the calculation. Its seat asymmetry increases from 2.30 to 2.56. Ohio's Voting Rights Act claim would be dubious. Luckily for the current map, the circumstances of its adoption were far different than the circumstances of Act 43's.

Ohio Republicans did not display the same invidious intent to impose a burden on representational rights as the *Gill* defendants. The worst thing that can be said about the Ohio map is that it was drawn to protect Republican incumbents. Republicans were fairly responsive to concerns about the districting process after Ohio was apportioned two fewer seats in the aftermath of the 2010 census. Republican lawmakers reached a compromise with Democratic African-American state legislators to unify the representation of several urban areas in exchange

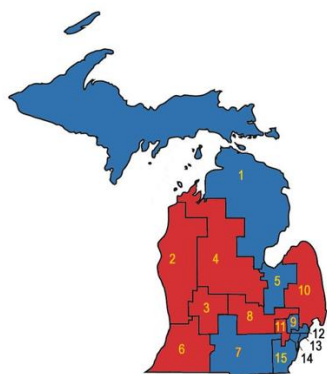
for shielding the plan from a ballot referendum. This compromise passed the state legislature by a supermajority vote (Marshall 2011; Levitt 2018). Ohio recently made significant legislative progress in limiting future partisan gerrymanders. In February 2018, the state House and state Senate approved a measure requiring bipartisan input and approval for future Congressional districting maps (Newkirk 2018). Though it may be a severe gerrymander, the Ohio Congressional map would probably withstand a challenge under a standard arising from *Gill*. The state legislature and governor did not operate with exclusively partisan intent in its creation.

### *Michigan*

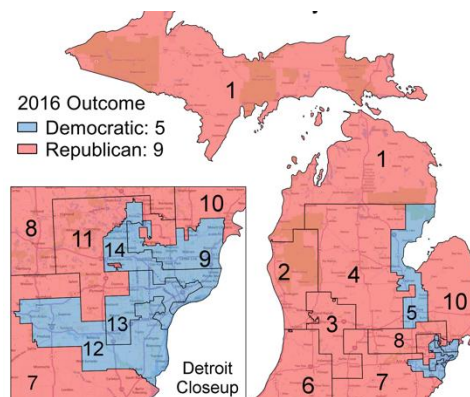
Michigan is the only state with a Congressional plan imminently likely to be struck down by a standard arising from *Gill*. The passage of Michigan's Congressional plan was undeniably partisan. The plan received no Democratic votes in the state legislature and changed the balance of Congressional political power. Under Michigan's old districting plan, also drawn by the Republican party, Michigan possessed five safe Democratic districts, one likely Democratic district, six safe Republican districts, one likely Republican district, and one competitive district. According an average of ratings from *FiveThirtyEight* and the Cook Partisan Voting Index, Michigan now possesses three safe Democratic districts, two likely Democratic districts, three likely Republican districts, and six safe Republican districts. Democratic Congressional candidates received more votes statewide than Republican candidates in 2012 and 2014, and only fifty thousand less in 2016. In each election, Michigan elected just five Democrats to Congress compared to nine Republicans. Supplemental measures also demonstrate high partisan bias in Michigan's current Congressional map (Royden and Li 2017, 2-7).

Michigan's previous districting plan is shown below on the left, color coded by the partisan Congressional representation of each district in 2010. The plan passed in 2012 is shown

on the right. Michigan's partisan gerrymander violates the first and second prong of the district court's three-part test but it could find solace in the third prong.



(Source: Michiganradio.org)



(Source: Daily Kos)

Michigan possesses two majority-minority districts, both of which stretch out of inner Detroit. The current plan maximizes the number of majority-minority districts in the Detroit area in a way that makes surrounding districts whiter and safer for Republicans (Bycoffe et al. 2018). The way Michigan's two majority-minority districts were preserved in the 2011 districting process worried Michigan Democrats and minority groups. Representative John Conyers, at the time the longest serving African-American member of the House, was drawn into a new district that kept only 20 percent of his previous constituents. Conyers' new 13<sup>th</sup> District wound around Detroit to include many of the city's northern suburbs. Many feared he would lose his seat (Ruiz, 2011). A racial gerrymandering challenge to the Congressional plan was thought to be imminent, but the Department of Justice declared the map satisfied the requirements of the Voting Rights Act (*Michigan v. United States*, No. 1:11-cv-01938 (D.D.C. 2012)).

A successful challenge to Michigan's Congressional redistricting scheme would probably be predicated on leaving Michigan's majority-minority districts, the 13<sup>th</sup> and 14<sup>th</sup>, unaffected. Similar to Ohio, Michigan's Congressional plan has a higher EG if its majority-minority districts are removed from the calculation. It rises slightly to 21.5 percent in 2012, 20.0 percent in 2014,

and 17.1% in 2016, with an average EG of 19.5 percent. The plan's seat asymmetry drops to 2.34, but not below the proposed threshold of two. It is clear that compliance with the Voting Rights Act is not a justification for the intentional and effective impediment on the effectiveness of Democratic votes. Political geography and compliance with traditional districting principles are unlikely to provide any relief to the defendants of the Michigan plan in litigation. According to *FiveThirtyEight*, a number of potential replacement plans exist that better comply with traditional districting principles by splitting fewer political subdivisions and that increase Democratic representation (Bycoffe et al. 2018). Thus, if the *Gill* plaintiffs prevail at the Supreme Court, Michigan's Congressional map is unlikely to survive a legal challenge.

The finding that the standard before the Court in *Gill* is unlikely to substantially affect the partisan outcomes of Congressional elections is supported by other scholarship. Jowei Chen and David Cottrell estimated the net effect of partisan gerrymandering across states is very modest. They find partisan gerrymandering creates a net Republican gain of one Congressional seat. Congress' partisan balance can be better explained by factors other than legislative intent to gerrymander, including non-partisan districting (Chen and Cottrell 2016). Chen and Cottrell's analysis and the estimated minor effects of the *Gill* standard on partisan outcomes suggest Congress' Republican tilt is a product of factors other than partisan intent to gerrymander.

### **State Legislative Effects**

Research and analysis by Professor Simon Jackman on state legislative plans from 1970 to 2014 reveals nine state legislative districting schemes, excluding Wisconsin Act 43, possessed EGs that exceed the 7 percent threshold before the district court (See Table 5; Jackman 2015; Cameron 2017). Five of these plans were passed by one party (controlling party in parentheses): Florida (R), Indiana (R), Michigan (R), North Carolina (R), and Rhode Island (D). Vermont's

state legislative plan passed under one party control but was voted for by 47 of 56 Republican state legislators (Levitt 2018; Vermont Legislative Bill Tracking System 2012). New York’s plan was approved by a Democratic state House and governor, in addition to a Republican controlled state Senate (Levitt 2018). Kansas’ Congressional, Senate, and state House plans were drawn by a three-judge federal panel after the Kansas State Legislature failed to redistrict by the end of the legislative session (Hanna 2012). The Democratic majority in the Virginia state Senate approved Virginia’s state legislative maps (*Bethune-Hill v. Virginia State Bd. Of Elections*, 580 U.S.\_\_\_\_ (2017); Newkirk 2017; Levitt 2018). Plans approved by both parties do not meet the standard of intent to create a partisan gerrymander.

**Table 5: State Legislative Districting Schemes that Exceed 7 Percent EG Threshold**

<b>State Legislature</b>	<b>EG in 2012 (Approx.)</b>	<b>EG in 2014 (Approx.)</b>	<b>Favored Party</b>	<b>Passed by One Party?</b>
Florida <sup>1</sup>	11.5%	16.5%	Republican	Yes
Michigan	13%	14.5%	Republican	Yes
Virginia	16.5%	10.5%	Republican	No
North Carolina <sup>2</sup>	11%	15.5%	Republican	Yes
Kansas	10.5%	11.5%	Republican	No
Indiana	13.5%	7.5%	Republican	Yes
Rhode Island	12%	7%	Democratic	Yes
New York	8%	13%	Republican	No
Vermont	9.5%	8%	Democratic	No

(Efficiency Gap data provided by Jackman 2015, and Cameron 2017)

<sup>1</sup>Florida now has a different state Senate plan.

<sup>2</sup>In 2016, North Carolina’s state House and Senate maps were ruled unconstitutional racial gerrymanders by a lower court.

Neither Florida’s plan nor North Carolina’s plan is likely to be struck down, though for different reasons. Florida can likely demonstrate it had no intent to create an unconstitutionally partisan gerrymander. It is unclear whether Florida’s state-level plans would be challenged or struck down in federal court. Florida’s state constitution contains rigorous fair districting provisions including, “no plan or individual district may be drawn with the intent to favor or

disfavor apolitical party or incumbent” (Fla. Const. art. III, §§ 20(a), 21(a); Levitt 2018).

Florida’s state senate plan was redrawn in 2015 after the state supreme court found it unconstitutionally favored eight incumbents. The state assembly plan however, has survived state-level challenges intact.

The North Carolina plan shown in Table 5 was deemed an unconstitutional racial gerrymander by a lower court in 2016. The lower court subsequently redrew the North Carolina state legislative district map. Swing analyses of the new North Carolina plan conducted by the Campaign Legal Center suggest Democrats would need to win 54.8 percent of the statewide vote in state House races to capture a majority of the House, and more than 55 percent of the statewide vote in state Senate races to capture a majority of the Senate (Greenwood 2017, 4-7). Until election results exist, however, the map will not be struck down.

The Michigan, Indiana, and Rhode Island plans are all in serious peril if the Supreme Court upholds the *Gill* district court’s decision. Nearly one fourth of Rhode Island voters cast ballots for Republicans candidates in 2016 state House elections but the Republican Party carried just 13 percent of the seats (Corriher and Kennedy 2017). In 2016, Indiana Republicans won 57 percent of the statewide vote in state House races but command 70 percent of the seats in the Indiana state House. They also control 41 of 50 seats in the state Senate. In 2012, the first year under the state legislative districting plans passed solely by Republican votes, Indiana Republicans grew their majority in the state House from 52 to 69 (Carden 2017). Michigan’s state level partisan gerrymander is impressively efficient. Michigan Republicans control 73 percent of the state Senate even though 2014 and 2016 statewide election results suggest they should control a bare majority of seats. They control 63 of 110 state House seats even though they barely lost the statewide vote in 2016. (Gibbons 2017; Roelofs 2017).

The fact that only three state legislative districting plans and one Congressional plan are in imminent danger if the Court upholds the *Gill* district court's standard suggests that party power will not be significantly altered by the result of *Gill*. Representation and the national balance of political power do not hinge on the outcome of *Gill* or the development of an efficiency gap based standard. If the Supreme Court adopts the lower court's standard as it currently exists, the Democratic Party is likely to gain two to three Congressional seats in Michigan. The Republican Party will lose some power in the Wisconsin, Michigan, and Indiana legislatures and gain some power in the Rhode Island legislature.

### **Effects on the Future of Redistricting**

The Court's decision in *Gill* will have a significant impact on the 2020 districting cycle. If the lower court's decision is upheld, states in the next round of districting will face a new constraint. Parties with total control of the districting process will confront a difficult choice: to gerrymander a plan right up to the efficiency gap threshold and risk the judicial imposition of an unfavorable map or attempt a weaker gerrymander that could jeopardize their legislative majority. Parties might see a Court-designated threshold as an invitation to gerrymander up to a certain threshold. In that case, it is possible that partisan gerrymanders may become less severe but more widespread.

The adoption of the *Gill* standard would not prevent Democratic gerrymanders from springing up in the 2020 redistricting cycle. Due President Trump's low approval ratings, many expect 2018, 2020, or both will be wave election years for the Democratic Party. Traditionally, when wave elections occur in census years it is very bad news for the losing party. The wave Republican election in 2010 resulted in the disproportionate number of severe Republican gerrymanders. When an election is not a wave election gerrymanders are less likely for two



reasons. First, one party is less likely to have total control of the districting process in most states. Second, evidence suggests state legislatures under one party control are naturally deterred from severe gerrymanders by fear that legislatures controlled by the other party will retaliate with “reaction gerrymanders.” The gerrymandering deterrent disappears when one party controls a disproportionate number of state legislatures (Bullock 2010, 131).

The combination of a Democratic wave election year in 2020 and the Court adopting the *Gill* lower court’s standard could lead to a situation, post 2020, in which Democrats have drawn large number of weak but ugly partisan gerrymanders. As noted in Chapter III, the lower court’s standard is slightly less likely to identify Democratic gerrymanders as unconstitutional because Democrats generally have less efficient geographic support distribution than Republicans. Because they are starting with a less efficient map, an efficiency gap standard gives them slightly more room to gerrymander (Chambers et al. 2017; Chen and Rodden 2015, Jackman 2015). For example, the Maryland plan at issue in *Benisek* does not surmount the two seat asymmetry threshold for effect demonstrated by the EG and supplemental metrics— although it is impossible to deny that the Maryland plan looks like an egregious partisan gerrymander. Democrats in 2021 could pass a number of plans similar to Maryland.

The Court should be wary of adopting a standard that strikes down unattractive Republican gerrymanders while upholding equally ugly Democratic gerrymanders. It is not out of the question that an efficiency gap based standard could lead to a situation where blue states have Maryland-esque districts and red states have neatly drawn districts. One can only imagine the harmful perceptions about judicial bias and legitimacy such a situation would generate. The Court’s foray into the thicket of partisan gerrymanders could prove very short if its standards are perceived as biased, inadequate, or harmful (Chambers, Miller and Sobel 2017).

Finally, the adoption of *Gill* district court's standard would not drastically effect American political polarization. In the immediate aftermath of *Gill*, lower courts are unlikely to set about invalidating plans with safe districts and replacing them with competitive districts. Future districting cycles might see legislators draw more competitive districts to avoid meeting the Court's standard of intent but it is just as likely that state legislators will shy away from the creation of highly competitive districts. Competitive districts if consistently won by one party, will beget a high efficiency gap. Uncompetitive districts, however, foster polarization by enabling extreme candidates to win election. Additionally, the population shift of Democratic voters to urban areas makes it more difficult for map drawers to create competitive districts that do not violate traditional districting principles. According to David Wasserman and Ally Flinn of the Cook Political Report, only 17 percent of the decline in swing districts since 1997 can be attributed to gerrymandering; 83 percent of the decline appears to be from residential self-sorting. Lastly, the Voting Rights Act and the importance of minority representation legitimate the creation of many safe Democratic majority-minority districts which necessarily make surrounding districts whiter and safe for Republicans.

### **Minority Representation and *Gill***

A ruling against partisan gerrymandering in *Gill* may paradoxically create a new set of legal (Constitutional) and political challenges to majority-minority districts. In its amicus brief to the Supreme Court, the Republican National Committee alleges the *Gill* district court's standard might create a Constitutional conflict with the Voting Rights Act. The RNC's argument is flawed because the third component of the *Gill* district court's standard almost certainly observes the creation of majority-minority districts in compliance with the Voting Rights Act as a legitimate reason for a plan's high efficiency gap. Any efficiency gap based standard, however, will label

most remedial Voting Rights Act plans extreme gerrymanders. Contrary to what one might expect, a more serious political challenge to the abundance of majority-minority districts is likely to come from the American left and center than the right. In the aftermath of *Gill*, the Voting Rights Act is liable to be perceived as shielding Republican gerrymanders. The controversy and political dilemma surrounding minority representation and majority-minority districts is not new, but it is likely to intensify once a standard for partisan gerrymanders exists.

If compliance with the Voting Rights Act were not a legitimate reason for a partisan gerrymander, the adoption of the partisan gerrymandering standard before the Court in *Gill* would be more consequential. Congressional plans in Texas, South Carolina, and possibly Alabama would be in danger of being struck down. Florida and North Carolina's original plans would still be considered unconstitutional. More state legislative maps across the country, but especially in the deep South, might not withstand a purely efficiency gap based test. This section is not an argument against majority-minority districts; it only seeks to highlight the present controversy over VRA districts that is likely to become more commonly understood in the aftermath of *Gill*. VRA districts provide positive and descriptive representation for minorities but they also increase political polarization and the increase the strength of partisan gerrymanders.

The Voting Rights Act is the hallmark of American civil rights legislation. In *Triumph of Voting Rights in the South*, Charles Bullock and Ronald Gaddie note that the VRA rapidly broke down barriers to minority representation and has reliably prevented the cracking of minority communities in districting (Bullock and Gaddie 2009; Bullock 2010, 83). Single member systems are not intended to provide proportional representation, so it is necessary to draw districts that ensure the election of minority representatives. Minority representatives change not only the composition but also the focus of the legislature. Black members of Congress sponsor

more legislation with a racial emphasis than white members (Bullock 2010; Canon 1999). It is unclear whether or not African-American legislators vote differently than white legislators of the same party and sizeable African-American constituencies. Evidence does suggest black Democrats devote more concern to racial matters outside of legislation than white Democrats with sizeable African-American constituencies (Bullock 2010). Blacks represented by an African-American in Congress are more likely to know their representatives name and record, contact their representative, trust their representative, and hold more positive views about American democracy (Bullock 2010; Gay 2003; Hajnal 2009).

The implementation of Section 2 of the VRA, which prevents vote dilution via cracking minority communities or submerging them in multimember districts, made it easier for minority communities to achieve descriptive representation but also had other more nefarious effects on representation. The 1982 amendments to Section 2 of the VRA, that prevented intentional *or* effective discrimination, were implemented during the 1990 redistricting cycle. During the early 1990s, white and minority voters were meticulously separated by a coalition of minority Democrat and white Republican state legislators (Bullock 2010). This process was especially pronounced in the South, accelerating the political transformation of the region's landscape. In the five Deep South states which hold the area's highest African-American populations, Alabama, Georgia, Louisiana, Mississippi, and South Carolina, all upper and lower legislative chambers are comprised by an almost exclusively white Republican majority and a majority-black Democratic minority (Hicks et al. 2017; McKee and Springer 2015). In 1990, the Deep South states sent 24 white Democrats to Congress. By the late 1990s they sent just four. The political transformation is particularly apparent in Georgia which sent eight white Democrats to Congress in 1991, but none in 1995 (See Table 6).

**Table 6: Changes in the Racial Composition of Georgia’s Congressional Districts Following 1992 Redistricting**

District	% Black	1991 Incumbent	% Black	1993 Incumbent
1	32	White Democrat	23	Republican
2	37	White Democrat	57	Black Democrat
3	35	White Democrat	18	Republican
4	25	White Democrat	12	Republican
5	67	Black Democrat	62	Black Democrat
6	20	Republican	6	Republican
7	9	White Democrat	13	Republican*
8	36	White Democrat	21	Republican*
9	5	White Democrat	4	Republican**
10	23	White Democrat	18	Republican*
11	New District		64	Black Democrat

\*Won by a Republican in 1994

\*\*Incumbent changed to Republican party in 1995.

Source: Bullock 2010, 75

The virtual extinction of moderate white Democratic representatives would not be so alarming if the elimination had not come at the expense of Democratic majorities friendly to minority interests. The replacement of white Democrats with black Democrats has not occurred at a one to one ratio (Hicks et al. 2017; McKee and Springer 2015; McKee 2010; Petrocik and Desposato 1998). White Republicans are “the net beneficiaries of the increase in black representation” (Hicks et al. 2017). Furthering this point, Republicans are staunch advocates of even the most questionably designed majority-minority districts, such as the one recently struck down by the Court in *Cooper* (Altman and McDonald 2015, Grofman 2006, Lamis 1999).

David Lublin writes in *The Paradox of Representation* that majority-minority districts may create a paradox of less substantive representation of minority interests if they create Republican legislative majorities. Evidence suggests this paradox is greater in the American South. The presence of white liberals in the North and some Rim South states offset the “bleaching” of districts (Bullock 2010, 86; Lublin 1997). In the Deep South, where achieving minority representation requires a greater number of African-Americans than anywhere else in

the nation (Hicks et al. 2017), bleached districts immediately began to elect Republicans. This phenomenon is partially responsible for the historic 54 seat pro-Republican swing in membership that took place during the 1994 United States House of Representatives elections.

The Supreme Court eventually ruled some of the districts created in the 1990 redistricting cycle to be violations of the Equal Protection Clause because the predominant consideration in their creation was the separation of blacks from whites (*Shaw v. Reno*, 509 U.S. 630 (1993); Bullock 2010, 86). In the 2000 redistricting cycle, minority legislators promoted the redistribution of minority voters to outlying districts as to help elect white Democrats. Minority legislators were largely denied control over the 2010 redistricting process, but it stands to reason they would further reduce the number minorities in majority minority districts again during the 2020 redistricting cycle in order to increase their own political influence. Meanwhile, Republicans will likely insist on maintaining the current demographic allocations (Hicks, Klarner, and McKee 2017). Ironically, minorities and the Democratic Party might have been locked into the current racial compositions of majority-minority districts were it not for a Court ruling many liberals deride. The non-retrogression requirement for preclearance by the Department of Justice for changes to districts in covered jurisdictions would not have permitted a district that “presents a diminished opportunity for minorities to elect their candidates of choice compared to the existing map” (Levitt 2018). The old coverage formula, however, was struck down in *Shelby County v. Holder*, 570 U.S. 2 (2013).

For better or worse, affirmative racial gerrymanders—drawn in compliance with the Voting Rights Act—are more responsible for political polarization and the diminished national power of the Democratic Party than commonly recognized. The fewer the number of districts that combine minority and white voters the fewer the number of legislators and political actors

that need to account for the policy preferences of each constituency when making decisions. It is much easier for the Republican Party to pack Democratic voters when the resulting gerrymanders are legitimated by the VRA and often passed by minority legislators. This style of gerrymandering produces safe districts, generates ideologically extreme representation, and promotes political polarization. It also creates a paradox of minority representation, in that more minority Congressional and state representatives exist than ever before but at a direct cost to the political power of the more sympathetic political party (Lublin 1997).

The benefits of majority-minority districts, past and present, can not be overlooked. The fact that majority-minority districts appear to be a near-permanent fixture of American politics merely underscores the point that a Court adopted standard for adjudicating partisan gerrymanders is inherently limited in its potential. Short of discovering and applying a radically new Constitutional theory of representation there is not much the Court can do to upend the American electoral system, nor should there be. A republican Court should not be in the business of prescribing cures to vague and indeterminate evils, rather it should ensure state action does not violate the Constitution. The fact that the standard before the Court in *Gill* would have minor immediate effects if adopted should be seen as more of a blessing than a curse. Such a standard not only ensures partisan gerrymanders will not grow more extreme but also leaves the responsibility for solving issues attributed to partisan gerrymandering in the hands of more appropriate and accountable branches of American democracy than the judiciary.

## Conclusion

### Cage the Beast and Shine the Light Elsewhere

The Supreme Court appears on the threshold of reshaping the American political landscape by slaying the extreme partisan gerrymander. If the Court upholds the lower court decision in *Gill* it will be the most consequential step it has taken to affect districting and representation since *Reynolds*. The short term effects of the Court's decision might be small, but the long term ramifications will be substantial. The Court-induced end of extreme partisan gerrymandering will be no cure-all for extreme legislators, uncompetitive elections, and Congressional gridlock. It will indirectly contradict certain provisions of the Voting Rights Act and may usher in a new era of American representation where the Court enforces a degree of proportionality in the translation of votes to seats. Its visible effects are likely to be minor, but the invisible effects might approach those of *Reynolds* in their significance. The Supreme Court striking down Wisconsin Act 43 will contain the infant threat of the partisan gerrymander before it evolves into a full grown hydra whose many heads snake out to ensure unresponsive legislative majorities.

### Brief Summary

Chapter I of this thesis established the Court has the authority to invalidate partisan gerrymanders as long as it uses a manageable standard. The derivation of this authority from the Fourteenth Amendment is not universally accepted. *Baker* held districting issues present justiciable questions. *Reynolds* implicitly held the Court may resolve districting issues as long as it has judicially manageable standards for doing so. The Court has never found judicially manageable standards for determining when a partisan gerrymander becomes unconstitutional.



Moreover, the Court's conservative wing believes no judicially manageable standard can exist. Thus, the Court has never limited partisan gerrymandering.

Chapter II reiterated it is unlikely the Court would unanimously rule against partisan gerrymandering, but also determined that Justice Kennedy and the Court's liberal wing believe a judicially manageable standard can be found. Court action, if it comes, will come against the beliefs and judicial philosophy of the Court's four conservative members. Chapter III examined the standard set forth in the district court's opinion in *Gill* and determined that, both Justice Kennedy and a majority of the Supreme Court are likely to accept it. Chapter IV found the effects of the Court adopting the *Gill* standard will not immediately increase the power of the Democratic Party, decrease political polarization, or significantly increase political participation.

### **Essential Effects**

The consequences of the Court's embracing the *Gill* standard may favor the Democratic Party in two ways. First, the *Gill* standard appears slightly less likely to catch severe Democratic gerrymanders than severe Republican gerrymanders. The Democratic Party begins with a less efficient geographic distribution of its political supporters. The concentration of Democrats in urban areas makes it more difficult for Democrats to gerrymander beyond the lower court's threshold than it is for Republicans. Second, Democratic Party power is limited by the creation of majority-minority districts. Majority-minority districts provide descriptive representation for minorities in compliance with the Voting Rights Act, but also limit the legislative power of the Democratic Party, which a vast majority of minority representatives are affiliated with. The adoption of a standard for striking down partisan gerrymanders, or perhaps that standard's lack of effects, will make more people aware of the tradeoff between descriptive representation and

legislative power. The Democratic Party stands to benefit from a lower concentration of minorities in majority-minority districts.

Affirmative racial gerrymandering is not likely to disappear anytime soon but in light of a partisan gerrymandering standard many may be willing to consider its drawbacks for the first time. In this way, a partisan gerrymandering standard is likely to create conflict with majority-minority districts drawn in compliance with the Voting Rights Act. The resulting conflict is unlikely to be legal—the *Gill* standard considers the creation of majority-minority districts to be a legitimate state interest—so much as it is political.

The *Gill* standard will likely reveal partisan gerrymandering is unfairly blamed for many of America’s democratic deficiencies that actually result from other factors, like political polarization, uncompetitive elections, and the disproportionate translation of votes into seats. Partisan gerrymandering is a symptom of America’s political ills far more than it is a cause (Enten 2018). Residential self-sorting and affirmative racial gerrymandering appear to bear greater responsibility for the polarization of legislators and the increase in uncompetitive elections than partisan gerrymandering.

The Court may travel further down the road to ensuring the proportional translation of votes into seats. Having secured the precedent that the EG is a reliable measure of discriminatory effect in *Gill*, future Courts could modify the threshold of discrimination. It is not difficult to imagine a scenario in which the Court lowers the threshold for what constitutes evidence of a districting plan’s unconstitutional discriminatory effect. As of *Gill*, that threshold may be set at 7 percent, or a two seat asymmetry for Congressional plans, but a future Court may lower that threshold to 5 percent or even 1 percent. A future Court might be willing to read proportionality of representation into the Constitution and demand an EG of less than 1 percent in all districting

plans. The Supreme Court's acceptance of the *Gill* standard, though it does not mandate proportionality, would set the foundation for a future proportional standard of representation.

The Court's involvement now runs the risk of preventing political evolution and democratic change to American representation. Redistricting reform is underway in a number of states. The Court's decision to strike down a partisan gerrymander might halt momentum for redistricting reform in its tracks. Many might falsely believe partisan gerrymandering and the problems attributed to it, have been solved. Legislative reform would be more responsive than Court reform and therefore, many say, more desirable. Legislative reform has led to state experimentation with alternative voting systems like the Top-Two Primary or Ranked Choice Voting. A future Court might hold one of these alternative electoral systems is essentially a partisan gerrymander. It is reasonable to fear that the Supreme Court might freeze our current political system in place and prevent its natural and chosen course of evolution.

### **Opinion**

The fundamental opinion of this thesis is that individuals have the right not to be intentionally and effectively discriminated against by the state on the basis of their political affiliation. If a state draws district lines with the intention of diluting the political power (future votes) of citizens of a certain political affiliation, succeeds, and can not justify its districting plan on other legitimate grounds, then the districting plan should be held unconstitutional. The Court may better justify the invalidation of a partisan gerrymander on First Amendment grounds rather than Fourteenth Amendment grounds. It is fairly evident, however, that the natural extension of *Baker* and *Reynolds* allows for a Court to strike down a partisan gerrymander pursuant to the Equal Protection Clause of the Fourteenth Amendment so long as it has a manageable standard for doing so.

It is unclear that the efficiency gap, and supplemental measures, are the most effective measure of discriminatory effect. Proponents of the EG should be very wary that a partisan court might fail to properly supplement the EG in order to reach a conclusion that a particular plan is valid or invalid. The need to supplement the EG denotes it is not may not be the “limited and precise” standard Justice Kennedy would accept (*Vieth v. Jubelirer*, 541 U.S. 306 (2004), Kennedy J., Concurring). Ideally, a standard would be as straightforward and restricted as “one person, one vote.” The lower court’s standard, as used by the lower court, appears to do a very good job at determining when a state intended to discriminate in redistricting on the basis of political affiliation, succeeded in discriminating, and has no legitimate alternative motive.

Determining what threshold of discriminatory effect is unconstitutional, raises thorny questions and risks further judicial entrenchment in the political thicket. In essence the Court is making an initial policy determination when it sets a threshold. Regardless of how well the Court’s placement of that threshold is supported by political science measures, it still raises serious questions. Maryland’s Congressional gerrymander is egregious in both appearance and effect, but it would not surmount the suggested threshold for a Congressional plan’s unconstitutionality. Is the Supreme Court the right body to mandate a threshold that would say Maryland’s Congressional gerrymander is fine but Michigan’s is not? An EG threshold for discriminatory partisan effect would be far more appealing if it were set by an accountable legislative body, like Congress, rather than the Supreme Court.

The hypothesized effects of the *Gill* standard demonstrate it is limited. If adopted it would do little more than maintain the status quo. Unlike *Reynolds*, it would not drastically reshape the current political landscape. Its main effect would likely be to limit the power of future legislatures to district for partisan gain. It would not take away the state legislature’s

ability to district or cast doubt on the legitimacy of the vast majority of existing districting plans. The fact that the *Gill* standard is limited makes its imperfections more tolerable. Moreover, if the standard does not prove manageable in practice it will not exist for long.

The right-left divide over the judicial philosophy of districting issues is vast. The only Justice who has ever bridged this chasm, Justice Kennedy, is 81 years old. The only two Justices on the Court who previously supported invalidating a partisan gerrymander, Justice Ginsburg and Justice Breyer, are 85 and 79, respectively. Regardless of the Court's decision in either *Gill* or *Benisek*, a partisan gerrymandering case will come before the Court again in the near future. Normally, Court precedent is difficult to overturn, but in this situation a conservative majority would simply need to declare that the standard in use is unmanageable, as it did in *Vieth*. It is a good bet that if the composition of the Court changes, then so will the holding. Whatever precedent *Gill* or *Benisek* set may be short-lived, especially if that precedent proves unworkable.

Many have recognized the potential for partisan gerrymandering to grow more efficient and precise with the onset of new technology. Fear is rarely a good reason to be compelled to act, and yet so often it seems a very good reason to grant unaccountable bodies more authority than they might otherwise possess. Unfortunately, a questionable measure of unconstitutional discriminatory effect is neither the only thing we have to fear, nor our greatest concern. In the 2020 redistricting cycle state legislatures will have unprecedented ability to design districts that further partisan ends. The partisan bias in districting plans has risen with every redistricting cycle since the 1970s (Stephanopolous and McGhee 836-837). In 2021, any state in which one party has complete control of the districting process will be able to draw the most effective partisan gerrymanders since *Reynolds* remedied malapportionment. The poor record of legislative restraint in redistricting suggests many states will use all the information at their disposal to

entrench the districting party in power. In this case, just like *Reynolds*, granting a little power to an unaccountable body may preserve the accountability of our accountable bodies.

The way our electoral system translates votes into seats is often deeply flawed. Partisan gerrymandering devalues the legitimacy of our institutions and, if left unchecked, is likely to grow extremely more efficient and precise in the near future. The Supreme Court has the power to introduce a remedy, provided it has a judicially manageable standard for doing so. Perhaps once the Supreme Court safely secures the nation from the talons of extreme partisan gerrymandering, America will realize that partisan gerrymandering—though detrimental to democratic norms and legislative accountability—is not responsible for many of the evils attributed to it. Partisan gerrymandering is merely a salamander that looks like a dragon in a certain light and might become one if allowed to grow.

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<https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=images&cd=&cad=rja&uact=8&ved=2ahUKEwiA4YCC1sbaAhUSVt8KHfb6C0MQjRx6BAgAEAU&url=https%3A%2F%2Fwww.rt.com%2Fusa%2F331611-nc-districts-racial-gerrymandering%2F&psig=AOvVaw20jIICRh-96VtlxDt1uiNM&ust=1524238801860661>

Map of Ohio's New 9<sup>th</sup> District, Page 9, Provided by MSNBC:

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