

Masthead Logo

**Mitchell Hamline Law Review**

Volume 45  
Issue 5 *Sua Sponte*

Article 1

2019

# Partisan Gerrymandering: Blurring The Line Between Law And Politics

Elizabeth M. Brama

Lauren E. Pockl

Samuel Louwagie

Follow this and additional works at: <https://open.mitchellhamline.edu/mhhr>

Part of the [Constitutional Law Commons](#), [Law and Politics Commons](#), and the [State and Local Government Law Commons](#)

## Recommended Citation

Brama, Elizabeth M.; Pockl, Lauren E.; and Louwagie, Samuel (2019) "Partisan Gerrymandering: Blurring The Line Between Law And Politics," *Mitchell Hamline Law Review*: Vol. 45 : Iss. 5 , Article 1.  
Available at: <https://open.mitchellhamline.edu/mhhr/vol45/iss5/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

Footer Logo

## PARTISAN GERRYMANDERING: BLURRING THE LINE BETWEEN LAW AND POLITICS

Elizabeth M. Brama,<sup>†</sup> Lauren E. Pockl,<sup>††</sup> and Samuel  
Louwagie<sup>†††</sup>

I.	INTRODUCTION .....	2
II.	THE JUDICIARY’S ROLE IN POLITICAL CASES AND CONTROVERSIES .....	6
	A. <i>Role of the Judiciary</i> .....	7
	B. <i>Political Question</i> .....	9
	C. <i>Judicial Involvement in Other Highly-Politicized Matters</i> ..	13
III.	THE EVOLUTION OF JUDICIAL INVOLVEMENT IN REDISTRICTING .....	19
	A. <i>Primacy of the Legislature in Redistricting</i> .....	20
	B. <i>Redistricting as an Important Equal Protection Concern, with Practical Impacts</i> .....	20
	C. <i>Thresholds for Review of Justiciable Redistricting Cases</i> ..	23
	1. <i>A party must have standing to contest a redistricting map</i> .....	23
	2. <i>Established standards for assessing population and racial gerrymandering</i> .....	24
	a. <i>Court-drawn redistricting maps</i> .....	25
	b. <i>Judicial review of legislature-drawn maps</i> .....	32
	3. <i>Partisan gerrymandering cases present unique challenges</i> .....	34
IV.	TOWARD A STANDARD FOR ASSESSING UNDUE POLITICAL MANIPULATION IN REDISTRICTING .....	41
	A. <i>Legislative Solutions: Nonpartisan Redistricting Commissions</i> .....	41
	B. <i>Judicial Solutions: Appropriate Standards and Steps in the Political Thicket</i> .....	44

---

<sup>†</sup> Elizabeth M. Brama, J.D., Vice President; Director; Shareholder, Briggs and Morgan, P.A. Elizabeth M. Brama was Legal Counsel for the 2001-2002 Minnesota Special Redistricting Counsel.

<sup>††</sup> Lauren E. Pockl, J.D., Associate, Briggs and Morgan, P.A.

<sup>†††</sup> Samuel Louwagie, J.D., University of Minnesota Law School, 2019.

2 MITCHELL HAMLINE LAW REVIEW SUA SPONTE [Vol. 45:5

1. *Establishing standards for evaluating partisan gerrymandering claims*..... 44

    a. *Standing should not be an insurmountable barrier to justiciability*..... 45

    b. *To assess credibility of redistricting plans, look to states’ neutral redistricting criteria for drafting plans*..... 48

2. *Address perception of partisan judiciary through drafted opinions*..... 53

V. CONCLUSION..... 56

I. INTRODUCTION

“[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.”<sup>1</sup>

In the United States, redistricting is defined as the redrawing of congressional and state legislative district boundaries every ten years, following a United States Census.<sup>2</sup> Redistricting is intended to ensure that all voters in a district are fairly and reasonably equally represented by their House and state legislative representatives. Underlying the redistricting process—which is typically conducted within each state—is an inherent objective to safeguard the electoral process fairly and impartially.<sup>3</sup> “[D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.”<sup>4</sup>

Regardless of how impartial redistricting is intended to be, it is often conducted by partisan elected officials (namely, state legislative bodies) who have vested interests in both protecting their own incumbency and protecting or expanding their political party’s opportunity to get their chosen candidates elected.<sup>5</sup> Federal and state courts have repeatedly recognized that state legislatures have

1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. See U.S. CONST. art. I, § 2, cl. 3 (requiring the federal government to conduct a census every ten years for the purpose of apportioning U.S. House of Representatives seats among the states).

3. *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (“The object of districting is to establish ‘fair and effective representation for all citizens.’” (citation omitted)).

4. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006).

5. See, e.g., *id.* at 410–13 (explaining how Democrats drew district maps in the 1990s with the express goal of winning more seats and how Republicans did the same following the 2000 census).

primacy in the redistricting process<sup>6</sup> and that it is an inherently political process.<sup>7</sup> While these are not unexpected considerations, it also has been recognized that the redistricting process can produce efforts to manipulate political boundaries in favor of certain parties, resulting in “gerrymandered” districts—that reflect desired political outcomes more than a balanced representation of the electorate.<sup>8</sup> Such districts are frequently oddly shaped, and neither conform to obvious geographic, county, or municipal boundaries nor reflect natural communities of interest.

Gerrymandering can be based on any number of theories related to maximizing a party’s opportunities to increase or maintain power, including: managing how persons of a particular minority group are included in (or excluded from) districts; incumbent protection plans that minimize the number of incumbents who are paired in a redrawn district or who must represent a different group of individuals than in the past; or partisan gerrymandering that seeks to consolidate or divide partisan voters. Gerrymandering around groups of voters is said to work most often through the “cracking” and “packing” of voters.<sup>9</sup> By definition, “[c]racking means dividing a party’s supporters among multiple districts so that they fall short of a majority in each one[,] [while] [p]acking means concentrating one party’s backers in a few districts that they win by overwhelming margins.”<sup>10</sup>

The United States Supreme Court has made it clear that certain forms of packing and cracking are illegal<sup>11</sup> and, if proven, will result

---

6. See *id.* at 414 (Article I of the Constitution “leaves with the States primary responsibility for apportionment of their federal congressional ... districts.”) (quoting *Grove v. Emison*, 507 U.S. 25, 34 (1993)).

7. See *Vieth*, 541 U.S. at 285 (“The Constitution clearly contemplates districting by political entities ... and unsurprisingly that turns out to be root-and-branch a matter of politics.”); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has and is intended to have substantial political consequences.”).

8. See Erick Trickey, *Where Did the Term “Gerrymander” Come From?*, SMITHSONIAN (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/> [<https://perma.cc/7WL9-W48Y>]. For example, an 1812 Massachusetts district was “freakishly shaped” in order to elect Democratic-Republican senators. See *id.* This district gave rise to the term “gerrymander” when opponents of Governor Elbridge Gerry noted that the district looked like a salamander, “a satire so piercing, it has overshadowed all of Gerry’s other accomplishments in history.” *Id.*

9. *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018).

10. *Id.*

11. *E.g.*, racial gerrymandering in violation of the Voting Rights Act

in declaring a district or state redistricting map to be unconstitutional.<sup>12</sup> This is because, under the United States Constitution, fair representation requires that one person's vote should not carry any more weight than another person's vote.<sup>13</sup> However, partisan gerrymandering presents one of the more unique and thornier issues facing the judiciary today. Partisan gerrymandering—sometimes known as political gerrymandering—is defined as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.”<sup>14</sup>

On the one hand, state legislatures—and generally the majority party of the legislative bodies—have primacy in redrawing congressional and legislative district boundaries. Moreover, Congress and state legislatures are inherently political bodies. Despite this reality, the Court has held that negative presumptions should not automatically attach to legislative plans.<sup>15</sup> Additionally, it is expected and accepted that political goals will play a role in redistricting conducted by state legislatures.<sup>16</sup>

On the other hand, overly-partisan gerrymandering has been a concern since the early days of the republic, as its effect on representation can lead to profound impacts on a wide variety of

---

12. See *id.* See also *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (holding racial gerrymandering in violation of §2 of the Voting Rights Act to be illegal).

13. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (“Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.”).

14. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015). While the term “political redistricting” is commonly used to describe drawing districts with political party affiliation as a key criteria, as previously noted all redistricting is political to some extent. Therefore, we use the term “partisan redistricting” throughout this article to reference potential gerrymandering based on political party affiliation, unless quoting a source that itself uses the term “political redistricting.” See also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 417 (2006) (using “partisan gerrymandering” in a context similar to that defined in this article) (“[P]artisan gerrymandering ... [r]educes the likelihood that ... representatives elected from gerrymandered districts will act as vigorous advocates for the needs and interests of [those] who reside within their districts.”).

15. *League of United Latin Am. Citizens*, 548 U.S. at 416.

16. See *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has and is intended to have substantial political consequences.”).

significant political issues of the day.<sup>17</sup> Furthermore, technology has increased the accuracy and sophistication of political mapmaking, giving rise to the creation of partisan advantages during the redistricting process.<sup>18</sup> And as technology advances, more extreme partisan gerrymandering becomes feasible.<sup>19</sup> Unsurprisingly, the body of judicial opinions addressing gerrymandering has expanded over time, as this article discusses in more detail.<sup>20</sup> In these contexts, the United States Supreme Court has, in more recent years, felt compelled to identify overly-partisan gerrymandering as a potentially unconstitutional act.

The increasing focus on partisan gerrymandering results in a fundamental tension around the judiciary's involvement in partisan gerrymandering issues. The United States Supreme Court has stated that redistricting is required under the United States Constitution because it is critical to fair elections in a representative democracy. Consequently, gerrymandered redistricting plans that frustrate this constitutional obligation impliedly create "claims" or "controversies" that courts must address, despite the obvious justiciability questions implicated by these cases.<sup>21</sup>

---

17. See *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (citation omitted) ("Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives.").

18. See *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) ("But technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like)."); Vann R. Newkirk II, *Partisan Gerrymandering Stands, for Now*, THE ATLANTIC (June 18, 2018), <https://www.theatlantic.com/politics/archive/2018/06/partisan-gerrymandering-stands-for-now/563063/> [<https://perma.cc/3MTH-F545>].

19. *Gill*, 138 S. Ct. at 1941.

20. See *infra* Part III.C.

21. See generally *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (finding a justiciable controversy where North Carolina officials drew district lines on the basis of race despite their claims of political motivations); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (determining that reapportionment plans are acceptable when they secure partisan fairness); *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring states to reapportion their districts based upon changes in population).

At what point should such an inherently political process be subject to judicial review for being “too” political? More importantly, to what extent might the judiciary be injuring its own authority as an independent, non-partisan branch of government when it must decide for or against a particular political party in partisan gerrymandering cases—especially in such an increasingly polarized political environment? This article attempts to answer these questions, focusing not only on how these problems arise, but also potential solutions.

First, this article focuses on the judiciary’s unique and specific role as one of three branches of government in the United States; the limitations of the judiciary with respect to addressing political questions under the political question doctrine; and the general criticisms of the judiciary’s involvement in highly-politicized cases.<sup>22</sup> Second, this article discusses the evolution of gerrymandering claims that have come before the United States Supreme Court, starting with early cases where the Court explained its rationale for evaluating gerrymandering claims, and culminating with an examination of more recent partisan gerrymandering decisions.<sup>23</sup> Finally, this article concludes by proposing a standard for assessing undue political manipulation of the redistricting process and identifies steps the judiciary might take to uphold its integrity when deciding such difficult questions.<sup>24</sup>

## II. THE JUDICIARY’S ROLE IN POLITICAL CASES AND CONTROVERSIES

Before turning to the specific issue of political gerrymandering, it is important to first identify the judiciary’s specific role in a government premised on a separation of powers and to set forth long-standing considerations for judicial involvement in politically-charged legal claims. This section examines the tension between the judiciary’s obligation to serve as a non-political check on the other branches of government, and its desire to stay out of political issues to maintain public faith and the basic integrity of the judicial system. Next, this section shows how the fundamental tensions in this area existed well before reaching such highly political and specific issues like legislative redistricting. Finally, this section recognizes how, in recent years, the United States Supreme Court has issued politically-

---

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

charged decisions, and has struggled to maintain public faith in the integrity of the subsequent outcomes.<sup>25</sup>

#### A. *Role of the Judiciary*

To understand the scope of the courts' potential involvement in redistricting cases, it is first important to understand the judiciary's role within the federal government. It is equally important to appreciate that state governments are similarly modeled on a separation of powers concept that divides the executive, legislative, and judicial branches of government. This overarching concept is crucial to understanding redistricting cases because they occur at the intersection between the three branches of government.

At the federal level, Article III of the United States Constitution establishes the judicial branch, providing that the "judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>26</sup> This branch of government differs significantly from the executive and legislative branches in that the members of the judiciary are appointed by the President and subsequently confirmed by the Senate,<sup>27</sup> whereas members of the executive and legislative branches are elected. Federal judges serve life terms, removable only through impeachment proceedings held by the House of Representatives and subsequent conviction by the Senate.<sup>28</sup> Granting lifetime appointments to federal judges "insulates them from the temporary passions of the public, and allows them to apply the law with only justice in mind, and not electoral or political concerns."<sup>29</sup>

Starting with Chief Justice John Marshall's landmark opinion in *Marbury v. Madison*, and continuing through the present, the United States Supreme Court has carefully defined its role as an independent branch of government that functions as a check on the legislative branch, but nevertheless avoids answering purely political questions.<sup>30</sup> The Supreme Court recognized early on that "[i]t is emphatically the province and duty of the judicial department to say

---

25. See, e.g., *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

26. U.S. CONST. art. III, § 1.

27. *Id.* art. II, § 2 ("[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court . . .").

28. *Id.* art. III.

29. *The Judicial Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/> [<https://perma.cc/HL4Q-6LJM>].

30. *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803).



what the law is.”<sup>31</sup> This “power [of] judges to ‘say what the law is’ rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of legal right.”<sup>32</sup> “Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.”<sup>33</sup> As Justice Scalia pronounced in *Vieth*:

“The judicial Power” created by Article III, § 1, of the Constitution is not *whatever* judges choose to do, or even *whatever* Congress chooses to assign them. It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.<sup>34</sup>

It is important to recall that Article III of the Constitution restricts judicial consideration to only those matters constituting “case[s] or controversies[ies].”<sup>35</sup> This limitation means that a party has standing to seek judicial action only when suffering an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”<sup>36</sup> In other words, courts existing under Article III may not issue advisory opinions,<sup>37</sup> nor address general grievances.<sup>38</sup> Thus, for any case—including a redistricting case—to be heard by federal judges, it must first clear the hurdle of establishing standing.

Finally, the constitutional limitations placed on the judiciary to “say what the law is” are “grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of legal right.”<sup>39</sup>

---

31. *Id.* at 177.

32. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (citation omitted).

33. *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

34. *Id.* at 278 (internal citations omitted) (emphasis in original).

35. U.S. CONST. Art. III, § 2.

36. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 149, 149 (2010) (citation omitted).

37. *See Muskrat v. United States*, 219 U.S. 346, 361 (1911).

38. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992).

39. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

*B. Political Question*

Judicial power is further limited when the claim made is one of a purely political nature—an issue of particular importance in political redistricting cases. The political question doctrine functions as “one of the rules basic to the federal system and [the Supreme] Court’s appropriate place within that structure.”<sup>40</sup> Issues that are purely political in nature are considered “political questions” that are reserved for the legislative and executive branches. The political question doctrine has been central to historic arguments that the judiciary is not the appropriate forum to consider matters of political gerrymandering.

Courts have long recognized the need to avoid encroachment upon the functions of the political branches. The political question doctrine dates back to *Marbury v. Madison*.<sup>41</sup> In that case, the Supreme Court insisted that its role was “solely[] to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”<sup>42</sup> Similarly, more than two centuries later, the Court said, “[s]ometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.”<sup>43</sup>

The political question doctrine is embedded in both “constitutional and prudential considerations,” and has been said to be “essentially a function of the separation of powers.”<sup>44</sup> It exists principally so that courts may avoid “inappropriate[ly] interfer[ing] in the business of the other branches of Government.”<sup>45</sup> Moreover, the political question doctrine highlights the inherent distinction between the judicial branch and the other two branches of

---

40. *Baker v. Carr*, 369 U.S. 189, 278 (1962) (Frankfurter, J., dissenting) (citation omitted).

41. 5 U.S. 137, 170 (1803).

42. *Id.*

43. *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

44. JARED P. COLE, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 6 (Dec. 23, 2014) (citation omitted), <https://fas.org/sgp/crs/misc/R43834.pdf> [<https://perma.cc/SVV5-9K2J>].

45. *U.S. v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

government,<sup>46</sup> and by doing so advances the separation of powers.<sup>47</sup> Further, by leaving wholly political questions to the coordinate branches, the judiciary can maintain the public's faith in the judiciary's ability to remain independent, remain free of undue political bias, and rely on precedent and good judgment even as it interprets the core laws of the land.<sup>48</sup>

In *Baker v. Carr*, the Supreme Court established six standards to identify the existence of a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>49</sup>

The *Baker* case involved a civil rights challenge to the redistricting of Tennessee's electoral map.<sup>50</sup> The *Baker* Court was presented with an argument that Tennessee had failed to redraw its legislative districts every ten years, as was required by the state

---

46. Compare the judicial branch—which, notably, at the federal level consists of appointed judges who are not subject to election or re-election—to the legislative and executive branches that are both comprised of elected officials who are subject to regular reelection.

47. “[T]he issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches[.]” but whether “the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.” *Nixon v. United States*, 506 U.S. 224 (1993) (White, J., concurring) (emphasis omitted).

48. See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority . . . ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”).

49. *Id.* at 217.

50. *Id.* at 187–88 (“The complaint[] alleg[es] that . . . these plaintiffs and others similarly situated, are denied the equal protection of the law accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes . . .”) (citation omitted).

constitution, which resulted in rural votes holding more weight than urban votes.<sup>51</sup> The Supreme Court held that equal protection challenges to state legislature-drawn electoral maps were important, justiciable, and not barred by the political question doctrine.<sup>52</sup>

This holding has been reaffirmed by several Supreme Court decisions, including *Davis v. Bandemer*, in which the majority stated that:

Since *Baker v. Carr*, we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed and enforced the “one person, one vote” principle. Our past decisions also make clear that, even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim.<sup>53</sup>

The *Bandemer* majority rejected the proposition that political redistricting cases may be non-justiciable, and further concluded that none of the previously established characteristics of a non-justiciable political question were present in that case.<sup>54</sup> The majority also explained that a political gerrymandering case is, essentially, no less manageable than racial gerrymandering cases that the Court has found to be justiciable.<sup>55</sup> Finally, a plurality of the Court concluded that the district court erred by finding the contested map violated the Equal Protection Clause, which is notable because the case was found to be justiciable merely by answering the question.<sup>56</sup>

Interestingly, since *Baker*, the Supreme Court has only dismissed claims as non-justiciable under the political question doctrine on three occasions.<sup>57</sup> One of these cases was *Vieth v. Jubelirer*, a case that

---

51. *Id.*

52. *Id.* at 209–10.

53. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (internal citation omitted); *see also Reynolds v. Sims*, 377 U.S. 533 (1964).

54. *Bandemer*, 478 U.S. at 143. More specifically, the Democrats claimed that an Indiana legislative reapportionment plan constituted a political gerrymander intended to disadvantage Democrats, which the Court ultimately found to be non-justiciable. *See id.*

55. *Id.* at 125–27.

56. *Id.* at 129.

57. *Vieth* was one such case, and is discussed in depth in this article. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). One of the other two cases was *Gilligan v. Morgan*, in which the Supreme Court dismissed students’ attempts to bar the Governor of Ohio from summoning the National Guard to subdue civil disorder at universities as a nonjusticiable political question. 413 U.S. 1 (1973). Finally, in *Nixon v. United States*,

is discussed at length throughout this article.<sup>58</sup> In *Vieth*, a four-Justice plurality determined that political gerrymandering questions are non-justiciable.<sup>59</sup> Justice Scalia, writing for the plurality, briefly addressed the *Baker* factors, remarking that “[t]hese tests are probably listed in descending order of both importance and certainty.”<sup>60</sup> Ultimately, Justice Scalia determined that only the second *Baker* factor—concerning a lack of judicially discoverable and manageable standards—was at issue and analyzed this factor in light of the Court’s tradition and history:

“The judicial Power” created by Article III, § 1, of the Constitution is not *whatever* judges choose to do, or even *whatever* Congress chooses to assign them. It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.<sup>61</sup>

The plurality further explained that political gerrymandering claims are non-justiciable political questions due to the absence of “judicially manageable standards.”<sup>62</sup>

The political question doctrine raises a dichotomy that is at the very core of redistricting cases. Elections are fundamental to our nation’s representative democracy. Meanwhile, the judiciary is to avoid political divisiveness and retain public trust in order to fairly and reliably resolve disputes. Controversial political questions often present the closest cases of judicial infringement on other branches of government, and may present the greatest threat to faith and trust in the judicial system as a whole.

---

the Supreme Court reviewed a federal judge’s claims that his impeachment trial violated Article I, Section 3, Clause 6 of the United States Constitution, because it was conducted by a committee of the Senate rather than by the full body. 506 U.S. 224 (1993). The *Nixon* Court ultimately determined that the question was political in nature because there was a textual commitment to the Senate of the manner in which it might “try” a federal officer for impeachment. *Id.* at 237.

58. *Vieth*, 541 U.S. at 267.

59. *See id.*

60. *Id.* at 278.

61. *Id.* (citation omitted).

62. *Id.* at 310.

Yet, one can argue that an issue that is fundamental to the right to suffrage is among those in greatest need of resolution by a nonpartisan judiciary.<sup>63</sup> Without an independent arbiter of politically charged actions that may threaten constitutional rights or the democratic process, the whole system would be placed at risk.<sup>64</sup> This dichotomy highlights why the more political a claim or controversy becomes, the more complicated the issue is for a judicial body to address.

Ultimately, the political question doctrine is a key consideration in Supreme Court jurisprudence and remains arguably unresolved in redistricting cases. As such, it must be considered with respect to any future review of reapportionment cases.

### *C. Judicial Involvement in Other Highly-Politicized Matters*

The Supreme Court's recent consideration of other highly-politicized matters further demonstrates the importance of the political question doctrine. Moreover, these matters illustrate how judicial involvement in political controversies can influence the public's faith and confidence in the judicial system, exemplifying the importance of "judicial restraint in resolving political disputes . . ."<sup>65</sup> This article identifies some of the highest profile cases because they highlight how judicial involvement in political matters is detrimental to public perception of the Court's impartiality and integrity.

---

63. See Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light—or at Least a Yellow Light*, FINDLAW (May 12, 2004), <https://supreme.findlaw.com/legal-commentary/the-supreme-court-gives-partisan-gerrymandering-the-green-light-or-at-least-a-yellow-light.html> [<https://perma.cc/8E4P-RUPX>] ("It is a basic principle of American constitutional law that in some circumstances, actors who are not politically accountable are better positioned to make the ground rules for those who are. Thus, we generally trust the courts to interpret the constitutional ground rules for politics because we think they are more likely to try to do the job fairly than are self-interested political actors. Even if the courts occasionally disappoint us by rendering what appear to be political judgments in the name of law, we can be certain that politicians will more often render political judgments, for that is the nature of their business.").

64. *Gill v. Whitford*, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring) ("More effectively every day, [partisan gerrymandering] enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches.").

65. *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting).

Perhaps one of the most well-known and highly-contentious cases in which the judiciary became entangled in politics is *Bush v. Gore*,<sup>66</sup> which arguably cost the Supreme Court significant legitimacy in the eyes of the public. *Bush v. Gore* concerned the 2000 presidential election between George W. Bush and Albert Gore, Jr., and involved the Supreme Court analyzing a ruling by the Florida Supreme Court on vote recount procedures.<sup>67</sup> The issue arose after several of Florida's ballots were improperly punctured, resulting in "hanging chads."<sup>68</sup> The Florida Supreme Court ordered a recount of the votes, with recounted votes being evaluated according to the "intent of the voter."<sup>69</sup>

On review, the Supreme Court answered the question of "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the standardless manual recounts violates the Equal Protection and Due Process Clauses."<sup>70</sup> The decision clearly divided the "conservative" and "liberal" wings of the Court. The majority ultimately identified a violation of the Equal Protection Clause and determined that the appropriate remedy was to order an end to the recount, rather than order a new recount under established procedures.<sup>71</sup> As a result, George W. Bush was identified as the winner of the electoral vote and sworn in as President, after a close election resolved by the United States Supreme Court on grounds some perceived to be partisan rather than legal in nature.<sup>72</sup>

The Court's acceptance of certiorari in *Bush v. Gore* exposed it to significant public scrutiny on two grounds that bear on other politically charged issues: (1) whether the Court had the legal authority to hear the case; and (2) whether the Court should have

---

66. *Id.*

67. *Id.*

68. *Id.* at 104. See generally Samantha Levine, *Hanging Chads: As the Florida Recount Implodes, the Supreme Court Decides Bush v. Gore*, US NEWS (Jan. 17, 2008), <https://www.usnews.com/news/articles/2008/01/17/the-legacy-of-hanging-chads> [<https://perma.cc/G592-Q4XB>].

69. *Bush*, 531 U.S. at 105.

70. *Id.* at 103.

71. *Id.*

72. See Jakob Brecheisen, *Bush v. Gore: Can the Supreme Court's Most Political Case Prevent Russian Hacking of Voting Machines?*, MINN. L. REV. (Apr. 1, 2018), <http://www.minnesotalawreview.org/2018/04/bush-v-gore/> [<https://perma.cc/VV54-JLJP>].

granted certiorari given its political implications.<sup>73</sup> In its *per curiam* decision, the Court's majority briefly acknowledged these concerns, stating that:

Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

....

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.<sup>74</sup>

Thus, the Court seemed to focus its responsibility to hear the appeal on the fact that lower courts' processes were at issue, and on that basis, stopped the recount.<sup>75</sup>

However, the dissenting Justices argued extensively that because the case involved a presidential election rather than a "fundamental constitutional principle,"<sup>76</sup> courts should not risk negatively impacting the reputation of the Court by gratuitously inserting themselves into questions of a political nature<sup>77</sup>:

73. See Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094 (2001).

74. *Bush*, 531 U.S. at 109, 111.

75. *Id.* at 98–101 (*per curiam*) and 135 (Souter, J., dissenting).

76. *Id.* at 157 (Breyer, S., dissenting).

77. As stated by Justice Sandra Day O'Connor, "[m]aybe the Court should have said, 'We're not going to take it, goodbye.'" Jeffrey Toobin, *Justice O'Connor Regrets*, NEW YORKER (May 6, 2013), <https://www.newyorker.com/news/daily-comment/justice-oconnor-regrets> [<https://perma.cc/74S4-T3JB>]. "The case, she said, . . . 'stirred up the public' and 'gave the Court a less than perfect reputation.'" *Id.*



[I]n this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. . . . It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed the rule of law itself. . . .

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." Justice Brandeis once said of the Court, "The most important thing we do is not doing." What it does today, the Court should have left undone.<sup>78</sup>

Similarly, Justice Stevens' dissenting opinion further highlighted the impact of the *Bush v. Gore* ruling on the national perception of the judicial branch of government:

[The] position [of] the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.<sup>79</sup>

Criticism of the Court's foray into political waters in *Bush v. Gore* underscores the credibility the Supreme Court lost in rendering its decision.<sup>80</sup> The *Bush* decision highlights the strong divide over when to grant review, and how judicial authority should be exercised in the context of elections.

*Bush v. Gore* is not the only case that drew criticism for entangling judicial and political responsibilities. In *Citizens United v. Federal Election Commission*, the Supreme Court struck down limits on

---

78. *Bush*, 531 U.S. at 157-58 (Breyer, J., dissenting) (citation omitted).

79. *Id.* at 128-129 (Stevens, J., dissenting).

80. See Chemerinsky, *supra* note 73, at 1106 ("*Bush v. Gore* obviously cost the Supreme Court enormously in terms of its credibility. Over forty-nine million people voted for Al Gore, and undoubtedly virtually all of them regard the Court's decision as a partisan ruling by a Republican majority in favor of the Republican candidate. Few cases, if any, in American history have been more widely perceived as partisan than *Bush v. Gore*.").

corporations' political campaign expenditures on the basis that corporations have the right to free speech under the First Amendment.<sup>81</sup> Many have criticized Justice Kennedy's majority opinion in the Supreme Court's five-to-four decision, particularly because the majority consisted of those Justices frequently identified as the conservative wing of the Court.

Constitutional scholar Ronald Dworkin called the decision "devastating," asserting that "the decision will further weaken the quality and fairness of our politics" and can "stand beside the Court's 2000 decision in *Bush v. Gore* as an unprincipled political act with terrible consequences for the nation."<sup>82</sup> Richard Hasen criticized the majority opinion as judicial activism "sound[ing] more like the rantings of a right-wing talk show host than the rational view of a justice with a sense of political realism."<sup>83</sup> While such strong opinions are not necessarily avoidable, the nature and stridency of these criticisms are now more common in politically-charged cases.

Several years later, in *National Federation of Independent Business v. Sebelius*, the Supreme Court, in yet another five-to-four decision, upheld President Obama's Patient Protection and Affordable Care Act.<sup>84</sup> The Court upheld the law's requirement that most Americans obtain insurance or pay a penalty was authorized by Congress's power to levy taxes.<sup>85</sup> This time, however, the five-to-four split consisted of Chief Justice John G. Roberts joining the four Justices who were considered part of the liberal wing of the Court.<sup>86</sup> This decision also drew criticism for being political, with critics stating that the Chief Justice "acted less like a judge than like a politician, and a slippery one."<sup>87</sup>

---

81. 558 U.S. 310 (2010).

82. Ronald Dworkin, *The "Devastating" Decision*, THE N.Y. REVIEW OF BOOKS (Feb. 25, 2010), <https://www.nybooks.com/articles/2010/02/25/the-devastating-decision/> [<https://perma.cc/7LJE-RA5F>]. Richard Hasen is a nationally recognized expert in election law and campaign finance.

83. Richard L. Hasen, *The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010), <https://slate.com/news-and-politics/2010/01/the-supreme-court-kills-campaign-finance-reform-in-citizens-united.html> [<https://perma.cc/58HH-PU4G>].

84. 567 U.S. 519 (2012).

85. *Id.*

86. *See id.*

87. Ramesh Ponnuru, *In Health-Care Ruling, Roberts Writes His Own Law*, BLOOMBERG (June 28, 2012), <https://www.bloomberg.com/opinion/articles/2012->

These entanglements of the federal judiciary in highly-political cases are almost sure to influence the public's perception of a supposed nonpartisan judiciary—the branch of government tasked with the responsibility of being an independent arbiter of the rule of law. This perceived politicization has only increased over time. The recent confirmation proceedings of Justice Brett Kavanaugh further contributed to—and for some, confirmed the existence of—a partisan division within the Supreme Court.<sup>88</sup> In pointed testimony before the Senate Judiciary Committee, now-Justice Kavanaugh described the sexual assault allegations against him as “a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election” and “[r]evenge on behalf of the Clintons.”<sup>89</sup> Justice Kavanaugh's denunciation of a particular political party could reinforce perceptions that the Supreme Court is further wavering from its roots as a nonpartisan, unbiased observer, particularly during a time when the Court already appears to be sharply split on liberal and conservative lines.<sup>90</sup> Such partisan

---

06-28/in-health-care-ruling-roberts-writes-his-own-law [https://perma.cc/64FZ-KEKS].

88. See Ronald Brownstein, *Brett Kavanaugh is Patient Zero*, THE ATLANTIC (Oct. 1, 2018), <https://www.theatlantic.com/politics/archive/2018/10/kavanaughs-partisanship-threatens-supreme-court/571702/> [https://perma.cc/WUN7-F3ZR] (“That would create a stark equation for Roberts, who must surely realize that much—perhaps most—of the nation would question the validity of every 5–4 party-line decision in which Kavanaugh would provide the deciding vote. In the past, fear of further eroding the Court's legitimacy has provided a limited (though hardly uniform) check on Roberts's willingness to force major decisions on party-line votes. But if the Senate confirms Kavanaugh, it will present Roberts with a justice whose every decision will be viewed through the lens of the partisan and tribal animosities he inflamed to defend his nomination.”).

89. *Kavanaugh hearing: Transcript*, WASH. POST (Sept. 27, 2018), <https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/> [https://perma.cc/74MR-9DCC].

90. See Brownstein, *supra* note 88 (“Kavanaugh's behavior has irrevocably marked his . . . tenure on the Court. With such a partisan route as his pathway, a Justice Kavanaugh would arrive at the Supreme Court as a patient zero, carrying a virus of illegitimacy to its decisions. Since Kavanaugh declared his hostility to the Democratic Party and the left so openly and with such ferocity, it has seemed inevitable that tens of millions of Americans will never see him as an impartial judge.”); Tessa Berenson, *How this Brutal Confirmation Process Could Shape Brett Kavanaugh as a Supreme Court Justice*, TIME (Oct. 2, 2018), <http://time.com/5409739/brett-kavanaugh-supreme-court-justice-process/> [https://perma.cc/QNM6-PJ2F] (“Blaming Democrats for his ordeal could be a sign that Kavanaugh would carry that anger to the high court and stay rigidly with the Justices nominated by Republican presidents.”).

divisiveness within the judiciary is troubling. As Justice Elena Kagan once explained, “The court’s strength as an institution of American governance depends on people . . . believing that it is not simply an extension of politics, that its decision-making has a kind of integrity to it. . . . And if people don’t believe that they have no reason to accept what the court does.”<sup>91</sup>

As partisan ideologies continue to diverge, even moderate judicial involvement in partisan politics will seemingly undermine necessary separation of the three branches of government. This is because such involvement weakens the judiciary by politicizing it, which then collaterally weakens the political branches of government when the judiciary interferes. Accordingly, there are lessons to be learned from decisions like *Bush v. Gore*, and the judiciary should continue to be cognizant of when judicial restraint in resolving political disputes is necessary.

Nevertheless, simply avoiding cases or controversies with a strong political component altogether may abdicate the judiciary’s power to serve as a reasonable check on elected government. Ultimately, the struggle between the judiciary’s function to serve as a check on the other branches of government while also maintaining judicial independence and integrity is at the focal point of gerrymandering claims.

### III. THE EVOLUTION OF JUDICIAL INVOLVEMENT IN REDISTRICTING

The Supreme Court’s reluctance to address political issues, accompanied by the consequences that result when the judiciary takes on such politically charged issues, helps explain why the judicial branch has struggled to face the issue of partisan gerrymandering head-on.

This section addresses the nature of the redistricting process, the history of the Supreme Court’s decision-making in gerrymandering cases, and how its decision-making has led to the current form of partisan gerrymandering seen today. Further, this section takes account of the Court’s expressed doubts on crafting a justiciable standard on gerrymandering while taking a closer look at the limited scope under which a claimant may achieve standing, before ultimately

---

91. Mark Sherman & Jessica Gresko, *Brett Kavanaugh’s Attack on Democrats Could Pose Risk to Supreme Court*, CBS NEWS (Sept. 29, 2018), <https://www.cbsnews.com/news/brett-kavanaugh-attack-on-democrats-poses-risk-to-supreme-court/> [https://perma.cc/4VJ5-8DLL].

raising the question of whether the Court will ever review a partisan gerrymandering case on the merits.

*A. Primacy of the Legislature in Redistricting*

In *Reynolds v. Sims*, the Court clarified that the dimensions of a state's electoral districts are unquestionably a political matter in the first instance.<sup>92</sup> Authority to draw district maps is explicitly given to state legislatures by the Constitution.<sup>93</sup> Specifically, Article I, Section 4 of the United States Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or *alter such Regulations*, except as to the Places of chusing Senators."<sup>94</sup> Consistent with this Constitutional provision, Justice Scalia, in *Vieth*, noted Congress's "initial power to draw districts for federal elections . . ."<sup>95</sup> Further, the Court has regularly stated that state legislatures are best equipped for the task of redistricting.<sup>96</sup>

*B. Redistricting as an Important Equal Protection Concern, with Practical Impacts*

Despite the reticence to address redistricting in some instances, the courts have regularly found themselves acting as a check on the legislative branch with respect to redistricting cases and controversies. The judiciary's involvement in redistricting can generally be traced back to *Baker v. Carr*.<sup>97</sup> In that case, the Supreme Court held that equal protection challenges to state legislature-drawn

---

92. 377 U.S. 533, 586 (1977) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination . . .").

93. U.S. CONST. art. I, § 2, cl. 3.

94. *Id.* art I, § 4 (emphasis added).

95. *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004).

96. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1997) ("The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies."); *see also Connor v. Finch*, 431 U.S. 407, 414–15 (1977) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination,' for a state legislature is the institution that is by far the best situated . . .").

97. *Baker v. Carr*, 369 U.S. 186 (1962).

electoral maps are important and justiciable.<sup>98</sup> This fundamental principle was further reinforced and expanded in *Reynolds v. Sims*, in which the Court noted that despite the primacy of the legislature in redistricting:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>99</sup>

Because even state legislatures must satisfy the “one person, one vote” standard of the Fourteenth Amendment, state and federal courts—as well as judicial panels around the country—find themselves deeply and increasingly involved in the political process and controversy of redistricting. Courts have served an important role in redistricting, either when the state legislature fails to legislate a new redistricting map after the decennial census is completed, or when a districting plan potentially violates the United States Constitution and undermines the right of suffrage.<sup>100</sup>

This line of cases, going back more than fifty years, underscores two important points. First, the Court has always struggled with the politicized role it may appear to play in redistricting cases.<sup>101</sup> Second, the Court has found that the “one person, one vote” principle is too important to defer if the legislature does not complete timely redistricting, or if it acts improperly with respect to drawing district lines.<sup>102</sup>

---

98. *Id.* at 187–88 (“The complaint[] alleg[es] that . . . these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes . . .”).

99. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (footnote omitted).

100. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 447 (2006); *Hippert v. Richie*, 813 N.W.2d 374, 378 (Minn. 2012); *see also* *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (“Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the ‘unwelcome obligation’ of the federal court to devise and impose a reapportionment plan pending later legislative action.”) (citation omitted).

101. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *League of United Latin Am. Citizens*, 548 U.S. at 399; *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Reynolds*, 377 U.S. at 533.

102. *See, e.g.*, *Vieth*, 541 U.S. at 267; *Davis*, 478 U.S. at 109;

Independent analysis highlights the importance of assessing whether redistricting impinges on an individual's right to vote, illustrating the extent to which redistricting controlled by one particular political party increases that party's opportunity to maintain or increase seats in future elections. For example, a study completed by the Associated Press demonstrated that in the 2016 election, "gerrymandered" maps gave Republicans a significant advantage.<sup>103</sup> The study found that Republicans won as many as twenty-two more seats in the House of Representatives than would be expected "based on the average vote share in congressional districts across the country."<sup>104</sup> In states such as Michigan, South Dakota, Wisconsin, Florida, and North Carolina, Republican controlled legislatures drew district maps that produced more Republican representatives than statewide voting percentages would predict.<sup>105</sup>

In addition to skewed representation, gerrymandering harms democracy by making too many districts noncompetitive. In 2004, only six percent of House of Representative seats were decided with a vote share in the range of fifty-five to forty-five percent,<sup>106</sup> and fewer than fifty of the 435 seats were "seriously contested" that year.<sup>107</sup> Both numbers were a distinct drop-off from historical norms.<sup>108</sup> One consequence of the non-competitive districts is an increase in polarization, creating "safe seats in which incumbents have strong incentives to reflect the views of their party's most extreme supporters—i.e., those active in primary elections—and little reason to reach out to swing voters."<sup>109</sup>

These statistics demonstrate the extent to which the outcomes of elections can be affected or even manipulated by drawing legislative boundaries to favor a political party's own interests and the general, overall impact of gerrymandering on elections. Thus, the importance

---

*Reynolds*, 377 U.S. at 533.

103. David A. Lieb, *AP Analysis Shows How Gerrymandering Benefited GOP in 2016*, AP NEWS (June 27, 2017), <https://www.apnews.com/e3c5cc51faba4b7fb67d8a3f996bdaca> [https://perma.cc/B8ZP-2LUS].

104. *Id.*

105. *Id.*

106. Thomas E. Mann, *Redistricting Reform*, THE NAT'L VOTER (June 2005), <https://www.brookings.edu/wp-content/uploads/2016/06/p04-07.pdf> [https://perma.cc/SJW7-4YVC].

107. *Id.*

108. *Id.*

109. *Id.*

of redistricting outcomes is reinforced by both Supreme Court findings regarding the Equal Protection suffrage protections, and statistical analyses underscoring the practical impacts of “gerrymandered” maps. However, as with any matter, a redistricting case must meet certain thresholds before a court will pass judgment on it.

### C. *Thresholds for Review of Justiciable Redistricting Cases*

#### 1. *A party must have standing to contest a redistricting map.*

A plaintiff must have “a personal stake in the outcome of the controversy” in order to bring a redistricting case before a federal court.<sup>110</sup> This requires a plaintiff to have suffered an injury in “a personal and individual way.”<sup>111</sup> A person’s right to vote is “individual and personal in nature,”<sup>112</sup> so, if a voter can show that his or her right to vote has been harmed, he or she has standing to sue.

Historically, the Court has held that plaintiffs can establish standing to sue in gerrymandering cases by proving that they live in the challenged district. In *Baker v. Carr*, for example, the Court held that the plaintiffs had standing because they claimed the map “disfavor[ed] the voters in the counties in which they reside[d].”<sup>113</sup> In other cases, such as *Bandemer* and *Vieth*, the plurality opinions did not directly address standing.<sup>114</sup> But in those cases, the plaintiffs lived within the challenged districts.<sup>115</sup>

Conversely, in a 1995 racial gerrymandering case, the Court rejected the plaintiffs’ objections to a redistricting map because they “d[id] not live in the district that [was] the primary focus” of the claim and, accordingly, they lacked standing.<sup>116</sup> Further, the partisan gerrymandering plaintiffs in *Gill* based their claim entirely on a

110. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

111. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

112. *Reynolds v. Sims*, 377 U.S. 533, 561 (1977).

113. *Baker*, 369 U.S. at 208.

114. *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986)..

115. *Bandemer*, 478 U.S. at 115; *Vieth*, 541 U.S. at 272.

116. *United States v. Hays*, 515 U.S. 737, 739, 744–45 (1995) (“Where a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment . . . . On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms . . .”).



statewide injury, which harmed Democrats' collective representation in the state legislature. At the trial, "not a single plaintiff sought to prove that he or she lives in a cracked or packed district."<sup>117</sup> Therefore, the Court held that the plaintiffs' case was "about group political interests, not individual legal rights."<sup>118</sup> As discussed later, this standing requirement bears directly on whether the judiciary will take on a politicized case.<sup>119</sup>

2. *Established standards for assessing population and racial gerrymandering.*

As previously noted, in *Baker v. Carr*, the Court reasoned that "[j]udicial standards under the Equal Protection Clause are *well developed and familiar*, and it has been open to courts since the enactment of the Fourteenth Amendment to determine . . . that a discrimination reflects no policy, but simply arbitrary and capricious action."<sup>120</sup> This was reiterated in *Davis v. Bandemer*, where the Court again noted that Fourteenth Amendment claims were frequently brought to the Court and it knew how to address them.<sup>121</sup> Similarly, other cases deployed specific standards to assess various claims of unconstitutional redistricting.<sup>122</sup> Accordingly, when standing exists, the judiciary has addressed redistricting disputes by accepting one of two primary roles (and sometimes both): (1) drawing district maps when legislatures fail to do so; or (2) adjudicating disputes over maps drawn by political bodies.

---

117. Gill v. Whitford, 138 S. Ct. 1916, 1932 (2018).

118. *Id.* at 1933.

119. See *infra* Section III.C.3.

120. Baker v. Carr, 369 U.S. 186, 226 (1962) (emphasis added).

121. 478 U.S. 109, 125–27 (1986).

122. See, e.g., Miller v. Johnson, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."); Shaw v. Reno, 509 U.S. 630, 644 (1993) ("[R]edistricting . . . that is so bizarre on its face that it is 'unexplainable on grounds other than race,' demands the same close scrutiny that we give other state laws that classify citizens by race." (quoting Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977))); Karcher v. Daggett, 462 U.S. 725, 731 (1983) ("If . . . plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.").

a. *Court-drawn redistricting maps.*

The first of those two roles, judicial drawing of district maps, presents courts with “the unwelcome obligation of performing in the legislature’s stead . . . .”<sup>123</sup> This role was once unthinkable. For example, when the Illinois legislature failed to update its congressional districts to reflect population changes in 1946, petitioners asked the Supreme Court to do so.<sup>124</sup> However, the Court considered it out of the question: “Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid.”<sup>125</sup>

That began to change following *Baker*, as it became clear that states would still need to hold elections after courts struck down their congressional maps but could not proceed with a district plan ruled unconstitutional.<sup>126</sup> Eventually, in 1965, the Supreme Court acknowledged that the judiciary’s power “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.”<sup>127</sup> In the decades since, this practice has become common when courts grant relief to plaintiffs who bring claims that the map from the prior census no longer serves the “one person, one vote” principle following the decennial census, and the legislature has either failed to draw a new map or it appears there is insufficient time for the legislature to draw such a map prior to the first major election after the census results are published.<sup>128</sup> Plaintiffs in these cases are frequently voters who claim violations of the Equal Protection Clause of the Fourteenth Amendment of the state or federal constitution and are brought under 42 U.S.C. § 1983. In states like Minnesota—where

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

124. *Colegrove v. Green*, 328 U.S. 549 (1946).

125. *Id.* at 553. Pre-*Baker*, the Court held that it could not even declare the system invalid because doing so would interfere with Congress’s role. *See id.* at 556.

126. *See Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964) (holding that Maryland courts should step in “if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion . . . under no circumstances should the 1966 election . . . be conducted pursuant to the existing or any other unconstitutional plan.”); *see also Scranton v. Drew*, 379 U.S. 40, 41 (1964).

127. *Scott v. Germano*, 381 U.S. 407, 409 (1965).

128. *See Sara N. Nordstand, The “Unwelcome Obligation”: Why Neither State Nor Federal Courts Should Draw District Lines*, 86 *FORDHAM L. REV.* 1997, 2005 (2018).

the state legislature regularly fails to agree upon a new district map following the decennial census—the state supreme court consistently draws congressional and legislative maps.<sup>129</sup>

Despite the Supreme Court’s anxiety over accepting political cases and addressing political questions, state and federal courts have found ways to establish standards for the drawing of fair maps, and to draw maps that do not result in further legal challenge, when called to do so. Their approaches are informative to the extent courts feel compelled to address redistricting claims, but do not wish to release or enable a map that is intentionally—or even accidentally—partisan.

Indeed, Minnesota’s own history provides an illustrative example that informs the consideration of partisan gerrymandering standards later in this article. The Chief Justice of the Minnesota Supreme Court has the authority, under sections 2.724, subdivision 1, and 480.16 of the Minnesota Statutes, to appoint a special redistricting panel if the state legislature and governor are unable to enact a congressional redistricting plan within a statutorily provided timeframe.<sup>130</sup> In 2001, then-Chief Justice Kathleen Blatz of the Minnesota Supreme Court was petitioned to appoint such a panel—the first Minnesota Special Redistricting Panel—to oversee all of Minnesota’s 2001–02 redistricting litigation.<sup>131</sup> After the Minnesota legislature failed to complete congressional and legislative redistricting activities by the statutory deadline, the redistricting panel of five judges addressed the constitutionality of Minnesota’s congressional election districts and adopted a redistricting plan that was considered “fundamentally fair

---

129. See *Hippert v. Richie*, 813 N.W.2d 374, 378 (Minn. 2012) (“The ordinary remedy for this constitutional defect is for the Minnesota Legislature to redraw the state’s senate and house districts to better reflect the state’s population. . . . [The] statutory deadline has arrived, and the Legislature and Governor have not enacted a legislative redistricting plan. Therefore, it is the role of the state judicial branch to prepare a valid legislative plan and order its adoption.”) (citation omitted).

130. MINN. STAT. §§ 2.724, subdiv. 1, 480.16; see also *Hippert*, 813 N.W.2d at 379 (“Traditional redistricting is performed through the legislative process, and the redistricting plan is enacted into law only after it is passed by the Legislature and signed by the Governor.”); *Zachman v. Kiffmeyer*, 629 N.W.2d 98, 98 (Minn. 2001) (ordering “that the special redistricting panel shall release a redistricting plan . . . only in the event a legislative redistricting plan is not enacted in a timely manner.”).

131. *Zachman v. Kiffmeyer*, CO-01-160, at 1 (Minn. Special Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Congressional Redistricting Plan), available at [http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Final\\_Congressional\\_Order.PDF](http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Final_Congressional_Order.PDF) [<https://perma.cc/4F7L-B2SM>].

and based primarily on the state's population and secondarily on neutral districting principles."<sup>132</sup>

With respect to population, the parties stipulated that "[t]he districts must be as nearly equal in population as is practicable. Because a court-ordered redistricting plan must conform to a higher standard of population equality than a legislative redistricting plan, absolute population equality will be the goal."<sup>133</sup> The neutral redistricting principles, which were also stipulated to by the parties, helped guide the redistricting panel in compiling a redistricting plan that satisfied both constitutional and statutory requirements.<sup>134</sup> Further, these politically neutral redistricting principles were meant to "advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process."<sup>135</sup> The redistricting principles considered by the panel included the following:

- *Contiguity and Compactness*: "Districts will consist of convenient, contiguous territory structured into compact units. . . . Districts with areas that connect at only a single point will be considered noncontiguous."<sup>136</sup>

132. *Id.* at 4. For access to all orders and other documents related to the 2001 Special Redistricting Panel visit <http://www.mncourts.gov/Media/Historic-High-Profile-Cases/Special-Redistricting-Panel-2001.aspx> [<https://perma.cc/MY7X-LB4C>].

133. *Id.* at 2 (Minn. Special Redistricting Panel Dec. 11, 2001) (Order Stating Redistricting Principles and Requirements for Plan Submissions) (internal citation omitted), *available at* [http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Criteria\\_Order.pdf](http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Criteria_Order.pdf) [<https://perma.cc/LG42-G6U6>].

134. *Id.* at 2 (Minn. Special Redistricting Panel July 12, 2001) (Chief Justice Blatz's Redistricting Order), *available at* [http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Blatz\\_JulyOrder.pdf](http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Blatz_JulyOrder.pdf) [<https://perma.cc/S5PX-JFWZ>]; *Zachman*, C0-01-160 (Minn. Special Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Congressional Redistricting Plan), *available at* [http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Final\\_Congressional\\_Order.PDF](http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2001Redistricting/Final_Congressional_Order.PDF) [<https://perma.cc/4F7L-B2SM>].

135. *Hippert v. Ritchie*, 813 N.W.2d 374, 379 (Minn. Special Redistricting Panel Feb. 21, 2012).

136. *Zachman*, C0-01-160, at 2 (Minn. Special Redistricting Panel Dec. 11, 2001) (Order Stating Redistricting Principles and Requirements for Plan Submissions). "Contiguity" has been explained as "[a]ll parts of a district being connected at some point with the rest of the district," whereas "compactness" has been described as "[h]aving the minimum distance between all the parts of a constituency (a circle, square or a hexagon is the most compact district)." *Redistricting Criteria*, NAT'L

- *Preserve Communities of Interest*: “Communities of interest will be preserved where possible . . . . For purposes of this principle, ‘communities of interest’ include, but are not limited to, groups of Minnesota citizens with clearly recognizable similarities of social, geographic, political, cultural, ethnic, economic, or other interests.”<sup>137</sup>
- *Preserve counties and other political subdivisions*: “The districts will be drawn with attention to county, city, and township boundaries. A county, city, or township will not be divided into more than one district except as necessary to meet equal population requirements or to form districts that are composed of convenience, contiguous, and compact territory. When any county, city, or township must be divided into one or more districts, it will be divided into as few districts as possible.”<sup>138</sup>
- *Not Drawn for Purpose of Defeating Incumbents*: “Districts may not be drawn for the purpose of protecting or defeating an incumbent. However, as a factor subordinate to all redistricting criteria, the panel may view a proposed plan’s effect on incumbents to determine whether the plan results in either undue incumbent protection or excessive incumbent conflicts.”<sup>139</sup>

Similarly, in 2012, a Minnesota Special Redistricting Panel of five judges (“2012 Panel”) drew a new state congressional and legislative district map following the 2010 U.S. Census, when the legislature again failed to do so by an established deadline.<sup>140</sup> The criteria used was much the same as the criteria used by the 2001 Minnesota Special Redistricting Panel, but with an additional specified criterion addressing the *preservation of political subdivisions*: “[p]olitical subdivisions shall not be divided more than necessary to meet

---

CONFERENCE OF STATE LEGISLATURES (June 14, 2018), <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx> [<https://perma.cc/3BU6-Q5HN>].

137. *Zachman*, C0-01-160, at 3 (Minn. Special Redistricting Panel Dec. 11, 2001) (Order Stating Redistricting Principles and Requirements for Plan Submissions).

138. *Id.* at 2–3.

139. *Id.* at 3.

140. *Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012) (Final Order Adopting a Congressional Redistricting Plan).

constitutional requirements.”<sup>141</sup> With respect to its use of neutral redistricting criteria, the panel explained that these principles are necessary because “[w]hen the judicial branch performs redistricting, it lacks the political authority of the legislative and executive branches and, therefore, must act in a restrained and deliberative manner to accomplish the task.”<sup>142</sup> Consistent with the panel’s recognition that courts engaged in redistricting lack the political authority possessed by the legislature and governor, “the plan established by the panel [was] a least-change plan to the extent feasible.”<sup>143</sup> Because the prior map was considered essentially nonpartisan, the 2012 Panel felt it unnecessary to draw a new map from scratch, instead making minimal adjustments to the existing congressional district boundaries.<sup>144</sup>

The 2012 Panel issued its revised map on February 21, 2012, and the Minneapolis Star Tribune editorial board said its impression of the map was “largely positive.”<sup>145</sup> Others were not as supportive of the revised map, however. For instance, then-Congressional Representative Michele Bachmann wrote the following to supporters: “Just as we suspected, the liberal courts have changed the makeup of Minnesota’s Congressional districts. The courts’ liberal bias was evident by cherry-picking the districts and going so far as to draw my

---

141. *Hippert v. Ritchie*, A11-152 (Minn. Special Redistricting Panel Nov. 4, 2011) (Order Stating Redistricting Principles and Requirements for Plan Submissions) available at <http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/2011Redistricting/A110152Order11-4-11.pdf> [https://perma.cc/83QE-DBZU].

142. *Hippert*, 813 N.W.2d at 395 (citing *Connor v. Finch*, 431 U.S. 407, 415, (1977) (stating that courts lack the “political authoritativeness” that legislatures bring to redistricting and that a court’s task “is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination”)); see *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam) (stating that “redistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment” and that courts are “ill suited” to make such policy judgments).

143. *Hippert*, 813 N.W.2d at 397.

144. *Id.* at 398.

145. Editorial, *Credit Judges for Fair Representation*, STAR TRIBUNE (Feb. 22, 2012), <http://www.startribune.com/editorial-credit-judges-for-fair-representation/139913633/> [https://perma.cc/Y6MB-Z4WK]; see Chris Steller, *Redistricting Draws Reformers but Some Say Process Worked Fine Last Time*, TWIN CITIES DAILY PLANET (May 24, 2009), <https://www.tcdailyplanet.net/redistricting-draws-reformers-some-say-process-worked-fine-last-time/> [https://perma.cc/H884-WJV4].

home . . . outside the new sixth district.”<sup>146</sup> However, neither the 2002 nor 2012 redistricting maps presented by the Minnesota Special Redistricting Panels drew appeals, and overall reviews of the map were largely positive.<sup>147</sup> Further, the focus on neutral redistricting criteria, while using political considerations solely as a check to ensure the new map did not lean too far in either direction, appears to have helped public perception of the 2012 Panel’s final decision.<sup>148</sup>

As another example, in January 2018, the Pennsylvania Supreme Court found the state’s Congressional Redistricting Act of 2011 unconstitutional due to extreme partisan gerrymander, and enjoined its use in upcoming May 2018 primary elections.<sup>149</sup> To remedy the situation, the court directed that, should the Pennsylvania General Assembly choose to submit a congressional district plan that satisfies the requirements of the Pennsylvania Constitution, and should such plan be accepted by the governor, it must then be submitted to the court for review.<sup>150</sup> The court also offered the opportunity for parties and intervenors to submit proposed remedial districting plans to the court for consideration.<sup>151</sup> The court specified that any remedial congressional districting plan, whether submitted by parties or intervenors or enacted by the legislature and governor, must consist of “congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.”<sup>152</sup>

Ultimately, the General Assembly was unable to pass legislation for the governor’s approval, making it the judiciary’s responsibility to create an appropriate redistricting plan.<sup>153</sup> The court considered

---

146. Brian Lambert, *Bachmann Not Pleased With ‘Liberal Courts’ on Redistricting*, MINNPOST (Feb. 22, 2012), <https://www.minnpost.com/glean/2012/02/bachmann-not-pleased-liberal-courts-redistricting> [<https://perma.cc/A4NX-3JWU>].

147. *Credit Judges for Fair Representation*, *supra* note 145.

148. *Credit Judges for Fair Representation*, *supra* note 145 (praising the “even-handedness of the five-judge panel’s work, befitting their mixed political pedigrees”).

149. *League of Women Voters v. Commonwealth*, 175 A.3d 282, 284 (Pa. 2018) (per curiam), *cert. denied sub nom*; see *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

150. *League of Women Voters*, 175 A.3d at 284.

151. *Id.*

152. *Id.*

153. *League of Women Voters v. Commonwealth*, 181 A.3d 1083 (Pa. 2018). The Pennsylvania Supreme Court stated that this was within its constitutional authority and responsibility, as under Pennsylvania law, “[w]hen the legislature is unable or

proposed remedial districting plans submitted by other parties, intervenors, and amici, and chose a plan that was “composed of congressional districts which follow the traditional redistricting criteria of compactness, contiguity, equality of population, and respect for the integrity of political subdivisions.”<sup>154</sup> The court itself redrew the state’s congressional district lines and issued a remedial congressional map.<sup>155</sup>

The Pennsylvania Supreme Court’s action drew both criticism and praise. Election experts said the Pennsylvania map “appear[ed] to be tilted toward neither political party,” and that it “look[ed] more like a 9-to-9 division of the state.”<sup>156</sup> However, some politicians were not all so pleased. A state senator complained: “Implementation of this map would create a constitutional crisis where the Pennsylvania Supreme Court is usurping the authority of the legislative and executive branches. . . . This map illustrates that the definition of fair is simply code for a desire to elect more Democrats.”<sup>157</sup> Pennsylvania Governor Tom Wolf, on the other hand, “applaud[ed] the court for their decision and respect[ed] their effort to remedy Pennsylvania’s unfair and unequal congressional elections.”<sup>158</sup>

There is no doubt that courts addressing redistricting maps have drawn criticism from both sides of the aisle, given that this is “one of the most intense inter-branch conflicts that our constitutional system allows. . . . [T]he affected parties will analyze each decision a court makes for any hint of bias . . . .”<sup>159</sup> As such, it is nearly impossible for any redistricting map to avoid all criticism.<sup>160</sup> Likewise, it is possible for judicially-constructed maps to be unfair or overly partisan, just as

---

chooses not to act, it becomes the judiciary’s role to ensure a valid districting scheme.”  
*Id.* at 1122 n.6.

154. *Id.* at 1087.

155. *Id.* at 1087–89.

156. Trip Gabriel & Jess Bidgood, *Court-Drawn Map in Pennsylvania May Lift Democrats’ House Chances*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/us/pennsylvania-map.html> [<https://perma.cc/2TVA-GJ7K>].

157. *Id.*

158. *Id.*

159. Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY 16 (2005), [https://scholarship.law.upenn.edu/faculty\\_scholarship/74/](https://scholarship.law.upenn.edu/faculty_scholarship/74/) [<https://perma.cc/EUW7-AGKC>].

160. *Id.* at 17 (“No redistricting plan—and certainly no court plan under exigent circumstances—is perfect.”).



it is possible for maps drawn by a state legislature to cross party lines or to be partisan but reasonably fair. The above examples indicate, however, that it may be possible for courts to draw redistricting maps that do not broadly undermine faith in the judiciary, even while acknowledging such maps always draw some critics.

*b. Judicial review of legislature-drawn maps*

The judiciary's other possible role in redistricting gets more attention: adjudication of disputes over legislature-drawn district maps.<sup>161</sup> Ever since *Baker*, courts have debated what role they can and should have as referees in this fight, and what standards they should use to judge a district map. However, the Court has not hesitated to assess and strike down district maps that it finds are racial gerrymanders.<sup>162</sup>

Unequal population claims—that is, claims that redrawn districts do not fairly represent the population distribution—were the original bases for gerrymandering lawsuits.<sup>163</sup> In 1964, the Supreme Court held that a state legislature must be apportioned according to population.<sup>164</sup> The Court required of state legislatures “an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”<sup>165</sup> This requirement was rooted in the principle that “[l]egislators represent people, not trees or acres.”<sup>166</sup>

Additionally, it is well-settled that the Equal Protection Clause “prohibits a State, without sufficient justification, from separat[ing] its

---

161. See *Redistricting and the Supreme Court: The Most Significant Cases*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jul. 19, 2018), <http://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx> [https://perma.cc/9R9D-D6SC] (discussing prominent cases the Supreme Court has handled concerning adjudication of legislatively-drawn districts).

162. See *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

163. See generally David Stebenne, *Re-Mapping American Politics: The Redistricting Revolution Fifty Years Later*, ORIGINS (Feb. 2012), <http://origins.osu.edu/article/re-mapping-american-politics-redistricting-revolution-fifty-years-later> [https://perma.cc/K7BP-PAKT] (discussing the origin and history of “gerrymandering”).

164. *Reynolds v. Sims*, 377 U.S. 533 (1964).

165. *Id.* at 577.

166. *Id.* at 562.

citizens into different voting districts on the basis of race.”<sup>167</sup> Congressional districts drawn on the basis of race violate the Constitution when: (1) “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district,”<sup>168</sup> and (2) that racial motivation fails to pass the court’s “strict scrutiny.”<sup>169</sup> To meet strict scrutiny, a state must prove that its district map is “narrowly tailored to further a compelling governmental interest.”<sup>170</sup>

The 2017 Supreme Court decision in *Cooper v. Harris* highlights the emphasis placed on racial gerrymandering cases and the applicable standard of review.<sup>171</sup> In *Cooper*, the Court held that two North Carolina congressional districts were unconstitutional racial gerrymanders.<sup>172</sup> The Court found that the state had purposefully aimed to make those districts majority-black, “packing” African-American voters into the two districts and limiting their influence in the surrounding districts.<sup>173</sup> The state admitted that race was its primary motivating factor in one of the districts, but argued that it was simply attempting to comply with the Voting Rights Act.<sup>174</sup> The Court rejected this argument, noting that the preferred candidate of African-American voters had already consistently won that district under previous electoral maps.<sup>175</sup> The “packing,” therefore, was unnecessary to give fair voice to African-American voters, and the race-based gerrymandering failed strict scrutiny.<sup>176</sup>

In *Cooper*, the parties further argued that it was difficult to separate racial motivation from partisan motivation in the drawing of district maps because past voting data indicated a correlation between voting preference and race.<sup>177</sup> Indeed, the North Carolina legislature in *Cooper* attempted to argue that it was merely attempting to “pack” *Democrats* into the second challenged district, not African-

---

167. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (internal quotations omitted).

168. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

169. *Shaw v. Reno*, 509 U.S. 630, 653 (1993).

170. *Id.* at 631.

171. 137 S. Ct. 1455 (2017).

172. *Id.* at 1481–82.

173. *Id.* at 1468.

174. *Id.* at 1469–70.

175. *Id.* at 1470–71.

176. *Id.* at 1469–70.

177. *Id.* at 1473.

Americans.<sup>178</sup> While determining whether race or political affiliation motivated the line-drawing is largely a factual question, the Court explained that alleged racial gerrymandering is subject to closer scrutiny because it “threatens special harms” that are not found in political gerrymandering cases.<sup>179</sup> Racial gerrymandering reinforces racial stereotypes and tacitly tells elected officials that they represent a racial group rather than their full constituency.<sup>180</sup> Therefore, racial gerrymandering is not “functionally equivalent” to political gerrymandering and is not “subject to precisely the same constitutional scrutiny.”<sup>181</sup> Because political gerrymandering does not threaten the same harms, the Court treats it differently from racial gerrymandering.

This background illustrates the Court’s method of assessing population and racial gerrymandering claims. However, partisan gerrymandering presents unique challenges, not only in terms of importance, but also in setting a workable standing threshold and standard of review.

### 3. *Partisan gerrymandering cases present unique challenges*

*Davis v. Bandemer* marked the Supreme Court’s first attempt to consider a political gerrymandering claim—almost twenty years after *Baker v. Carr*.<sup>182</sup> The plaintiffs in *Bandemer* argued that Indiana’s district lines “were intended to and did violate their right, as Democrats, to equal protection under the Fourteenth Amendment.”<sup>183</sup> A majority of the Court held the claim was justiciable and that the standards for political gerrymandering cases were just as judicially manageable as those for racial gerrymandering cases.<sup>184</sup> However, according to the *Bandemer* plurality, the plaintiffs needed “to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>185</sup>

In a separate opinion, Justice Powell argued that the plurality’s standard was not clear and that the Court had “fail[ed] to enunciate

---

178. *Id.*

179. *Shaw v. Reno*, 509 U.S. 630, 649–50 (1993).

180. *Id.* at 650.

181. *Id.*

182. *Compare* *Davis v. Bandemer*, 478 U.S. 109, 115 (1986), *with* *Baker v. Carr*, 369 U.S. 189 (1962).

183. *Bandemer*, 478 U.S. at 115.

184. *Id.* at 125.

185. *Id.* at 127.

standards by which to determine whether a legislature has enacted an unconstitutional gerrymander.”<sup>186</sup> Justice Powell’s opinion has proven prescient: As of the writing of this article, no Supreme Court majority has ever agreed upon a standard for unconstitutional political gerrymandering, and the Court has never held that a district map constituted an unconstitutional political gerrymander. The Supreme Court did not revisit the *Bandemer* decision for eighteen years. In the interim, the lower courts were left with the aftermath of the Supreme Court’s inability to furnish a standard for addressing claims of political gerrymandering.<sup>187</sup> And the lower courts, having considered numerous political gerrymandering claims, did not themselves succeed in shaping a standard for determining these claims.<sup>188</sup>

Subsequently, in 2004, a plurality of Supreme Court justices concluded that *Bandemer* should be revisited and partisan gerrymandering cases should be declared non-justiciable.<sup>189</sup> In *Vieth*, Justice Scalia’s plurality opinion acknowledged “the incompatibility of severe partisan gerrymanders with democratic principles.”<sup>190</sup> Even so, Scalia’s opinion surveyed the courts’ attempts to agree on a partisan gerrymandering standard and concluded that because none had emerged, none must exist.<sup>191</sup> Thus, a plurality of the Court found in *Vieth* that “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable . . . .”<sup>192</sup>

---

186. *Id.* at 161–62.

187. *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004).

188. *Id.* at 279–80. Justice Scalia, writing for the plurality in *Vieth*, discussed the history of the lower courts’ political gerrymandering decisions in the eighteen year span between *Bandemer* and *Vieth*:

Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer*’s four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time—but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney’s fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused.

*Id.* (citations omitted).

189. *Id.* at 281.

190. *Id.* at 292.

191. *Id.* at 281.

192. *Id.*

The plaintiffs and dissenters in *Vieth* argued that standards for political gerrymandering are “manageable” because they can be borrowed from cases determining that racial gerrymandering is unconstitutional.<sup>193</sup> Nevertheless, the plurality argued that the effects of political gerrymandering, as opposed to racial gerrymandering, are impossible to assess, and that creating a standard for evaluating the effects of political gerrymandering is near impossible.<sup>194</sup> The plurality also specifically rejected “fairness” as a standard, finding it judicially unmanageable: “Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party’s not winning the number of seats that mirrors the proportion of its vote.”<sup>195</sup> As such, partisan gerrymandering is not the same as more “manageable” types of gerrymandering claims.

Despite this discussion, in and after *Vieth*, the Court has continued to recognize that “[p]artisan gerrymanders ... are incompatible with democratic principles.”<sup>196</sup> Given the Court’s own past statements about the importance of congressional district development to fair representation, the question arises: is it really acceptable for justices on the country’s highest court to consider it impossible to identify and remedy gerrymandering—an acknowledged potential harm to democratic principles and the right of suffrage? At what point, if any, should American voters accept that the judiciary may “call it quits” on identifying a workable standard simply because it has not yet been achieved? In doing so, is the Court abdicating its role as a check on the legislative branch of government? And would an imperfect standard better preserve fair representation than no standard at all?

---

193. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788 (2017); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

194. *Vieth*, 541 U.S. at 287 (“But a person’s politics is rarely as readily discernible—and *never* as permanently discernible—as a person’s race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.”) (emphasis in original).

195. *Id.* at 291.

196. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (citing *Vieth*, 541 U.S. at 292).

These questions are particularly vexing considering that the Supreme Court has historically been willing to address other nebulous problems arguably less important to the underpinnings of representative government—including whether art is an obscenity not protected by the First Amendment,<sup>197</sup> or whether tomatoes should legally be considered vegetables.<sup>198</sup> One must question whether the Court ought to abdicate its responsibility “to say what the law is” in cases or controversies that pose a threat to fundamental democratic principles.<sup>199</sup>

Perhaps for these reasons, Justice Scalia’s opinion in *Vieth* did not garner a majority, and Justice Kennedy refused to wholly shut the door on political gerrymandering claims. In his concurring opinion, Justice Kennedy argued that the fact that “no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.”<sup>200</sup> *Vieth* left the issue unsettled; no Supreme Court majority had yet declared political gerrymandering non-justiciable, but neither had any majority figured out what to do about it.<sup>201</sup>

While other partisan gerrymandering cases have been brought to, and reviewed by, the Court, the Court has to date declined to further define a standard for justiciability or standard of review. In *League of United Latin American Citizens v. Perry*, the Court declined to revisit the justiciability issue, instead holding that the plaintiffs had not offered the Court a “manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”<sup>202</sup> However, the Court did acknowledge that the Constitution, through the First and Fourteenth Amendments, limits a state’s power to “rely exclusively on partisan preferences in drawing

---

197. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 191–92 (1964) (Brennan, J., writing for the majority) (retaining the “not perfect” and “contemporary community standards” test for identifying obscenity); *id.* at 197 (Stewart, J., concurring) (noting that the Court was “trying to define what may be indefinable . . . But I know it when I see it, and the motion picture involved in this case is not that.”).

198. *Nix v. Hedden*, 149 U.S. 304, 307 (1893).

199. *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803).

200. *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring).

201. See generally *id.* at 279 (discussing the inability of courts to settle on a standard for judicial action).

202. 548 U.S. 399, 414 (2006).

district lines . . . .”<sup>203</sup> Rather, the state has a “fundamental duty . . . to govern impartially.”<sup>204</sup>

In the twelve years since *Perry*, political gerrymandering has become one of America’s most heated political issues. In 2018, the Supreme Court heard two partisan redistricting cases, raising expectations that it would finally settle, or at least shed more light on, the issue. But in both cases, the Court declined to address the justiciability of political gerrymandering cases. In *Whitford v. Gill*, the plaintiffs were Wisconsin voters who argued that the state’s legislative map caused “statewide harm to their interest ‘in their collective representation in the legislature,’ and in influencing the legislature’s overall ‘composition and policymaking.’”<sup>205</sup> Additionally, the plaintiffs presented a measure of partisan advantage: efficiency gaps.<sup>206</sup>

[O]n a statewide level, the degree to which packing and cracking has favored one party over another can be measured by a single calculation: an “efficiency gap” that compares each party’s respective “wasted” votes across all legislative districts. “Wasted” votes are those cast for a losing candidate or for a winning candidate in excess of what that candidate needs to win.<sup>207</sup>

The *Gill* plaintiffs promised the Court that the problem of political gerrymandering could be solved by evaluating the efficiency gap.<sup>208</sup> The Supreme Court did not agree, determining that the suggested efficiency gap metrics do not “address the effect that a gerrymander has on the votes of particular citizens.”<sup>209</sup> The Court held that voters must allege that the impact of their specific, individual vote—not the votes of a group—was diluted by a district map. The *Gill* plaintiffs’ claim, however, did not identify “an individual and personal injury of the kind required for Article III standing.”<sup>210</sup> As such, the Court

---

203. *Id.* at 461.

204. *Id.* at 462.

205. 138 S. Ct. 1916 (2018) (quoting Brief for Appellees at 31).

206. *Id.* at 1924.

207. *Id.*

208. *Id.* at 1933 (“The plaintiffs and their *amici curiae* promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just ‘a pencil and paper or a hand calculator’—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades.” (quoting Brief for Heather K. Gerken et al. as *Amici Curiae* at 27 (citations omitted))).

209. *Id.*

210. *Id.*

effectively rejected the claims on standing grounds.<sup>211</sup> Ultimately, the Court did not address whether the map itself was in violation of constitutional principles.<sup>212</sup>

In *Benisek v. Lamone*—the Court’s second partisan gerrymandering case of 2018—a dismissal of the plaintiffs’ claim was upheld by the Court because the plaintiffs unnecessarily waited six years after an election to challenge the legislative map.<sup>213</sup> As such, the Court again avoided the justiciability questions by instead requiring plaintiffs to show “individual and personal injury” to the right to vote in order for the Court to consider judicial intervention.<sup>214</sup>

It is not surprising that the Court would decide these cases on procedural grounds where such issues existed, and avoid wading into the “political thicket”<sup>215</sup> of judging political maps unless and until strictly necessary. This is consistent with long-standing principles of eschewing political questions and ensuring standing exists, so as to avoid involving the Court in matters that are not ripe or do not present

---

211. Arguably, however, the Court rejected the claims by looking past standing to the substantive question of whether plaintiffs had established an actual injury rather than by questioning simply whether a basis to claim one existed and was caused by the redistricting map in question. *Id.* at 1930–31 (“Here, the plaintiffs’ partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter’s own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.”).

212. *Id.*

213. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (“In considering the balance of equities among the parties, we think that plaintiffs’ unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request.”).

214. *Whitford v. Gill*, 138 S. Ct. 1916, 1931 (2018) (“[O]ur cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing.”).

215. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., writing for the plurality). While the majority of the Court dismissed the claim of unfair districts, Justice Frankfurter’s opinion was delivered only on behalf of three members of a four-member majority of the Court (since the Court was missing two members). Justice Frankfurter wrote for the plurality that “To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.” *Id.* The case was no longer considered particularly good law after *Baker v. Carr*, but the “political thicket” language remains commonplace in redistricting discussions.



a specific injury.<sup>216</sup> *Gill* sets the bar quite high—if not impossibly high—for judicial intervention in redistricting cases, requiring parties to establish standing by showing an individualized, personal injury, rather than a generalized injury to statewide voters or the collective political interest of a larger political party. This approach also helps the judiciary avoid criticism for taking either political party’s side in an inherently political process.

Long-standing Supreme Court precedent nonetheless suggests that the judiciary must remain open to addressing gerrymandering cases due to the practical impacts of redistricting on voting rights and the Court’s recognition of the importance of voting in our representative democracy. Moreover, judicial consideration may be the most effective course of addressing partisan gerrymandering cases in a non-partisan manner because judicial review is intended to be non-partisan (at least at the federal level, where judges are appointed). Finally, if the judiciary continues to avoid cases of partisan gerrymandering on justiciability grounds, despite the findings of *Davis v. Bandemer*, state legislatures may feel increasingly empowered to draw unfairly partisan maps without any fear of restriction.<sup>217</sup>

In light of the legal importance of the right to suffrage, the practical and statistical impact of political redistricting on the voting outcomes, and the potential consequences of abdicating judicial oversight of redistricting, the Court should not extract the judiciary from partisan redistricting entirely. That is, the Court should not issue any conclusions that extend the plurality opinion in *Vieth*.<sup>218</sup>

---

216. See, e.g., *Abbot Laboratories v. Gardener*, 387 U.S. 136 (1967) (analyzing the ripeness doctrine); *Baker v. Carr*, 369 U.S. 186 (1962) (analyzing the political question doctrine).

217. See Robert Pack, *Land Grab: The Pros and Cons of Congressional Redistricting*, D.C. BAR (Apr. 2004), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2004-redistricting.cfm> [<https://perma.cc/WMK5-USWX>] (“Any person or party seeking to have a new map thrown out for political reasons faces an uphill battle. ‘Each year that passes and no plan is ever found to violate that doctrine,’ says Klain, ‘the more the legislatures feel themselves unencumbered [by the courts].’”).

218. The Supreme Court heard oral arguments on two new partisan gerrymandering cases on March 26, 2019. The first case, *Lamone v. Benisek*, was originally considered by the Court during the 2017–18 term and resulted in a brief, unsigned opinion that left the merits unaddressed. *Benisek v. Lamone*, 585 U.S. \_\_\_ (2018). The case then went back to the district court. The district court ruled for the plaintiffs and ordered the Maryland to draw a new map for the 2020 election. No. 1:13-CV-03233-JKB, 2018 WL 5816831, *cert. granted* (D. Md. Nov. 7, 2018). The

That said, we are mindful of the limited role of the judiciary, the importance of the political question doctrine, and of cases in which the Court has issued perceivably “partisan” decisions in highly politicized cases.<sup>219</sup> As a result, courts should continue to be careful and methodical in determining when to address partisan gerrymandering cases. To balance these concerns, courts should only assume the important responsibility of finding partisan gerrymandering claims justiciable under carefully-assessed circumstances, and they should approach such matters acknowledging directly how the case outcomes may be perceived.

#### IV. TOWARD A STANDARD FOR ASSESSING UNDUE POLITICAL MANIPULATION IN REDISTRICTING

As delineated throughout this article, the question remains: how should the judiciary approach political redistricting in a manner that is fair, mindful of political outcomes, and maintains public faith in the judiciary? This requires workable standards that address two issues. First, what is the appropriate standard for determining when a party has standing to raise a gerrymandering claim—that is, what are the boundaries of judicial consideration for a partisan gerrymandering case? Second, what is the appropriate substantive standard to apply to partisan gerrymandering claims?

##### A. *Legislative Solutions: Nonpartisan Redistricting Commissions*

Currently, nine states give “primary responsibility” for drawing congressional district plans to nonpartisan redistricting commissions: Arizona, Colorado, California, Hawaii, Idaho, Montana, Michigan, New Jersey, and Washington.<sup>220</sup> Although such practices

---

second case, *Rucho v. Common Cause*, also considers whether partisan gerrymandering claims are justiciable and whether a congressional map, in this instance North Carolina’s, is unconstitutional. No. 1:16-CV-1026, 2018 WL 4214334, *cert. granted* (M.D.N.C. Sept. 4, 2018). Both cases provide the Court opportunities to reconsider the plurality opinion in *Vieth*.

219. See *supra* Section II.

220. See NAT’L CONFERENCE OF STATE LEGISLATURES, *Redistricting Commissions: Congressional Plans* (Jan. 21, 2019), <http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx> [<https://perma.cc/7DE6-4T7E>] [hereinafter *Redistricting Commissions: Congressional Plans*].

have been challenged,<sup>221</sup> the Supreme Court has held that the Elections Clause permits ballot initiatives to move district line-drawing power from a state's legislature to an independent commission.<sup>222</sup> Other states utilize a commission on an advisory basis, with primary responsibility remaining in the hands of the legislature.<sup>223</sup> Still others have explored, or are exploring, the utilization of commissions in some regard.<sup>224</sup> One potential advantage of utilizing multi-partisan or nonpartisan commissions is that fewer redistricting maps drawn by them lead to partisan gerrymandering challenges before the courts.

Indeed, there is some evidence that these commissions are already accomplishing important goals of districting reform. One such goal is more competitive districts.<sup>225</sup> For example, Arizona's Independent Redistricting Commission was created by ballot initiative in 2000 and produced maps in 2001 and 2011. Those maps had an average margin of candidate victory more than twenty-eight percent lower than the rest of the nation.<sup>226</sup> California followed in 2010 by creating the Citizen's Redistricting Commission. After creating the independent commission, California saw the number of "toss-up" districts—those decided by five percentage points or fewer—increase sharply, and its average margin of victory dropped thirty percent from the previous decade.<sup>227</sup> Put differently, the districts drawn by these commissions have less partisan tilt in one direction or the other.

---

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

222. *Id.* at 2673 ("Nothing in that Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.").

223. See *Redistricting Commissions: Congressional Plans*, *supra* note 220.

224. See NAT'L CONFERENCE OF STATE LEGISLATURES, *Redistricting Commission Bills* (Dec. 8, 2017), <http://www.ncsl.org/research/redistricting/redistricting-commission-bills.aspx> [<https://perma.cc/T45K-2NP7>].

225. Kim Soffen, *Independently Drawn Districts Have Proved to Be More Competitive*, N.Y. TIMES (July 1, 2015), <https://www.nytimes.com/2015/07/02/upshot/independently-drawn-districts-have-proved-to-be-more-competitive.html> [<https://perma.cc/QE55-YST6>]. *But see* Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C-IRVINE L. REV. 637, 666–67 (expressing skepticism that increased competitiveness can be fully explained by independent commissions).

226. Soffen, *supra* note 226.

227. Soffen, *supra* note 226.

The commissions also have increased transparency and openness, as they have held “a considerable number of hearings to solicit input from the public.”<sup>228</sup> Yet another virtue of the commissions: they produce district maps on time and those maps go unchallenged by costly and time-consuming litigation.<sup>229</sup> This is in contrast to legislatures, which frequently find themselves deadlocked.<sup>230</sup>

Different commissions achieve these goals in different ways. The commissions in Arizona and California, for example, took divergent approaches to member selection.<sup>231</sup> Most importantly, they differed sharply in their approach to drawing district maps.<sup>232</sup> However, both had “clear, prioritized criteria” which guided the map-drawers, insulating them from political bias. The “differences ultimately seem to have been less important to the success of the commission than the fact that there were clear and . . . prioritized rules.”<sup>233</sup> The Arizona commission is tasked with creating the most competitive districts that it can. Arizona’s constitution states that “[t]o the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.”<sup>234</sup> To promote competition, the Arizona commission takes partisan data into consideration.<sup>235</sup> In contrast, the California commission is forbidden from considering partisan data,<sup>236</sup> and is required by its constitution to respect “[t]he geographic integrity of any city, county, city and

228. Miller & Grofman, *supra* note 226, at 666.

229. See Miller & Grofman, *supra* note 226, at 651 (“As yet, a court has not stepped into the process to draw maps when a commission is responsible for creating congressional maps. Commissions consistently deliver district maps on time, and largely without litigation.”).

230. See Miller & Grofman, *supra* note 226, at 651.

231. See Miller & Grofman, *supra* note 226, at 666.

232. Soffen, *supra* note 226.

233. *Redistricting Commissions: What Works*, BRENNAN CTR. FOR JUSTICE (Jul. 24, 2018), <https://www.brennancenter.org/blog/redistricting-commissions-what-works> [<https://perma.cc/LC4K-KYJT>]; see Campaign Legal Center, *Designing Independent Redistricting Commissions* (2018), [https://campaignlegal.org/sites/default/files/2018-07/Designing\\_IRC\\_Report2\\_FINAL\\_Print.pdf](https://campaignlegal.org/sites/default/files/2018-07/Designing_IRC_Report2_FINAL_Print.pdf) [<https://perma.cc/M8W4-LWV3>].

234. ARIZ. CONST. art. IV, pt. 2, § 1(14)(F).

235. Soffen, *supra* note 226. (“In California, the commission was legally forbidden from considering partisan data when forming the districts, as opposed to Arizona, where the commission was supposed to use this data to promote competition.”).

236. Soffen, *supra* note 226.

county, local neighborhood, or local community of interest . . . .”<sup>237</sup> This means “keeping the rural areas in the same district or putting the Northern California wineries in the same district as their warehouses.”<sup>238</sup>

In other words, as the National Conference of State Legislatures has stated, much depends on the make-up of each commission and the scope of its assigned work.<sup>239</sup> There is some evidence that independent redistricting commissions achieve several important redistricting goals that partisan legislatures struggle with. California and Arizona present two different examples of how settled, prioritized criteria can guide map-drawers in creating more competitive district races.

Though it is not a complete solution, these practices have the benefit of helping to ensure more redistricting plans are completed outside of the legislature and with fewer abdication of map-drawing or appeals to the courts. Other states were investigating such initiatives as of this article’s drafting, and by the time of publication it is possible other states’ voters will have approved new redistricting commissions.<sup>240</sup> Such practices, if permitted to expand to other states, have the potential to help more courts avoid wading into the “political thicket” of either drawing or reviewing redistricting maps.

*B. Judicial Solutions: Appropriate Standards and Steps in the Political Thicket*

*1. Establishing standards for evaluating partisan gerrymandering claims*

Although the redistricting commission is a promising construct to insulate the judiciary—among other goals—it is only available where new legislation or a ballot initiative approves its creation. Given the primacy of the legislature, it appears that implementation

---

237. CAL. CONST. art. XXI, § 2(d)(4).

238. Soffen, *supra* note 226.

239. *Redistricting Commissions: Congressional Plans*, *supra* note 220 (“Reformers often mistakenly assume that commissions will be less partisan than legislatures when conducting redistricting but that depends largely on the design of the board or commission.”).

240. Alexis Farmer & Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUSTICE (Oct. 26, 2018), <https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting> [<https://perma.cc/6AZ8-S8WE>].

of a redistricting commission cannot be required by judicial order. As such, the existence of commissions in some states does not resolve the question of when and on what grounds courts should assess and decide questions of partisan gerrymandering.

*a. Standing should not be an insurmountable barrier to justiciability*

First, it is critical to address the standing threshold, as standing confers jurisdiction. Narrow interpretations of what constitutes standing can significantly reduce the number of occasions when an Article III court hears a partisan gerrymandering case. By way of review, a threshold for consideration of political redistricting claims is whether the plaintiff has standing to state a claim. To show standing before an Article III court in a redistricting case, a plaintiff must have “a personal stake in the outcome of the controversy,” requiring an individualized injury to the person’s right to vote.<sup>241</sup>

This standing requirement in partisan gerrymandering cases was upheld and further defined in *Gill v. Whitford*, largely by requiring that a voter challenging a redistricting plan on partisan gerrymandering grounds live in a district in which votes were “packed” or “cracked.”<sup>242</sup> In *Gill*, the lead plaintiff acknowledged that his ability to elect a representative from his political party of choice would have likely been essentially the same regardless of statewide partisan gerrymandering. Other plaintiffs focused on statewide (rather than individual district) impacts. Consequently, the Court found the plaintiffs had no standing to pursue a partisan gerrymandering case.<sup>243</sup> The conclusion that a plaintiff must live in a district that is affected by gerrymandering, which in turn means the plaintiff’s own vote has been diluted by partisan efforts, is consistent with the standing requirement of a “personal injury.” Absent this limitation, it is conceivable that any individual of voting age could bring a partisan gerrymandering claim in the State where she or he resides, regardless of individual harm.

To avoid making the requirements for standing overly stringent, however, it is critical to place certain terminology from the *Gill*

---

241. *Glaze v. State*, 909 N.W.2d 322, 325 (Minn. 2018) (“Standing is the requirement that a party has a sufficient stake in a justiciable controversy. To have standing on appeal, a party must be ‘aggrieved’ by the underlying adjudication.”).

242. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

243. *Id.* at 1933.

decision into proper context. First, the references to an “individual” injury should not foreclose a litigant who *does* live in an affected district from claiming that the injury affects both voters in his or her district and in the state at-large. Because voting districts must be comprised of relatively equal populations—there cannot be gaps or overlaps—a change to one or more congressional or legislative districts necessarily affects the surrounding districts of the state.<sup>244</sup> It is simply not possible to change only the boundaries of one single district. Accordingly, the effect of gerrymandering on one district cannot be separated from its effect on districts throughout the state.<sup>245</sup>

Further, it is critical to acknowledge the important difference between the lead plaintiff “expressly acknowledg[ing] that [the redistricting plan in question] did not affect the weight of his vote,” and the Court’s note that the lead plaintiff also acknowledged that his district would be “under any plausible circumstances, a heavily Democratic district.”<sup>246</sup> While an acknowledgement that there is no impact to one’s vote obviates any claim of standing, a plaintiff would arguably still have standing to bring a partisan gerrymandering claim where vote weight was affected, but the outcome of the election was not changed because the district leans heavily toward one party. This is because packing Democratic voters into one district may not affect the ability of a voter in that district to elect a Democrat, but would have the effect of “wasting” Democratic votes on a statewide basis. Almost by definition, packing voters into one district has the effect of cracking voters of another party into a different district to maximize the impact on multiple districts.<sup>247</sup> A prevailing plaintiff ultimately must, of course, offer proof that such vote wasting actually occurred.<sup>248</sup> But for standing purposes, evidence that a district was intentionally and/or more materially tilted to one political party should be sufficient.<sup>249</sup>

---

244. *See id.* at 1937 (Kagan, J., concurring) (explaining that with enough plaintiffs attacking individual districts in a statewide gerrymander, the “obligatory revisions could amount to a wholesale restructuring of the State’s districting plan”).

245. For instance, compare a lead plaintiff acknowledgement that his own ability to elect a Democrat in his district was not affected, to another plaintiffs’ decision to focus on proving a statewide impact at trial instead of the impact on their own district. These claims should be considered inseparable from the outcome of *Gill*.

246. *Gill*, 138 S. Ct. at 1924, 1932.

247. *Id.* at 1924.

248. *Davis v. Bandemer*, 478 U.S. 109, 143 (1986).

249. *Id.* at 127.

Finally, the requirement of an “individual” voter injury should not be taken too literally. Gerrymandering by definition targets groups of voters to achieve an outcome within a district or state.<sup>250</sup> The partisan mapmaker’s focus on a particular political party of which the plaintiff is a member, and the effect of partisan gerrymandering on the district in which the plaintiff lives, will ultimately have the effect of diluting the power of individual votes.<sup>251</sup> Further, it is almost impossible to suggest that a map was drawn to affect one individual voter when, by definition, the gerrymandering party is attempting to move sufficient votes around to make a difference in an election.<sup>252</sup> As such, the focus of the *Gill* decision on an “individual injury” should not be construed too narrowly.

This approach to standing is consistent with the concurring opinion of Justice Kagan in the *Gill* decision.<sup>253</sup> Specifically, Justice Kagan joined in the Court’s finding that no standing existed, but stated in her concurrence that:

This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. “Voters,” we held, “of course present statewide *evidence* in order to prove racial gerrymandering in a particular district.” And in particular, “such evidence is perfectly relevant” to showing that mapmakers had an invidious “motive” in drawing the lines of “multiple districts in the State.” The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy.<sup>254</sup>

While one could argue in *Gill*—as the majority did—whether Justice Kagan’s concurrence was necessary under the limited holding of the case,<sup>255</sup> the standing issue and Justice Kagan’s concurrence serve two important purposes in the context of this article. First, *Gill* illustrates a decision in which the Court took appropriate, largely neutral steps to avoid becoming overly entangled in the “political

---

250. See Joann D. Jamuf, “Should I Stay or Should I Go?: The Current State of Partisan Gerrymandering,” 74 *FORDHAM L. REV.* 163, 168 (2005).

251. See *id.* at 169–70.

252. *Id.* at 209–10.

253. See *Gill v. Whitford*, 138 S. Ct. 1916, 1934–41 (2018) (Kagan, J., concurring).

254. *Id.* at 1937 (emphasis in original) (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1265, 1267 (2015)).

255. *Id.* at 1931.



thicket” of partisan gerrymandering.<sup>256</sup> To the extent that media criticism of the Court occurred following the *Gill* decision, it focused largely on a desire for more clarity around partisan gerrymandering standards, rather than on whether the Court was being overly-partisan as in other recent cases described earlier in this article.<sup>257</sup> Adhering to standing requirements—especially in such politically-charged circumstances—is a good thing.

Second, and perhaps conversely, the standing discussion in the *Gill* opinion underscores that there are limits on the extent to which the Court can—or should—avoid partisan gerrymandering claims on standing grounds.<sup>258</sup> The inverse of the *Gill* decision would be the argument that a plaintiff who lives in a district in which her votes were diluted should have standing to state a partisan gerrymandering claim. Where a plaintiff has standing to be heard on a legal question involving the Equal Protection Clause of the Constitution and the right to suffrage, one might argue the judiciary should address those legal questions and important rights. The next question, then, is whether such a claim can be justiciable pursuant to an articulable judicial standard.

*b. To assess credibility of redistricting plans, look to states’ neutral redistricting criteria for drafting plans*

As previously discussed in this article,<sup>259</sup> a plurality of the United States Supreme Court stated in *Bandemer* that partisan redistricting claims are justiciable,<sup>260</sup> while the plurality in *Vieth* stated that they are not.<sup>261</sup> In addition, the *Vieth* plurality argued that no federal court has identified a manageable standard for evaluating partisan gerrymandering, and largely rejected a standard based on evidence of intent to gerrymander, actual effect on an overall plan, or a general assessment of compactness, contiguity, and other neutral redistricting criteria.<sup>262</sup> The *Vieth* plurality likewise rejected

---

256. *See id.* at 1933–34.

257. Amy Howe, *Opinion Analysis: Court Stays Out of Merits on Partisan Gerrymandering, at Least For Now*, SCOTUSBLOG (June 18, 2018, 1:40 pm), <https://www.scotusblog.com/2018/06/opinion-analysis-court-stays-out-of-merits-on-partisan-gerrymandering-at-least-for-now/> [https://perma.cc/JE7D-F333].

258. *See Gill*, 138 S. Ct. at 1929.

259. *See supra* Part III.C.

260. *Davis v. Bandemer*, 478 U.S. 109, 125 (1986).

261. *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004).

262. *Id.* at 305–06.

standards for assessing partisan gerrymandering that focused generally on “fairness” and the “totality of the circumstances.”<sup>263</sup>

Given the inherently political nature of redistricting, the standard for establishing that a map is unconstitutionally partisan should be based on a clear, and relatively high, standard. We believe, however, that this is achievable. First, the *Vieth* plurality did not examine in any detail how the “neutral redistricting criteria” that state courts have successfully utilized to draw largely neutral maps might be measured to assess maps allegedly drawn on impermissibly partisan grounds.<sup>264</sup>

To address these questions, the approaches used by the Minnesota Special Redistricting Panel and Pennsylvania court are instructive and may present a reasonable solution. Specifically, sophisticated redistricting software has now existed for several decades<sup>265</sup> and allows statistical measurements of redistricting plans on several levels—providing objective quantification of how closely a plan satisfies fundamental, neutral principles such as population equality, contiguity, compactness, alignment with political subdivision boundaries, and Voting Rights Act compliance.<sup>266</sup> Further, we can say from experience with Minnesota’s redistricting panels that it is manageable for a court to identify a range of acceptable measures (e.g., population equality requirements, compactness measures, percentage of political subdivision splits) that would indicate a redistricting plan satisfies fundamental neutral principles. This is, in fact, what the Minnesota Panels did, providing maps and associated statistics to show satisfaction of neutral

---

263. *Id.* at 268–69.

264. *Id.* at 305–06.

265. See CALIPER, MAPITUDE FOR REDISTRICTING SOFTWARE, <https://www.caliper.com/mtredist.htm> [<https://perma.cc/JH4Y-PZLJ>]; see also DISTRICTBUILDER, <http://www.districtbuilder.org/> [<https://perma.cc/GA3B-QMPD>].

266. See, e.g., *Hippert v. Ritchie*, A11-152 (Minn. Special Redistricting Panel Nov. 4, 2011) (Order Stating Redistricting Principles and Requirements for Plan Submissions); *Zachman v. Kiffmeyer*, C0-01-160, at 3 (Minn. Special Redistricting Panel Dec. 11, 2001) (Order Stating Redistricting Principles and Requirements for Plan Submissions). It is also worth noting that where courts are charged with drawing maps from scratch, they may consider more abstract (albeit still potentially politically neutral) criteria such as gender, communities of interest, etc. We do not suggest using such additional criteria in the assessment of maps for partisan purposes, as these categories are somewhat farther removed from the fundamental nonpartisan tenets of redistricting, and may not serve to isolate partisan political goals.

redistricting criteria. Experts also are available to provide data, testimony, and analysis of how these criteria are met.

There also is evidence of the Supreme Court establishing numeric standards related to redistricting. Indeed, the Supreme Court has previously established exactly such metrics for population equality within congressional<sup>267</sup> and legislative districts,<sup>268</sup> holding that districts materially exceeding these thresholds create a prima facie case for discrimination.<sup>269</sup> Further, it is possible to establish standards for compactness, contiguity, and equality of population because specific levels were once legislated (though they are no longer required by federal statute).<sup>270</sup> While it would be ideal to have legislation that specifies when a district or plan is overly partisan, it can still be said that judicial assessment of, and adherence to, neutral redistricting criteria acts as a counterbalance to overly-partisan redistricting,<sup>271</sup> while failure to adhere to such criteria may indicate partisan bias.

That said, we do not propose specific percentages or numeric ranges of acceptable outcomes in this article, as establishing such standards could form the basis for a separate article or judicial

---

267. See *Karcher v. Daggett*, 462 U.S. 725 (1983) (holding that the “equal representation” standard of U.S. Const. Art. I, § 2, requires that congressional districts “be apportioned to achieve population equality ‘as nearly as is practicable’” (citation omitted)); see also *Vieth*, 541 U.S. at 276–77.

268. *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (“Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.” (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973)).

269. *Id.* (“A plan with larger disparities in population, however, creates a prima facie case of discrimination, and therefore must be justified by the State.” (internal citation omitted)).

270. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(a)-(b) (2012) (barring voting qualifications or prerequisites to voting or standard, practice, or procedure which, “based on the totality of circumstances, [are] shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizen”); *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (U.S. 1986) (identifying threshold conditions for a court finding that a legislative district must be redrawn under the requirements of Voting Rights Act § 2).

271. We say “overly” partisan because it must be acknowledged, of course, that all redistricting by legislative bodies is partisan to some extent, regardless of how compact, contiguous, etc., the district(s) in question may be. The question arises solely when such redistricting is so discriminatory as to violate the Equal Protection Clause. See generally *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (outlining three elements the Court uses to determine if redistricting is discriminatory).

decision. However, because districts that have the explicit appearance of gerrymandering—partisan or otherwise—tend to appear the least compact and may tend to divide more political subdivisions, the acceptable range of compactness and political subdivision split scores should be fairly stringent. Establishing meaningful requirements for compactness and maintaining political subdivisions has the further benefit of increasing confidence in both the redistricting and judicial review processes, since these measures help with the fundamental logistics of administering elections, voting, and identifying representatives.<sup>272</sup>

Additionally, because politics are an inherent part of redistricting, and because it is not uncommon for geographic areas to swing “blue” or “red” based on groups of people who choose to live in the same area, we do not follow the equal population cases that suggest the courts may find a *prima facie* case of discrimination where these measures are not met. Rather, we propose a converse approach: establishing by a preponderance of the evidence that any district that satisfies these acceptable ranges of neutral districting criteria would equate to a *prima facie* case that no unduly partisan redistricting exists, even if the political benefits are largely one-sided. Consequently, satisfying neutral redistricting criteria standards would present the strong presumption that a plan is not unduly partisan.

Where these criteria are *not* met, it would therefore still be the plaintiff’s burden to prove that their individual district(s) or statewide plan were: (1) the product of intentional partisan districting meant to waste votes of the opposite political party or maximize votes for the party in favor of the districting; and (2) successful in diluting one’s ability to elect the party of his or her choice

---

272. Compact districts that do not split subdivisions make it easier for cities to establish voting locations, reduce the number of different ballots that may be required for any particular election, and reduce the cost of vote counting and reporting. See Ryan D. Williamson, et al., *This is how to get rid of gerrymandered districts*, WASH. POST (March 17, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/17/this-will-get-rid-of-gerrymandered-districts/?utm\\_term=.20f647f0bf56](https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/17/this-will-get-rid-of-gerrymandered-districts/?utm_term=.20f647f0bf56) [<https://perma.cc/44W3-U842>]. Likewise, these same factors make it easier for voters to understand who represents them; allow the populations of individual cities, counties, and municipalities to have a louder collective impact on their elected official; and sometimes simply make it easier to access a polling location. *Id.*

in the district at issue. This is akin to the *Davis v. Bandemer* plurality standard established decades ago.<sup>273</sup>

Although the *Vieth* plurality rejected a test of impact (successful vote dilution) based on whether a majority party of the electorate is precluded from electing a majority of representatives on the grounds that a political majority could not be readily identified, this is an overly narrow test of impact. There are two reasons for this conclusion. First, as with neutral redistricting criteria, redistricting software gathers evidence of political affiliation and voting history that politicians and political parties alike use to develop district plans.<sup>274</sup> That same data can be assessed to determine the extent to which packing and cracking efforts occurred. Second, we know that studies are regularly conducted that specifically identify the impacts of partisan “gerrymanders” on election outcomes. Now, it is possible to discern when partisan goals have resulted in wasted votes and influence on elections.<sup>275</sup>

Accordingly, this suggested standard combines several objective measures of partisan discrimination: (1) failure to fulfill neutral, applied statistical measures; (2) evidence of intentional discrimination; and (3) statistical evidence of wasted votes. When all those elements are present, and supported by documentary and/or expert evidence, we submit that a finding of unconstitutional partisan redistricting does not require definitive evidence that a particular election outcome was prevented (which may indeed be a largely impossible standard). Nor is the standard judicially unmanageable because of a reliance on such abstract concepts as “fairness” or “totality of the circumstances.” Rather, when the above conditions are met, a court may apply the facts to the law and find that a redistricting

---

273. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (concluding that unconstitutional partisan gerrymandering occurs only in the event of “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group”).

274. See, e.g., CALIPER, MAPTITUDE FOR REDISTRICTING SOFTWARE FEATURES, <https://www.caliper.com/redistrictingfeatures.htm> [https://perma.cc/NE32-GYWM].

275. We do not intend to suggest that such data is perfect, nor that past voting patterns necessarily determine future party status—or indeed any specific party affiliation. But the same can be said of population and demographic data: By the time redistricting is underway following each decennial census, the census data is already stale. Likewise, incumbent data and political subdivision boundaries are changing all the time.

plan is overly-partisan and dilutes votes in violation of the Equal Protection Clause.

Ultimately, however, the goal is neither perfect data nor a perfect standard. Perfection has never been required for either judicial review of redistricting, nor in many other areas where the Court has assessed fundamentally abstract concepts. “Manageable” is, instead, more related to “reasonable,” “functional,” “practical,” and “achievable.”<sup>276</sup> As such, the more important goal—that this article seeks to advance—is to create a reasonable judicial check on legislative redistricting and the fundamental threats to the right to suffrage that redistricting poses. In turn, elections will be made fairer as compared to allowing partisan legislative redistricting to continue wholly unconstrained.

2. *Address perception of partisan judiciary through drafted opinions*

In multiple cases (some of which were discussed above) and in media interviews, Supreme Court Justices have bemoaned the public perception of the politicization of the Court. Several years before the changes brought by Justice Scalia’s vacancy, Merrick Garland’s nomination, and Brett Kavanaugh’s confirmation process, Chief Justice Roberts noted the importance of the Court speaking with one voice (when possible) and for the Justices to avoid personal criticisms of each other.<sup>277</sup> For example, Chief Justice Roberts stated “that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”<sup>278</sup> There is little question that “closely divided, 5-4 decisions make it

---

276. *Manageable*, OXFORD ENGLISH DICTIONARY (3rd ed. 2010).

277. Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC (Jan/Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/> [<https://perma.cc/YZL4-4SGR>] (noting that at the end of the prior term, “[o]pposing justices addressed each other in unusually personal terms and generated a flurry of stories in the media about the divisions on the Court, especially in cases involving terrorism, the death penalty, and gerrymandering. Roberts seemed frustrated by the degree to which the media focused on the handful of divisive cases rather than on the greater number of unanimous ones, and also by the degree to which some of his colleagues were acting more like law professors than members of a collegial Court.”).

278. *Id.*

harder for the public to respect the Court as an impartial institution that transcends partisan politics.”<sup>279</sup>

Yet the Court seems to often decide the most controversial cases on precisely that divide—and not just any division of Justices, but divisions that have been so frequently perceived to be on “partisan” grounds. For many years, this involved one Justice (most recently Justice Kennedy, and before him, Justice O’Connor) acting as the “swing” vote. As such, the concern is less about whether decisions are five-to-four or six-to-three, but rather whether cases are divided between the “liberal” and “conservative” wings of the Court.<sup>280</sup>

While promoting unanimity and avoiding partisan divides are good goals, especially in highly political cases involving alleged partisan gerrymandering, even more is required of Justices seeking to protect the judiciary. First, judges and Justices who repeatedly decide cases on what they know will be perceived to be partisan lines need to reconsider which cases they are accepting on certiorari (when there is a choice) and how they are approaching their decisions. Continuing down the current path of maintaining regular divides between the “conservative” and “liberal” wings of the Court will only further undermine public faith in the fairness of the judiciary, no matter how correct the final decision may be.

This is not to say that judges should vote in a way they believe to be incorrect for the sake of fostering a less divided Court. Rather, other, smaller steps may help. There are multiple ways to look at a case, and, frequently, multiple grounds on which to decide any given case. Moreover, even the occasional decision along the lines of *National Federation of Independent Business v. Sebelius*, where George W. Bush appointee Chief Justice Roberts sided with the “liberal wing” of the Court, helps break the public perception that the justices are unavoidably divided along party lines.<sup>281</sup>

Additionally, Justices—and judges on other courts—should explicitly acknowledge the political ramifications of any judicial decision on partisan gerrymandering claims. Feigning total ignorance of specific political implications while favoring a strict focus on legal interpretation or generalizations about political issues set before the

---

279. *Id.*

280. Adam Edelman, “The Decider’: What Kennedy’s Legacy Means for the Supreme Court’s Future,” NBC NEWS (June 27, 2018), <https://www.nbcnews.com/politics/supreme-court/decider-kennedy-s-legacy-supreme-court-swing-vote-n887166> [<https://perma.cc/J94J-W5SX>].

281. 567 U.S. 519 (2012).

judiciary—as largely occurred in *Bush v. Gore*—is no longer credible.<sup>282</sup> This is particularly the case after the recent Supreme Court confirmation proceedings, in which now-Justice Brett Kavanaugh called out one political party in angry language and tone.<sup>283</sup> In the shadow of that hearing, it is not enough for the Court to simply say in general terms that it is not partisan; these can be empty words when the decision itself seems no different from congressional votes on important legislation, divided heavily along party lines.

In other words, the opinion or opinions of the Court on politicized issues, especially such as partisan gerrymandering, should not only acknowledge that they have waded into the political thicket, but should also be explicitly clear that the Justices understand a particular outcome may feed into the partisan interpretation. The Court, for example, could include as part of its opinion an acknowledgment that its decision, though grounded in the law, may result in partisan criticism. Such an acknowledgement might be something like the following:

We recognize that this outcome (in which a claim of [Republican or Democratic] partisan gerrymandering is [struck down or upheld]), especially as decided by this majority, may be perceived as resulting from a particular political influence or a desire to help that political party. We have considered whether it is possible to maintain the integrity of the Court and avoid that perception—but the reality is that this is the right outcome based on the law, which does not allow [briefly summarize legal problems with alternate outcome]. We acknowledge such issues are difficult for the courts and that any decision would likely be viewed as if it were political. However, this Court is making the decision based solely on the record and the applicable legal standard. That is our duty.

Inclusion of language such as the text suggested above would help signal to critics and the other branches of government that the Court understands its proper and limited role in resolving political disputes. Finally, the Court does not serve itself when a member of the Court waits until after a decision is issued to comment that the Court should not have decided the issue. A concurring opinion is one thing—

---

282. 531 U.S. 98 (2000).

283. See *supra* notes 88–90 and accompanying text.



and challenging enough; subsequent comments in the press only appear to cast aspersions on other members of the Court.

Overall, the burden is on the Justices who issue a decision in a politically difficult case to act, and they must decide the case in a manner that protects the integrity of the Court. Routinely deciding cases so that the majority opinion is joined by Justices appointed by a member of one political party, while the dissent is authored by a Justice (or Justices) appointed by the opposite party, creates the impression that partisan politics have overtaken the Court. The Justices of our United States Supreme Court, who make critical decisions on such important issues to preserve the Constitution, must also strive for greater consensus, avoid making personal attacks, and focus on preserving the integrity of the judiciary branch.

#### V. CONCLUSION

Ultimately, the judiciary's ability to assess partisan gerrymandering claims, while maintaining public faith in the integrity of the courts, depends greatly on the judges' and Justices' decisions and manner of expressing themselves. Solid legal analysis is necessary, but not sufficient, to minimize the political fallout that results from wading into the political thicket of redistricting claims, especially when motivated by partisan politics. Such decisions must have a basis in solid, "neutral" legal analysis, but should also recognize explicitly that these cases involve challenging questions that overlap with political issues. Moreover, judges involved in these cases should take personal responsibility for their reactions and should be carefully cognizant that decisions split along perceived political lines on a court or panel will have negative consequences for public faith and trust in the judiciary. Thus, while courts should not abdicate their responsibility to act as a check on the other branches of government in partisan redistricting cases, they must proceed with utmost care and for the greater good.