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Erratum

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THE "UNWELCOME OBLIGATION": WHY NEITHER STATE NOR FEDERAL COURTS SHOULD DRAW DISTRICT LINES

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In recent years, the judiciary's inability to hold state legislatures accountable for partisan gerrymanders has encouraged state governments to draw legislative and congressional district lines with high partisan advantage, thereby allowing a political party to acquire seats in numbers disproportionate to their popular support. In 2017, the U.S. Supreme Court granted certiorari on two partisan gerrymandering cases: Gill v. Whitford *and* Benisek v. Lamone. *Although the Court might articulate a judicially manageable standard to determine when a districting plan is politically fair, other methods to prevent federal courts from creating district maps that perpetuate partisan bias exist.*

This Note examines and critiques current debates regarding the judiciary's role in redistricting and adjudicating partisan gerrymandering claims. It argues that independent redistricting commissions—enacted through state voter initiatives or referendums—should replace federal courts' authority to develop redistricting plans.

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INTRODUCTION

On August 23, 2011, for the first time in forty years, Republicans passed a redistricting plan, Act 43, through Wisconsin's state legislature.[1] Wisconsin's recent state assembly elections illustrate the plan's partisan effects. In 2012, Republicans won sixty of the ninety-nine state assembly seats with over 48 percent of the popular vote.[2] In the 2014 and 2016 elections, Republicans maintained control: in 2014, the party won sixty-three seats with 52 percent of the vote,[3] and in 2016, Republicans won sixty-four seats with 53 percent of the vote.[4]

"Partisan bias in congressional district maps following the 2010 census tripled compared to the post-2000 districts."[5] Eighteen states have significant

1. 2011 Wis. Sess. Laws 708. Following the 2010 census, Republicans controlled both houses of the state legislature and the governorship. Whitford v. Gill, 218 F. Supp. 3d 837, 846 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161). In Wisconsin, the legislature drafts state senate and assembly districts following each decennial census. WIS. CONST. art. IV, § 3. Under the U.S. Constitution, states have the primary responsibility to reapportion their federal and state legislative districts. *See* U.S. CONST. art. I, § 2; *see also* Growe v. Emison, 507 U.S. 25, 34 (1993). In the majority of states, the state legislature draws the legislative district maps that are passed by a majority vote from each chamber of the state's legislature and must withstand the governor's veto power. ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA 3 (2016).

2. *Whitford*, 218 F. Supp. 3d at 853; *see also* Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. TIMES MAG. (Aug. 29, 2017), https://www.nytimes.com/2017/08/29/magazine/the-new-front-in-the-gerrymandering-wars-democracy-vs-math.html [https://perma.cc/UZ2N-JYQE].

3. *Whitford*, 218 F. Supp. 3d at 853.

4. Bazelon, *supra* note 2.

5. Anthony J. McGann et al., *We Have a Standard for Judging Partisan Gerrymandering. The Supreme Court Should Use It.*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/02/we-have-a-standard-for-judging-partisan-gerrymandering-the-supreme-court-should-use-it/ [https://perma.cc/32DE-BNL7]. The majority of studies found little or no partisan bias, defined as deviation from partisan symmetry, from the 1980s until the 2000s, at which time there was a slight bias toward the Republican Party (1.5 percent). MCGANN ET AL., *supra* note 1, at 17; *see also* Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514, 536 (1994) (defining partisan symmetry as the ability of each party to translate the same percentage of district vote into

partisan bias, such as a 20 percent Republican advantage when Democrats and Republicans obtain equal votes.[6] Partisan gains allow a political party to acquire seats in numbers disproportionate to the party's popular support. Indeed, "estimates suggest that gerrymandering before the 2012 elections cost Democrats between 20 and 41 seats in the House."[7]

This Note examines the extent of federal courts' involvement in redistricting and the ways in which the judiciary can limit partisan gerrymandering—drawing district lines to entrench the political party in power.[8] Part I provides an overview of redistricting and reapportionment. Part I.A discusses legislative districting: the constitutional and statutory standards for reapportionment and what constitutes a partisan gerrymander. Part I.B analyzes the rules authorizing courts' involvement in redistricting: when the state and federal judiciary may redraw district plans and when federal courts can adjudicate redistricting claims.

Part II explores current debates regarding the judiciary's role in redistricting and adjudicating partisan gerrymandering claims. Parts II.A and II.B analyze opposing positions: complete judicial removal and complete judicial involvement. Parts II.A.3 and II.B.3 discuss the ramifications of each approach on outstanding state and federal redistricting litigation. Part II.C analyzes the flaws of each approach and suggests that the federal judiciary create independent solutions for drawing electoral districts and adjudicating redistricting claims.

Finally, Part III proposes a resolution that confines judicial intervention to adjudicating constitutional apportionment and Voting Rights Act (VRA) challenges. This Note argues that independent redistricting commissions should replace federal courts' authority to reapportion districts if a state legislature fails to adopt a constitutional plan before the state's redistricting deadline. Direct legislation—state voter initiatives or referendums—can limit the conflict of interest present in legislative redistricting, such as representatives drawing the districts in which they will campaign.

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legislative seats). In 2012, Republicans won 234 out of 435 seats in the House of Representatives with 49.4 percent of the vote. MCGANN ET AL., *supra* note 1, at 1.

6. MCGANN ET AL., *supra* note 1, at 4 (finding that thirty-eight states have three or more House of Representatives districts, which is the number of districts in which partisan bias can occur). As of August 2017, redistricting litigation was ongoing in seven states, including three appeals to the U.S. Supreme Court. Michael Li et al., *The State of Redistricting Litigation (Late January 2018 Edition)*, BRENNAN CTR. JUST. (Feb. 2, 2018), https://www.brennancenter.org/blog/state-redistricting-litigation [https://perma.cc/L228-VN6E].

7. Bernard Grofman, *The Supreme Court Will Examine Partisan Gerrymandering in 2017. That Could Change the Voting Map.*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/31/the-supreme-court-will-examine-partisan-gerrymandering-in-2017-that-could-change-the-voting-map [https://perma.cc/T36U-VBGR]; *see also* Jeff Greenfield, *The Democrats' Gerrymandering Obsession*, Politico (Oct. 6, 2017), https://www.politico.com/magazine/story/2017/10/06/supreme-court-gerrymandering-democrats-obsession-215686 [https://perma.cc/XA7W-WQK4] (stating "Republicans enjoy [a net of] 16 to 17 extra seats in Congress under the maps of [2010] because of partisan bias" (first alteration in original)).

8. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (5–4 decision).

I. AT THE DRAWINGBOARD: RULES REGARDING REDISTRICTING IN THE UNITED STATES

A. Legislative Districting

This Part discusses how each state's legislature or supreme court, or federal district courts, reapportion federal congressional and state legislative districts in response to each decennial census. Part I.A.1 discusses the constitutional and statutory criteria that govern legislative districting. Part I.A.2 then analyzes how state legislatures create partisan gerrymanders.

1. Constitutional and Statutory Standards

The Constitution requires that Congress conduct a decennial national census to determine the population of the United States.[9] In turn, Congress reapportions the number of representatives each state sends to the House of Representatives.[10] After reapportionment, state legislatures must redraw district lines to maintain districts of equal populations to satisfy the Fourteenth Amendment's "one person, one vote" requirement.[11]

Legislative districting consists of both federal congressional and state legislative districts.[12] Although Article I of the Constitution regulates congressional districts and the Equal Protection Clause governs state districts, courts review both under the Fourteenth Amendment.[13] The Equal Protection Clause requires that states "make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable."[14] In *Reynolds v. Sims*,[15] the U.S. Supreme Court stated that the

9. U.S. CONST. art. I, § 2, cl. 3.

10. *See* Timothy P. Brennan, Note, *Cleaning Out the Augean Stables: Pennsylvania's Most Recent Redistricting and a Call to Clean Up This Messy Process*, 13 WIDENER L.J. 235, 238 (2003).

11. U.S. CONST. art. I, § 2, cl. 3; MCGANN ET AL., *supra* note 1, at 2. Although frequently used interchangeably, districting and redistricting refer to the process of drawing electoral district lines from which voters elect public officials, while apportionment and reapportionment are the "allocation of a finite number of representatives among a fixed number of pre-established areas." Davis v. Bandemer, 478 U.S. 109, 161 n.1 (1986) (Powell, J., concurring in part and dissenting in part) (citations omitted).

12. Redistricting also affects local jurisdictions, such as county commissions, city councils, and school boards. ACLU, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT REDISTRICTING BUT WERE AFRAID TO ASK 3–4 (2001), https://www.aclu.org/report/everything-you-always-wanted-know-about-redistricting-were-afraid-ask [https://perma.cc/Y2RA-VXW5]. This Note focuses only on federal congressional and state legislative districts.

13. Brennan, *supra* note 10, at 244 n.39, 257–58.

14. Reynolds v. Sims, 377 U.S. 533, 577 (1964); *see also* Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1306–07 (2016); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (construing Article I, § 2 of the Constitution to embody the "one person, one vote" principle for congressional districts). In *Harris*, the Court held that attacks on state-approved plans with a maximum population deviation under 10 percent will rarely succeed. *Harris*, 136 S. Ct. at 1306–07.

15. 377 U.S. 533 (1964).

failure to redistrict decennially is "constitutionally suspect."[16] However, states may constitutionally redistrict mid-decade.[17]

Traditional considerations that permit deviation from equally populated districts include, but are not limited to, "compactness, contiguity [of territory], and respect for political subdivisions or communities defined by actual shared interests."[18] The Supreme Court recently recognized the "competitive balance among political parties" and "compliance with section five of the [VRA]" as legitimate considerations that permit deviation from equipopulated districts.[19] State constitutions, elections codes, and statutes list additional districting criteria.[20] Delaware forbids its General Assembly from creating districts that unduly advantage a person or political party.[21] However, states including Maryland require that the legislature respect existing political boundaries when redistricting.[22] State legislatures also consider the federal VRA, specifically section 2, which prohibits legislatures from creating districts that intentionally or effectively dilute minority voters' ability to elect candidates of their choice.[23] Although the Constitution authorizes Congress to "make or alter such [state] Regulations,"[24] Congress has never directly intervened in the districting process.[25]

2. Partisan Gerrymanders

Besides adhering to constitutional and statutory criteria, state legislatures may draw districts with political implications. "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are

16. *Id.* at 584. However, the Court did not hold that decennial reapportionment is a constitutional requirement. *Id.* at 583. Subsequent cases assume that the release of decennial data invalidates existing districting plans if the data indicates a shift in population. *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 488 n.2 (2003) (collecting cases).

17. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 415 (2006) (5–4 decision).

18. Miller v. Johnson, 515 U.S. 900, 916 (1995); *see also* Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505, 534 (E.D. Va. 2015). Contiguity, compactness, and population equality are statutory requirements. *See* 2 U.S.C. § 2a(c) (2012) (codifying single-member house districts); Brennan, *supra* note 10, at 244–45.

19. *Harris*, 136 S. Ct. at 1306–07. The VRA protects the rights guaranteed by the Fifteenth Amendment by "provid[ing] minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination." NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, at 51 (2009).

20. 6 ANTIEAU ON LOCAL GOVERNMENT LAW § 86.04[2] (2d ed. 2017).

21. DEL. CODE ANN. tit. 29, § 804 (2017).

22. MD. CONST. art. III, § 4.

23. Voting Rights Act of 1965, 52 U.S.C. § 10301 (2012); *see also* Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs, 775 F.3d 1336, 1339 n.3 (11th Cir. 2015).

24. Vieth v. Jubelirer, 541 U.S. 267, 275 n.3 (2004) (5–4 decision) (quoting U.S. CONST. art. I, § 4); *see id.* at 362 (finding that "where a State has improperly gerrymandered congressional districts, Congress retains the power to revise the State's districting determinations"); Niel Franzese, Comment, *The Open Our Democracy Act: A Proposal for Effective Election Reform*, 48 CONN. L. REV. 263, 285 (2015).

25. Franzese, *supra* note 24, at 285.

inseparable from districting and apportionment."[26] As districting is inherently political, legal scholars and political scientists have focused on determining when districting for partisan advantage constitutes an antidemocratic, unconstitutional partisan gerrymander.

Political gerrymandering began shortly after the Constitution's ratification, which authorized state legislatures to redistrict electoral lines.[27] In 1788, Patrick Henry redrew a Virginia congressional district to unsuccessfully weaken James Madison's campaign.[28] The term gerrymandering arose in 1812 after Governor Elbridge Gerry signed into law a redistricting plan manipulated for partisan gain that included a salamander-shaped Massachusetts state senate district.[29]

Partisan or political gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power."[30] Although the Constitution prohibits malapportionment—creating districts with unequal populations—political parties may manipulate the shape of district lines for partisan advantage.[31]

The most common gerrymandering techniques, packing and cracking, distribute voters to benefit the controlling political party that draws district lines.[32] Packing occurs when drafters create a single district with a supermajority of the opposing party, while cracking is the opposite approach: separating single-party districts into several districts to mitigate the opposing party's ability to obtain a majority of districts.[33] Both techniques create "wasted" votes—votes for the winning candidate exceeding the amount needed to win or votes for the losing candidate—which reduce voters' ability

26. Gaffney v. Cummings, 412 U.S. 735, 753 (1973); *see also* Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505, 511 (2015) (holding that redistricting "shapes more than the abstract boundaries of electoral districts; it shapes the character, conduct, and culture of the representatives themselves").

27. *See* Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L.J. 312, 312 (2015).

28. Brent Kendall & Jess Bravin, *Gerrymandering, a Tradition as Old as the Republic, Faces a Reckoning*, WALL ST. J. (Sept. 29, 2017, 12:06 PM), https://www.wsj.com/articles/gerrymandering-a-tradition-as-old-as-the-republic-faces-a-reckoning-1506698255 [https://perma.cc/65B3-ASXA].

29. Michael Li & Alexis Farmer, *What Is Extreme Gerrymandering?*, BRENNAN CTR. JUST. (Sept. 5, 2017), https://www.brennancenter.org/blog/what-is-extreme-gerrymandering [https://perma.cc/6BHH-FVHN]; *see also* ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 16–19 (1907).

30. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015). Plaintiffs have standing to challenge their own district and the entire state map to equalize district populations and remedy vote dilution. Transcript of Oral Argument at 30–31, 36, Gill v. Whitford, 137 S. Ct. 2268 (2017) (No. 16-1161), 2017 WL 4517131 (documenting Chief Justice Roberts and Justice Kagan's questioning of Mr. Smith, counsel for appellees, regarding standing for political gerrymandering claims).

31. *See* U.S. CONST. art. I, § 2, cl. 3; *see also* MCGANN ET AL., *supra* note 1, at 17 (noting that malapportionment is not outlawed in U.S. Senate elections, where it is constitutionally required).

32. Bazelon, *supra* note 2.

33. Vieth v. Jubelirer, 541 U.S. 267, 286 n.7 (2004); *see also* Kendall & Bravin, *supra* note 28.

to translate votes into legislative seats.[34] Political scientists, such as Nicholas Stephanopoulos and Eric McGhee, calculate an election's wasted votes to determine if a districting plan provides a systemic advantage to a political party in translating district votes into legislative seats.[35] The net number of a party's wasted votes divided by the total number of district votes produces the "efficiency gap" (EG)—a partisan symmetry standard that Stephanopoulos and McGhee propose to measure when a district plan is unconstitutional.[36]

Drafters use redistricting software to create district plans that comply with state and federal requirements while maximizing partisan advantage.[37] Due to technological advances, drafters can create multiple compliant district plans to identify each plan's partisan effect. Redistricting software displays not only county and municipal boundaries but also demographic information such as minority group population and political affiliation.[38] Redistricting software can also depict the "partisan performance of a particular map under all likely electoral scenarios," which would enable the majority political party to entrench itself for the duration of the enacted plan.[39]

Although partisan gerrymandering is constitutional and occurs in numerous states, it conflicts with democratic principles as it prohibits voters from translating votes into party representation.[40] While wasted votes exist in every election, the net number of wasted votes compared to the total amount of district votes has increased since 2000.[41] High levels of wasted votes created by packed and cracked districts perpetuate a systemic advantage for a political party that does not exist when both parties waste a comparable number of votes.[42] Redistricting after the 2010 census was particularly consequential due to "partisan imbalance in control of state

34. Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161); *see id.* at 854 n.79 (noting that "wasted" is a term of art).

35. *See generally* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

36. *See* Eric Petry, *How the Efficiency Gap Works*, BRENNAN CTR. JUST. (2017), https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf [https://perma.cc/62EW-9APS]; *see also infra* note 182 and accompanying text.

37. *See* Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders." (citation omitted)).

38. *Whitford*, 218 F. Supp. 3d at 847–48; *see also* Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 333 (2014) (noting that drafters can input voter registration and prior election results into redistricting software to predict electoral outcomes under particular plans).

39. *Whitford*, 218 F. Supp. 3d at 892; *see id.* at 852 (stating that Republicans would "maintain a 54 seat majority while garnering only 48% of the statewide vote").

40. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015) (quoting Vieth v. Jubelirer, 541 U.S. 267, 292 (2004)).

41. *See supra* note 5 and accompanying text.

42. *See* Petry, *supra* note 36, at 2.

legislatures and governorships."[43] As of 2017, one political party controls the state's governorship and holds a majority in both the state senate and state house in thirty-four states.[44] In 2017, polling averages estimated that "54 percent of the [popular] vote wins Democrats 47 percent of the seats" in the U.S. House of Representatives.[45] This threat to voters' representational rights is of bipartisan concern as partisan gerrymanders disrupt the function of the House of Representatives: incumbents, shielded from political accountability, do not provide "constituent-first representation" or assist in forming bipartisan solutions.[46] Partisan gerrymandering disrupts politicians' traditional attention toward issues particular to their district, such as control of resources.[47] Politicians' focus on their district's identity encourages political competition; furthermore, maintaining prior political boundaries facilitates effective partnerships between representatives and local officials to pass legislation.[48]

B. Courts' Involvement in Redistricting

This Part provides an overview of judicial involvement in redistricting congressional and state legislative districts and in adjudicating constitutional challenges to the apportionment of congressional and state legislative districts. Part I.B.1 discusses the Supreme Court's interpretation of the Constitution, which affords state courts—in addition to the state legislatures—primary authority to apportion their congressional and state legislative districts. Part I.B.2 then analyzes the Supreme Court's mandate that federal courts ensure the placement of valid redistricting plans, focusing specifically on *Scott v. Germano*[49] and *Growe v. Emison*.[50] Part I.B.3 discusses the authority Congress provided to federal courts to adjudicate constitutional apportionment challenges.

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43. Bernard Grofman & German Feierherd, *The U.S. Could Be Free of Gerrymandering. Here's How Other Countries Do Redestricting.*, WASH. POST (Aug. 7, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/07/the-supreme-court-will-soon-consider-gerrymandering-heres-how-changes-in-redistricting-could-reduce-it/ [https://perma.cc/HX7R-BV2N].

44. *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [https://perma.cc/8CZK-7HDZ] (last visited Feb. 14, 2018).

45. Matthew Yglesias, *Democrats' 2018 Gerrymandering Problem Is Really Bad*, VOX (Aug. 24, 2017, 4:30 PM), https://www.vox.com/platform/amp/policy-and-politics/2017/8/24/16199564/democrats-2018-gerrymandering-problem [https://perma.cc/KFQ6-JEFL]. Notably, in presidential elections, Barack Obama won slightly less than 53 percent of the vote in 2009, and George H.W. Bush won just over 53 percent of the vote in 1988. *Id.*; *see also* MCGANN ET AL., *supra* note 1, at 4 (finding that if Democrats won 54 percent of the vote, they would have a fifty-fifty chance of regaining control of the House of Representatives).

46. Brief for Bipartisan Group of Current and Former Members of Congress as Amici Curiae in Support of Appellees at 4–5, 10–11, Gill v. Whitford, 137 S. Ct. 2268 (Sept. 5, 2017) (No. 16-1161), 2017 WL 4311097.

47. *Id.* at 6–8.

48. *Id.*

49. 381 U.S. 407 (1965).

50. 507 U.S. 25 (1993).

1. Redistricting by State Courts

The Constitution mandates that Congress reapportion the number of federal congressional seats each state receives after every decennial U.S. census.[51] Then, the Constitution authorizes state legislatures to redistrict congressional and state legislative district maps based on the census's population shifts.[52]

The Supreme Court requires "federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself."[53] In *Germano*, the Supreme Court articulated state courts' important role in redistricting: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."[54] Thus, the Supreme Court interpreted the Elections Clause as providing primary apportionment authority to "appropriate [state] agencies," including state supreme courts.[55]

In the 1990s, state courts actively developed redistricting plans after district courts granted declaratory or injunctive relief to plaintiffs in redistricting litigation.[56] Although no "specific provision of statutory or constitutional law clearly granted subject-matter jurisdiction to the courts, the general authority of courts to provide remedies for civil wrongs" allows state supreme courts to actively develop remedial redistricting plans.[57] The Full Faith and Credit Act requires that federal courts give state courts' redistricting plans the same effect as the state's federal court-drawn plans.[58] Unlike legislatively enacted plans, federal courts cannot modify the state court's redistricting plan except by certiorari from the Supreme Court on appeal from the state's highest court.[59]

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51. U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by [the U.S. population] . . . ."). The decennial U.S. census collects population data to reapportion the number of federal congressional districts each state receives. *See* 13 U.S.C. § 141(b) (2012).

52. U.S. CONST. art. I, § 4, cl. 1 ("The . . . Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."). Although the text of Article I, Section 4, Clause 1 of the Constitution only grants authority to the state legislature to apportion congressional districts, the Supreme Court has held that state and federal courts have jurisdiction to develop legislative and congressional redistricting plans where the legislature fails to act. *See Growe*, 507 U.S. at 34 (noting that "*Germano* prefers *both* state branches to federal courts as agents of apportionment"); Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986); *Germano*, 381 U.S. at 409.

53. *Growe*, 507 U.S. at 33.

54. *Germano*, 381 U.S. at 409.

55. *Id.* In *Germano*, the Supreme Court remanded the case to the Northern District of Illinois to fix a reasonable time in which the state agencies, including the state judiciary, "may validly redistrict the Illinois State Senate" provided that the agency creates the plan so that it is utilized in the next election. *Id.*

56. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 19, at 130.

57. *Id.* at 131.

58. 28 U.S.C. § 1738 (2012).

59. Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986).

2. Redistricting by Federal Courts

In *Growe*, the Supreme Court authorized federal district courts not only to require state agencies to implement a constitutionally valid reapportionment plan before state redistricting deadlines but also to develop redistricting plans in limited circumstances.[60] Federal district courts, however, cannot affirmatively obstruct state reapportionment nor permit federal litigation to impede state reapportionment.[61] In *Growe*, the Supreme Court affirmed the holding in *Germano*, which requires federal district courts to defer to state judicial or legislative redistricting absent evidence that either branch will fail to produce a constitutional redistricting plan before the state's redistricting deadline.[62] However, in reapportionment litigation, federal district courts maintain jurisdiction over state legislative redistricting efforts until the adoption of a valid reapportionment plan.[63] For example, as the legislature cures districting violations, the district court may set deadlines for legislative action, allow state court review of proposed plans, or appoint a special master to create a contingent plan.[64] If the state's agencies do not implement a timely redistricting plan that conforms to federal law, the district court can either instruct the state legislature to remedy the existing legal violations or develop and implement its own constitutional plan before the next election.[65]

3. Adjudication by Courts

Congress passed statutes affording three-judge district courts jurisdiction to adjudicate the constitutionality of apportionment plans with direct appeal to the Supreme Court.[66] In 1910, Congress created such courts, each containing at least one federal appellate judge, for "parties seeking relief against state officials."[67] The reason for creating a three-judge court was to "encourage greater deliberation . . . before a grant of injunctive relief, to lend greater dignity to the proceedings, and to provide expedited Supreme Court

60. Growe v. Emison, 507 U.S. 25, 34 (1993).

61. *Id.* at 36.

62. *Id. Compare* Benavidez v. Eu, 34 F.3d 825 (9th Cir. 1994) (finding that the district court's deferral abstention until the conclusion of state proceedings was proper but that the district failed to retain jurisdiction), *with* Terrazas v. Slagle, 789 F. Supp. 828 (W.D. Tex. 1991) (finding that the district court's denial of defendants' request to stay court's judgment that the elections be held pursuant to interim court-drawn plans was proper to avoid postponing primary elections), *aff'd*, 506 U.S. 801 (1992).

63. *Growe*, 507 U.S. at 29, 31. A federal district court may establish a deadline for the state court to act before the federal court redistricts. *Id.* at 34.

64. *Id.* at 29.

65. Scott v. Germano, 381 U.S. 407, 409–10 (1965); *see* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 19, at 155–60 (listing deadlines for state legislatures to redistrict). Alaska requires that the commission report a plan ninety days after receiving official census data, whereas Arizona does not set a specific date by which the legislature must redistrict. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 19, at 155.

66. 28 U.S.C. § 1253 (2012).

67. Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 84 (1996); *see, e.g.*, 28 U.S.C. § 2284 (2012).

correction if necessary."[68] In a 1976 amendment, Congress narrowed the authority of three-judge district courts to actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."[69] As amended, § 2284(a) also indirectly allows three-judge district courts to adjudicate VRA claims.[70]

In the 1960s, the Supreme Court formed constitutional requirements for congressional and state legislative district maps. In *Baker v. Carr*,[71] the Supreme Court declared that malapportionment challenges to legislative district maps were justiciable under the Equal Protection Clause, where vote dilution based on where voters lived failed to provide voters "equal protection of the laws."[72] In addition to recognizing a malapportionment cause of action, Justice William Brennan articulated six factors by which courts could determine whether a case presented a nonjusticiable political question.[73] In partisan gerrymandering cases, "a lack of judicially discoverable and manageable standards" is the primary reason why the Supreme Court has never declared a district plan to be an unconstitutional partisan gerrymander.[74]

After *Baker*, subsequent malapportionment challenges limited the extent to which state legislatures could draw district maps for partisan advantage.[75] Such limitations prompted the "reapportionment revolution."[76] In *Reynolds* and *Wesberry v. Sanders*,[77] the Supreme Court constitutionalized the principle of "one person, one vote";[78] state governments must equalize populations across state legislative and federal congressional districts to

68. Solimine, *supra* note 67, at 84. Congress passed this legislation to curtail individual federal judges granting injunctions against state governments. *Id.*

69. 28 U.S.C. § 2284(a).

70. Solimine, *supra* note 67, at 97. Although § 2284(a) does not reference the VRA, the Senate Judiciary Committee report noted that three-judge courts should adjudicate VRA claims. *Id.* at 95–97 ("[T]hree-judge courts, virtually without discussion, apparently have exercised a form of pendent jurisdiction to adjudicate Voting Rights Act claims concurrently with the constitutional (i.e., apportionment) claim."); *see also* Cooper v. Harris, 137 S. Ct. 1455, 1464 n.2 (2017) (noting that three-judge district courts determine the constitutionality of congressional districts).

71. 369 U.S. 186 (1962).

72. *Id.* at 188.

73. *Id.* at 217.

74. *Id.* The remaining factors are (1) "[T]extually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "[T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (3) "[T]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (4) "[A]n unusual need for unquestioning adherence to a political decision already made"; and (5) "[T]he potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

75. MCGANN ET AL., *supra* note 1, at 22–23.

76. *Id.* at 22; Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 755 (2004).

77. 376 U.S. 1 (1964).

78. MCGANN ET AL., *supra* note 1, at 2. While the equal population requirement for congressional districts derives from Article I, Section 2 of the Constitution, the Equal Protection Clause of the Fourteenth Amendment requires states to create legislative districts of equal population. *Id.* at 2; *see also* Reynolds v. Sims, 377 U.S. 533, 577 (1964).

satisfy Article I of the Constitution and the Equal Protection Clause.[79] In *Reynolds*, the Supreme Court required state governments to redistrict after each decennial census to create districts of roughly equal populations.[80]

In *Davis v. Bandemer*,[81] the Supreme Court held that the one-person, one-vote principle applies to partisan gerrymandering; partisan gerrymandering claims are justiciable under the Equal Protection Clause.[82] While the Supreme Court in *Bandemer* stated that judges have a duty to review redistricting claims under the Equal Protection Clause, the Justices disagreed on a method to identify unconstitutional partisan gerrymandering.[83] In her concurrence, Justice Sandra Day O'Connor contended that partisan gerrymandering claims present a nonjusticiable political question because the Equal Protection Clause lacks "judicially discoverable and manageable standards"[84] for resolution and the Framers of the Fourteenth Amendment did not intend to provide political parties with an equal share of power.[85]

Despite the Supreme Court's position that "an equal protection challenge to a political gerrymander presents a justiciable case or controversy,"[86] the Court has never invalidated an electoral district for partisan gerrymandering.[87] Thus, although the Supreme Court recognized partisan gerrymandering as a cause of action in the 1980s, it has not since held a district plan unconstitutional on that ground[88] as a majority of the Court has yet to agree upon a "manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[89] In *League of United Latin American Citizens v. Perry* (*LULAC*),[90] Justice Kennedy,

79. *See* Cox, *supra* note 76, at 757.

80. *Reynolds*, 377 U.S. at 583; *see also* Cox, *supra* note 76, at 757–78, 758 n.36 (finding that the *Reynolds* court did not "lay down a rule that states must redistrict immediately following each census," but reapportionment with less frequency "would raise a presumption of unconstitutionality").

81. 478 U.S. 109 (1986).

82. *Id.* at 110, 115, 123–27 (noting that plaintiffs who allege that the state legislature's district plan violated their right, as Democrats or Republicans, to equal protection must prove both discriminatory intent and discriminatory effect). Justice Sandra Day O'Connor, who concurred in the Court's decision, argued that granting justiciability to political gerrymandering claims would cause judicial intervention in the political process, when the Fourteenth Amendment does not grant a right of proportional representation—receiving the same percentage of seats as the percentage of votes received—to political parties. *Id.* at 147 (O'Connor, J., concurring); *see* Transcript of Oral Argument, *supra* note 30, at 41 (quoting Chief Justice Roberts as saying that proportional representation "has never been accepted as a political principle in the history of this country").

83. *Bandemer*, 478 U.S. at 185 n.25.

84. *Id.* at 148 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

85. *Id.* at 147.

86. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 413–14 (2006) (citing *Bandemer*, 478 U.S. at 118–27).

87. Adam Liptak, *Justices to Hear Major Challenge to Partisan Gerrymandering*, N.Y. TIMES (June 19, 2017), https://www.nytimes.com/2017/06/19/us/politics/justices-to-hear-major-challenge-to-partisan-gerrymandering.html [https://perma.cc/6JLR-T4M7].

88. Stephanopoulos & McGhee, *supra* note 35, at 831. In *LULAC*, the Court upheld *Vieth* and concluded that Texas's middecade redistricting did not consist of an unconstitutional partisan gerrymander. *LULAC*, 548 U.S. at 414, 423.

89. *LULAC*, 548 U.S. at 414.

90. 548 U.S. 399 (2006).

writing for the majority, upheld *Vieth v. Jubelirer*[91] but refused to revisit the plurality's position on justiciability.[92] Until a majority of the Supreme Court agrees upon a standard to measure political fairness, partisan gerrymandering will remain a nonjusticiable political question. Left to the political process and without judicial scrutiny, state legislatures will continue to create partisan gerrymanders.

II. CURRENT DEBATE OVER THE ROLE OF FEDERAL COURTS IN REDISTRICTING AND ADJUDICATING REDISTRICTING CLAIMS

Due to the detrimental effects of partisan gerrymandering, political scientists such as Nicholas Stephanopoulos, Eric McGhee, Andrew Gelman, and Gary King formulated quantitative standards to define and measure political fairness in redistricting plans.[93] These scholars argue that removing partisan gerrymandering claims from the political question doctrine will restrict partisan gerrymandering, as redistricting plans would receive judicial scrutiny, and establish a political threshold to assist drafters.[94] Federal courts' ability to adjudicate such claims, however, will not limit state legislatures from implementing partisan redistricting plans.[95] After the 2010 census, plaintiffs in *Perez v. Abbott*,[96] registered voters in two Texas counties and a member of the Texas legislature, successfully proved gerrymandering in several federal court-drawn maps.[97] This Part evaluates whether federal

91. 541 U.S. 267 (2004).

92. *LULAC*, 548 U.S. at 414.

93. *See* LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, EXTREME MAPS 4 (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf [https://perma.cc/2HY8-LPH9] (assessing partisan bias and gerrymandering through three quantitative tests: the efficiency gap, the seats-to-votes curve, and the mean-median district vote share difference); Gelman & King, *supra* note 5, at 536; Stephanopoulos & McGhee, *supra* note 35, at 831. King proposed the symmetry standard as a measure of fairness in *LULAC*, but Justice Kennedy, writing for the majority, rejected the standard due to its reliance on hypothetical causes for asymmetry and its failure to determine how much partisan advantage is unconstitutional. *LULAC*, 548 U.S. at 420.

94. *See* Stephanopoulos & McGhee, *supra* note 35, at 886–87.

95. If the Supreme Court holds partisan gerrymandering claims to be justiciable, then it likely will impose a limitation on justiciability as these cases are the Court's mandatory jurisdiction. If a party appeals the judgment of the three-judge panel, then the Supreme Court must decide the case on the merits. 28 U.S.C. § 1253 (2012); *see also* Transcript of Oral Argument, *supra* note 30, at 37 (noting that Chief Justice Roberts stated that political gerrymandering cases fall within the Court's mandatory jurisdiction).

96. No. SA-11-CV-360, 2017 WL 3495922 (W.D. Tex. Aug. 15, 2017).

97. *Perez*, 2017 WL 3495922, at *44–45; *see also* Second Amended Complaint at 1, *Perez*, 2017 WL 3495922 (No. SA-11-CV-360). On appeal, the Supreme Court consolidated and granted hearings on cases numbered 17-586 and 17-626, dismissed cases numbered 17-680 and 17-780, and granted the application for stay pending appeal on case 17A245. *See* Morris v. Texas, No. 17-780 (U.S. Jan. 16, 2018) (mem.) (dismissing appeal); Tex. Democratic Party v. Abbott, No. 17-680 (U.S. Jan. 16, 2018) (mem.) (dismissing appeal); Abbott v. Perez, No. 17-586 (U.S. Jan. 12, 2018) (mem.) (granting hearing); Abbott v. Perez, No. 17-626 (U.S. Jan. 12, 2018) (mem.) (granting hearing); Abbott v. Perez, No. 17A245 (U.S. Sept. 12, 2017) (mem.) (granting application for stay pending appeal). In *Perez*, a three-judge panel in San Antonio created new district maps for temporary use for the 2012 election as Texas's 2011 maps were in litigation on charges of racial gerrymandering. *Perez*, 2017 WL 3495922, at *2–4. Racial gerrymandering is "the deliberate and arbitrary distortion of district

courts should have the authority to create redistricting plans and to adjudicate partisan gerrymandering claims. This Part also examines the effect of each approach on current redistricting litigation. To protect voters' representational rights, the judiciary should alter its current approach to redistricting.

Part II.A outlines the common argument that federal district courts should not have the authority to redistrict in limited circumstances given that they cannot adjudicate partisan gerrymandering claims, including claims that court-drawn maps are unconstitutional partisan gerrymanders. Part II.B then presents the opposing argument: federal courts should adjudicate partisan gerrymandering claims because the Supreme Court granted federal courts the authority to redistrict electoral maps in certain circumstances.

A. Judicial Removal from Redistricting

This Part sets forth the following positions: first, federal courts should not redistrict electoral maps due to the legislative nature of redistricting, the judiciary's lack of political authority, and the absence of judicial review; second, federal courts should continue to declare partisan gerrymandering claims a nonjusticiable political question and refrain from proposing their own standard to maintain judicial integrity. This Part also examines the effects of this approach.

1. Federal Courts Should Not Redistrict

The "one-person, one-vote" revolution not only created a new constitutional redistricting standard but also emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination."[98] Although the Supreme Court authorized federal courts to redistrict in certain circumstances, the Court referred to the judiciary's authority as an "unwelcome obligation of performing in the legislature's stead."[99]

Redistricting is "one of the most significant acts a State can perform to ensure citizen participation in republican self-governance."[100] When redistricting, federal courts must address "'hard remedial problems' in minimizing friction between their remedies and legitimate state policies."[101] The federal judiciary did not provide a "uniform formula" or "rigid mathematical standard[]" to assist courts in striking such a balance.[102]

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boundaries . . . for [racial] purposes." Shaw v. Reno, 509 U.S. 630, 640 (1993) (alterations in original) (quoting Davis v. Bandemer, 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part)). In a racial gerrymandering claim, "the injury has to be localized to the place where that district is." Transcript of Oral Argument, *supra* note 30, at 31 (quoting counsel for appellees' description of a *Shaw v. Reno* claim).

98. Reynolds v. Sims, 377 U.S. 533, 586 (1964).

99. Connor v. Finch, 431 U.S. 407, 415 (1977); *see also* League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 415 (2006).

100. *LULAC*, 548 U.S. at 416.

101. *Connor*, 431 U.S. at 414 (quoting Taylor v. McKeithen, 407 U.S. 191, 194 (1972)).

102. Roman v. Sincock, 377 U.S. 695, 710 (1964).

Although the Supreme Court provided general guidance on how to create legislative reapportionment plans, the judiciary lacks the "political authoritativeness" of state legislatures.[103] Federal courts do not possess a "distinctive mandate" to resolve conflicts between state apportionment policies and constitutional and statutory standards.[104] Rather, federal courts must form a remedial plan that is not arbitrary or discriminatory.[105]

The Supreme Court not only discourages federal courts from redistricting but also prefers legislatively enacted plans to court-drawn maps.[106] The judiciary maintains its integrity by favoring legislative plans as they represent the will of voters rather than that of life-tenured district court judges. Furthermore, democratic legitimacy requires that elected representatives conduct legislative functions. In contrast, district judges who create voting districts operate outside of the democratic process.[107] Federal district courts may implement court-drawn reapportionment plans pending later legislative action.[108] After the adoption of a court-drawn plan, state legislatures may replace the court's remedial measure by enacting their own constitutionally valid design.[109] When a legislature seeks to replace a court-drawn plan, "no presumption of impropriety [attaches] to the legislative decision to act."[110] Although courts prefer legislatively enacted plans to court-remedial measures, the judiciary upholds its enacted plan if the legislature seeks to adopt "improper criteria for districting determinations."[111]

Furthermore, state legislatures may draw district plans with some partisan bias to benefit the political party in control and to reflect the state's political demographics as long as such districts conform to constitutional and statutory standards. Representatives seek to continue drafting voting districts given their familiarity with existing political boundaries and relationships with local officials.[112] Courts, by contrast, are neutral arbiters and cannot develop a district plan with partisan bias. Yet, courts inadvertently create racial and

103. *Connor*, 431 U.S. at 414–15; *see also LULAC*, 548 U.S. at 415.

104. *Connor*, 431 U.S. at 415.

105. *Id.*

106. *LULAC*, 548 U.S. at 416 ("Congress is the federal body explicitly given constitutional power over elections. . . . A lawful, legislatively enacted plan should be preferable to one drawn by the courts.").

107. Contrary to elections holding representatives accountable, the judiciary can redistrict without political or judicial scrutiny as long as court-drawn maps satisfy constitutional and statutory requirements and partisan gerrymandering claims remain a nonjusticiable political question. *See* Upham v. Seamon, 456 U.S. 37, 41–42 (1982).

108. *LULAC*, 548 U.S. at 415.

109. *Id.* at 416.

110. *Id.*

111. *Id.* Beyond preference, federal courts hold court-drawn plans to stricter standards than legislatively enacted maps. *See* Connor v. Finch, 431 U.S. 407, 407 (1977) ("[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must . . . ordinarily achieve the goal of population equality with little more than *de minimis* variation." (first alteration in original) (quoting Chapman v. Meier, 420 U.S. 1, 26–27 (1975))).

112. Brief for Bipartisan Group of Current and Former Members of Congress as Amici Curiae in Support of Appellees at 6–8, 10–11, Gill v. Whitford, 137 S. Ct. 2268 (Sept. 5, 2017) (No. 16-1161), 2017 WL 4311097.

partisan gerrymanders when applying constitutional and statutory standards because courts are not required to consider the political effects of constitutional plans.

In *Perez*, a three-judge panel in the Western District of Texas enacted interim congressional and state legislative redistricting plans for the 2012 election after registered voters in Bexar and Harris Counties and a member of the Texas legislature filed lawsuits alleging that Texas's 2011 redistricting plans violated the Equal Protection Clause and section two of the VRA.[113] After the Texas legislature enacted the court's interim plans without change in 2013, registered voters alleged that these maps maintained discriminatory features of the 2011 plans.[114] In 2017, a three-judge panel of the Western District of Texas held that the Texas legislature's 2013 enactment of the court's 2012 interim plans constituted racial gerrymandering because the legislature did not eliminate from the 2012 plans the racially discriminatory features found in the 2011 plans.[115]

The federal court's involvement in *Perez* demonstrates the consequences of judicial participation in implementing interim plans. Although the court informed the state legislature that the interim plans were not final determinations of the merits of the plaintiff's claims,[116] the potential consequences of state legislatures enacting court-drawn plans without change imposes a higher duty upon the judiciary to create constitutional plans.

2. Partisan Gerrymandering Claims Should Remain a Political Question

While the judiciary has authority to adjudicate partisan gerrymandering claims, federal courts' ability to determine whether districts plans are politically fair is also an "unwelcome obligation of performing in the legislature's stead" because the legislature has primary authority over legislative reapportionment, including partisan advantage.[117] The Supreme Court could make a political—rather than legal—determination if it proposed a threshold to determine constitutionality. Thus, partisan gerrymandering claims should remain nonjusticiable because the Court has not approved of "judicially discernible and manageable standards [to adjudicate]" these

113. Perez v. Abbott, No. SA-11-CV-360, 2017 WL 3495922, at *2 (W.D. Tex. Aug. 15, 2017). In 2011, Texas was subject to the preclearance requirements of section five of the VRA, and the United States District Court of District of Columbia had not precleared the state's plans in time for the upcoming election. *Id.* at *2; *see also* Second Amended Complaint at 1, *Perez*, 2017 WL 3495922 (No. SA-11-CV-360).

114. *Perez*, 2017 WL 3495922, at *2–4. The court emphasized that their "interim map[s] [were] a result of preliminary determinations" and "not a final ruling on the merits of any claims." *Id.* at *2.

115. *Id.* at *44.

116. *Id.* at *2.

117. Connor v. Finch, 431 U.S. 407, 415 (1977); *see also* League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 415 (2006).

claims.[118] The Supreme Court has never declared a partisan gerrymander unconstitutional.[119]

After *Bandemer*, no case articulated a standard for federal courts to determine whether a redistricting plan was too political.[120] Eighteen years after the Court held in *Bandemer* that political gerrymandering claims are justiciable, a plurality of the Court in *Vieth* concluded that partisan gerrymandering claims are nonjusticiable political questions because no "judicially discernible and manageable standards" existed to adjudicate whether a district map containing partisan advantage unconstitutionally undermined the minority party.[121] The plurality rejected the *Bandemer* standards for constitutionality because partisan gerrymandering required a standard different from racial gerrymandering, as the *Bandemer* standards were unmanageable or contrary to precedent.[122] Rather than suggesting an alternative standard, the plurality adopted Justice O'Connor's reasoning in *Bandemer*.[123] By refusing to intervene, the plurality permitted the political process and state governments to resolve partisan gerrymandering.

In his concurrence, Justice Kennedy argued that until courts have a manageable and nonpartisan standard to define fair districting, courts' adjudication of partisan gerrymandering claims "would risk assuming political, not legal, responsibility" for the districting process.[124] Justice Kennedy, however, left open the possibility that subsequent plaintiffs might

118. Vieth v. Jubelirer, 541 U.S. 267, 281 (2004); *see also LULAC*, 548 U.S. at 404 (concluding that plaintiffs must "show a burden, as measured by a reliable standard, on [their] representational rights" to successfully identify unconstitutional partisan gerrymandering). Justice Breyer suggests standards manageable by courts as opposed to social scientists or computer experts. Transcript of Oral Argument, *supra* note 30, at 11–13.

119. Liptak, *supra* note 87. The Supreme Court has declared district maps designed to disenfranchise minority voters to be unconstitutional. Kendall & Bravin, *supra* note 28.

120. *Vieth*, 541 U.S. at 279. Two years later, in *LULAC*, Justice Kennedy stated that Texas's middecade redistricting was not "sufficiently suspect to give shape to a reliable standard." *LULAC*, 548 U.S. at 423.

121. *Vieth*, 541 U.S. at 281. In *Vieth*, the plurality rejected plaintiff's proportional-representation test for fair districting. *Id.* at 287–89. Justice Antonin Scalia stated that the Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups." *Id.* at 288. Furthermore, the plurality stated that proportional representation is not judicially manageable as the standard does not define "majority status." *Id.*; *see also* Cox v. Larios, 542 U.S. 947, 949–50 (2004) (Stevens, J., concurring) (stating that "the equal-population principle remains the only clear limitation on improper districting practices" post-*Vieth*).

122. *Vieth*, 541 U.S. at 283, 287–90 (noting that lower courts struggled to determine unconstitutional discriminatory effect). To limit judicial discretion, the plurality in *Vieth* required that plaintiffs provide a definition of fairness and a standard to measure fairness in redistricting plans. *See* Transcript of Oral Argument, *supra* note 30, at 44–45.

123. *Vieth*, 541 U.S. at 307 (Kennedy J., concurring) (noting that the Court requires a model, which shows that a party applied political classifications "in an invidious manner or in a way unrelated to any legitimate legislative objective"). In her concurrence in *Bandemer*, Justice O'Connor stated that drawing district plans through the legislative process "is a critical and traditional part of politics [that] . . . foster[s] active participation in the political parties. . . . [C]hallenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term." Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

124. *Vieth*, 541 U.S. at 307.

find a suitable standard to determine when redistricting plans burden political groups' representational rights under the First and Fourteenth Amendments.[125]

Although the plurality did not technically overrule the justiciability of political gerrymandering claims, the plurality's opinion and Justice Kennedy's concurrence signal that a majority of the Court was unwilling "to overturn districting plans on grounds of partisan gerrymandering."[126]

The Supreme Court requires a manageable standard to intervene on the ground of partisan gerrymandering to maintain the Court's integrity. A concrete standard discredits public belief that the Court reached its decision based on each Justice's political appointment.[127] A manageable standard would limit judicial intervention to only extreme cases, which would ensure the stability of most district plans and prevent the judiciary from entering "this political thicket."[128] Justice Breyer's dissent in *Vieth*, however, notes that "pure politics" can help "secure constitutionally important democratic objectives."[129] Political accountability is one advantage of partisan-motivated districting.[130] Thus, a manageable standard must distinguish between justified and unjustified uses of political factors.[131]

Since the Court rendered its decision in *Vieth*, scholars have proposed quantitative tests to measure fair districting.[132] The three-judge panel in *Whitford v. Gill*[133] relied upon the efficiency gap in determining that Wisconsin's state assembly map was an unconstitutional partisan gerrymander.[134] The EG aggregates the results of a redistricting plan's packing and cracking into one number: the difference between a parties'

125. *Id.* at 314 ("First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights."). Under the First Amendment, plaintiffs could allege that, although they live in a district represented by their party, the state legislature's district plan violates their right of representation and association with other state party supporters by inhibiting their ability to campaign for a party majority in the state assembly. Transcript of Oral Argument, *supra* note 30, at 30–31, 35 ("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.").

126. MCGANN ET AL., *supra* note 1, at 2.

127. *See* Transcript of Oral Argument, *supra* note 30, at 42 (quoting Justice Alito as saying that Chief Justice Roberts questioned whether the efficiency gap's 7 percent threshold was too arbitrary to garner public respect).

128. Colegrove v. Green, 328 U.S. 549, 556 (1946).

129. *Vieth*, 541 U.S. at 355 (Breyer, J., dissenting).

130. *See* Transcript of Oral Argument, *supra* note 30, at 28–29 (quoting Ms. Murphy, counsel for amici curiae, noting that Justice Breyer's dissent in *Vieth* discussed the benefits of districting for partisan advantage).

131. *See Vieth*, 541 U.S. at 360 (noting that "maintaining relatively stable legislatures in which a minority party retains significant representation" is a justified use of political factors to draw district boundaries).

132. *See* ROYDEN & LI, *supra* note 93, at 4; *see also* Stephanopoulos & McGhee, *supra* note 35, at 831.

133. 218 F. Supp. 3d 837 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

134. *Id.* at 898 (holding that the plaintiffs met their burden, measured by the efficiency gap, on their representational rights claim).

wasted votes in an election.[135] Although the Supreme Court might recognize the EG as a manageable standard, the Court should affirm its position on justiciability until additional scholarship sufficiently tests the EG.[136] Compliance with traditional districting factors, such as VRA requirements, protection of incumbents, and political geography, can generate a high EG apart from intentional partisan gerrymandering.[137]

Furthermore, even if the EG can provide a definition of fair partisan districting and a standard to measure it, the EG is not a *reliable* measure to predict the amount of partisan advantage a particular redistricting plan will achieve.[138] The EG relies on election data; it cannot assist state legislatures in identifying districting measures that constitute partisan gerrymandering.[139] Case law on the issue indicates that "mid-decade redistricting, incumbent protection, unproportional representation in a single election and pairing minority party incumbents" do not, by themselves, constitute partisan gerrymandering.[140] The 7 percent threshold recommended by Professor Simon Jackman, an expert witness for the plaintiffs in *Whitford*, only identifies when a map is too political after an election; it does not identify which districting measures caused the high EG.[141]

Advocates who believe that the Court should not adjudicate partisan gerrymandering claims might return to Justice Brennan's six-factor test to determine whether a case presented a political question and argue that partisan gerrymandering claims fall under two additional factors: (1) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" and (2) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[142]

Regarding the first factor, the Court could declare that partisan gerrymandering claims remain a political question until Congress determines how much partisan bias states may include or consider when developing redistricting plans. As to the second factor, if the Court enacted its own

135. *Id.* at 861 ("[A]n EG of 7% in favor of one party in the first election year of a plan almost certainly means that the EG will favor that same party in each subsequent election year under that plan.").

136. *See* Transcript of Oral Argument, *supra* note 30, at 44 (noting that Justice Alito stated that the efficiency gap does not address how to factor uncontested elections into its analysis).

137. *Id.* at 53–54 (quoting Justice Alito as saying that "factors that have nothing to do with gerrymandering" can cause a high EG).

138. *See* Christopher P. Chambers et al., *Flaws in the Efficiency Gap*, 33 J.L. & POL. 1, 33 (2017) (noting the efficiency gap's flaws, including limits to political competition and harm to the major political party that did not draft the districting plans).

139. Unlike the Supreme Court's approach to racial gerrymandering, where "race for its own sake, and not other districting principles, [cannot be the] legislature's dominant and controlling rationale in drawing its district lines," the Court has not held that partisan advantage cannot be the legislature's dominant and controlling rationale for drawing its district lines. *See* Miller v. Johnson, 515 U.S. 900, 913 (1995).

140. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 19, at 126.

141. Whitford v. Gill, 218 F. Supp. 3d 837, 860–61 (W.D. Wis. 2016) (finding that a high EG, 7 percent, "in the first year of a redistricting plan likely means that the EG will remain high for the lifetime of the plan").

142. Baker v. Carr, 369 U.S. 186, 217 (1962).

standard that determined fair districting, it could be argued that the Court lacked respect for Congress, which has constitutional authority to regulate redistricting.

3. Effects of This Approach

If the Supreme Court maintains its current position—that partisan gerrymandering is a justiciable cause of action which remains a nonjusticiable political question until scholars present a judicially manageable standard—then the Court likely will not propose its own standard so as to maintain the judiciary's legitimacy and integrity. If the Court proposes its own standard to determine political fairness, such as a threshold proposed by the efficiency gap, then critics could argue that the Court has constitutionalized an arbitrary political determination by which state legislatures can justifiably deviate from a number-based threshold. If the Court adopts a number-based standard, then it needs to articulate how the standard accounts for partisan bias resulting from compliance with VRA requirements and limits judicial intervention: ensuring the stability of most district plans.

As the Supreme Court awaits a judicially manageable standard to determine when partisan advantage is unconstitutional, state legislatures can implement redistricting plans for extreme partisan gain without judicial scrutiny as long as the plan meets the one-person, one-vote and the VRA requirements before the state's redistricting deadlines.[143] If federal and state courts could not create remedial redistricting plans, then there would be no judicial check on partisan gerrymandering. State legislatures could develop district plans with extreme partisan advantage without judicial involvement before or after the plan's enactment. District plans with extreme partisan bias would remain in effect until either the state legislature conducted middecade redistricting or until the following decennial census.

Although judicial authority to redistrict is an "unwelcome obligation," it safeguards voters' representational rights.[144] If a state legislature failed to implement a constitutional plan before the state's redistricting deadline and the judiciary could not intervene, then either the election would not occur or voters would elect public officials under prior districting plans, resulting in a violation of the one-person, one-vote requirement.[145] Such maps would also violate section two of the VRA as old district maps could effectively dilute minority voters' "ability to elect candidates of their choice."[146] Although the

143. J. Gerald Herbert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 543, 551 (2011).

144. Connor v. Finch, 431 U.S. 407, 415 (1977).

145. 2 U.S.C. § 2a(c) (2012) (listing procedures to elect representatives when a state has not redistricted after any apportionment).

146. Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs, 775 F.3d 1336, 1339 & n.3 (11th Cir. 2015). Section 2 of the VRA prohibits state or political subdivisions from implementing voting qualifications, standards, practices, or procedures that deny or abridge the right of any U.S. citizen "to vote on account of race or color." Voting Rights Act of 1965, 52 U.S.C. § 10301 (2012).

federal judiciary would remain active in adjudicating claims of racial gerrymandering, the state legislature's remedial plan, complying with section two of the VRA, could lawfully consist of partisan gerrymanders.

If partisan gerrymandering continues, then voter turnout will likely decline: when citizens believe that their state's redistricting plan predetermines election results, they are less likely to vote.[147] Competitive races have higher voter turnout.[148] As partisan gerrymandering continues, voter turnout will decrease in states with high partisan advantage as individual voters will believe that gerrymandering eliminates their ability to translate votes into legislative seats.[149] Furthermore, in gerrymandered states, political opponents may not challenge the incumbent as the opponent would need to win more than the majority.[150] Although the Court believes that democracy should resolve partisan gerrymandering, its unwillingness to declare districting plans unconstitutional is antidemocratic, as it allows state legislatures to manipulate the composition of federal and state legislatures for ten years.[151]

B. Judicial Involvement in Redistricting

This Part discusses the following positions, which contrast with the legislature's role discussed in Part II.A. First, district courts should continue to redistrict electoral maps to safeguard voters' representational rights because federal courts have regulated legislative and congressional district maps since *Baker*. Second, federal courts should adjudicate partisan gerrymandering claims because the plaintiffs in *Whitford* and *Benisek* proposed judicially manageable standards to determine fair districting. This Part also examines the effects of this approach.

1. Federal Courts Should Continue to Redistrict

Advocates who support the federal judiciary's involvement in redistricting argue that federal courts should maintain jurisdiction over state legislative redistricting efforts until a state agency or a federal court adopts a valid reapportionment plan.[152] Although Congress has constitutional authority to

147. *See* Robert Colton, Note, *Back to the Drawing Board: Revisiting the Supreme Court's Stance on Partisan Gerrymandering*, 86 FORDHAM L. REV. 1303, 1310 (2017). State legislatures, defending challenged maps, argue that traditional districting criteria or a state's natural political geography cause partisan effects. *See* Whitford v. Gill, 218 F. Supp. 3d 837, 911 (W.D. Wis. 2016).

148. *See* Catanese, *supra* note 38, at 340.

149. *Id.* In gerrymandered states, citizens might believe that representatives choose their voters rather than voters choosing their representatives.

150. *Id.* at 341–42 (discussing the impact of gerrymandering on public policy and public officials).

151. Transcript of Oral Argument, *supra* note 30, at 38–39 (quoting Mr. Smith, counsel for appellees, stating that an unbounded "festival of copycat gerrymandering" will occur if the Court does not provide a judicial remedy for partisan gerrymandering).

152. *See* Growe v. Emison, 507 U.S. 25, 31 (1993).

regulate partisan gerrymandering,[153] this should not limit courts' involvement.[154] Federal courts have regulated state elections under the Fourteenth Amendment since *Reynolds* and *Baker*.[155] In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[156] the Supreme Court held that the Elections Clause permits nonlegislative redistricting, which includes independent commissions.[157] Although courts lack the political authoritativeness over the state legislature in creating redistricting plans, federal courts must follow state redistricting policy and constitutional and statutory guidelines to develop a plan that remedies the state agency's violations but includes as much of the state's legislature's redistricting law as possible.[158] Such constraints limit the judiciary's discretion in developing redistricting plans to remediate legislative violations.[159]

Federal courts should redistrict in limited circumstances to prevent a political party that controls the state legislature, house, and governorship from drawing electoral lines to affect partisan balance and the representation of political communities. When a political party controls state government, judicial involvement safeguards voters' representational rights because federal district courts do not intend to implement plans with partisan advantage; the state legislature's proposed redistricting plan is the foundation of federal courts' remedial plans. In these circumstances, federal courts could develop more politically fair district plans that retain competitive districts and reflect the distribution of state party power by respecting existing political boundaries, as opposed to gerrymandered districts that entrench a political party's majority for the duration of the plan. Furthermore, federal courts use the same redistricting technology that legislatures use to entrench the party in power to mitigate the proposed plan's partisan effects.[160]

153. Congress has this power pursuant to the Fifteenth, Nineteenth, and Twenty-Sixth Amendments. *See* U.S. CONST. amends. XIV, XIX, XXVI.

154. Transcript of Oral Argument, *supra* note 30, at 60–61 (providing examples of the Court regulating election abuses by state government); *see* Franzese, *supra* note 24, at 285 (noting that although Article 1, Section 4 of the Constitution "gives Congress the power to supersede state regulations of congressional elections, Congress has not used this power to divest states of redistricting authority" (quoting Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 413)).

155. Transcript of Oral Argument, *supra* note 30, at 60–61.

156. 135 S. Ct. 2652 (2015).

157. *Id.* at 2659 (permitting use of the Arizona Independent Redistricting Commission in congressional and legislative districting).

158. Upham v. Seamon, 456 U.S. 37, 41–42 (1982).

159. In *Connor*, the Court analyzed whether the district court "properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." Connor v. Finch, 431 U.S. 407, 430 (1977) (Powell, J., dissenting).

160. Perez v. Abbott, No. SA-11-CV-360, 2017 WL 3495922, at *2 (W.D. Tex. Aug. 15, 2017).

2. Federal Courts Should Adjudicate Partisan Gerrymandering Claims

The Supreme Court recognizes that partisan gerrymanders "[are incompatible] with democratic principles";[161] yet a majority of the Court has not agreed upon a substantive standard to determine when partisan advantage in a districting plan is unconstitutional. In *LULAC*, Justice Kennedy stated that a successful partisan gerrymandering case "show[s] a burden, as measured by a reliable standard, on the complainants' representational rights."[162] In subsequent litigation, such as *Whitford*, voters affected by gerrymandered districts proposed standards to determine the plan's burden on their representational rights.[163]

Although the Supreme Court has not agreed upon a standard for constitutionality, courts agree that a plaintiff must establish the state's discriminatory intent and a discriminatory partisan effect to prove that a state's redistricting plan violates the Equal Protection Clause. A plaintiff must provide "a reliable measure of how much partisan dominance a plan achieves"[164] and "a standard for deciding how much partisan dominance is too much."[165] Courts disagree, however, over the extent to which plaintiffs must prove discriminatory effect.

In November 2016, Wisconsin's three-judge panel invalidated the state's redistricting plan—Act 43—for partisan gerrymandering in *Whitford*.[166] The plaintiffs in *Whitford*—registered Democratic voters and supporters claiming injury on behalf of all Democrats in Wisconsin—based their challenge on a First Amendment's freedom of association test in addition to a Fourteenth Amendment equal protection test, in line with Justice Kennedy's concurrence in *Vieth*.[167] The majority held that the plaintiffs demonstrated "that the defendants intended and accomplished an entrenchment of the Republican Party likely to endure for the entire decennial period. They did so when the legitimate redistricting considerations neither required nor warranted the implementation of such a plan."[168]

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161. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658 (alteration in original) (quoting Vieth v. Jubelirer, 541 U.S. 267, 292 (2004)).

162. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 418 (2006).

163. *See* Whitford v. Gill, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

164. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 19, at 126.

165. *LULAC*, 548 U.S. at 420.

166. *Whitford*, 218 F. Supp. 3d at 930.

167. *Id.* at 883–84 ("It is clear that the First Amendment and the Equal Protection Clause protect a citizen against state discrimination as to the weight of his or her vote when that discrimination is based on the political preferences of the voter."); Complaint at 7, *Whitford*, 218 F. Supp. 3d 837 (No. 3:15-cv-00421-bbc), 2015 WL 4651084; *see also* Shapiro v. McManus, 136 S. Ct. 450, 456 (2015) (noting that a First Amendment claim against a specific congressional district required a trial on the merits).

168. *Whitford*, 218 F. Supp. 3d at 883. In *Whitford*, the plaintiffs proposed a test for partisan gerrymandering: first, the plaintiffs must establish the state's intent to create partisan gerrymanders; second, they must prove a partisan effect, through the efficiency gap, above a certain threshold, which renders the plan presumptively unconstitutional; third, the state bears

In analyzing whether a state legislature possessed discriminatory intent, courts consider the circumstances surrounding the plan's design and implementation. In *Whitford*, the state legislature enacted the most partisan possible map under state law and traditional districting principles.[169] Courts also consider whether legislatures removed competitive districts as swing districts are less partisan than districts controlled by incumbents. A redistricting 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."[170]

The district court in *Whitford* held that Wisconsin's district maps burdened Democratic voters' representational rights "by impeding their ability to translate their votes into legislative seats."[171] The court relied upon new social science models, the efficiency gap and partisan symmetry, to measure the plans' partisan advantage.[172] Professor Jackman, an expert witness for the plaintiffs, testified that a high EG, like 7 percent, "in the first year of a redistricting plan likely means that the EG will remain high for the lifetime of the plan."[173] The predictability of this threshold directly responds to the plurality in *Vieth*, which, in rejecting the *Bandemer* standards, emphasized that district maps can appear problematic in certain elections as voters' political affiliations change. In *Whitford*, however, plaintiffs considered election data since 2011.[174]

Partisan gerrymandering is a bipartisan concern because it undermines voters' trust in the democratic process.[175] Democracy functions when voters choose their representatives, not when elected representatives choose their voters by constructing gerrymandered districts.[176] Determining justiciability is the first step in remediating the harms caused by partisan gerrymandering

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the burden to rebut the presumption by showing that either a legitimate state policy or political geography caused the high efficiency gap. *Id.* at 854–55; *see also* Grofman, *supra* note 7.

169. *Whitford*, 218 F. Supp. 3d at 851–53. The Wisconsin legislature rejected four constitutionally valid plans for lack of partisan advantage. *Id.* at 892–95.

170. *LULAC*, 548 U.S. at 419.

171. *Whitford*, 218 F. Supp. 3d at 910; *see also* Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (holding that plaintiffs can raise equal protection concerns when apportionment plans "minimize or cancel out the voting strength" of racial minorities or political representation of voters).

172. *See* Gelman & King, *supra* note 5, at 536. Both the efficiency gap and partisan symmetry measure the effectiveness of a political party in translating statewide votes into legislative seats. *See* Petry, *supra* note 36, at 4.

173. *Whitford*, 218 F. Supp. 3d. at 860.

174. *Id.* at 902.

175. *See* Brief of Republican State Leadership Committee as Amicus Curiae in Support of Appellants at 19, Gill v. Whitford, 137 S. Ct. 2268 (Aug. 4, 2017) (No. 16-1161), 2017 WL 3412005 (arguing that voters may prefer noncompetitive districts given that "the closer the representative is to the voter ideologically, the more satisfied is the voter" (quoting THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 30 (2008))); Brief of Senators John McCain and Sheldon Whitehouse in Support of Appellees at 2–3, Gill v. Whitford, 137 S. Ct. 2268 (Sept. 5, 2017) (No. 16-1161), 2017 WL 4311105.

176. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817 (2012) (describing this "legislative conflict of interest" as "legislators drawing district lines that they ultimately have to run in").

as courts must evaluate justiciability before determining the merits of a case.[177]

On October 3, 2017, the Supreme Court heard oral arguments in *Gill v. Whitford*.[178] If the Court vacates the district court decision and refuses to articulate a manageable standard to adjudicate challenges of unconstitutional partisan gerrymanders, then state legislatures might continue to determine the composition of the House of Representatives once every ten years, regardless of voters' changing preferences. Results from the 2018 midterm elections will dictate the composition of the state legislatures that will create the district maps after the 2020 census.

In oral argument for *Whitford*, Justice Breyer, arguably intending to sway Justice Kennedy, articulated the process by which a judge could adjudicate partisan gerrymandering claims.[179] First, the judge would inquire whether there was single-party control of redistricting.[180] If a commission, court, or divided legislature developed the redistricting plan, then the judge would end the inquiry.[181] If, however, a single political party controlled districting, then the judge would inquire whether there was partisan symmetry.[182] Next, the judge would analyze whether partisan symmetry would persist across elections.[183] If the judge found that the redistricting plan meets each criterion and the legislature lacks a justification for the plan's partisan effects, then the court could declare the plan an unconstitutional partisan gerrymander.[184]

Two months after oral arguments in *Whitford*, the Supreme Court added to its merits docket *Benisek v. Lamone*[185]: a challenge of Maryland's 2011 cracking of the state's sixth congressional district.[186] In *Benisek*, the plaintiffs—registered Republican voters and supporters—alleged that the Democratic-controlled state legislature violated their First Amendment representational and associational rights by cracking the Sixth Congressional District—flipping it from Republican to Democrat—based on citizens' voting histories and party registration.[187] The three-judge district court not only held that plaintiffs stated a justiciable claim and denied the defendants' motion to dismiss but also articulated a standard for justiciability of partisan gerrymandering claims under the First Amendment.

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177. Benisek v. Lamone, 266 F. Supp. 3d 799, 806 (D. Md.), *hearing granted*, 138 S. Ct. 50 (2017) (No. 17-333).

178. Transcript of Oral Argument, *supra* note 30, at 1.

179. *Id.* at 11–13.

180. *Id.*

181. *Id.*

182. *Id.* Partisan symmetry occurs when a political party received a majority of state legislative or congressional seats in an election with only 48 percent of the vote or when a district plan has a high efficiency gap. *See* Gelman & King, *supra* note 5, at 536 (defining "partisan bias as the deviation from partisan symmetry").

183. Whitford v. Gill, 218 F. Supp. 3d 837, 910 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

184. Transcript of Oral Argument, *supra* note 30, at 11–13.

185. 266 F. Supp. 3d 799 (D. Md.), *hearing granted*, 138 S. Ct. 50 (2017) (No. 14-990).

186. *Id.* at 801.

187. Second Amended Complaint at 3, 6–7, *Benisek*, 266 F. Supp. 3d 799 (No. 13-cv-3233).

Under the new standard, plaintiffs must first establish that the drafters intended to dilute votes and retaliate based on citizens' voting history or political association.[188] Second, plaintiffs must demonstrate how the district plan diluted votes of targeted citizens.[189] Third, plaintiffs must show that the vote dilution would not have occurred but for the drafters' retaliatory intent.[190] If plaintiffs satisfy these elements, then they have established a First Amendment claim and an Article I, Section 2 claim unless the state shows that its district plan "was narrowly tailored to achieve a compelling government interest."[191] Upon appeal, the Supreme Court will determine whether it has jurisdiction to hear the case as well consider the case's merits.

The Supreme Court's rulings in *Whitford* and *Benisek* may not only define how much partisan advantage is constitutional. These decisions may also have long-term effects on both the partisan balance in the House of Representatives and state legislatures and, because many courts have stayed proceedings pending the outcome in *Whitford*, the future of redistricting litigation.[192]

3. Effects of This Approach

Wisconsin's attorney general, Brad Schimel, said that the Court's adoption of plaintiffs' constitutional test to determine unconstitutional partisan gerrymandering in *Whitford* would "invalidate a third of the legislative maps drawn in the past 45 years."[193] This approach lacks limitations to prevent every district map from being subject to litigation and shifts the responsibility of implementing appropriately partisan districting plans from elected representatives to unelected federal judges. Invalidating a third of legislative and congressional district maps contradicts the caution that the judiciary should exercise before invalidating district plans enacted by elected representatives.[194] Furthermore, if a party appealed the judgment of the panel, the Supreme Court would have to decide the case on the merits.[195]

188. *Benisek*, 266 F. Supp. 3d at 802.

189. *Id.*

190. *Id.* (quoting Shapiro v. McManus, 203 F. Supp. 3d 579, 595–96 (D. Md. 2016)). In other words, plaintiffs must allege "intent, injury, and causation." *Id.* (quoting *Shapiro*, 203 F. Supp. 3d at 596–97).

191. *Id.* (quoting *Shapiro*, 203 F. Supp. 3d at 597).

192. *See* Rucho v. Common Cause, No. 17A745, 2018 WL 472142 (U.S. Jan. 18, 2018) (mem.) (granting application to stay order of the Middle District of North Carolina, which ordered the state legislature to create revised congressional district plans by January 24, 2018, after finding North Carolina's congressional maps to be unconstitutional partisan gerrymanders violating the Equal Protection Clause); Common Cause v. Rucho, No. 1:16-CV-1026, 2018 WL 341658, at *2 (M.D.N.C. Jan. 9, 2018); *see also* Li et al., *supra* note 6.

193. Kendall & Bravin, *supra* note 28. *But see* Transcript of Oral Argument, *supra* note 30, at 52 (noting that Mr. Smith, counsel for the appellees, stated that the one-third estimate ignores that commissions or courts drew many of those maps, which removes them from invalidation).

194. *See* Transcript of Oral Argument, *supra* note 30, at 52.

195. 28 U.S.C. § 2284 (2012).

This approach would threaten the integrity of the Supreme Court through the Court's continuous political determinations.[196]

C. Revising the Judiciary's Role in Redistricting

Neither position presented—complete judicial removal or complete judicial involvement—mitigates the harms of partisan gerrymandering. Rather, the adoption of either position would risk harm to voters' representational rights and judicial integrity. Either state legislatures would create and implement redistricting plans without judicial scrutiny or the judiciary would redraw up to one-third of existing district plans, thereby involving itself in the political process by overturning plans enacted by elected representatives. To address partisan gerrymandering, the judiciary is not required to choose one position over the other; it could create independent solutions with respect to drawing electoral districts and adjudicating redistricting claims.

While advocates for upholding partisan gerrymandering as a political question argue that a judicially manageable standard does not yet exist, those who advocate for the Supreme Court to adjudicate these claims disagree upon the source—the First or Fourteenth Amendment—and the standard by which to measure partisan fairness. For example, although Justice Antonin Scalia dismissed partisan symmetry as neither judicially manageable nor protected by the Equal Protection Clause, courts can still consider a state's legislative seats-to-votes ratio to find that disproportional representation constitutes discriminatory effect.[197]

Under the efficiency gap or a number-based threshold, the state legislature can articulate legitimate deviations that threaten the legitimacy of the court's determination. However, the Supreme Court constitutionalized similar political determinations by creating the one-person, one-vote requirement. Even if the state can articulate legitimate deviations from a numbers-based threshold, the Supreme Court has not yet articulated the "legitimate state prerogatives and neutral factors" implicated in redistricting.[198] Rather, the Court has held that unconstitutional gerrymandering requires more than finding the application of political classifications and that the burden rests on defendants to articulate legitimate objectives.[199]

In *Whitford*, the three-judge district court declared Act 43 unconstitutional because the plan's partisan advantage made it impossible for Democrats to win the state assembly.[200] Yet regardless of the Supreme Court's holding in *Whitford*, the Democratic Party could shift its attention to winning elections for the governorship and state senate to eliminate state government trifectas,

196. Transcript of Oral Argument, *supra* note 30, at 36–38 (noting that Chief Justice Roberts stated that the Court "will have to decide in every case whether the Democrats win or the Republicans win").

197. Whitford v. Gill, 218 F. Supp. 3d 837, 906 (W.D. Wis. 2016), *hearing granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

198. *Id.* at 911.

199. *Id.*; *see also* Vieth v. Jubelirer, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring).

200. *Whitford*, 218 F. Supp. 3d at 843.

thereby creating political competition which would frustrate the state legislature's ability to pass district plans with high partisan advantage.[201]

III. WHERE TO DRAW THE LINE ON JUDICIAL INVOLVEMENT

As discussed in Part II, neither total judicial removal nor judicial involvement provide practical solutions to preventing partisan gerrymandering. Regardless of the Supreme Court's eventual decision in *Whitford*, federal district courts should not develop district plans. There are three avenues of reform: (1) the Supreme Court, (2) Congress, and (3) direct legislation by voter initiative or referendum.[202] Even if the Supreme Court adopts the plaintiffs' argument in *Whitford*, the Court is unlikely to remove the federal judiciary's authority to develop redistricting plans. In addition, Congress is unlikely to use its constitutional authority under the Elections Clause to constrain gerrymandering based on the political implications of redistricting reform.[203] States that permit direct legislation—voter initiatives and referendums—however, present viable solutions to limit the conflict of interest present in legislative redistricting—that representatives draw the districts in which they campaign.[204]

State constitutions determine whether the legislature, judiciary, or an independent commission develops congressional and state legislative redistricting plans.[205] The majority of state constitutions designate districting authority for state legislative and congressional districts to the state legislature.[206] However, in response to heightened partisan gerrymanders,

201. Greenfield, *supra* note 7; *see also supra* note 44 and accompanying text. In addition, state supreme courts could find that district maps containing a certain level of partisan advantage violate the state's constitution. *See* League of Women Voters of Pa. v. Pa. Gen. Assembly, No. 159 MM 2017, slip op. at 2 (Jan. 22, 2018) (per curiam) (declaring Pennsylvania's Congressional Redistricting Act of 2011 a partisan gerrymander that "clearly, plainly, and palpably violates" the state's constitution).

202. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2660 (2015) (explaining the difference between initiatives and referendums). Initiatives are petitions proposing statutes or constitutional amendments to adopt or reject by voters. *Id.* Referendums, however, are petitions for voters to approve or disapprove legislative action. *Id.* Initiatives, unlike referendums, "operate[] entirely outside the States' representative assemblies." *Id.*

203. Herbert & Jenkins, *supra* note 143, at 555.

204. *See supra* note 176 and accompanying text. Arizona's constitution gives voters lawmaking power, including initiative and referendum, which enabled voters to enact the Arizona Independent Redistricting Commission. Michael Woods, Note, *Gerrymandering (Almost) Gone Wild: How the Supreme Court Saved Independent Redistricting Reform*, 68 FLA. L. REV. 1509, 1510, 1515 (2016) (noting that in 2000, Arizona voters passed a ballot initiative that amended the state constitution to create standards to guide the Arizona Independent Redistricting Commission); *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2659.

205. Cain, *supra* note 176, at 1812; *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. JUST. (Apr. 14, 2017) [hereinafter *Who Draws the Maps?*], https://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines [https://perma.cc/FV5Z-39VF].

206. *Who Draws the Maps?*, *supra* note 205.

several states have enacted redistricting reforms.[207] While several states, including Florida, passed strict redistricting guidelines to limit legislative gerrymandering, other states, such as California and Arizona, removed the legislature's power to redistrict by enacting redistricting commissions.[208]

A redistricting commission is a body, apart from the state legislature, designated to draw electoral district lines.[209] Separate from the state legislature, many states have proposed nonpartisan, bipartisan, or independent redistricting commissions. On the one hand, in nonpartisan commissions, the commission's membership is either not specified or is reserved, in part, for political independents.[210] In bipartisan commissions, on the other hand, the commission reserves the majority of membership for members of the state's two major political parties.[211] In independent commissions, members enact district plans without legislative approval and cannot be either legislators or current public officials.[212]

In states that adopted redistricting commissions, federal district courts retain authority to create a district plan if the commission fails to adopt a constitutionally valid plan before the state's redistricting deadline. Although the court remains involved in the redistricting process, the use of commissions to draft electoral maps limits partisan bias—eliminating the legislative conflict of interest because members from the two major political parties and a minority party compromise in drawing district lines.[213] Furthermore, if the district court intervenes in the districting process, the court remedies the commission's violations by following state redistricting policy and constitutional and statutory guidelines while retaining as much of the commission's districting plan as possible.[214] Given that commissions enact less partisan plans, there is a lower risk that the court in remedying the commission's violations will create a partisan gerrymander.[215]

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207. Woods, *supra* note 204, at 1510. Elements of redistricting reform include "greater transparency, options for third-party map submissions, citizen approval through direct democracy, careful vetting for conflict of interest, [and] partisan and racial balance." Cain, *supra* note 176, at 1812.

208. Woods, *supra* note 204, at 1510–11; *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2658. In *Arizona Independent Redistricting Commission*, the Court upheld Arizona's constitutional grant of lawmaking power to the electorate in addition to the legislature. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2659. California's independent commission consists of fourteen members: three Democrats, three Republicans, and two third-party voters chosen from applicants for the commission, who together choose six additional members. *See* Catanese, *supra* note 38, at 343–44; *see also Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2659.

209. *Who Draws the Maps?*, *supra* note 205.

210. Anthony J. Gaughan, *To End Gerrymandering: The Canadian Model for Reforming the Congressional Redistricting Process in the United States*, 41 CAP. U. L. REV. 999, 1058 (2013) (noting that in Iowa, a nonpartisan government agency redistricts).

211. *See* Cain, *supra* note 176, at 1814.

212. *Id.* at 1817.

213. *Id.* at 1843 (noting that an independent citizen commission "does not try to replace politics" but rather "aspires to improve it enough to prevent substantial and widely perceived unfairness").

214. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2659 (2015).

215. *See* Cain, *supra* note 176, at 1842–43.

Independent redistricting commissions—enacted through state voter initiatives—should replace the federal court's authority to develop redistricting plans because state voter initiatives give voters lawmaking power. Moreover, legislators can partake in choosing commissioners and can provide them with political authority that the judiciary lacks. At the same time, the structure of the commission prohibits legislators and candidates from drawing district lines.[216] Independent-commission membership also prohibits commissioners from running for office in districts they drew for one year after redistricting, thus restricting potential conflict of interests.[217] For example, some states, including Arizona and California, prohibit legislative staff from joining the redistricting commission, while Idaho and Washington prohibit membership by lobbyists.[218]

Independent redistricting commissions draw electoral lines in thirteen states.[219] Arizona's independent redistricting commission (AIRC) and California's redistricting commission (CRC) are the most well-known alternatives to legislative redistricting.[220] Under the Arizona State Constitution, the state commission on appellate court appointments establishes a pool of citizen-candidates for the independent redistricting commission with ten nominees each registered with the largest political parties and five registered minority voters.[221] From the pool of twenty-five, legislative party officials appoint four AIRC members, who, in turn, appoint the fifth member—the chair.[222]

In California, however, the state auditor forms a pool of citizens—based on their analytical skills, impartiality, "and a demonstrated appreciation for California's diverse demographics and geography"—from which legislative officials can strike citizens.[223] Then, the auditor randomly selects eight members: three Democrats, three Republicans, and two minority-party or no-affiliation members.[224] The eight commissioners then choose the remaining six members: two Democrats, two Republicans, and two minority-party or no-affiliation members.[225] The CRC model is less partisan than the

216. *Who Draws the Maps?*, *supra* note 205.

217. *Id.*

218. *See infra* notes 220–25 and accompanying text.

219. Gaughan, *supra* note 210, at 1058 (noting that Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington have independent commissions for congressional and state legislative redistricting); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 19, at 163–66 (noting that Alaska Arkansas, Colorado, Missouri, Ohio, and Pennsylvania have established independent commissions only for legislative redistricting).

220. *See* Cain, *supra* note 176, at 1812.

221. ARIZ. CONST. art. IV, pt. 2, §§ 1(3)–(5). The highest-ranking officers and the minority party leaders in the Arizona House of Representatives and Senate make appointments to the commission from the pool of nominees. *Id.* § 1(6). Only two members can belong to the same political party or reside in the same county. *Id.* § 1(3).

222. *Id.* § 1(8). The four commission members select the fifth member, the chair, who must not be registered with a party that is already represented on the commission. *Id.*

223. *Background on Commission*, CAL. CITIZENS REDISTRICTING COMMISSION, http://wedrawthelines.ca.gov/commission.html [https://perma.cc/5E9R-ZF6R] (last visited Feb. 14, 2018); *see also* Cain, *supra* note 176, at 1818.

224. *Background on Commission*, *supra* note 223.

225. *Id.*

AIRC model because the legislature cannot appoint members; it can only strike candidates.

State voter initiatives and referendums are viable solutions for redistricting reform because they stop the cycle of representatives elected through gerrymandered district plans from electing new representatives to maintain a political majority.[226] Together, initiatives and referendums do not only adopt legislation to limit partisan gerrymandering, they correct legislative gerrymanders.[227] In *Whitford*, Wisconsin voters lacked power to authorize independent commissions to redistrict: only the state legislature could enact that transition.[228] Thus, in states such as Wisconsin, change in partisan redistricting is unlikely to occur until voters can effect change through initiatives.[229]

Although independent commissions provide broader political representation, Professor Bruce Cain identified flaws in Arizona and California's redistricting commissions that retain partisan influence.[230] First, neither commission addresses the political influence of technical and legal employees; the commission's support staff could jeopardize the commission's bipartisanship because most redistricting consultants and specialized lawyers assist a political party.[231] Second, state legislatures fund the commission before and after the plan's enactment and can withdraw funding if displeased with the plan's partisan effects.[232] Third, in Arizona, the legislature has authority to "remove AIRC members for 'gross misconduct.'"[233] Thus, in states where the legislature can interfere with the commission and the controlling party disagrees with the commission's plan, courts must discern whether the legislature's interference was lawful. Although Professor Cain identified flaws in the most prominent commissions, amendments to initiatives governing or forming the commissions can resolve each conflict.

CONCLUSION

Notwithstanding the Court's decisions in *Whitford* and *Benisek*, the Supreme Court can largely avoid this political thicket. State voter initiatives can transfer federal courts' authority to develop redistricting plans to independent redistricting commissions. Although independent commissions

226. *Supra* note 176 and accompanying text.
227. *See supra* note 95 and accompanying text.
228. Greenfield, *supra* note 7.
229. *Id.*
230. *See* Cain, *supra* note 176, at 1834–35.
231. *Id.*
232. *Id.* at 1835 ("The total budget for Arizona's 2001 Independent Redistricting Commission was $9,544,100, 63% of which was spent after 2002.").
233. *Id.* at 1836. The Governor of Arizona's attempt to remove the Arizona Independent Redistricting Commission's independent chair led to a Supreme Court ruling. *See generally* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015). The Arizona Constitution allows the governor, with concurrence by two-thirds of the Senate, to remove a member of the Arizona Independent Redistricting Commission for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." ARIZ. CONST. art. IV, pt. 2, § 1(10).

have not "lessened the odds of redistricting-related litigation," they limit the legislative conflict of interest in redistricting that causes partisan advantage and remove opportunities for federal courts to create district maps that perpetuate political bias.[234] If independent redistricting commissions create more politically fair district plans that retain competitive districts, then voter turnout will increase: individual voters will believe that they can translate their votes into legislative seats. Increased voter turnout benefits democracy because voters use their ballot power to hold representatives accountable, as opposed to gerrymandered districts that entrench a political party's majority for the duration of the plan.

If the Supreme Court articulates a standard for lower courts to adjudicate partisan gerrymandering claims, then district courts could order numerous state legislatures to redraw district plans with less partisan advantage. Independent redistricting commissions could develop several state legislative and congressional district plans if the state's legislature does not enact a constitutional plan before the state's redistricting deadline. Overall, this shift would be a positive one because independent commissions achieve the benefits of the judiciary developing district plans in the legislature's stead, while avoiding its shortcomings—thus making their authority to redistrict in such circumstances a much more welcome obligation.

234. Cain, *supra* note 176, at 1812.