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Rethinking How Voters Challenge Gerrymandering: Congress, Courts, and State Constitutions

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RETHINKING HOW VOTERS CHALLENGE GERRYMANDERING: CONGRESS, COURTS, AND STATE CONSTITUTIONS

*Megan Wilson**

> *"Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be."*
>
> *– Justice William Brennan*[1]

I. INTRODUCTION

In 2016, President Trump won the electoral college but lost the popular vote by almost 2.9 million votes.[2] Unsurprisingly, the election sparked a heated debate about the effectiveness of our voting system and the role of the electoral college.[3] What has been surprising is the public's increased interest in the effect gerrymandering has on elections.[4]

Arguably, voting rights received the highest level of attention from the public and legal scholars during the 1960s civil rights

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

2. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html.

3. *See, e.g.*, Alvin Chang, *Trump Will Be the 4th President to Win the Electoral College After Getting Fewer Votes than His Opponent*, VOX (Dec. 16, 2016, 1:37 PM), https://www.vox.com/policy-and-politics/2016/11/9/13572112/trump-popular-vote-loss.

4. G. Terry Madonna & Michael Young, *Guest Column: How Gerrymandering is Damaging Our Political Process*, DAILY TIMES (Oct. 19, 2017), https://www.delcotimes.com/opinion/guest-column-how-gerrymandering-is-damaging-our-political-process/article_a36acbe4-3c36-52e2-be4c-51d539a753f4.html (noting that public interest in gerrymandering often "waxes and wanes" in accordance with the decennial census).

movement.[5] The Warren Court would make a number of decisions that extended voting rights protections, in what would come to be known as the reapportionment revolutions.[6] However, public interest in protecting voting rights would wane until the mid to late 80s, when Congress passed the Voting Rights Act.[7] Again, this interest would not last, and by the 90s growing numbers of white voters viewed the protections afforded by the Voting Rights Act as unfairly giving minority groups political advantages over white voters.[8]

In contrast, the current interest in voting rights shows an increased concern with gerrymandering's ability to undermine elections.[9] With that concern has come a push by the public for something to be done. Possibly as a response to this public concern, the Supreme Court has taken on two partisan gerrymandering cases this term.[10] Despite the public and legal community's renewed interest in gerrymandering claims, little attention has been given to state court voting rights decisions.[11]

This Note will argue that the attention devoted to voting rights protection under the Fourteenth Amendment is misplaced because "state courts are the primary actors in shaping the right to vote" and protecting the integrity of the election process.[12] Part II of this Note will provide a basic background on gerrymandering and the United States political system. Part III will give an overview of federal redistricting jurisprudence to show how the Supreme Court has limited possible voting rights violations under the Fourteenth Amendment to only cases where the plaintiff has been denied a chance to influence the political process as a whole, which may be an impossible standard.

Part IV explains how Congressional non-involvement and federal jurisprudence has led to unchecked gerrymandering. As a result,

5. RICHARD K. SCHER ET AL., VOTING RIGHTS AND DEMOCRACY, ix–x (1997).

6. *Id.*

7. *Id.* at x.

8. *Id.* at xi–xii.

9. Madonna & Young, *supra* note 4.

10. *See* Robert Barnes, *Supreme Court Will Take Up a Second Gerrymandering Case This Term*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/politics/courts_law/2017/12/08/4fde65f4-dc66-11e7-b1a8-62589434a581_story.html.

11. Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 2 (2016) (noting that studies show media coverage of state courts is disproportionately low given the importance of their decisions).

12. *Id.*

gerrymandering has increased, undermining the Framers' intent to create a representative government, and suppresses elections.

Finally, Part V will argue that state courts are better situated than federal courts to protect the right to vote. Drawing on the cases discussed in Part II, this Part will explain how federal courts are limited by the United States Constitution's lack of expressed protection for voting rights. In contrast, the constitutions of forty-nine states contain language directly protecting the right to vote. Furthermore, the Note will argue that state courts have historically been the protector of individual rights and should, therefore, interpret their own constitutional protections as stronger than those of the United States Constitution.

II. OVERVIEW OF GERRYMANDERING AND THE UNITED STATES ELECTORAL SYSTEM

By the time the Constitutional Convention was held in 1787, the Founding Fathers had already decided that America's national elections would use a representative system, rather than a direct democracy.[13] The process of electing representatives to the Senate and House of Representatives established two approaches to representation.[14] The Senate would be made of two members from every state and thus, representation would be based on state interests, regardless of each state's population.[15] The number of members in the House would be decided based on population, with each House member originally representing 30,000 people, a number that would increase over time.[16]

Because population growth in the United States is never stable, redistricting and reapportionment are necessary to ensure that each district is comprised of the correct number of voters.[17] State and local governments use the House model of representation and also require regular redistricting.[18] Issues arise and courts are called on to intervene when people believe that the methods or manner of redistricting are unfair and undermine the political process. One such problematic method of redistricting is gerrymandering, or political redistricting,

13. SCHER ET AL., *supra* note 5, at 1–2.
14. *Id.* at 2.
15. *Id.*
16. *Id.*
17. *Id.* at 4.
18. *Id.*

which is the "deliberate effort[] to draw district lines for political advantage."[19]

State legislatures use three common gerrymandering techniques to redistrict to their advantage: packing, shacking, and cracking.[20] These techniques help a party create a map that ensures it will win the most seats possible and waste the opposing party's votes.[21] Cracking is the process of breaking up large groups of opposing party voters and placing them in districts that heavily support the controlling party.[22] However, in areas where the vote is competitive, a party will instead redistrict by packing as many opposing party voters into as few districts as possible.[23] While packing requires giving up some seats, it ensures a win in most of the districts.[24] Finally, shacking is used to challenge the success of an opposing party's incumbent representative.[25] This can be done by moving an incumbent's residence to a new district, preventing her from relying on the constituents who previously elected her.[26] Alternatively, two incumbents from the opposing party can be placed in the same district, which forces them to compete for a single seat.[27]

Although the power to oversee the logistics of federal elections has been granted to Congress by the United States Constitution,[28] Congress has rarely provided any instructions on how to appropriately

19. *Id.* at 19. The term gerrymandering is derived from the combination of the words Gerry and salamander. In response to efforts by Massachusetts governor, Elbridge Gerry, to redraw districts to favor his party, a cartoon was published depicting a district shaped like a salamander, including an embellished forked tongue, wings, and talons. *Id.* at 19–20.

20. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551–52 (2004).

21. *Id.* at 551.

22. *Id.*

23. *Id.* at 551–552.

24. *Id.* at 552.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); U.S. CONST. art. I, § 4 ("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 . . . ."); U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

draw district lines.[29] One consequence has been vote dilution, meaning a person's vote can have different weight depending on where the voter lives.[30] For example, the number of House representatives from each state was originally determined by population and every House representative was elected by districts with about the same population.[31] Over time, the number of members in the House grew in response to population growth.[32] However, in response to the 1910 Census, Congress capped the number of House representatives at 435.[33] Because the United States population was growing but new House seats were not being added, voter dilution happened in two significant ways.[34]

First, representatives in states with smaller population growth could be elected with a smaller number of votes than representatives in states with larger population growth because new representatives were not being added to account for population differences.[35] Second, within states, the population in urban areas grew much more rapidly than in rural areas.[36] In some states the difference in populations between districts could be as high as three to one.[37] The effect was an over representation of rural, usually white, voters because House members elected from those districts represented far fewer people than those elected by urban voters.[38]

Modern voter dilution, caused by state legislatures' gerrymandering, can be traced back to judicial non-involvement. Because Congress has not exercised much control over state redistricting, court decisions have signaled to state legislatures how aggressively they can gerrymander.[39] For example, in 2004, the Supreme Court's decision in *Vieth v. Jubelirer*,[40] although only a plurality, "sent a clear signal that a majority of the Court was not

29. ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 24 (2016).
30. *See id.* at 23.
31. SCHER ET AL., *supra* note 5, at 2.
32. MCGANN ET AL., *supra* note 29, at 25.
33. *Id.*
34. *Id.*
35. *Id.* at 26.
36. *Id.*
37. *Id.*
38. *Id.*
39. *See id.* at 185.
40. 541 U.S. 267 (2004).

inclined to overturn districting plans on grounds of partisan gerrymandering."[41] Given the impact judicial decisions have on a legislature's ability to gerrymander, Part III will give an overview of the development of federal jurisprudence on redistricting.

III. ANSWERING THE QUESTION OF JUSTICIABILITY AND THE FOURTEENTH AMENDMENT'S STANDARDS APPLICABLE TO REDISTRICTING CLAIMS

Federal court decisions, compared with state court decisions, receive a majority of the attention from legal scholars and the media.[42] There are practical reasons for this. When the Supreme Court interprets federal law, the opinion will apply nationwide.[43] Even decisions made in lower federal courts generally have a larger geographic reach than state courts.[44] Thus, federal courts may be seen as the ideal place to challenge gerrymandering because of the impact the decisions have. But, as described below, federal jurisprudence on gerrymandering has evolved to make federal courts a less desirable forum.

Section A gives examples of early redistricting cases and judicial response. It will introduce the concepts of justiciability and Fourteenth Amendment protections against vote dilution. Section B shows two kinds of claims that the Court has found to be justiciable: racial discrimination and unequal populations. Next, Section C highlights the difficulty the Court has had in applying the Fourteenth Amendment to purely political redistricting cases. Finally, Section D gives an overview of one of the most recent gerrymandering cases to come before the Supreme Court, but suggests even if the Court holds that the claims are justiciable, the protections offered may be insufficient to stop gerrymandering.

A. The Court's Early Response to Gerrymandering

Because Congress has generally been uninvolved in regulating the redistricting process, court decisions, particularly those by federal courts, have become the ultimate authority. Thus, until the 1960s, when courts first held the judiciary could intervene in redistricting

41. MCGANN ET AL., *supra* note 29, at 2.
42. Douglas, *supra* note 11, at 2.
43. *Id.*
44. *Id.*

matters, state governments were relatively unrestrained in how they redistricted.[45] While cases decided before 1960 would be unsuccessful at challenging redistricting, the issues discussed in these early cases would become the foundation of the modern debate about judicial intervention in redistricting.

In *Wood v. Broom*,[46] the Court held that the Apportionment Act of 1911's equal, contiguous, and compact requirements were applicable only to the 1910 apportionment cycle and thus, did not apply to redistricting after the Apportionment Act of 1929.[47] More importantly, the Court acknowledged the potential for justiciability being an issue in redistricting cases.[48] However, the Court ended the opinion by stating "[u]pon these questions the Court expresses no opinion."[49]

Next, in 1946, based on the holding in *Wood*, the Court in *Colegrove v. Green*[50] again rejected a claim based on the equal, contiguous, and compact requirements of the 1911 Act.[51] Petitioners claimed that because Illinois's legislature had failed to redistrict since 1901, the state's districts violated the Apportionment Act of 1911 and their right to equal protection under the Fourteenth Amendment.[52] However, in his opinion, Justice Frankfurter chose to frame the issue as a question of whether the Court could redraw Illinois's map to comply with 1911 Act.[53] The opinion stated, "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."[54]

Colegrove was decided by a 4-3 plurality, with Justice Rutledge concurring only with the result. He instead argued that such claims could be justiciable but "only in the most compelling circumstances."[55]

45. MCGANN ET AL., *supra* note 29, at 185.
46. 287 U.S. 1 (1932).
47. *Id.* at 8.
48. *Id.*
49. *Id.*
50. 328 U.S. 549 (1946).
51. *Id.* at 551.
52. *Id.* at 550.
53. *Id.* at 551–52.
54. *Id.* at 556.
55. *Id.* at 565 (Rutledge, J., concurring).

In contrast, Justice Black, supported by two Justices, argued in the dissent that the Court could rule on this claim because the redistricting violated the Fourteenth Amendment.[56] He reasoned that there is no difference between a state legislature denying a person the right to vote and "destroy[ing] the effectiveness of their vote."[57] In either situation, "the admitted result is that the Constitutional policy of equality of representation has been defeated."[58] He also dismissed concerns that redistricting is a political question because it concerns politics.[59] Citing various cases,[60] Justice Black showed that courts have and should step in to protect individual rights, including the right to vote.[61]

The *Colegrove* opinion raised two important questions about the federal courts' involvement in overseeing redistricting. First, if voters and Congress have the power to stop legislatures from improperly redistricting, should the courts intervene? Second, in what circumstances could the Fourteenth Amendment be used to challenge redistricting?

B. Compelling Circumstances as the Basis for the Equal Protection Clause Voting Rights Jurisprudence

While the immediate result of the *Colegrove* decision was judicial noninvolvement, Justice Rutledge's "compelling circumstances" doctrine would become the basis for one of the first successful redistricting challenges.[62]

In 1960, *Gomillion v. Lightfoot*[63] established a common "compelling circumstance" for judicial intervention: racial

56. *Id.* at 570 (Black, J., dissenting).

57. *Id.* at 571.

58. *See id.* at 572.

59. *Id.* at 573.

60. *Compare* Nixon v. Herndon, 273 U.S. 536, 539 (1927) (rejecting the argument that a claim raises a political question if the subject of the suit is political as "little more than a play upon words" and holding claims based on evasions of political rights are justiciable), *and* Smiley v. Holm, 285 U.S. 355, 369–70 (1932) (holding that courts could rule on constitutionality of laws that "govern[] the exercise of political rights"), *with* Giles v. Harris, 189 U.S. 475 (1903) (declining to enforce political rights because relief sought by plaintiffs, judicial supervision to ensure specific performance of state electoral legislation, was not judicially manageable), *and* Coleman v. Miller, 307 U.S. 433, 454 (1939) (holding that claims challenging the ratification process of a Constitutional amendment involved a political question because Congress, not the courts, has final authority).

61. *Colegrove*, 328 U.S. at 572–73.

62. MCGANN ET AL., *supra* note 29, at 29.

63. 364 U.S. 339 (1960).

discrimination. There, plaintiffs claimed that the boundaries of the City of Tuskegee, Alabama, had been redrawn to exclude the majority black communities.[64] They argued this denied them the right to vote in violation of the Fifteenth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[65] The Court held that "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."[66] The majority opinion did not address plaintiffs' Equal Protection claim.

In contrast, Justice Whittaker's concurring opinion argued that plaintiffs' equal right to vote had not been violated because they were not treated differently than other voters in their new district.[67] However, he did believe that defendant's actions had unlawfully segregated voters based on race in violation of the Equal Protection Clause.[68]

Although both *Colegrove* and *Gomillion* sought to challenge voter dilution, the Court expressly distinguished *Gomillion* from *Colegrove*.[69] The Court reasoned that in *Gomillion* "affirmative legislative action [had] deprive[d] [the plaintiffs] of their votes and the consequent advantages that the ballot affords" because of their race.[70] The racial discrimination "lift[ed] this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation."[71] However, the Court also used an almost identical argument to the one made by Justice Black in his *Colegrove* dissent to hold that a statute is not immune from constitutional challenges simply because it involves a political mechanism.[72] In fact, although Justice Douglas joined the majority opinion, he noted that he "adheres to the dissents in *Colegrove v. Green*," suggesting he does not believe racial classifications were necessary for judicial involvement.[73]

Gomillion established that, in some circumstances, courts could hear claims that a state's redistricting plan was unconstitutional. Thus,

64. *Id.* at 340.
65. *Id.*
66. *Id.* at 346.
67. *Id.* at 349 (Whittaker, J., concurring).
68. *Id.*
69. *Id.* at 346 (majority opinion).
70. *Id.*
71. *Id.* at 346–47.
72. *See id.* at 347.
73. *See id.* at 348 (Douglas, J., concurring).

this case created one of the first constraints on redistricting—a statute could not discriminate against a racial group.

In 1962, in *Baker v. Carr*,[74] the Court would again expand on the limits of redistricting. Plaintiffs alleged the Tennessee legislature had failed to enact a new redistricting statute since 1901 and, as result of population growth, votes in some counties were apportioned more weight than others.[75] Thus, plaintiffs claimed their votes had been debased in violation of the Equal Protection Clause.[76] Although the Court did not rule on the merits of the case, it established that an Equal Protection claim based on unequal populations within districts could succeed.[77]

In determining if the case involved a political question, the Court reiterated that a discrimination claim based on Equal Protection does not become non-justiciable merely because it involves a political right.[78] Instead a claim is a political question when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[79]

Baker and similar, subsequent cases based on population inequity ultimately established the "one person, one vote" rule, which requires reasonably equal populations in each district.[80]

C. Modern Jurisprudence: Into the Political Thicket

A comparison of the holdings in *Colegrove* and *Baker* shows the shift in the Court's treatment of redistricting claims. The Court no longer believed that all redistricting claims were non-justiciable, and

74. 369 U.S. 186 (1962).

75. *Id.* at 191–92. "We are told that single vote in Moore County, Tennessee is worth 19 votes in Hamilton County . . . ." *Id.* at 245 (Douglas, J., concurring).

76. *Id.* at 193–94 (majority opinion).

77. *See id.* at 237.

78. *Id.* at 209–10.

79. *See id.* at 217. As shown below, these two factors have proven to be the most used in subsequent cases. However, the Court identifies six factors in total: "[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

80. MCGANN ET AL., *supra* note 29, at 32–33.

the dissent in *Colegrove* would prove to predict this change. The Court now agreed that a district map could be invalidated based on race and unequal population.[81] Moreover, the Court expressed the belief that the Fourteenth Amendment standard could be used to evaluate gerrymandering claims.[82] However, the Court's consensus would end there. The two cases discussed below show how the Court has had a more difficult time deciding just what the Equal Protection standard requires.

In 1986, *Davis v. Bandemer*[83] attempted to establish a standard of review that would be used to evaluate whether partisan gerrymandering violated the Equal Protection Clause. Plaintiffs were Democrats in Indiana who alleged that the Republican controlled state legislature intentionally redistricted for the purpose of disadvantaging Democrats.[84] The results of the 1982 election showed Democrats did not gain seats proportional to the number of votes received.[85] For example, in the House elections, Democratic candidates won 51.9% of the votes, but received only forty-three of the one-hundred seats.[86] The Court addressed whether Plaintiffs' claim was justiciable and, if so, what standard should applied to determine whether an equal protection violation occurred.[87] The result was a widely divided opinion.

A majority of the Court, 6-3, held that a partisan gerrymandering claim could be justiciable.[88] In contrast, the three dissenting Justices asserted that the claim involved a political question, because there was no judicially manageable standard under which the Court could analyze it.[89] In addition, although the majority agreed that there is a standard to evaluate these Equal Protection claims, they disagreed on what standard courts should apply.

A plurality of four Justices advocated for a test that would require plaintiffs to show both intent to discriminate against a group and an actual discriminatory effect.[90] To prove discriminatory effect,

81. *Baker*, 369 U.S. at 237; Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960).
82. *Baker*, 369 U.S. at 237.
83. 478 U.S. 109 (1986).
84. *Id.* at 115.
85. *Id.*
86. *Id.*
87. *Id.* at 118.
88. *Id.* at 127.
89. *Id.* at 148 (O'Connor, J., concurring in part and dissenting in part).
90. *Id.* at 127 (majority opinion).

plaintiffs must show they were consistently denied equal access to the political process as a whole.[91] A lack of proportional representation, especially in a single election cycle, would be insufficient to show effect because the power to influence the election goes beyond the particular result.[92] A losing group is presumed to be adequately represented by the winning candidate.[93] The holding created an odd standard[94] under which a court can find intentional discrimination but no effect, if a party cannot sufficiently show redistricting biased several elections' results and impacted statewide political power.[95]

In 2004, *Vieth v. Jubelirer* called into question the holding of *Bandemer*.[96] The majority opinion, supported by a 5-4 vote, affirmed the district court's decision to dismiss the case, but only four Justices agreed it should be dismissed as a non-justiciable issue.[97] Justice Scalia, writing for those four Justices, argued there was no discoverable and manageable standard under which the Court could evaluate the claim.[98] Justice Scalia noted that in the eighteen years since *Bandemer*, courts have almost unanimously refused to intervene in gerrymandering cases, because the *Bandemer* standard cannot be met and no new, better standard has been proposed.[99] However, Justice Kennedy, the other majority vote, stated in a concurring opinion that a judicially manageable standard could exist, but that it had not yet been articulated.[100] Additionally, three of the four dissenting Justices each advocated for a different standard in separate dissenting opinions.[101]

Thus, while *Vieth* did not overturn *Bandemer* or establish that partisan gerrymandering was a non-justiciable issue, it did show the Court struggled to reach a consensus about the Court's role in gerrymandering claims. Under the *Bandemer* standard,

91. *Id.* at 132.
92. *Id.* at 131–32.
93. *Id.* at 132.
94. In the context of other Fourteenth Amendment claims, the courts often note: "the law recognizes that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose." Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 543 (S.D.N.Y. 2006).
95. *See Bandemer*, 478 U.S. at 130–31.
96. Vieth v. Jubelirer, 541 U.S. 267 (2004).
97. *Id.*
98. *Id.* at 281.
99. *Id.* at 281–82.
100. *Id.* at 311.
101. *Id.* at 317.

gerrymandering must impact the ability to participate in the electoral process as whole, limiting the court's involvement to only claims of gross, widespread gerrymandering.[102] A limitation that the majority in *Vieth* believed would be impossible to satisfy.[103] Although the Equal Protection Clause may prove to be a discoverable and manageable standard for some redistricting claims, it appears less helpful in evaluating purely political claims.

D. Precedents Collide in Gill v. Whitford*: Supreme Court Showdown Between* Bandemer *and* Vieth

In 2017, the Supreme Court agreed to hear *Gill v. Whitford*.[104] Plaintiffs argued they had found a judicially discoverable and manageable standard: a three-part burden-shifting test based on the test articulated in *Bandemer*.[105] First, a plaintiff would have to show an intent by defendants to gerrymander for partisan advantage.[106] Second, she would need to prove actual partisan effect.[107] If the plaintiff is able to meet her burden, the statute is presumed unconstitutional.[108] The third element would shift the burden to defendants to justify the district make-up based on legitimate state policy or the state's political geography.[109] If the defendant is unable to rebut the presumption, the court would rule the map unconstitutional, invalidating its use in further elections and requiring the state to draw a new map.[110]

In this case, Plaintiffs claimed that the election results from 2012 and 2014 showed Democrats have been shut out of the electoral process.[111] In 2012, Republicans won 48.6% of the votes and sixty out of ninety-nine seats, and in 2014, they won 52% of the votes and 63 seats.[112] Plaintiffs contended Republicans achieved these results by

102. Davis v. Bandemer, 478 U.S. 109, 131–32 (1986).
103. *Vieth*, 541 U.S. at 287–89.
104. 218 F. Supp. 3d 837 (W.D. Wis. 2016); *see* Gill v. Whitford, 137 S. Ct. 2268 (2017).
105. *Gill*, 218 F. Supp. 3d at 854.
106. *Id.* at 854–55.
107. *Id.* at 855.
108. *Id.*
109. *Id.* The district court made no finding as to which party should bear the burden of proving this element, but found that if the plaintiff had the burden, they had met it. *Id.* at 911.
110. *Id.* at 855.
111. *Id.* at 853; *see* Mark Joseph Stern, *Is Partisan Gerrymandering Dead?*, SLATE (Oct. 3, 2017, 4:12 PM) https://slate.com/news-and-politics/2017/10/will-gill-v-whitford-kill-partisan-gerrymandering.html.
112. *Gill*, 218 F. Supp. 3d at 853.

cracking and packing Democrats to waste or dilute their votes, and that the newly developed efficiency gap theory is evidence of these practices' effect on the elections.[113]

Again, the Court was asked to decide whether the Fourteenth Amendment provides a sufficiently discoverable and manageable standard to make gerrymandering claims justiciable. However, as the cases have shown, the question of justiciability has created increasingly divided opinions. Not only is there debate over the appropriate standard, but also what a lack of standard means for the justiciability of the claim.[114] Moreover, a decision endorsing justiciability would only allow court intervention in the most extreme cases of gerrymandering. However, any redistricting to disadvantage voters should raise serious concerns about the impact it has on voting rights.

IV. HOW UNCHECKED GERRYMANDERING UNDERMINES REPRESENTATION AND SUPPRESSES ELECTIONS

Every election cycle, voters are inundated with political content geared at convincing them of the urgency of their vote and the competitiveness of elections. Yet "[t]he first instinct of power is the retention of power"[115] and state legislatures understand that power can be retained "directly by the suppression of competitive elections themselves."[116] In addition, the use of technology to draw districts and collect information, an increased predictability in voter patterns, and

113. *Id.* at 854. The efficiency gap theory offers a simplified equation for determining the percentage of votes wasted by each party in a given election. The equation starts with the assumption that a winning party "wastes" any votes over the 50% mark because they are more than a party needs to win. *Who's Gerry and Why Is He So Bad at Drawing Maps?*, MORE PERFECT (Oct. 2, 2017), https://www.wnycstudios.org/story/whos-gerry-and-why-he-so-bad-drawing-maps/. In contrast, it assumes that any votes for the losing party in a given district are all "wasted" because they did not help achieve a win. *Id.* In addition, the theory has a number of advantages. First, the math can be simplified into a basic equation described above. Mira Bernstein & Moon Duchin, *A Formula Goes to Court: Partisan Gerrymandering and the Efficiency Gap*, 64 NOTICES AM. MATHEMATICAL SOC'Y 1020, 1024 (2017). Second, the efficiency gap can be calculated using the results of a single election. *Id.*

114. *See*, *e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 281–83, 309–11 (2004) (compare Justice Scalia, finding that a lack of standard makes the claims non-justiciable, with Justice Kennedy, preferring to hold off on ruling on justiciability in the hopes that a standard will be articulated).

115. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).

116. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 56 (2004).

modern court cases have all allowed political parties to gerrymander more effectively in order to secure and maintain their power.[117]

There are two ways state legislatures use gerrymandering to suppress elections. First, partisan gerrymandering works by diluting the strength of the opposing party's votes.[118] The party in power at the time of redistricting draws the districts to better secure its control.[119] The controlling party can ensure a favorable outcome, not only in the coming election, but also in subsequent election cycles.[120] Second, bipartisan or "sweetheart" gerrymandering allows both parties to limit the competitiveness of elections.[121] Both parties agree to draw districts to ensure their incumbents are placed in safe districts where voters will reliably reelect the chosen candidate.[122]

A. Modern Gerrymandering Conflicts with the Framers' Intent to Protect the Power of the People

Both kinds of gerrymandering are an affront to the principles of democratic representation. This is best understood when considering the history and purpose of the House of Representatives. The two-house structure of Congress represents The Great Compromise struck between Federalists, who wanted Congress to derive its power directly from the people, and Anti-Federalists, who argued Congress should be chosen by state governments.[123] Thus, the House was created based on two founding principles.

First, the House was intended to represent the will of the people, separate from the interests of the states.[124] Thus, the number of House representatives is based on population, rather than the geographical boundaries of the state.[125] Second, its election procedures were created to ensure the House was sympathetic to and dependent on the concerns of the people.[126] House elections are held every two years, and, in a

117. *Id.*
118. *See supra* Part II.
119. Pildes, *supra* note 116, at 59.
120. *Id.* at 59–60. For example, the McGann Study claims the bias found by researchers will persist until 2022, the first election after the next redistricting cycle. MCGANN ET AL., *supra* note 29, at 3.
121. Pildes, *supra* note 116, at 60–61.
122. *Id.*
123. MCGANN ET AL., *supra* note 29, at 179.
124. *Id.* at 181.
125. *Id.*
126. *Id.*

functioning election system, members must respond to the changing concerns of their constituents or be voted out of office.[127]

In contrast, when state legislatures are allowed to aggressively gerrymander, the states, rather than the people, are given control over House elections.[128] Article 1, Section 4 of the United States Constitution gives state legislatures the power to draw their own congressional and state districts.[129] But states are only required to redistrict every ten years in response to the Census.[130] As a result, gerrymandering allows the party in control of the state legislature at the time of redistricting to control the outcome of House elections for the next decade.[131] Thus, states are not only picking their House representatives, but representatives also have little fear of removal, leaving any accountability to the voters diminished or lost during those ten years.[132]

The Framers of the Constitution anticipated this problem. James Madison argued that if states have the sole power to draw districts they would create districts that favored certain candidates for the state legislature and "the inequality of the Representation in the Legislatures of particular States [] would produce a like inequality in their representation in the Nat[ional] Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter."[133] Thus, additional language was added to Article 1, Section 4 that gives Congress the authority to "make or alter" the districts created by states.[134]

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127. *See id.* For example, a study done by Soroka and Wlezien found that a government that has elections every two years is more responsive to rapid changes in public opinion than a government that holds elections every four to five years. *Id.* at 192.

128. *Id.* at 190.

129. U.S. CONST. art. I, § 4 ("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 . . . .").

130. SCHER ET AL., *supra* note 5, at 4.

131. *See* MCGANN ET AL., *supra* note 29, at 191. Potentially more concerning is the ability of state legislatures to use gerrymandering to ensure outcomes in state elections. If a party can draw state legislative districts to guarantee their party secures a majority in the state legislature, that same party can gerrymander the House elections with little opposition. However, little research has been done on modern levels of partisan gerrymandering of state electoral districts. *Id.* at 191. So, the issue will not be discussed further in this Note.

132. *Id.* at 194–95.

133. Vieth v. Jubilerer, 541 U.S. 267, 275 (2004) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 240–41 (M. Farrand ed. 1911)).

134. *Id.* at 275; *see* U.S. CONST. art. I, § 4.

However, the increased partisan nature of our political system and extensive integration of state and national parties has undermined the Framers' intentions.[135] It is questionable whether Congress has ever acted as a check on the states' self-interested behavior,[136] but now, more than ever, Congress is incentivized to pressure state leaders to aggressively gerrymander to secure party seats.[137] Moreover, parties may challenge specific state maps in an attempt to decrease the opposing party's power but both parties benefit from gerrymandering. Thus, it is difficult to imagine Congressional representatives enacting laws to challenge the system that elected them, despite any violations it inflicts on constituents' representational rights. In fact, "a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there."[138]

B. Federal Courts Are Reluctant to Combat Gerrymandering

Furthermore, the authority given to Congress by Article I, Section 4's "make or alter"[139] language has affected how the courts view redistricting claims. First, courts have been concerned that redistricting claims are not justiciable because Section 4 creates a "constitutional commitment of the issue to a coordinate political department."[140] In *Colegrove*, the Court cites Section 4 as giving Congress, not the courts, the power to ensure fair representation in the House.[141] Subsequent cases would find at least some individual claims are justiciable, and limit the question of gerrymandering's

135. Pildes, *supra* note 116, at 61.

136. Congress has exercised its authority to combat gerrymandering with decreasing frequency. *Vieth*, 541 U.S. at 276; MCGANN ET AL., *supra* note 29, at 24. Between 1842 and 1911, Congress enacted a series of Apportionment Acts that imposed requirements on redistricting such as contiguity, compactness, and equal population. *Vieth*, 541 U.S. at 276; MCGANN ET AL., *supra* note 29. However, each new act superseded the previous and the only remaining requirement is states must use single member districts. *Vieth*, 541 U.S. at 276. In 1965, Congress enacted the Voting Rights Act, which has seen a success. Pildes, *supra* note 116, at 59. For example, beginning in the early twentieth century, Southern Democrats used gerrymandering to "destroy [their] political competitors . . . and thereby created a one-party monopoly that ruled the entire region" until the passage of the act. *Id.* Since 1980, Congress has also introduced several bills, but none have passed. *See Vieth*, 541 U.S. at 277.

137. Pildes, *supra* note 116, at 61.

138. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 470 (2006) (Stevens, J., concurring in part and dissenting in part).

139. U.S. CONST. art. I, § 4 ("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 . . . .").

140. Baker v. Carr, 369 U.S. 186, 217 (1962); Colegrove v. Green, 328 U.S. 549, 564 (1946).

141. *Colegrove*, 328 U.S. at 554.

justiciability to the existence of a manageable and discoverable standard. But, the reasoning in *Colegrove* has twisted through opinions and dissents all the way to *Vieth*.[142] While *Vieth* did not concern Article 1, Section 4, Justice Scalia still began the plurality opinion by laying out the basis and history of Section 4 as a remedy to the issues created by gerrymandering.[143]

In addition, federal courts have historically been reluctant to invalidate districts because they believe if "Congress failed in exercising its powers . . . the remedy ultimately lies with the people" to elect officials who will.[144] The logic of this assumption goes hand in hand with another common argument: constituents' rights are not violated by the use of politics in districting because "today's minority could be tomorrow's majority" and so representatives are sensitive to all constituents' concerns.[145] However, as discussed below, these assumptions are being challenged by social science research.

Thus, the combination of congressional noninvolvement and judicial reluctance to intervene has given state legislatures the green light to begin foreordaining election results. Research on House elections has shown a recent increase in partisan and sweetheart gerrymandering. As a result, legislatures are increasingly incentivized to undermine fair elections by effectively disenfranchising voters who are unable to vote them out.

C. Research on State Legislatures' Ability to Control Elections

In *Gerrymandering in America*, researchers Anthony McGann, Charles Smith, Michael Latner, and Alex Keena lay out the methodology and results of the study they conducted on partisan gerrymandering after *Vieth* ("McGann Study"). The researchers hypothesized that while *Vieth* did not make gerrymandering claims non-justiciable, state legislatures would view the plurality opinion as effectively removing the courts from the conversation.[146] And in fact, they found that redistricting done after *Vieth* created significant bias

142. Vieth v. Jubilerer, 541 U.S. 267, 275, 285 (2004).
143. *See id.* at 275.
144. *See Colegrove*, 328 U.S. at 554.
145. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 469–70 (2006); Davis v. Bandemer, 478 U.S. 109, 131–32 (1986).
146. MCGANN ET AL., *supra* note 29, at 1.

in the voting process that can only be attributed to states pushing for partisan advantage more aggressively than ever before.[147]

The McGann Study compared the results of House elections from 2002 to 2012.[148] The basis of the methodology is partisan symmetry, which looks to see if all parties would gain the same number of seats if they won a given percentage of the vote.[149] For example, in an unbiased system, both Party A and Party B would receive 60% of the seats if they won 55% of votes in a given state. If Party A can win the same number of seats as Party B with less votes, there is a bias.[150] The study looked at the presence and effect of bias on national elections, as well as in individual state results.[151]

The results of the McGann Study show a sharp increase in bias towards Republicans at the national level in the 2012 election.[152] The study found the asymmetrical bias was 9.38%, meaning Republicans gained 9.38% more seats than Democrats would have gained for the same percentage of votes.[153] In contrast, the results of the 2002–2010 elections only had an asymmetry level of 3.4% in favor of Republicans.[154] The level of bias found in the 2002–2010 election "is only 35% of the bias [] observe[d] in 2012."[155]

The McGann Study also looked at the results of the House elections in each state. The level of bias found at the state level is even more problematic. Looking at the ten most biased states, their level of asymmetry for 2012 fell between approximately 30% and 40%, in favor of Republicans.[156] This means that if Republicans received 52% of the votes and won 70% of the seats, Democrats would only receive 30% to 40% of the seats for the same 52% of votes.[157] In comparison, in the 2002–2010 elections there were fewer states that had a pro-Republican bias, and the level of bias was much lower, and there were more states with a pro-Democrat bias.[158]

147. *Id.* at 3.
148. *Id.* at 57.
149. *Id.* at 65–66.
150. *Id.* at 66.
151. *Id.* at 56.
152. *Id.* at 56.
153. *Id.* at 71.
154. *Id.* at 72.
155. *Id.*
156. *Id.* at 73.
157. *Id.*
158. *Id.* 81.

Next, the researchers hypothesized that two additional factors would need to be true to show the increase was due to political motives.[159] First, that bias would be found predominately in states where a party had the motive and opportunity to redistrict to the party's advantage.[160] The study found legislatures were only motivated to engage in partisan districting in states that had competitive elections.[161] Also, a party had sufficient opportunity when it controlled the state legislature and the governor was a member of that party.[162] Second, states redistricting in 2012 would create more bias, even in states that were already biased.[163] This could be shown in two ways. One, states that already had Republican bias in 2010 would have significantly more bias in 2012.[164] Two, the states that were biased towards Democrats but became Republican in 2010 would have much higher levels of bias in 2012 as compared to previous years.[165]

The McGann Study found that both of these assumptions to be true. Fourteen of the eighteen states where the level of bias was statistically significant were found to have legislatures with a motive and an opportunity to engage in partisan gerrymandering.[166] "Thus, with only a few exceptions, the presence of partisan control of the districting process and electoral competitiveness at the electoral level seem to be both necessary and sufficient conditions for partisan bias."[167] Next, the study showed that legislatures redistricted for partisan advantage more aggressively after 2010. In many states that already had a pro-Republican bias in 2002, the bias almost doubled and accounted for a 2.8% increase in national bias.[168] Also, the bias in states that did not have a Republican bias in 2002, but became Republican biased in 2012, accounted for 3.7% of the national increase.[169] In previous years, Republicans would be expected to create bias in a similar amount to the Democrats, but instead the study

159. *Id.* at 146–47.
160. *Id.*
161. *Id.* at 148–49.
162. *Id.* at 148.
163. *Id.* at 158.
164. *Id.*
165. *Id.* at 158–59.
166. *Id.* at 157.
167. *Id.*
168. *Id.* at 161.
169. *Id.* at 162.

shows they increased the bias by a large margin.[170] These results support the McGann Study's claims that *Vieth* is actually responsible for the increase in redistricting bias, because the alternative variables did not change significantly between 2002 and 2012.[171] These results raise a number of concerns about whether the House is properly functioning as a representative form of government.

Moreover, a 2006 study by Alan Abramowitz, Brad Alexander, and Mathew Gunning found that the 2002 and 2004 elections were the least competitive general elections in United States history as a result of bi-partisan gerrymandering.[172] Generally, elections following redistricting, such as the 2002 election, see the most turn-over, but only four of almost four hundred House incumbents lost the general election.[173] Of the 381 incumbents that did win, only forty-three won by less than a landslide, defined as a victory of more than 60%.[174] Moreover, a "competitive election" is generally characterized as one in which the winner receives less than 55% of the votes.[175] In 2002, less than 10% of House elections were competitive.[176] As such, House incumbents had a reelection rate of 99% in 2002.[177] More alarming is the fact that these results were fairly consistent until 2010 when states were forced to redistrict.[178]

Furthermore, the lack of competitiveness cannot be attributed to voter preference for incumbents. United States Senate and gubernatorial elections are held on a statewide basis and therefore are not susceptible to gerrymandering.[179] These elections are held on the same day as House elections and about half of the 2002 races were

170. *Id.* For example, in 2010, Republicans in North Carolina won enough seats to gain control of the state legislature. *Id.* In 2002, when the Democrats controlled, the level of pro-Democrat bias was about 10%. *Id.* If Republicans were not redistricting more aggressively after *Vieth*, the results of the 2012 election should show a pro-Republican bias of about 10%. *Id.* Instead, the 10% pro-Democrat bias was replaced by a 36.6% pro-Republican bias. *Id.*

171. *Id.* at 70.

172. Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 75 (2006).

173. Pildes, *supra* note 116, at 62.

174. *Id.* at 62–63.

175. *See id.* at 63.

176. *Id.*

177. Jaime Fuller, *There Are 405 House Races Where the Frontrunner Has a 90% Chance of Winning*, WASH. POST, May 29, 2014, https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/there-are-only-30-house-races-this-year-where-the-election-hasnt-already-been-decided/?utm_term=.b6af216efaf7.

178. *Id.*

179. Issacharoff & Karlan, *supra* note 20, at 573.

competitive.[180] The election results from California are often cited to demonstrate the disparity.[181] In 2002, every House incumbent from California won by a landslide, meaning no challenger received over 40% of the votes.[182] In contrast, just a year later California voters "rebelled in mass against the political status quo" and held a special election to oust the elected governor and replace him with Arnold Schwarzenegger, who is generally considered politically independent.[183]

Thus, when incumbents use sweetheart gerrymandering to create safe seats, "even a significant shift in popular preference would have little effect on who gets elected."[184] Unlike partisan gerrymandering, sweetheart gerrymandering does not allow one party to win seats disproportional to votes they receive. Instead, if 60% of voters register as Democrats, the state legislature will district to ensure Democrats win 60% of the seats.[185] So, the standards proposed by both Justices and plaintiffs to evaluate the constitutionality of redistricting laws would fail to find non-competitive elections a violation of voters' rights.

V. STATE COURTS AS THE NEW CHAMPIONS OF VOTING RIGHTS

Because the United States Constitution does not include an express right to vote, federal courts have used the Fourteenth Amendment to extend protections for voting rights to include forms of vote dilution.[186] In the context of partisan gerrymandering, federal jurisprudence has limited these protections only to those cases where the plaintiffs can show they have been denied a chance to influence the political process as a whole.[187] This standard does not include incumbent protection or potentially less overt methods of gerrymandering. This Part will argue that state courts are the better positioned to protect the right to vote because they are not limited by federal precedent and are free to interpret the scope of voting rights contained in their own constitutions.

180. *Id.*
181. *E.g.*, *id.*
182. *Id.*
183. *Id.*
184. Pildes, *supra* note 116, at 64.
185. *Id.*
186. Baker v. Carr, 369 U.S. 186, 226 (1962).
187. Davis v. Bandemer, 478 U.S. 109, 123 (1986).

A. Additional Protection of the Right to Vote from the Fourteenth Amendment

The United States Constitution does not include any provisions expressly identify voting as a fundamental right. Instead, the Constitution discusses elections in several clauses, but these clauses only dictate the process of voting.[188] No clause specifically enumerates the right to vote.[189] In addition, the Fourteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments only convey "negative" rights, or prohibitions on governmental actions.[190] As a result, early federal courts doubted whether the Constitution created a right to vote.[191]

Moreover, the early Supreme Court cases that described the right to vote as fundamental do not cite any particular constitutional provision in support of this conclusion.[192] Instead, the Court based its decision on the important role voting plays in the preservation of democracy.[193] For example, in *Yick Wo v. Hopkins*,[194] the Court stated: "Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."[195]

Finally, in the 1960s, a series of decisions by the Warren Court would establish the Equal Protection Clause as the constitutional basis for challenging laws that treated votes unequally.[196] Because the United States Constitution does not include an express right to vote, federal courts have used the Fourteenth Amendment to hold the right

188. *See supra* note 28 (quoting the text of U.S. CONST. art. 1, §§ 2, 4, 5).

189. Joshua Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95 (2014).

190. *Id.; see* U.S. CONST. amend. XIV (stating the punishment for states who prohibit eligible citizens from voting); U.S. CONST. amend. XV (the right to vote shall not be denied based on race); U.S. CONST. amend. XVII (granting states the same control over Senate elections that Article 1, Section 2 gives them over House elections); U.S. CONST. amend. XIX (the right to vote shall not be denied based on sex); U.S. CONST. amend. XXIV (the right to vote shall not be denied based on ability to a pay poll tax); U.S. CONST. amend. XXVI (the right to vote shall not be denied based on age).

191. *See* Douglas, *supra* note 189, at 96–97 (citing Minor v. Happersett, 88 U.S. 162, 178 (1874) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one . . . .").

192. *Id.* at 97.

193. *Id.*

194. 118 U.S. 356 (1886).

195. *Id.* at 370.

196. *See* Douglas, *supra* note 189, at 97.

to vote is protected beyond the prohibitions listed in other amendments. Of course, the idea that the Fourteenth Amendment protects the right to vote was not novel: Justice Black had argued that voting rights were protected from improper redistricting by the Fourteenth Amendment in his dissenting opinion from *Colegrove* in 1946.[197] But it was not until *Baker* that the Court held that the right to vote, secured by the Equal Protection Clause, may be violated by gerrymandering.[198] In deciding that the claim was justiciable, the Court looked to the Fourteenth Amendment to locate a judicial standard for gerrymandering claims.[199] The Court held that the "[j]udicial standards under the Equal Protection Clause are well developed and familiar" and that the courts are well adept at determining when "discrimination reflects no policy, but simply arbitrary and capricious action."[200]

However, the courts would come to realize that applying these "well developed and familiar standards" to redistricting claims would be more difficult than the *Baker* Court believed. The issue for the courts was identifying just what was "arbitrary and capricious" because reasonable judges could disagree about whether maps reflected intentional discrimination or naturally accruing imbalances.[201] In response to these concerns, the Court adopted the one person, one vote doctrine, a clear bright-line rule for reapportionment cases.[202] In contrast, the Court in *Gill* was still trying to define a clear standard for gerrymandering cases.

B. Gerrymandering and the Impossible Fourteenth Amendment Standard

Once the Court held that the Fourteenth Amendment offered protections for voting rights, the courts began to grapple with the question: how much politics is too much politics in the redistricting

197. Colegrove v. Green, 328 U.S. 549, 569 (1956) (Black, J., dissenting).

198. *See* Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . .").

199. *Id.* at 226.

200. *Id.*

201. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 193 (2012).

202. *Id.* at 193–94; *see, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.").

process.[203] A question that has proven significantly more difficult to answer than how equal do populations within districts have to be. As a result, the federal jurisprudence on gerrymandering has limited the applicability of the Fourteenth Amendment protections to gerrymandering cases.

Building on the holding in *Baker*, the *Bandemer* Court would find that political redistricting claims were justiciable, in part because the Fourteenth Amendment provided a discoverable and manageable standard.[204] And, just as the Justices in *Baker* suggested, the Court used a familiar Equal Protection standard: intent plus effect.[205]

However, deciding on this test got courts no closer to deciding how much politics is acceptable. The standard was initially developed for racial discrimination cases, where any showing of discriminatory effect, based on discriminatory intent, is sufficient.[206] In contrast, the Court has held that some amount of redistricting for political gain is inevitable and legal.[207] For instance, redistricting to protect incumbents has long been held to be a legitimate motive.[208] As a result, the Court held that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[209]

This standard created two serious problems for future litigants. First, the holding is based on assumptions that are being challenged by research done on the House elections since 2000.[210] The Court reasons that the power to influence elections as a whole cannot be determined by the loss of one election.[211] The losing party voters are presumed to be adequately represented by the winning party's representative and can change the outcome of the next elections if they are not.[212]

203. *See* Vieth v. Jubelirer, 541 U.S. 267, 297 (2004) (defining the original unanswered question as "How much political motivation and effect is too much?").

204. Davis v. Bandemer, 478 U.S. 109, 123–24 (1986).

205. *Id.* at 127.

206. *Vieth*, 541 U.S. at 281, 285–86.

207. *Id.* at 285–86.

208. *Id.* at 298.

209. *Bandemer*, 478 U.S. at 132.

210. *See* discussion on the McGann study and the competitiveness of the 2002 elections, *supra* Part IV.

211. *Bandemer*, 478 U.S. at 131–32.

212. *Id.* at 132, 135.

However, redistricting can affect a party's ability to win an election for a decade.[213]

The second issue is that despite the increase in research conducted on elections and gerrymandering, the *Bandemer* test has proven to be a potentially impossible standard. Writing for the plurality in *Vieth*, Justice Scalia detailed the difficulty courts have had in applying the *Bandemer* test, specifically noting that in the eighteen years since the test was developed no court has invalidated a map based on gerrymandering.[214] As a result, the plurality held that "[b]ecause this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants, we decline to affirm it as a constitutional requirement."[215]

However, the plurality was not able to undo the precedent set by *Bandemer*, and the plaintiffs in *Gill* are again attempting to persuade the Court that this standard can be met. But, given the Court's requirement that plaintiffs show they have been "shut out of the political process,"[216] the question becomes, why are plaintiffs looking to the Fourteenth Amendment to protect their rights against vote dilutions? Legal scholars have suggested alternative suits could be brought under the First Amendment[217] or Due Process Clause.[218] However, given the Court's ambivalence about the justiciability of gerrymandering claims, this Note instead argues that state courts offer a better forum for such claims.

C. State Courts Can Interpret Their Own Constitutions to Protect Voting Rights

State courts offer plaintiffs two advantages: 1) state constitutions include more explicit protections for voters, and 2) state courts are not limited by the limited and still unsettled federal precedent discussed above.

213. *See* MCGANN ET AL., *supra* note 29, at 192.

214. Vieth v. Jubelirer, 541 U.S. 267, 279–280 (2004).

215. *Id.* at 283–84.

216. *Bandemer*, 478 U.S. at 139.

217. *See* Justin Levitt, *Symposium: Intent is Enough*, SCOTUSBLOG (Aug. 9, 2017, 10:44 AM), http://www.scotusblog.com/2017/08/symposium-intent-enough/.

218. Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655 (2017).

Unlike federal courts, state courts do not need to search for a provision in the United States Constitution to support a finding that the right to vote extends to gerrymandering claims. The constitutions of forty-nine states explicitly make voting a substantive right.[219] These provisions ("Voting Provision") usually include language that a citizen "'shall be qualified to vote,' 'shall be entitled to vote,' or 'is a qualified elector.'"[220] Arizona is the only state that uses negative language, similar to that found in the United States Constitution, in its Voting Provision.[221] In addition, twenty-six states provide further protection because their constitutions include provisions requiring elections to be "'free,' 'free and open,' or 'free and equal.'"[222] Thus, unlike federal courts, state courts do not have to limit their analysis of gerrymandering claims by trying to determine which provision of the United States Constitution they derive the right to vote from.

Moreover, state courts should find that state legislatures are bound by these Voting Provisions. In *Smiley v. Holm*,[223] the Court explained the limits that could be placed on the power given to state legislatures under Article 1, Section 4 of the United States Constitution ("Election Clause").[224] The Minnesota Constitution required any bill passed by the state legislature to be approved by the governor or, after reconsideration by the legislature, passed by a two-thirds vote.[225] However, the defendant argued that the Election Clause created a duty given to the state legislature which could not be limited by the state constitution.[226]

The Court disagreed, holding that the Election Clause did not confer a duty but rather authority to make laws for the state.[227] Because the state legislature is exercising its law making power when it redistricts, it must use its authority in accordance with the state

219. Douglas, *supra* note 189, at 101.

220. *Id.* (footnotes omitted) (quoting COLO. CONST. art. VII, § 1; HAW. CONST. art. II, § 1; N.M. CONST. art. VII, § 1). For more information about the specific language of each state's Voting Rights Clause see the table at the end of Douglas's article.

221. *Id.* at 102.

222. *Id.* at 103.

223. 285 U.S. 355 (1932).

224. *Id.*; U.S. CONST. art. I, § 4. ("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 . . . .").

225. *Smiley*, 285 U.S. at 363.

226. *Id.* at 372.

227. *Id.* at 367.

constitution.[228] Building on the holding in *Smiley*, the Court, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[229] held that a citizen initiative to give redistricting control to an independent commission did not violate the Election Clause's grant of authority to state legislatures.[230] Thus, state legislatures should be equally bound by the Voting Provisions.

Next, state courts should not bind themselves based on federal precedent. In his article *State Constitutions and the Protection of Individual Rights*, Justice Brennan argues that state courts should not defer to federal precedent, even when their decisions are based on state constitutional provisions that are similarly or identically phrased to those in the United States Constitution.[231] Instead state courts should see decisions based on federal law as merely persuasive and decide for themselves if they are convinced by the Supreme Court's opinions.[232] Importantly, "state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts."[233] Thus, state courts do not need to seek a judicially discoverable and manageable standard, or use the *Bandemer* standard, even in cases involving state equal protection clauses.

Moreover, the Bill of Rights was drafted to mirror the rights granted under various state constitutions, rather than states reiterating federally protected rights in their constitutions.[234] In order to draft the Bill of Rights, the Framers looked to state constitutions and included only rights which were protected by one or more state constitutions.[235] Additionally, until the Fourteenth Amendment was enacted and the Bill of Rights was held applicable to state action, state constitutions were independently interpreted as controls on state actions.[236]

Justice Brennan's reasoning is even more applicable when applied to cases based on state constitutional provisions that have no analogous United States constitutional provision. As discussed above,

228. *Id.* at 367–68.
229. 135 S. Ct. 2652 (2015).
230. *Id.* at 2659.
231. Brennan, *supra* note 1, at 500, 502.
232. *Id.* at 502.
233. *Id.* at 501.
234. *Id.*
235. *Id.*
236. *Id.* at 501–02.

state constitutions include provisions expressly granting citizens the right to vote, while the United States Constitution only provides prohibitions on government actions.[237] State courts interpreting the Voting Provisions, therefore, have no controlling federal cases interpreting a federal counter part. Moreover, it can be inferred by the inclusion of Voting Provisions that states did not believe the United States Constitution provided adequate protection for such an important right. Therefore, if state courts were to base their decisions on federal gerrymandering jurisprudence, they would "thwart[] a state court's ability to provide the heightened level of protection that state constitutions' direct provision of the right to vote demands."[238]

Instead, state courts should use federal jurisprudence only as a guideline for deciding what protection their respective constitutions offer. Accordingly, state courts would be a much better forum to litigate gerrymandering claims, regardless of the outcome of *Gill*. State courts do not need to base gerrymandering claims on violations of the Fourteenth Amendment or worry about federal justiciability. Historically, state courts have protected individuals from improper actions by state governments, and, given the extensive impact gerrymandering has on voters' rights, the courts should not shy away from the opportunity to do so now.

VI. CONCLUSION

Over the last decade gerrymandering has attracted a higher level of public consciousness, possibly due to a combination of social media, the twenty-four-hour news cycle, and the willingness of legislatures to gerrymander even more aggressively. The public's increasing dissatisfaction with the United States electoral system and with the representatives it puts in power has created a perfect storm. More voters are looking for a way to combat what they see as unfair voting processes. But in the case of gerrymandering, it appears that Congress and the federal courts are unable or unwilling to provide much protection.

This Note has offered an overview of how gerrymandering works to undermine the intent of the Framers to create representational government. Modern election results may be less reflective of the

237. Douglas, *supra* note 189, at 101.
238. *See id.* at 124.

voters' choices and more reflective of legislative interference. In addition, this Note has provided a basic summary of notoriously complicated federal Equal Protection voting rights jurisprudence in the hope of giving the reader an understanding of the difficulties faced by federal litigants. Sometimes gerrymandering works in small, subtle ways that nevertheless affect the voters' ability to elect representatives. In addition, incumbent protection makes representatives less responsive to the will of voters and diminishes voters' power to respond.

This Note argues that state courts could be an alternative to the uphill battle litigants face in federal courts. State courts offer voters a chance to create new, stronger protections against gerrymandering that are not limited by federal precedent. First, state courts can use the states' Voting Provisions, rather than the Fourteenth Amendment, to invalidate district maps. Second, state courts have the freedom to create a higher level of protection, beyond only that form of gerrymandering that deprives someone or a group of access to the political process as whole. In fact, state courts have historically interpreted their constitutions as creating broader rights than those found in the United States Constitution. Precisely because these Voting Provisions have no analogous United States constitutional provision, there is no controlling federal authority to handcuff state courts. Thus, state courts should take up the call by voters to protect the integrity of elections, and to create new limits on gerrymandering.