Courtroom Cartography: How Federal Court Redistricting Has Shaped American Democracy from *Baker* to *Rucho*

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A dissertation

submitted to the Faculty of

the department of Political Science

in partial fulfillment

of the requirements for the degree of

Doctor of Philosophy

Boston College
Morrissey College of Arts and Sciences
Graduate School

January 2022

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Every decade, following the U.S. Census, lawmakers redraw state and federal legislative districts. This process of redistricting is a necessary aspect of representative democracy for capturing population changes in a dynamic society. While this responsibility of redrawing legislative districts has historically been left to state legislatures to complete - and more recently to commissions and panels - the reality is that every redistricting cycle, some of these maps are actually drawn by the U.S. federal courts. These maps determine the district boundaries for millions of Americans - who votes where, for whom and with whom.

Since the Supreme Court ruled that legislative reapportionment was a justiciable issue for federal judiciary in 1962's landmark decision, *Baker v Carr*, the lower federal courts have regularly taken the extraordinary step of drawing legislative districts themselves when the initial redistricting institution fails to implement a lawful plan. This places the famously nonpartisan institutions at the center of the most political activity. There is no clear constitutional or statutory guidance for how federal courts should make these remedial maps, and there are dozens of competing criteria for where to draw each line: compactness, partisan advantage, racial representation, competitiveness, protection of political subdivisions, etc. This raises fundamental questions about the role of the federal courts in American government, the nature of representative democracy, judicial independence and

the separation of powers, the criteria for judging fairness, institutional capacity and federalism. Despite these tensions, there has been no comprehensive research on the impact that federal courts have on redistricting. This dissertation aims to address these tensions and fill this scholarly gap, answering the question of *What has been the impact of federal court involvement in legislative redistricting between 1962's Baker v Carr and 2019's Rucho v Common Cause.*

In this dissertation, I use five approaches to undertake a comprehensive examination of the role of the federal courts in redistricting during this 57-year period. In Chapter 2, I adapt Supreme Court decision making theories for the lower federal courts to develop a theory of institutional constraints. I argue these constraints determine the courts' choices on when, how and why to make a redistricting map and which criteria to use. In Chapter 3, I use an American Political Development approach to examine the changes in judicially manageable standards created by the Supreme Court over time for understanding the legally constraining precedents for the lower courts. In Chapter 4, I conduct an original descriptive content analysis of more than 1,200 lower federal court decisions between 1960 and 2019 related to redistricting to understand the preconditions for federal court action, the trends in lower federal court caseload and outcomes, and the obedience of the lower courts to Supreme Court precedents.

In Chapter 5, I present the analytical heart of this dissertation, testing my theory and defining what makes a federal court-made map distinct from those made by other institutions. To accomplish this goal, I use an original dataset of five decades of

redistricting plans at the state and federal levels together with 13 varied quantitative methods developed by myself and other political scientists for measuring gerrymanders. Analyses of these data allow me to quantify the criteria used by the federal courts in distinction to other institutions, leading to predictive results about the federal courts as map makers. I find that federal courts create redistricting plans with lower population variance, more compact districts, and a higher proportion of majority-minority districts for descriptive racial representation than legislatures or commissions. Federal courts also create some partisan bias in their plans but at a lower level than is seen in legislatures.

In Chapter 6, I take a qualitative, case study approach and compare these empirical results to the actual court opinions in four representative instances where the courts drew the maps. I examine how well judges understood the nonpolitical criteria they were actually using in practice and apply my theory of institutional constraints on lower federal courts.

In sum, this dissertation offers:

- new datasets and methods for studying redistricting institutions;
- descriptive accounts of the trends, processes and development of federal courts redistricting;
- an institutional theory and approach for studying the lower federal courts;
- A detailed examination of the development of Supreme Court precedents on redistricting that constrain lower court decision making;
- and quantitative and qualitative analyses of which criteria the federal judiciary favors when they draw plans and why.

Most importantly, this dissertation finds that the criteria courts favor in practice differ from those used by state legislatures and commissions. Federal courts apply criteria shaped by judicial constraints and that reflect a distinct understanding of legislative representation. The dissertation's conclusion examines the implications of these findings for American democracy, the lower federal courts, voters and constituents.

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ACKNOWLEDGEMENTS

Typing this dissertation was an individual effort, but the project as a whole is the result of the generosity, help and support of dozens of people. Writing a dissertation and earning a PhD at Boston College are rare experiences for which I am extremely grateful.

I want to thank the faculty and staff of the Boston College Political Science department. I am especially thankful for the advice, assistance and instruction that Susan Shell, Peter Skerry, Christopher Kelly, Marc Landy and Kay Schlozman gave me over the years about political science, teaching, research and the hidden curriculum necessary to succeed in academia (and even get into the PhD program.) Thank you also to Shirley Gee who has helped me in countless ways over the past seven years.

Additionally, I want to thank my dissertation committee – Shep Melnick, David Hopkins and Michael Hartney - for extensive help on my dissertation from its chaotic conception to this in-depth (and long) exploration of the federal courts and redistricting. To Shep, thank you for teaching me how to think about courts and their impact on politics, how to write practically for a book project, and how to investigate a question in politics in an effective and interesting way – to make the general specific and the specific general again. This project came together in large part because of Shep's generosity to host an impromptu reading course on public law and his encouragement to investigate neglected questions in law and politics. To David, thank you for timely and detailed feedback on every chapter, advice on research design and the challenge to develop a strong point of view for the

implications of my findings and political relevance. To Michael, thank you for help at every step of the way, from troubleshooting STATA errors with me to offering big picture advice about life as a political scientist - and for all of coffee in the process. I cannot imagine writing this without your help.

Additionally, I'd like to thank Ronald Keith Gaddie at the University of Oklahoma and Nicholas Stephanopoulos at Harvard Law School for advice at critical points in my dissertation process.

Thank you to my family and friends for support and inspiration throughout this project and process. I am grateful to my parents, Susan and Roger, for giving me the skills that allowed me to do any of this, and for encouragement and support during graduate school and many years before. Thank you to my sister, Alex, my grandmother, Claire, and the rest of my family – the Hayeses, Collinses, Deweses, Doirons and Ericsons - for unconditional support throughout graduate school. Thank you also to the Kelly family for the space to start this project.

Additionally, I want to thank and acknowledge my grandfather, Robert Collins, who was student at Boston College decades before me and remains a student of history to this day. He instilled in me the importance of academic learning and scholarship, the value of history in contemporary politics, and the necessity of compassion for a good life. Without these influences, it is hard to imagine I would have filled out my application, let alone completed this degree.

I want to especially thank my wife Deidre, who has not only been incredibly supportive throughout my seven years at Boston College, but also took the bold step to marry this graduate student a few months before he took his comprehensive exams. Deidre has helped proofread countless papers, talked through complex problems and provided inestimable support. While we both worked at home together during the early days of the pandemic, Deidre's work ethic was inspirational to me in completing this project. But it's her love and partnership that are the biggest aids in every aspect of my life and were crucial to my success on this project and at BC. Thank you.

And, finally, I'd like to thank my daughter Lucy, who inspires me to be thoughtful in my work and has permanently altered my perspective. Her entire gestation and life so far have taken place while I've been writing this dissertation. Although she can only babble right now, maybe someday she'll choose to read this and see what I was doing that whole time. Maybe she'll have ideas about how I could improve it. I'm grateful she exists and I hope that if she chooses to undertake a large project like this, she's lucky enough to be surrounded with the same support I was.

Thank you.

1.0 INTRODUCTION

In 2012, the Congressional districts for both Texas and New York were redrawn by the U.S. federal courts.

In many ways the two states were in contrasting positions that year. Sixty-three percent of New York citizens voted for incumbent Barack Obama and the state sent 21 Democrats to Congress compared to just 6 Republicans. Fifty-seven percent of Texans voted for presidential challenger Mitt Romney and elected 24 Republicans to serve in the House - two-thirds of the delegation. Although both state populations grew - New York by about 400,000 and Texas more than ten times that at 4.2 million - New York lost two of its Congressional seats following the 2010 Census, while Texas gained four more. Despite these many differences, both of these states shared in the fact that federal courts intervened and created the redistricting plans used in the 2012 elections.

In the 2012 New York case of *Favors v Cuomo* the three-judge federal court explained that it was reluctant to draw the new Congressional districts - that it is not the job of the courts. However, the federal court did eventually draw the districts used in the election but only because the *de jure* state redistricting institutions forced the court's hand by failing at their task. The court wrote,

> Judicial redistricting has correctly been described as an "unwelcome obligation."... That is particularly so in this case because of the extremely limited time frame within which the court has had to create the Ordered Plan. But the task is unwelcome for reasons that go beyond the practical to implicate the proper division of power within our federal republic. While congressional district lines must always be drawn to conform to federal law, the power to draw such lines is committed in the first instance to the states, not to the federal government, and is properly exercised by the most democratic branch of state government, the legislature ... But when, as here, a state completely abdicates its congressional redistricting duties, it effectively cedes state power to the federal government. Further, it transfers power that should be exercised by democratic bodies to a judiciary ill equipped to resolve competing policy arguments. Such a twin recalibration of important power balances in a federal republic is itself "unwelcome."[1]

In the 2012 Texas case, the three-judge court also acknowledged how unwanted the task of redrawing the state's Congressional districts was. However, even after the federal court-drawn maps were challenged at the Supreme Court in *Perry v Perez,* giving the state institutions more time to draw constitutional districts, the federal court plan was what was ultimately used in the 2012 elections. In the order adopting the plan, the lower court reiterated the institution's discomfort with this method of redistricting, explaining its remedial and unintended nature. The court wrote,

> We emphasize the preliminary and temporary nature of the interim plan, ordered in adherence to the standards set forth by the Supreme Court in this very case, as we undertake our "unwelcome obligation" to the text of the note mindful of the exigent circumstances created by the need for timely 2012 primaries and general elections in Texas. Nothing in this opinion explaining this Court's independently drawn PLAN H309 represents a final judgment on the merits as to any claim or defense in this case.[2]

[1]"New York," *All About Redistricting* (blog), accessed March 16, 2022, https://redistricting.lls.edu/state/new-york/.

[2]United States Dist. Court v. Texas, 2012 U.S. Dist. LEXIS 190609 (United States District Court for the Western District of Texas, San Antonio DivisionMarch 19, 2012, Filed). https://advance-lexis-com.proxy.bc.edu/api/document?collection=cases&id=urn:contentItem:5DDB-M1H1-F04F-C03G-00000-00&context=1516831.

The rhetoric of these two court opinions is explicit about how unusual and undesirable it is for the federal courts to draw legislative district lines. The courts express their discomfort, their deference to the state and their extreme hesitance to act. The courts only act when forced by the state institutions' failure to make a legal plan. But how uncommon are these examples of the federal courts taking on such an "unwelcome" power?

In 2002, a federal court in Wisconsin drew the state legislative district lines in *Baumgart v Wendelber*[3]. The three-judge district court wrote that it was reluctant to draw the new redistricting plan until it was forced by state institutional inaction. The judges stated that, "having found various unredeemable flaws in the various plans submitted by the parties, the court was forced to draft one of its own...The court undertook its redistricting endeavor in the most neutral way it could conceive."[4]

In 1992, a federal court in Alabama drew the Congressional district lines in *Wesch v Hunt.* The court explained that the regular procedure was unlikely to produce a constitutional map in time for the upcoming election and that the federal court was reluctant to act but forced by circumstances to draw the district map. The opinion explained, "At the time this case was filed, this court considered it highly unlikely that the legislative process could produce a congressional redistricting plan and have it precleared in time … Consequently, the court finds that the only means by which Alabama's 1992 congressional primaries may be held in a timely manner ... is pursuant to an interim redistricting plan ordered by this court."

[3] *Baumgart v. Wendelberger*, Case Nos. 01-C-0121, 02-C-0366 (E.D. Wis. May. 30, 2002)
[4] *Baumgart v. Wendelberger*

In 1982, a federal court in Minnesota drew the state's eight Congressional district lines in *LaComb v. Growe*. The three-judge district court expressed frustration that the de jure redistricting institutions failed to produce a legal map despite the court's substantial deference. Reluctantly, the federal court drew the redistricting plan for the state after being forced by the legislature's inaction. The court wrote, "Throughout these proceedings, the Court has repeatedly emphasized the responsibility of the legislative and executive branches of the State for congressional redistricting...The State has been urged to meet that responsibility. It has been given more than an adequate opportunity to do so...The State Legislature has failed to agree upon a plan of congressional redistricting...Consequently, the Court has been forced to undertake the task of redistricting."

In 1977, the U.S. Supreme Court wrote in *Connor v Fitch* about the unusual and extreme circumstances that would be necessary to lead lower federal courts (LFCs) to draw legislative districts. The Court wrote,

> These high standards reflect the unusual position of federal courts as draftsmen of reapportionment plans. We have repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims* … In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the 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."[5]

Connor v Fitch has been quoted in many subsequent LFC opinions adopting a court-drawn redistricting map while acknowledging the "unwelcome obligation" of the task.

[5] Connor v Fitch 431 U.S. 407 (1977)

Despite the rhetoric in each of these court opinions, the truth is that since 1962's *Baker v Carr* and the justiciability of reapportionment in the federal courts, redistricting by the LFCs is not that uncommon at all. It may be "unwelcome," but it has become a consistent part of every decennial redistricting cycle and therefore a regular part of American representative government. In the past 60 years, the LFCs have drawn the legislative lines for dozens of states, dozens of times, redrawing the representative districts for millions of Americans.

Although legislative redistricting by the federal courts has now become a reality of American government, there has been very little investigation into the impact of this irregular role for the least political branch. This project is an effort to fill that void. Starting with the inherent tension between the federal judiciary's traditional independent role in the American political system and the political task of redistricting, this project uses a multimethod approach to comprehensively explore the development, processes, consequences and implications of the federal courts becoming consistently involved in the redrawing of legislative districts across the United States since 1962. This project answers how, when and where LFCs decide to take the extraordinary step and draw legislative districts themselves; what criteria and qualities they use to draw these maps in comparison to other redistricting institutions; and why it matters for American representative democracy.

1.1 The Least Dangerous Branch and the Most Political Activity

By famously entering the "political thicket" and deciding on the justiciability of reapportionment as matter for the federal judiciary under the 14th Amendment, the Supreme Court opened the door for the federal courts to become the *de facto* map-makers for legislative districts every reapportionment cycle. The federal courts entered a formerly exclusive state policy arena with a new role and without clear instruction from precedent, statute or the Constitution on how to redistrict.

While the Supreme Court did develop some legal principles and standards for adjudicating reapportionment and redistricting disputes in *Baker's* immediate progeny, the LFCs were still faced with the facts of specific cases - of when to intervene and where to draw the actual lines for new districts on a map. In the earliest cases, the Supreme Court provided only the legal principle of equity as a guide for the lower courts[6].

In the years following *Baker,* with *Gray v Sanders, Wesberry v Sanders* and *Reynolds v Sims,* the Supreme Court established the clear principle of equal population among districts for reapportionment and redistricting - the One Person, One Vote standard. However, as articulated by Justice John Marshall Harlan II in his *Reynolds* dissent, One Person, One Vote was far from comprehensive and lacked the necessary practical instructions for how LFCs should draw new redistricting maps. The LFCs were still faced with dozens of cartographical choices and little guidance. Harlan wrote,

[6] Douglas concurrence, Baker v Carr 369 U.S. 186 (1962)

> This Court, however, continues to avoid the consequences of its decisions, simply assuring us that the lower courts 'can and . . . will work out more concrete and specific standards,' ... Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single member districts or multi-member districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for districting consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possible solutions, with varying political consequences, than reapportionment broadside.

For the 57 years between 1962's *Baker* decision that started the justiciability of redistricting cases and 2019's *Rucho v Common Cause,* which ended the justiciability of *partisan* gerrymandering claims, LFCs have consistently been faced with a wide range of redistricting cases and have had broad discretion with how and when to act. In short, during this time period, the situation Justice Harlan described in his *Reynolds* dissent did not change substantially - there were not clear instructions for where the lines should be drawn.

Since *Reynolds*, the Supreme Court has established some judicially manageable standards, such as for favoring single-member districts[7] or for maintaining the number of districts in a state plan, but it has not ruled on the core concerns in Harlan's dissent, such as the preeminence of competing criteria like compactness of districts versus electoral

[7] Connor v. Johnson, 402 U.S. 690 (1971)

competitiveness. The Court has developed some principles on partisan and racial gerrymandering, but lacks instructions on how to implement these concepts in specific plans, and standards have changed substantially over time. The LFCs lack a three-prong test or comprehensive judicially manageable standards for what "fair and neutral criteria" are or how they could be practically implemented.

In the U.S. most redistricting is done by legislatures or commissions. In contrast to the federal courts, legislatures and commissions typically have clear procedures laid out by state law as well as requirements for the criteria they favor, such as compactness or nonpartisanship. Further, the incentives of a partisan legislature or commission are usually discernible in a way they are not with courts. Courts only will only act when partisan gridlock or legal violations upset the de jure redistricting procedures.

While state courts also fulfill a similar emergency role as LFCs in the redistricting process, tasked with resolving disputes, their legal standards and political incentives differ from those of federal courts. State courts are often guided or bound by the same state constitutional provisions for specific favored criteria that legislatures or commissions are. Additionally, many states have judges who are elected by the people or accountable to state office holders, and therefore may have a different incentive structure from federal court judges.

Consequently, the federal courts are unique among redistricting institutions. They must act in critical moments and on severe Constitutional violations, regardless of the continued absence of instruction from precedent or law. The federal courts have continued to be the de facto map-makers for legislative districts across the U.S. decade after decade, and yet, we know almost nothing about the maps they make.

Although the LFCs took on this new responsibility after *Baker,* they largely retained their same role in the US political system - they remain one of the American political institutions furthest removed from the individual voter and the democratic process. LFC judges are appointed by the president and approved by the Senate, isolated from popular selection. Unlike the Electoral College or the U.S. Senate, federal court judge selection is rare in maintaining its distance from democracy since the American Founding. The federal judiciary, and the lower federal courts specifically, remain one of the lowest information areas for most Americans.[8]

There is a clear tension between the court's role in the American political system and its unique responsibility in redistricting, which is only exacerbated by the absence of clear instructions from law. The court's role is one of the least democratic and responsive to the public, while this responsibility as de facto map-maker requires the federal courts to partake in one of the most political acts, determining representation for state and federal legislatures. Without clear legal standards or criteria, unelected federal court judges must use their own judgement and the few Supreme Court standards to determine where to draw the lines, and which competing criteria to favor when creating a redistricting map that will determine legislative representation. The judicial branch is acting with legislative power on the design of legislatures themselves.

This tension begs the important questions: *How, when and why do the federal courts make a redistricting plan? What are the criteria that lower federal courts favor when making a redistricting map? How do these criteria compare to the criteria favored by other redistricting institutions, such as commissions and legislatures? How aware are*

[8] For example, in 2018, a PBS/C-SPAN poll of 1,032 likely voters, 52% of those surveyed could not name a single U.S. Supreme Court justice. (https://static.c-span.org/assets/documents/scotusSurvey/)

the federal judges of the criteria they've chosen to use? And, how do the biases of federal court drawn maps affect representation in a state for citizens and constituents?

This dissertation project addresses these questions directly with a multimethod research design that yields the most comprehensive analysis of federal court involvement in legislative redistricting ever.

Despite the importance of this topic and the unique role that the federal courts have taken in American representative government since *Baker*, with the least partisan branch taking part in the most political activity, there has been no systematic analysis of federal court redistricting in political science or law. There has been no examination of which criteria the courts use when redistricting, why or what the effect is. This project not only contributes novel findings on federal court redistricting but also multiple original datasets for five decades of redistricting criteria broken down by institutions as well as thousands of LFC redistricting cases.

This project finds that LFC action on redistricting - both with case decisions and map making - is shaped by legal, structural and political constraints absent from the Supreme Court, especially *stare decisis*, the threat of appeal and concerns over legitimacy. The analysis of thousands of federal court cases between 1962 and 2019, shows that federal courts take on the most redistricting cases during redistricting cycles and are exceptionally hesitant to create their own plans, with deference to state institutions until an emergency remedy is needed. Additionally, federal courts create legislative redistricting maps that favor different criteria than used by other institutions such as legislatures or commissions, specifically favoring population equality, racial proportional representation and compactness, corresponding to Supreme Court precedent

and deference to traditional redistricting criteria when standards are absent. Additionally, this project finds that LFC are generally accurate in understanding the criteria they favor, with qualitative analysis of select court opinions accurately matching the empirical quantitative results for the same maps.

Ultimately, viewing this project as a whole, it shows that the federal courts have adapted to their unique role despite the lack of institutional capability. The lower courts follow precedent on criteria where the Supreme Court has developed standards and are cautious in areas without clear instruction from the Supreme Court, resulting in plans that are only minorly partisan and not particularly politically competitive or incumbent protective. As a result, the LFCs create a distinct form of representation for the constituents who live in their created legislative districts - different from those in plans made by legislatures, state courts and commissions.

1.2 Why Redistricting by The Federal Courts Matters

There has been no systematic or specific analysis of what criteria federal courts use when they make a redistricting map or how it impacts representation in either legal or political science scholarship. However, understanding the role of the federal courts as a redistricting institution is important because redistricting is important.

Even though the federal courts are constitutionally more likely to get involved in the process when a redistricting plan is at its most complicated and fraught, concerning partisan disputes or race-based voting rights violations, the decisions LFCs make as to

where to actually draw the lines matters to the constituents of the districts who inhabit them.

Elections are a fundamental aspect of democracy, and, in the U.S., with single-member districts and winner-take-all elections, where you draw the lines determines who votes where, with whom and for whom. Redistricting, especially with the use of improved software and modern-day detailed voter data, can be used to create partisan advantages in elections and legislatures as well as minority vote dilution. Redistricting affects voter participation, voter information, electoral responsiveness, control of legislatures, the relationship between the legislator and constituents, and policy outcomes, - who gets what and where[9].

Scholarship on the differences among outcomes in redistricting institutions is not comprehensive, but the findings are clear. The most canonical conclusions related to redistricting institutions is that single-party control for legislative redistricting leads to plans that are the least competitive and favor their own party and their incumbents the most - all other institutional arrangements - commissions, courts, bipartisan legislatures -

[9] Cain, Bruce E. "Assessing the partisan effects of redistricting." *American Political Science Review* 79, no. 2 (1985): 320-333.; Gelman, Andrew, and Gary King. "Enhancing democracy through legislative redistricting." *American Political Science Review* 88, no. 3 (1994): 541-559.; Ansolabehere, Stephen, Alan Gerber, and Jim Snyder. "Equal votes, equal money: Court-ordered redistricting and public expenditures in the American states." *American Political Science Review* 96, no. 4 (2002): 767-777.; Hayes, Danny, and Seth C. McKee. "The intersection of redistricting, race, and participation." *American Journal of Political Science* 56, no. 1 (2012): 115-130.; Yoshinaka, Antoine, and Chad Murphy. "Partisan gerrymandering and population instability: Completing the redistricting puzzle." *Political Geography* 28, no. 8 (2009): 451-462.; Yoshinaka, Antoine, and Chad Murphy. "The paradox of redistricting: How partisan mapmakers foster competition but disrupt representation." *Political Research Quarterly* 64, no. 2 (2011): 435-447.; Cottrill, James B. "The effects of non-legislative approaches to redistricting on competition in congressional elections." *Polity* 44, no. 1 (2012): 32-50.; McKee, Seth C. "Redistricting and familiarity with US House candidates." *American Politics Research* 36, no. 6 (2008): 962-979.; Carson, Jamie L., Michael H. Crespin, and Ryan D. Williamson. "Reevaluating the effects of redistricting on electoral competition, 1972–2012." *State Politics & Policy Quarterly* 14, no. 2 (2014): 165-177.

are less partisan and more competitive than partisan controlled legislature on average in nearly every category[10].

Looking specifically at courts, it has been repeatedly shown that court-drawn maps (federal and state courts grouped together) draw more competitive redistricting plans than legislatures do, but that there is little difference between courts and commissions on this metric[11]. Similarly, courts (both state and federal together) have also been shown to draw generally compact districts, especially for state legislatures[12].

When looking at partisan measurements, courts generally do better than partisan legislatures at drawing unbiased districts using the Efficiency Gap measurement[13], similar to those made by commissions or divided legislatures. However, when examining court composition, there is bias toward the party that appointed the majority of judges to the panel for court-drawn plans. Some argue that federal judges have some partisan bias in their redistricting decisions, but are far more constrained than legislatures, favoring

[10] Erikson, Robert S. "Malapportionment, gerrymandering, and party fortunes in congressional elections." *American Political Science Review* 66, no. 4 (1972): 1234-1245.; Cain, Bruce E., and Janet C. Campagna. "Predicting partisan redistricting disputes." *Legislative Studies Quarterly* (1987): 265-274. ; Campagna, Janet, and Bernard Grofman. "Party control and partisan bias in 1980s congressional redistricting." *The Journal of Politics* 52, no. 4 (1990): 1242-1257.; Gelman and King 1994; Engstrom, Erik J. "Stacking the states, stacking the House: The partisan consequences of congressional redistricting in the 19th century." *American Political Science Review* 100, no. 3 (2006): 419-427.;Murphy and Yoshinaka 2009

[11] Carson, Jamie L., and Michael H. Crespin. "The effect of state redistricting methods on electoral competition in United States House of Representatives races." *State Politics & Policy Quarterly* 4, no. 4 (2004): 455-469.; Murphy and Yoshnka 2009; Carson, Jamie L., Michael H. Crespin, and Ryan D. Williamson. "Reevaluating the effects of redistricting on electoral competition, 1972–2012." *State Politics & Policy Quarterly* 14, no. 2 (2014): 165-177.; Cottrill, James B., and Terri J. Peretti. "Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting." *Election Law Journal* 12, no. 3 (2013): 261-276; Peterson, Jordan Carr. "The Mask of Neutrality: Judicial Partisan Calculation and Legislative Redistricting." *Law & Policy* 41, no. 3 (2019): 336-359.

[12] Edwards, Barry, Michael Crespin, Ryan D. Williamson, and Maxwell Palmer. "Institutional control of redistricting and the geography of representation." *The Journal of Politics* 79, no. 2 (2017): 722-726.; Grainger, Corbett A. "Redistricting and Polarization: Who Draws the Lines in California?." *The Journal of Law and Economics* 53, no. 3 (2010): 545-567.

[13] Stephanopoulos, Nicholas O. "Arizona and Anti-Reform." *U. Chi. Legal F.* (2015): 477.

maps made by litigants of their own party or making bias maps[14]. Others show a more blatant bias, explaining that the partisan composition of the court, especially when combined with the partisan composition of the state government, has historically led to maps biased toward a specific party[15]. Following the *Baker* decision, this partisan bias led to more Democratic gerrymanders and long-lasting legislature dominance by Democrats after the 1960s[16]. Court-drawn maps are most likely when the state legislature or government is under bipartisan or divided control[17].

These studies help explain the environment that leads to court involvement and illuminates the criteria they may favor, but no prior studies have looked specifically at federal courts as distinct from state courts or focused on courts specifically in relation to favored criteria. Despite the substantial scholarly attention paid to the political question at the heart of *Baker* and the legal advocacy for and against specific LFC actions, there has been no systematic examination of the criteria used and consequences of LFC redistricting in legal or political science scholarship. Some studies have included court-drawn maps as an institutional variable, and most group federal courts and state courts together as one category of variable despite the substantial legal, electoral, geographic and institutional differences[18]. No study has looked specifically and systematically at how federal courts draw legislative maps, and which redistricting criteria they favor.

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[14] Lloyd, Randall D. "Separating partisanship from party in judicial research: Reapportionment in the US district courts." *American Political Science Review* 89, no. 2 (1995): 413-420.; McKenzie, Mark Jonathan. "The influence of partisanship, ideology, and the law on redistricting decisions in the federal courts." *Political Research Quarterly* 65, no. 4 (2012): 799-813.

[15] Cox, Gary W., and Katz, Jonathan N. *Elbridge Gerry's Salamander : the Electoral Consequences of the Reapportionment Revolution*. New York: Cambridge University Press, 2002.

[16] Cox and Katz 2002

[17] Lloyd, "Separating Partisanship," 1995; McDonald, Michael P. "A comparative analysis of redistricting institutions in the United States, 2001-02." *State Politics & Policy Quarterly* 4, no. 4 (2004): 371-395.

[18] This project's analysis shows that courts should not be grouped together, as federal courts do not create maps as competitive as those made by state courts, for example.

Most studies emphasize only congressional or state data. None have been comprehensive in using all of the available measurements and metrics for partisan, racial and traditional criteria. There has been no systematic assessment of how the unique role of the federal courts has shaped the redistricting plans that have been used in elections and the experience of representation that these maps represent.

Additionally, if the 2020 Redistricting Cycle is anything like the previous five decades, the federal courts will draw the legislative districts for Congress and state legislatures in multiple states. These questions of what criteria do the federal courts use, how do they differ from other institutions and how does that impact representation not only have academic and theoretical implications for the American political system. They also have immediate practical implications for the people who will live in and vote in districts created by the federal courts in the immediate future. This project allows for a better understanding of current actions taken or not taken by the federal courts to draw contemporaneous conclusions about legislative district maps.

1.3 Thinking About Redistricting as Choices Among Competing Criteria

There are many different ways to conceptualize the process of redistricting. One can picture a cabal of incumbent legislators sitting around a map and "choosing their voters," district by district. One can think in terms of a party operative and see their partisan opponents setting themselves up for a decade of state legislative dominance across a whole map. One can picture a noble redistricting commission trying to draw a

fair map and focusing on compactness. Or on maintaining town boundaries? Or counties? Or racial representation? Which one is it?

One reason that redistricting is important in politics and governance is that there is not a consensus criterion that achieves fairness and neutrality, regardless of whether a legislature, commission or court is doing the redistricting. There is no agreement on what criteria should be used for "good" redistricting.

In his book, *The Reapportionment Puzzle*, political scientist Bruce Cain discussed the inherent conflicts that present themselves for anyone drawing a legislative map[19]. As Cain explained, each redistricting criteria that is chosen necessarily conflicts with another potential criteria that could have been chosen. The unavoidable conflicts in redistricting are what make it a political activity. Cain explained that there is no such thing as a "nonpartisan, noncontroversial reapportionment process."[20].

Although Cain is drawing on his experience as a 1981 California redistricting consultant and writing about legislature-made redistricting plans, his insight that redistricting has an inherent political nature, defined by decisions over competing criteria, is important and applicable to the federal courts as well. LFCs may not hold the legislative seats in the maps being drawn, but by deciding on certain criteria over others, federal courts make political decisions and shape the definitional character of the districts they create.

This project builds on Cain's insights and conceptualizes the process of redistricting as the reality of choosing among competing criteria. Redistricting criteria are

[19] Cain, Bruce E. *The Reapportionment Puzzle*. Berkeley: University of California Press, 1984. Cain discusses this in the area of what he calls "good government criteria," which blends my categories of traditional, political and precedential criteria.
[20] Cain, *Reapportionment Puzzle,* 77.

the substantive concepts that those who are creating a redistricting plan value when they draw a line, district or map. The drawing of lines is the means to the end of the criteria. Redistricting criteria represent the concrete choices that redistricting institutions have to make because there are infinite possibilities for how to draw legislative districts in a given space.

As Cain explained, each criterion chosen can also be a decision to subordinate other criteria. Not all criteria conflict with other criteria, but the choice of some means the detriment of others. For example, Cain points to the criterion of comparative seats in a redistricting plan and the criterion of promoting minority political strength. He wrote,

> This is one instance in which two goals almost always contradict one another, because of historic voting patterns of minorities in this country. The overwhelming Democratic bias of Black and Hispanic communities means that the seats they control will almost always be safely Democratic. Only the addition of highly registered… white, Republican suburb to nonwhite urban seats would make such districts competitive; but, as noted already, this would likely be struck down as racial gerrymandering.[21]

Common redistricting criteria include contiguity of districts, compactness, equal population, partisan advantage, incumbency protection, racial representation, competitiveness, preservation of previous districts, and maintenance of town or county boundaries[22]. These are the important criteria for this project because they are common, and they have direct impacts for the politics and representation that take place in the new legislative districts.

[21] Cain, *Reapportionment Puzzle,* 71-72.

[22] These are the common criteria used in redistricting, but criteria could represent anything. If one wanted to maximize the number of triangular districts, emphasize symmetry across the state or gerrymander by age, then they would be favoring redistricting criteria albeit uncommon ones.

With every line that the lower federal courts draw to construct a legislative district they are choosing to use specific criteria. And, further, they are necessarily choosing one criterion at the expense of another or several others because not all criteria can coexist.

Cain's discussions of the competing and conflicting criteria involved in redistricting, and how this makes the process political is useful for this project's understanding of the role of the federal courts as redistricters. By choosing criteria, they are making political choices, about what to favor and what to subordinate. The inherent conflicts among certain criteria make the decisions all the more impactful. This project, particularly the quantitative analysis of Chapter 5, shows that LFCs systematically favor population equality and descriptive racial representation at the plan level above all other criteria. Secondarily, LFCs favor compactness. And third, they have a slight bias toward the partisan advantage of the president's party that appointed them.

These findings alone tell us a lot about the maps that LFCs create and can yield conclusions on the kinds of politics, legislatures and representation that can be expected. But, when these findings are considered from the perspective of Cain's competing criteria it multiplies their implications. Now, not only do we know that LFCs favor population equality, but they also disfavor maintenance of city and county boundaries by subordinating those criteria, for example. Using the competing criteria approach to thinking about redistricting allows for a more comprehensive understanding and ultimately a translation of these findings to conclusions on the impacts that redistricting institutions have on the experience of representation that constituents living in a plan. These implications are fully explored in this project's conclusion.

1.4 What This Project Tells Us About the Federal Judiciary

On one hand, the involvement of the federal courts in redistricting represents a substantial disagreement between the purpose and role of the federal courts in the U.S. system and the task they are being asked to take on - the least dangerous branch and the most political activity. However, as this project shows, it also represents a site for the exploration of a long tradition of court involvement in American politics. In many ways, federal court redistricting embodies Alexis de Tocqueville's observation of judges in American democracy from the 1830s. He wrote,

> He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless, when he examines the nature of the tribunals, they offer nothing which is contrary to the usual habits and privileges of those bodies, and the magistrates seem to him to interfere in public affairs of chance, but by a chance which recurs every day.[23]

The federal court judges' chance for drawing legislative districts recurs at least once a decade.

This project uses redistricting as a subject area to explore deeper ideas about how the federal judiciary functions internally and externally with the American public in politics. Ultimately, this project highlights how the federal courts make profoundly political decisions on who votes where, with whom and for whom by drawing legislative districts. As Chapter 2 explains, these decisions are themselves shaped and constrained by the structure of the federal judiciary, U.S. laws and political concerns, such as legitimacy.

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[23] Tocqueville, Alexis de, Mansfield, Harvey C., Jr., and Winthrop, Delba. *Democracy in America*. Chicago, Ill ; London: University of Chicago Press, 2002. Book I, Ch. 6

Additionally, the role that LFCs have adopted in crafting legislative districting maps mirrors a larger overall shift that the federal courts experienced in public law during the middle of the 20th Century. This shift in public law litigation[24] signifies a fundamental change in the duties that federal courts were performing outside of their initial responsibilities of adjudication. This project exists as a case study in the specific policy arena of redistricting both exemplifying this shift and examining the potential impact of this shift on both the institution of the federal courts and in the American political system more generally. The results of this study underscore the flexibility and power of federal courts to address issues to which they are poorly suited institutionally. It also emphasizes the importance of legitimacy norms and other constraints in guiding the federal judiciary when there is a vacuum of clear law.

A question inherent in a project such as this, looking at the federal judiciary taking on a task for which they lack clear guidance begs the question: *How good of a job for federal courts do at redistricting?* This project resists these normative judgements, but does present a clear picture of federal court-redistricting as being distinct from other institutions' districting. Based on the criteria and aspects of representation that a reader values, he or she will see the federal judiciary as doing a "good" or a "bad" job.

One of the aspects that most animates this project is the disagreement at the heart of redistricting, of which criteria to favor, which to disfavor and what that ultimately means for representation. These are the political questions at the heart of all redistricting and the barrier to federal court involvement until *Baker.* This project will provide readers

[24] Discussed in Chapters 2 and 7

with all of the information necessary about every aspect of federal court redistricting to let him or her make the necessary normative judgements.

1.5 What This Project Tells Us About the Lower Federal Courts and the Supreme Court

This project strengthens the understanding of the relationship between the LFCs and the Supreme Court.

The content analyses of Chapters 3 and 4, the quantitative analysis of Chapter 5 and the qualitative case analysis of Chapter 6 all support the conclusion that the LFCs are substantially constrained by the high court and obedient to its precedents. If the Supreme Court had created comprehensive redistricting instructions for the lower courts in these opinions, then this project would be brief. But, instead, the Supreme Court has only weighed in on some criteria used for redistricting and either purposefully or incidentally stayed mute on others. This leads to a dynamic where the LFCs are both obedient to the narrow precedents of the Supreme Court while also lacking comprehensive guidance on how to draw an entire redistricting map.

This project's analysis adds evidence to the importance of *stare decisis* in the LFCs. Although the importance of precedent is often questioned for the Supreme Court, the conclusions in this project show that it is a powerful force for the lower courts and specifically for redistricting. The Supreme Court's creation of judicially manageable standards has a profound effect on the types of criteria LFCs favor when redistricting, as well as when to make a map or be deferential. However, the Supreme Court's inaction

also shapes LFC decisions. This adds importance to recent decisions such as *Rucho* as well as points to the need for greater research of LFCs specifically.

This project also shows that responsiveness is a two-way street. Chapter 4 uses an original dataset and analysis to illustrate how rises in LFC caseload on certain questions impact Supreme Court decisions on these same questions, and how in turn this impacts LFC caseloads.

Further, this project presents a novel theory of LFC decision making, which contributes a new approach to studying this undervalued aspect of judicial politics. This institutional theory emphasizes the constraints that shape LFC behavior in contrast to the unconstrained or under-constrained models of Supreme Court action like the attitudinal or strategic models. This theory and approach, and the evidence throughout the book supporting it, adds important context to our understanding of the relationship between LFCs and the Supreme Court, and the federal judiciary operates in the U.S. political system and ought to be studied academically.

1.6 What This Project Tells Us About Redistricting and Representative Democracy in America

This project explains a lot about the redistricting process and consequences that are absent from other scholarship in law and political science. More than anything, this project shows that key consequences of federal court redistricting[25] since *Baker* are the

[25] Redistricting, reapportionment and gerrymandering are distinct but related terms. Apportionment refers to the allocation of representatives among a set of geographic units, whether Congressional representatives to a state or state senators within a state. Reapportionment refers to the subsequent allocation of these representatives to the same geographic units. States are able to apportion state legislature and senate

institutional differences. Federal courts draw legislative districts favoring different criteria than legislatures or commissions. This means a different form of representation for the constituents in those districts. For example, constituents in LFC-made plans will be represented more numerically equally, with the most stringent understanding of One Person, One Vote. They will be represented spatially by closeness to other voters, not by town or county boundaries. Minority constituents may have more representation based on race or ethnicity, but less party representation than a legislature-made map. In sum, the institution that does the redistricting has substantial power and the political decisions they make matter and have a concrete impact on the people who live under that plan.

Additionally, this project only further underscores the lack of a consensus "fair and neutral criteria" for redistricting. This is the elusive quality that would take away any controversy from federal court involvement in map making. This project's exploration and analyses of redistricting only shows again and again how inherently and necessarily political redistricting is - there is no fair and neutral criteria. As is explored in the

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representative in a variety of ways depending on state constitutional rules. U.S. House of Representatives reapportionment is done by Congress as stated in the U.S. Constitution Article I, Section 2, which leads to redistricting in the state to accommodate the newly apportioned delegation in the state.

Redistricting refers to the practice of redrawing the geographic units that the allocated representatives will represent. Redistricting is most important in the single-member, first-past-the-post electoral systems found throughout most of the U.S. because each district drawn denotes a single representative's district. Redistricting is done to account for shifts in population, property, wealth or other dynamics. It is also required when there is a gain or loss of seats but not territory in a reapportionment. There are a variety of methods and purposes for redistricting that are more fully explored later (chapter 5).

Gerrymandering simply refers to redistricting toward a specific end. Named for then-Massachusetts Governor Elbridge Gerry, the early and eponymous gerrymander was an irregularly drawn (debatably salamander shaped) district designed to help Gerry's party gain an extra seat in the 1812 election. Gerrymandering commonly refers to noncompact, irregularly drawn districts, however modern examples include regularly shaped districts that have been drawn with computer aid for partisan advantage or demographic targeting.

Throughout the book I will use "redistricting" most often as the key term. Redistricting is required for either gerrymandering or reapportionment to occur in the relevant circumstances and therefore applies to every court case herein examined. Although, within cases there may be small differences when people use "gerrymander" to refer to the shape of a district or reapportionment to talk about the purpose of the new map being drawn, both include elements of redistricting and the choose of where and how to the draw the lines is the most important element in redistricting and the subject of inquiry for this book.

conclusion, each redistricting criteria decision is at the expense of another criterion. The lack of objective standards only highlights the importance of the role of who draws the lines, the role that the federal courts have taken on since *Baker,* and the conclusions of this project.

While the findings from this project help explain the concrete impacts of federal court redistricting on representation, it also provides the raw materials that citizens and constituents need to draw their own conclusions on the bigger questions. Redistricting represents only one of the ways in which the federal judiciary has expanded its purview in American government during the 20th century, but it is also the way that is maybe the most legislative and most directly impacts democratic institutions. It is also more complicated and opaquer to many voters than a headline-grabbing decision on voter identification requirements or mail-in ballots would be.

Citizens and constituents can use this project's findings to ask whether the unelected, federal courts should have such a substantial role in such an important aspect of representative democracy. Many people may like the form of representation that the federal courts create as well as the break from legislative gridlock, partisan fighting and naked politicking. But there are legitimate questions to ask about whether these ends justify these means - *should a process that definitionally requires politics; that requires so many decisions because there is a complete lack of consensus; that has such substantial outcomes for representation and democracy itself, be left to unelected and nonrepresentative federal judges? Without clear instructions from a democratically elected legislature or constitution? Even if they do a good job?*

This is the fundamental question underlying this project. Perhaps American democracy is strengthened by the federal judiciary taking up the pen and drawing legislative districts, shaping others, and guaranteeing equal representation for people, groups and interests that had been unrepresented in the process before regardless of its status as the least democratic branch. Perhaps American democracy would be better if it stayed more democratic, with democratically chosen commissions or elected legislators drawing the district lines that determine who is represented with and by whom. If the lack of consensus on which competing criteria to use to draw each district line is what makes redistricting political, perhaps the solution should be political rather than judicial.

There are many potential "solutions" to these redistricting conundrums, ranging from Congressional direction for redistricting criteria or constitutional amendments to a completely new form of electoral systems that does not use single member districts. While these alternative reforms remain hypothetical, the lasting question is generally, *what should the role for courts be in American democracy?* and specifically, *what should the role of the lower federal courts be for in making legislative districts in the U.S. today?* While people ponder this role for the courts in the U.S. politics, the federal courts will continue to do what they do best - solve the immediate problems in front of them, and in 2022 that will surely include redrawing some redistricting plans.

1.7 Shape of the Project

Due to the lack of scholarship on this exact question, this project has brought two distinct streams of research together to develop a starting point. First, I draw on judicial

behavior research, specifically models of Supreme Court Decision-making like the strategic and attitudinal models, and adapt them to fit LFCs by emphasizing the constraints on the subordinate courts. From this, I develop a theory of LFC action on redistricting cases and map criteria with testable hypotheses. Second, I use the social science tools and findings from redistricting scholarship in law and political science to test and examine LFC-made redistricting plans.

This dissertation project has six parts. In Chapter 2, I present an original theory of LFC behavior for redistricting, filling a void in the scholarship for the most common type of federal court cases and building on existing Supreme Court behavior literature for an institution-focused model of constraint-based LFC redistricting and testable hypotheses for the questions are the center of this project: *How, when and why do the federal courts make a redistricting plan? What are the criteria that lower federal courts favor when making a redistricting map? How do these criteria compare to the criteria favored by other redistricting institutions, such as commissions and legislatures? And, how do the biases of federal court drawn maps affect representation in a state for citizens and constituents?* The theory emphasizes the political constraints of legitimacy, the legal constraint of *stare decisis* and the structural constraint of accountability as those that affect when and how LFCs redistrict.

In Chapter 3, I take an American Political Development approach to examine the development of Supreme Court standards on three areas of redistricting case law - malapportionment, racial voting violations and partisan gerrymandering. This analysis explains the standards that have been used by the LFCs when facing specific cases and serves as a case study for the political development of standards in the Supreme Court

over time. The results of this analysis provide the reader with a detailed understanding of the multiple orders of redistricting standards that LFCs must consider for a given case in a given year categorized by claim type and subject area.

Chapter 4 presents an original content analysis of more than 1,000 LFC cases between 1960 and 2019. Addressing the core question - *How, when and why do the federal courts make a redistricting plan?* - Chapter 4 uses this large dataset to map the typical processes of LFC court cases on redistricting and which conditions lead to court-made maps. Further, this analysis highlights specific trends in LFC redistricting over time, over space, by subject matter and by outcome. This chapter also uses the caseload data to test the responsiveness between the U.S. Supreme Court and LFCs, and illustrates the typical timeline of federal court involvement in redistricting cycles.

Chapter 5 presents the large-scale quantitative analysis of an original dataset, analyzing the criteria used by federal courts as redistricting institutions compared to those used by other redistricting institutions such as legislatures or commissions. This analysis shows the historical differences between these redistricting institutions' preferred criteria and predicts the effects of LFCs as redistricters, showing them more likely to favor population equality, racial proportional representation and compactness in comparison to all other institutions. In a second level analysis, Chapter 5 also shows a slight partisan bias of LFC made maps when accounting for the party of the president who appointed each judge on the three-judge panel.

Chapter 6 uses case studies and qualitative analysis of LFC opinions where a redistricting map was drawn to add understanding of federal court districting. This small-N analysis of modal states in multiple decades allows for the comparison of the stated

criteria in the LFC opinions to empirical measurements of redistricting criteria from Chapter 5. The results show a largely accurate understanding of favored LFC redistricting criteria by the judges, with a blind spot on political and partisan criteria. Additionally, this chapter adds to the understanding of the process of LFC redistricting developed in Chapter 4 and the hierarchy of favored LFC criteria explored in Chapter 5.

Finally, Chapter 7 discusses the entire project together and its findings in terms of representation. The conclusion addresses how the LFCs ultimately are impacting American democracy by intervening in map making as well as potential next steps for this area of study.

The rhetoric of these two court opinions is explicit about how unusual and undesirable it is for the federal courts to draw legislative district lines. The courts express their discomfort, their deference to the state and their extreme hesitance to act. The courts only act when forced by the state institutions' failure to make a legal plan. But how uncommon are these examples of the federal courts taking on such an "unwelcome" power?

2.0 AN INSTITUTIONAL THEORY OF FEDERAL COURT REDISTRICTING

Following 1962's *Baker* decision, the legitimacy barrier[26] for federal court involvement in redistricting was lowered. This barrier fell as nonjusticiability did. Redistricting was no longer an untouchable political question. It was now an issue that required attention from the federal judiciary. Over the following decades, the U.S. federal courts became involved in hundreds of redistricting and reapportionment cases across the U.S. both in the lower courts as well as the Supreme Court.

The federal courts have been neither passive nor dismissive. The Supreme Court under Chief Justices Warren, Burger, Rehnquist and Roberts has taken on more than a dozen key cases since 1962, mainly finding "judicially manageable standards" founded on constitutional rights that apply to redistricting and redefine the role of federal courts in this subject area. Despite the important role of the Supreme Court on redistricting since *Baker*, it is the lower federal courts that have been the most active, drawing and influencing the redistricting maps in dozens of states over the course of decades. The sudden and intimate involvement of the federal courts in the formerly exclusive state action of redistricting begs the question at the heart of this project: *How has the involvement of the federal courts, starting with Baker, impacted the redistricting process, the criteria used for crafting remedial plans and ultimately representation in the U.S.?*

[26] Wilson, James. "American Politics, Then and Now." *Commentary* 67, no. 2 (1979): 39-46.

To get at this ultimate question, first one needs to understand how the courts behave as institutions - why U.S. federal courts act as they do on these cases? One can look at the decisions issued by the courts and the actual plans that have been created or shaped by the courts to understand *how* they acted, but this does not explain *why* they redistricted this way. To arrive at a systematic explanation of how federal court-drawn maps differ from those made by other institutions, such as legislatures and commissions, and therefore what the impact of *Baker* has been on representation over time, we need a testable hypothesis.

This chapter does just that: It presents a new and original **institutional theory of lower federal court action for redistricting** emphasizing institutional constraints of the federal courts universal across the U.S. and over time between *Baker* and *Rucho.* This theory allows for a hypothesis both about why courts would act a certain way with redistricting cases and let's one test these predictions. These predictive results can be compared with the outcome variables of the actual maps shaped or created by the courts over the decades, using a variety of measurements established by legal scholars and social scientists to measure map criteria such as compactness or partisan symmetry as the quantitative analysis of Chapter 5 shows.

2.1 How Do We Normally Think About Federal Courts?

Answering "How do lower federal courts act?" requires a novel approach. The federal courts see hundreds of thousands of cases each year[27], while the Supreme Court has about 8,000 appeals filed, hearing only about 80 with plenary review in a typical term[28]. However, despite this disparity, there is substantially less research on the actions and behavior of lower federal courts and no systematic theories of lower court decision making distinct from the Supreme Court. While some of this can easily be explained by finality of Supreme Court action and the import of the rarity of its rulings, this does not discount the importance of understanding the lower federal courts, especially in the areas where decisions have not been successfully appealed or overturned by the Supreme Court.

The Supreme Court sees the lion's share of attention from scholars, both in substantive analysis as well as methods of research. Older models of analysis of legal realism and political systems have given way to behavioral and rational choice approaches for studying the Court, importantly including the attitudinal model[29] and the strategic model[30]. Though different from one another, both of these models emphasize understanding and predicting Supreme Court action by analyzing the individual behaviors and attitudes of the nine justices for a given Court. They emphasize the individual

[27] 354,339 in U.S. Federal District Courts in 2016; 53,649 in Circuit court in 2016 https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016
[28] https://www.supremecourt.gov/about/justicecaseload.aspx
[29] Best exemplified in Segal, Jeffrey A., and Spaeth, Harold J. *The Supreme Court and the Attitudinal Model*. Cambridge ; New York: Cambridge University Press, 1992.; Segal, Jeffrey A., and Spaeth, Harold J. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK ; New York: Cambridge University Press, 2002.
[30] Best exemplified in Epstein, Lee, and Knight, Jack. *The Choices Justices Make*. Washington, D.C.: CQ Press, 1998.

decision-making of each justice. Dealing extensively with behavioral approaches and rational choice, these theories can work well for understanding and predicting judicial behavior at the highest level, but they explicitly do not work for the level of the lower federal courts, where the most important action on redistricting occurs, such as court-made maps. The strategic and attitudinal theories only apply to the Supreme Court because the institution lacks key qualities that allow for largely unconstrained[31] decision making by the justices.

In order to take a more comprehensive look at the involvement of the whole federal judiciary in redistricting from the "Reapportionment Revolution" of the 1960s through 2019's *Rucho* decision, I developed a research approach that is less devoted to the Supreme Court and judges as individual decision-makers. Rather, to get at this question - *How has the involvement of the federal courts, starting with Baker, impacted the redistricting process, the criteria used for crafting remedial plans and ultimately representation in the U.S.?* - I created a completely new and original institutional theory.

This new theory helps explain why and how LFCs operate as institutions, and institutions that are related but distinct from the Supreme Court. My theory is designed to explain and predict LFC actions on redistricting specifically, but could easily be adapted to fit any range of federal court policy or subject areas. The institutional focus of my theory helps explain what the impact of federal court involvement in redistricting has

[31] The strategic model does explicitly require institutional constraints as rules for its model to function. However, the constraints of the Supreme Court justices differ substantially from those of the LFC judges, and the lower courts themselves

meant outside of a specific decision by a single judge on a single case in a single place in a single year[32].

My new institutional theory of LFC action uses insights from a range of scholarship. It incorporates behavioral approaches and rational choice by assuming that the individual judges will decide cases at least in part based on their ideal points, policy preferences, political views, ideological stances, and strategic action among other factors. It also incorporates institutionalism and historical institutionalism by understanding the individual actors to be shaped and limited by the institution as it has changed and developed over time. However, with these assumptions, what is necessary to answer our main questions is to understand lower federal courts together, regardless of a specific judge, specific district, or specific time. *By focusing on the institutional constraints of the LFCs, one can predict a limited set of favored criteria when judges draw or influence redistricting plans while allowing for an individual judge's behavior, attitudes, policy preferences and party identification as well as the shaping forces of the institution[33].*

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[32] This is particularly important in redistricting litigation where many of the federal district courts comprise the now-rare three-judge panels, as will be discussed in depth later.

[33] Institutions are critical to the study of American government, but a simple, agreed upon definition is elusive (Heclo, Hugh. *On Thinking Institutionally*. Boulder, Colo.: Paradigm Publishers, 2008.) Different disciplines, such as sociology and economics, and schools of thought, define the term and important concept in ways that substantially vary. Here, I define a political institution as an intangible structure defined by a system of formal and informal rules that constrain individual behavior both inside and outside of the institution (Political institutions as distinct from other institutions - Orren, Karen., and Skowronek, Stephen. *The Search for American Political Development*. Cambridge, UK; New York: Cambridge University Press, 2004. 81-84), infuses value past the task at hand (Selznick, Philip. *Leadership in Administration; a Sociological Interpretation*. Evanston, Ill.: Row, Peterson, 1957. 17, that is durable over time and resistant to change (Significantly influenced by Heclo, Olsen and March ("... a relatively enduring collection of rules and organized practices … relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing circumstances," Rhodes et al, 3); Orren, Karen., and Skowronek, Stephen. The Search for American Political Development. Cambridge, UK; New York: Cambridge University Press, 2004. 18). This definition combines rational choice definitions of institutions (In Institutional Change and Economic Performance Douglass North defines an institution as "the rules of the game in society, or more formally... the humanly devised constraints that shape human interaction Rhodes et al, 24; Calvert "There is only rational behavior, conditioned on expectations about the behavior and reactions of others. When these expectations take on particularly clear form across individuals, apply to situations recurring over a long time ... we often collect

2.2 LFC Theory Overview and Expectations

Although the attitudinal model and the strategic model are not as directly applicable to the LFCs as they are to the Supreme Court, they include critical data for studying the whole federal judiciary. The unique lack of institutional constraints that define the attitudinal and strategic models, making them exclusively applicable to the Supreme Court, add to the understanding of the lower courts by highlighting which specific constraints are most important for federal judicial decision making, in law and politics. Therefore, by *inverting these approaches and emphasizing the institutional constraints rather than explaining the importance of their absence*, I can instead explain why the lower courts actually operate as they do - *the presence of these specific constraints affect LFC behavior in a way that their absence impacts Supreme Court decisions*. Ultimately, these constraints shape the institutional choices of the courts and therefore the decisions of judges. For redistricting, this can mean when and how to intervene in a redistricting case, and ultimately which criteria to use when drawing a remedial legislative districting plan to be used in an election.

Starting from this premise, I build a comprehensive, original institutional theory[34] of constrained LFC action on redistricting cases. As stated, I start with the constraints

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these expectations and strategies under the heading institution") as rules that constrain individual behavior at critical points in time with historical institutionalist and older statist understandings that emphasize the formal and legal structures of governmental, and the consequences of the durability of an institution (i.e. path dependence and precedent).
An institution like the U.S. federal courts is what remains over time as the individual pieces and parts are replaced. There are individual federal judges who have had a large role in the judiciary and have shaped the institution, but to answer our question we need to focus on the form rather than specific substance and see how it impacts all substances that it molds. The durable, venerable institution of LFCs gives consistency to the 57 years between Baker and Rucho that is not seen in a single behavioral approach.

[34] This theory sits on the same foundation Donald Horowitz uses in 1977's *The Courts and Social Policy* "proceeds from the premise that every process, every institution has its characteristic ways of operating;

outlined by the attitudinal model and strategic account. I then expand my list of key LFC constraints using scholarship on American legal history, federal court procedure, judicial politics and redistricting scholarship. This creates a long list of constraints. LFCs, as political institutions in the U.S. federal system, are subject to a variety of constraints, rules and limitations, usually from multiple sources simultaneously. All of these constraints must be considered by courts and judges.

In order to organize the variety and number of constraints, as well as the multiple orders of constraints that act on LFCs for any given redistricting case, my theory uses a framework (Table 2.1). This framework provides an understanding of how these constraints fit into certain categories of similar concerns and constraints, which can then be used for causal analysis in political science.

This theory and framework emphasize three categories of constraints operating at three levels of hierarchy for an LFC during a redistricting case. In any given redistricting case, a LFC has to contend with 1. Legal constraints, 2. Structural Constraints and 3. Political constraints[35]. The legal constraints highlight the Constitutional, statutory and legal principles (such as stare decisis) that act upon and constrain LFCs. Structural constraints refer to the requirements that limit the actual functionality of a court when hearing a redistricting case, such as the requirement of a three-judge panel for reapportionment decisions that is immediately appealable to the Supreme Court[36]. The political category includes the qualities that constrain LFCs in their decision making, but

each is biased toward certain kinds of outcomes; each leaves its distinctive imprint on the matter that touches." Horowitz, Donald L. *The Courts and Social Policy*. Washington: Brookings Institution, 1977, 24.

[35] Using a similar categorization scheme as Seabrook, however the constraints are completely different. His emphasizes redistricting constraints on the parties in legislatures who are drawing the redistricting plans, but the schema is useful for my three levels of LFC constraints; Nicholas R. Seabrook, *Drawing the Lines: Constraints on Partisan Gerrymandering in U.S. Politics* (Ithaca ; London: Cornell University Press, 2017).

[36] 28 U.S.C. § 2284; See Footnote 359

that are not explicitly legal requirements or even legal principles like precedents. Instead, these are factors that affect LFCs systematically but not legally or structurally, such as the need for legitimacy in the U.S. political system.

Institutional Theory of Constrained Lower Federal Court Action

	Legal Constraints	**Structural Constraints**	**Political Constraints**
American Common Law Courts	● Case or Controversy Requirement; Justiciability; Jurisdiction ● Line of Cases ● Stare Decisis	● Triadic Structure	● Generalist Judges ● Membership in a Community of Judges
U.S. Article III Courts	● No Control over Docket ● Life tenure	● Regional Basis ● Not the Court of Last Resort	● Ambition for Higher Office ● Accountability to other U.S Institutions
LFCs in Redistricting Cases	● U.S. Constitution ● Statutes ● Supreme Court Standards	● Three Judge Panels ● Use of Special Masters, etc	● Legitimacy

1 - Table 2.1 – An Institutional Theory of Constrained Lower Federal Courts

Each of these categories of constraints operate differently on the LFC when considering the court as A. an American Common Law Court, B. An Article III U.S. Federal Court and C. As a Federal Court with a Redistricting or Reapportionment Case.

Each of these levels of hierarchies operates simultaneously, but the exact constraints differ. For example, within the same case, an LFC is limited in its ability to fashion a remedy by legal constraints at the Common Law level due to jurisdiction concerns, at the Article III level due to a lack of its docket control and at the redistricting subject level by Supreme Court standards.

Using this framework, and considering all of these constraints together, it becomes clear that there will be subject areas and time when and where LFCs will be more likely to act on redistricting cases and that specific criteria will be more likely favored above other redistricting criteria. These constraints present some clear prohibitions and some areas for judicial restraint. Put simply, these institutional constraints influence the actions that the federal courts will take, can take and ultimately the maps that the courts make. It is an institutional theory of *discretion within constraints* allowing for broad, predictable and for a testable hypothesis on both how LFCs will decide on cases, when they will step in to draw maps, and how the criteria used in these maps will compare with other institutions.

As the next section explains in detail, this institutional theory of LFC action leads to 4 hypotheses:

1. **Combined Constraints and LFC Redistricting Cases - Hypotheses 1**: Due to the combination of legal, structural and political constraints acting together, the LFCs will be reluctant map makers and deferential to states and de jure redistricting institutions whenever possible. Legal constraints over a lack of control over the docket determine that LFCs will see many redistricting cases during each redistricting cycle and throughout the decade. Other legal constraints, such as stare decisis, also determine that there are certain areas where LFCs must take action and when action is necessary for a Constitutional plan to be put into place. However, the structural constraints that threaten overturning of LFC decisions on Supreme Court appeal and the political constraints, chiefly legitimacy, will determine that the LFCs are likely to avoid drawing or creating their own redistricting plans until they are forced to. Therefore, federal court-made plans will only be made as a last resort to conform to these constraints.
2. **Legal Constraints and Settled Law Criteria - H2 and H3**: This theory expects strict adherence to Supreme Court precedent for malapportionment and racial gerrymandering standards by LFCs when crafting remedial plans due to the strong legal constraints, such as stare decisis and the fact that LFC are not the court of last resort. I expect a statistically significant effect on population variance (negative) and racial gerrymandering (positive) in line with Supreme Court precedent when LFCs draw the, with closer adherence than other redistricting

institutions. For population variance, this would manifest itself as close to perfect equality among districts in a federal court-drawn plan. For racial gerrymandering, I expect to see the LFCs promote majority-minority districts in line with state demographics. These expectations are premised on legal constraints impacting LFCs as redistricting institutions, including stare decisis.

3. **Political Constraints and Partisan and Political Criteria - H7, H8 & H9:** Second, this theory predicts that political constraints, especially concern over legitimacy, will result in a general disuse of both "**political" criteria,** such as incumbency protection or competitiveness, as well as "**partisan" criteria**, such as partisan bias or gerrymandering. However, given what is shown in judicial behavior literature, there may be some partisan bias toward majority of the judges on the LFC as part of the constrained discretion. Any bias should be tempered by political constraints such as legitimacy, accountability and judges' ambition for higher office. I expect LFCs to not have any significant effect on political criteria such as competitiveness or incumbency protection, with no promotion of these criteria above average levels due to constraints over political legitimacy[37]. I expect LFCs as redistricting institutions generally to have a muted impact on partisan measurements such as the Partisan Bias Test, Mean-Median Test and the Efficiency Gap, with scores close to non-partisan or zero due to political constraints on the federal courts. However, I also expect to find a small partisan effect on LFC-made maps when looking at the structural constraints of the composition of the three-judge panel regarding partisanship of appointment. I do not expect a strong partisan bias toward one party or the other due to the long time frame in the data set, but rather bias toward the majority in the three-judge panel.
4. **Combined Constraints and Traditional Criteria - H4, H5 & H6:** I expect the LFCs to have an effect and generally favor traditional criteria such as compactness, protection of political subdivisions and continuity of districts, although to a lesser degree than criteria like malapportionment or racial vote protection. The theory predicts general favor toward traditional criteria due to lesser legal and political constraints, present structural constraints and absent strict constraints on the topic. Because there are fewer constraints preventing the use of traditional criteria, and their use is not viewed as political or partisan it does not threaten legitimacy in any way. Instead, it may be the closest thing to the

[37] Justice Felix Frankfurter wrote in his *Baker* dissent **"**The Court's authority -- possessed of neither the purse nor the sword -- 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."

elusive LFC goal of a fair and neutral as well as conservative criteria. It's biggest constraint in use will likely be the other criteria competition.[38]

The remainder of this chapter fully explores the institutional theory of constrained LFC action in three steps. First, I first outline my general approach, and explain how this approach to studying LFCs relates to the attitudinal and strategic models. Second, I work through each category of the framework to explain why this constraint is important and how it could impact LFC action on redistricting. This second section builds on a comprehensive study of federal court research in law and political science. Finally, I point to some of the powers and discretion that the courts retain in redistricting cases, which also shape maps but are not as universal as constraints across the U.S. and over time as to impact the institution itself in the same way.

2.3 Part II - Working Through the Theory

Building on Popular Approaches

Before exploring each of the individual constraints and categories that provide the building blocks for the institutional theory of constrained LFC action, it is important to first look at the attitudinal model and the strategic model. Unlike other explanations of court behavior, such as the legal or historical institutionalist models, both the attitudinal and strategic model prize the individual actions and motivations of justices above other concerns, seeing these as central to court action. For the LFC theory, it is not important to

[38] These hypotheses are further explained in this chapter's conclusion, require the explanation of Supreme Court standards (Chapter 3) and are tested fully (Chapter 5).

completely examine, endorse or challenge these models, but rather to look at the institutional framework that allows for the individual decision-making of the Supreme Court to exist. By inverting these theories of individual behavior and instead looking at the institutional factors necessary for these theories to exist as legitimate and accurate, I can establish some of the most critical constraints on LFCs where these institutional factors do not exist or exist in a varied form.

The attitudinal model of judicial decision making is defined in contrast to the "legal model"[39] and in relation to the rational choice approach. Harold Spaeth and Jeffrey Segal are the major proponents of the attitudinal model, describing and defending it in *The Supreme Court and the Attitudinal Model* and *The Supreme Court and the Attitudinal Model Revisited.* The attitudinal model was developed by Harold Spaeth, David Rohde and Glendon Schubert. In simple terms, "this model holds that the Supreme Court decides disputes in light of the facts of the case vis-a-vis the ideological attitudes and values of the justices[40]." The purpose of this model is to explain, and predict, decisions of justices based on their liberalism or conservatism. It is a data heavy approach that requires ideological coding of judicial decisions and is rooted in legal realism, behavioralism, empirical political science, psychology and economics[41]. The attitudinal model may be the farthest contrast from this early notion, but it is proven. Spaeth and Segal argue, "The fact that the attitudinal model has been successfully used to predict the

[39] Legal Model for Spaeth and Segal: "The legal model… holds that the Supreme Court decides disputes before it in in light of the facts of the case vis-a-vis precedent, the plain meaning of the constitution and statutes, and the intent of the framers." Spaeth and Segal, *The Supreme Court and the Attitudinal Model,* 86
[40] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited*, 86
[41] The most theoretically important is the basis in legal realism, which opposes early notions from Blackstone and the common law that judicial decisions are about "finding the law", holding instead that judges make law.

Court's decisions further confirms its status as the best explanation of the Court's decisions[42]."

However, the attitudinal model only works for the U.S. Supreme Court because it is unencumbered by certain institutional constraints or the "rules of the game." As the authors explain,

> An actor's (i.e. justice's[43]) choices will depend on the rules of the game, 'the various formal and informal rules and Norms within the framework of which decisions are made. As such they specify the types of actions are permissible in which are impermissible the circumstances and conditions under which choice may be exercised in the manner of choosing… the Supreme Court's rules and structures along with those of the American political system in general give *life tenure* justices enormous latitude to reach a decision based on their personal policy preferences. Members of the Supreme Court can further their policy goals because *they lack electoral or political accountability* have *no ambition for higher office* in *comprise a court of last resort* that *controls its own caseload*[44]. While the absence of these factors may hinder the personal policy making capabilities of lower court judges were judges and other political systems their presents and enable the justices to engage in "rationally sincere behavior."[45]

The attitudinal model supports the argument that institutional factors, rules official and unofficial, shape the individual behavior of justices. Here, I apply this same theory to judges, and by extension LFCs, by focusing on these institutional factors. When explicating the rules of the game necessary for the attitudinal model to exist, Spaeth and Segal list four key constraints - lack of accountability, absence of ambition for higher office, its place as court of last resort, and the fact that it controls its own caseload[46]. These are four critical constraints that 1. Prevent the attitudinal model from being directly

[42] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited*, 350
[43] Emphasis added
[44] Emphasis added
[45] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited*, 92
[46] The authors also point to life tenure, which is shared among Article III judges.

applied to lower court judges and 2. Directly impact the decisions that lower court judges can exercise on redistricting matters. Building on the attitudinal model, I use each of these four as key constraints in my LFC theory.

The strategic model argues that justices work toward desired policy preferences by considering the policy preferences of others and shaping their behavior accordingly and strategically to reach an ideal point. It emphasizes the constraining forces of other actors as well as institutional factors. One of the most influential and important explorations of the strategic account is the rational choice-based model in Lee Epstein and Jack Knight in *The Choices Justices Make*[47].

The strategic model builds on the broader use of rational choice approaches in political science to study behavior and institutions. A rational choice approach studies an individual actor as the main unit of analysis and assumes this actor to act rationally, examining their choices under constraints, rational behavior and political outcomes. Rational choice political scientists either study an institution as a set of rules to a game and examine the choices and constraints of the individual actors within this game at a point in time or they study institutions as equilibria[48]. My LFC theory is interested in the rules of the game in Epstein and Knight's approach.

The strategic account has three main ideas: 1. that justices' actions are directed toward attaining goals, 2. that justices are strategic and 3. that institutions structure justices' interaction.[49] This approach is defined directly in contrast to the "unconstrained

[47] Epstein and Knight, *The Choices Judges Make*
[48] Rhodes, R. A. W., Binder, Sarah A, and Rockman, Bert A. *The Oxford Handbook of Political Institutions*. Oxford Handbooks of Political Science. Oxford: Oxford University Press, 2008.
[49] Epstein and Knight, *The Choices Judges Make*, 10 and 11, quote/paraphrase

decision maker" model of attitudinalism and the idea that justices choose policy preferences based solely on ideological preference.[50]

Epstein and Knight wrote,

> On our account, which we call the strategic account, justices may be primarily seekers of legal policy, but they are not unsophisticated characters who make choices based merely on their own political preferences. Instead, justices are strategic actors who realize their ability to achieve goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act. In other words, the choices of justices can best be explained as strategic behavior, not solely as responses to either personal ideology or apolitical jurisprudence… [the most important implication] is that law, as it is generated by the Supreme Court, is the long-term product of short-term strategic decision making. [51]

This approach incorporates many more factors than the attitudinal approach, and seeks to break down a judicial decision to its component parts in order to make it quantifiable. This strategic account can apply to opinion writing as well as whether justices decide to grant cert or not. Additionally, although the strategic model only applies to the Supreme Court, a similar rational choice perspective could more easily be applied to lower courts than the attitudinal model.

The major implication of *Choices* and Epstein and Knight's strategic approach is that the decision making at this one point in time leads to rule changes and new law created by the justices and the court[52]. A second implication is that this approach allows for a better account of the court within a full study of the federal government, in the separation of powers system. It can help bring the courts into broader American politics

[50] Epstein and Knight, 10
[51] Epstein and Knight, xiii
[52] Epstein and Knight, 183

rational choice analysis[53]. The most useful aspect of the approach for the LFC theory is that it highlights the constraints on the Court[54].

A rational choice approach allows researchers to understand exactly how justices or judges are constrained. Rational choice scholars other than Epstein and Knight also support this idea. For example, Matthew McCubbins, Roger Noll and Barry Weingast, have shown how Congress can empower the courts or constrain them when it comes to policy implementation[55] or statutory interpretation[56]. Others such as Spiller and Tiller examine the ways that Congress can constrain the judicial decision-making process through changing the standards courts must apply to agency review[57].

Epstein and Knight explain that the institutional constraints are what allows rational choice to be studied in the courts. They wrote,

> According to the Strategic account we cannot fully understand the choices justices make unless we also consider the institutional context in which they operate. By institutions we mean sets of rules that "structure social interactions in particular ways." Using this definition institutions can be formal such as laws or informal such as norms and conventions[58].

The specific constraints noted by Epstein and Knight that are important for studying federal court action on redistricting include life tenure and service during good behavior[59], the constraints of other judges and courts[60], the constraints of other

[53] Epstein and Knight, 183
[54] Epstein and Knight 184
[55] Mathew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 *Virginia Law Review* 431-482 (1989)
[56] McNollgast. "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation." *Geo. LJ* 80 (1991): 705.
[57] McNollgast. "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation."
[58] Epstein and Knight, *The Choices Judges Make*, 17
[59] Epstein and Knight, 17
[60] Epstein and Knight, 112

branches[61], the constraints of the public[62], the norms of precedent[63], the norm of disfavoring creation of new issues[64], and institutional legitimacy generally[65].

2.4 Exploring the LFC Theory Constraint by Constraint

Building on the constraints absent from the Supreme Court in the attitudinal model and strategic account, and present in the LFCs, one can understand what type of LFC action to expect on redistricting cases. This is a core idea at the center of this institutional theory of constrained LFC action and critical to understanding how LFCs will decide cases on redistricting and what types of remedial redistricting plans they make.

This section of the chapter walks through the theory and the three-by-three framework, and includes the insights from Epstein and Knight, and Spaeth and Segal, as well as a range of other key constraints I included because they have been found to impact LFC decision making over time. These are all key constraints on LFC action and understanding how exactly they work, and work together, is a critical step in understanding *why* LFCs act how they do and favor the criteria in map making that they do. This allows both for greater understanding of LFC constraints as well as testable hypotheses for LFC redistricting.

[61] Epstein and Knight, 112, 138-144, 156
[62] Epstein and Knight, 112, 138-144
[63] Epstein and Knight, 17, 157, 163-164
[64] Epstein and Knight, 157-159
[65] Epstein and Knight, 163

I. Legal Constraints

LFCs have a number of legal constraints when they hear a case. Some of these legal constraints are laws, either constitutional and statutory, that explicitly limit the possible decisions of the court. Others are long-held legal principles of law that form the culture and expectations of LFCs - the qualities that define the American court system in distinction to continental Europe or British Common Law. The legal constraints on LFCs are the most numerous, and arguably the most important, constraints for redistricting cases.

This section emphasizes the most impactful legal constraints on LFCs when they decide redistricting cases, especially when drawing or influencing maps. Following the framework (table 2.1) this section is broken into the three categories: American Common Law Courts, U.S. Article II Courts, and LFCs in Redistricting cases.

A. American Common Law Courts

Considering the lower federal courts as "courts, generally" or as "Anglo-American" judiciaries may not be significant for comparing these institutions to the Supreme Court, but it is useful when thinking about federal court action in distinction from other institutions that create redistricting maps, such as state legislatures or commissions. These institutional constraints on the federal courts are the least specific to redistricting, but they are nonetheless critical in this subject area. They are foundational to LFCs and absent in other redistricting institutions. Simply put, the de facto involvement of federal courts in the redistricting process is in sharp distinction to the de jure role of commissions and legislatures, in resources, guidelines and, especially, constraints.

a. Case or Controversy Requirement, Justiciability and Jurisdiction (Legal Constraint)

The case or controversy requirement for U.S. federal courts is one of the most foundational aspects of U.S. law, but it is also a powerful constraint on redistricting decisions. Federal courts in the U.S. can only make ruling on subject areas such as redistricting with a real case before the court. Article III of the Constitution explains that in the U.S.,

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[66]

The requirement of a real case or controversy is enshrined in the Constitution, but applies to Anglo-American courts more broadly. Its importance is best defined in contradistinction to continental European courts, in the fact that U.S. federal courts cannot give advisory opinions. For redistricting, this importantly means that one party in the legislature cannot look for an advisory opinion on the constitutionality of a redistricting map before it is enacted. Instead, the party must ensure it is a real case or controversy and bring it to the courts, which incurs substantial monetary and opportunity costs. Further, this requirement constrains LFCs by forbidding advisory decisions on state maps without a suit being brought, regardless of how malapportioned or gerrymandered the state map may be where the district court sits. To many this requirement seems

[66] U.S. Const. art. III, § 2

obvious, but it is far from universal and advisory opinions exist internationally as well as within states[67].

In their broad study of the U.S. Federal Courts, Robert Carp and Ronald Stidham define this requirement as "there must be a controversy between legitimate adversaries who have met all the technical legal standards to institute a suit. The dispute must concern the protection of a meaningful, nontrivial right or the prevention or redress of a wrong that directly affects the parties of the suit."[68] The authors further point to three corollaries to the case or controversy requirement: there are no advisory or hypothetical opinions[69], parties in the suit must have standing[70], and courts rarely hear cases that will become moot[71].

Related to the case or controversy requirement, and implicit in Carp and Stidham's definition, are notions of justiciability. Justiciability can be defined differently, but includes understandings of what cases or controversies the courts will hear and what they will not. For Anglo-American common law courts there are four critical aspects of justiciability: mootness, ripeness, standing and political questions.

Mootness requires cases or controversies to not just be real, but to be timely. The courts will only take and decide the case if its decision will have a real effect on the controversy. It will typically not take the case if the ruling is moot because it is too late to have an effect. Mootness is an especially important consideration with redistricting. Often, redistricting cases are brought before an election. If the case were to be brought so

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[67] Posner, Richard A. *The Federal Courts : Challenge and Reform*. Cambridge, Mass.: Harvard University Press, 1996, 43
[68] Carp, Robert A., and Stidham, Ronald. *The Federal Courts*. 2nd ed.. Washington, D.C.: CQ Press, 1991, 51.
[69] Carp and Stidham, *The Federal Courts,* 52
[70] Carp and Stidham*,* 52
[71] Carp and Stidham, 53

closely to the election that the court's ruling would not have an effect on the election, it may not be considered due to mootness.

Related to mootness, is the notion of ripeness. Ripeness requires the case or controversy to be current or soon-to-be in need of adjudication. The case must be ready to be heard. Courts will rarely hear cases where an actual harm has not occurred or the concern is far off - the case must be ripe for adjudication when it is brought in order to be decided. A party cannot bring suit against a redistricting map that has not been passed into law simply because it is being considered. If the suit is brought against a redistricting plan that is enacted, but the legislature has plenty of time to remedy the plan's defects themselves, the LFC may hold back until the issue is riper for remedy.

Standing is another crucial aspect of justiciability and the case or controversy requirement. The parties of a lawsuit must have standing to bring the suit in the first place or it will quickly be dismissed. There are a number of aspects to standing that require further development, but the most important and simple understanding is that standing requires a party to experience real and direct harm. Standing is a critical aspect of redistricting cases and an area that has received substantial attention at all levels of the federal judiciary. In 2018, the much-anticipated partisan gerrymandering case *Gill v Whitford*, was remanded by the Supreme Court based on standing issues. Some redistricting claims require standing by residents in the specific district, of a certain race or of a specific group or party.

The most important justiciability question for redistricting is THE question of redistricting: the Political Question Doctrine. In the U.S., the doctrine was solidified in precedential law with *Luther v Borden* in 1849. *Luther* explained that the federal courts

would not involve themselves in issues of politics, which should instead be resolved by the Executive, Legislative or states governments. In short, that political questions are nonjusticiable.

In 1946, the Court decided *Colegrove v Green,* a challenge to Illinois's malapportioned Congressional districts. The 4-3 majority opinion explained that the political question doctrine applied to redistricting and reapportionment, and therefore made these issues nonjusticiable and off limits to the federal courts. The 1962 Supreme Court majority in *Baker v Carr* overturned *Colegrove* and explained that redistricting and reapportionment are not themselves political questions, while elaborating on what should be off-limits as political questions.

In 2019, *Rucho v Common Cause*, found that partisan gerrymandering claims still presented a nonjusticiable political question[72]. Generally, the political question doctrine constrains LFCs by what types of cases are justiciable. Historically, this included all redistricting cases. Currently, it is less of a constraint, but still limits LFCs on partisan controversies.

Related to standing, justiciability, and the case and controversy requirement, is the importance of jurisdiction. All courts value jurisdiction as a foundational aspect of their power, and in the U.S., the federal courts have expansive but not limitless jurisdiction. Jurisdiction is simply the types of cases that a court is allowed to hear and the location - in space and time - in which a case can come from, according to the source of the court's authority, such as a constitution or legislature. Cases or controversies may be kept from federal courts due to jurisdictional concerns.

[72] This entire discussion is expanded upon in Chapter 3

While jurisdiction is, in the abstract, a legal constraint on Anglo-American Common Law courts generally, it is further a constraint on Article III courts and LFCs. The limitations of the jurisdiction of U.S. Article III federal courts are laid out in the U.S. Constitution - clear and concrete constraints on the federal courts. However, within these limits, Article III courts can be further constrained by acts of Congress[73]. Because jurisdiction within the bounds of Article III is under the power of Congress, a further constraint is the threat of Congress to limit jurisdiction[74]. "Jurisdiction setting" can be an on-going duty of legislatures.[75]

The case or controversy requirement, the justiciability issue and jurisdiction together present a set of barriers that a case must hurdle before even being considered by a court on the merits. In this way, it constrains LFCs because it limits the cases that the courts can hear and rule upon. A limitation of the inputs will surely reduce the outputs. These barriers to entry in the courts, also increases the likelihood of relief. If ripeness, standing and the case or controversy requirement mean that a party has suffered a real wrong, then the probability of relief may be increased. These are the most foundational legal constraints on LFCs as Anglo-American common law courts, and have a real impact on redistricting cases - they are necessary conditions.

b. Line of Cases (Legal Constraint)

In precedential common law systems, the courts are not only constrained by the cases that come before them, but also by the order of the cases that come before them. As future cases are necessarily shaped by the precedential rulings and likely impacted by the

[73] Posner, *The Federal Courts,* 40
[74] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 94
[75] Carp and Stidham, *The Federal Courts,* 42

accompanying dicta, past cases have an outsized effect on the shape of law and doctrine. In redistricting cases, this simple and foundational common law fact allows for thought-provoking hypotheticals: *What if Shaw v. Reno came after Miller v. Johnson?* But more importantly, the line of cases - the accident and strategy involved in the order by which courts hear cases - directly impacts and constrains the actions that a court takes on an individual redistricting map. There will be specific precedents for some maps, others that are absent, and others that have become more evolved as the line of cases developed. Thinking of the line of cases as a constraint on LFCs highlights the importance of precedent even more in understanding the actions of courts in and outside of time.

The line of cases can form a legal path dependence. Path dependence is typically used in political and policy discussions to illustrate how present decision making has been impacted by past decisions. Path dependence is critical to understanding the development of institutions[76]. For LFCs facing redistricting cases, their present options for adjudication and remedial action are largely shaped not only by the decisions of the Supreme Court and other LFCs, but by even the cases that came to the courts. Which cases or controversies were brought to the federal courts versus state courts, which had standing to continue, which were decided months before others - These facts and counterfactuals are important for the development of the lines of cases, the path dependence of redistricting jurisprudence, and ultimately the constraints on an individual LFC at any point in time.

[76] "Institutional development over time is marked by path dependence. A crisis or serious confluence of events or social pressures, produces a new way of doing things." Rhodes, R. A. W., Binder, Sarah A, and Rockman, Bert A. *The Oxford Handbook of Political Institutions*. Oxford Handbooks of Political Science. Oxford: Oxford University Press, 2008. 39

The following chapter outlines the development of standards from the Supreme Court for malapportionment, racial gerrymandering and partisan gerrymandering. It directly addresses the role of the line of cases and precedent in redistricting and sheds light on how this order and the ratcheting effect of path dependence has affected LFCs.

c. Stare Decisis and Precedent (Legal Constraint)

The U.S. federal courts are Anglo-American Common Law precedential courts where cases are decided by applying general laws and precedent to specific facts in cases. *Stare decisis*, Latin for "to stand by things decided," is the legal principle of adhering to precedent or past rulings in order to decide a case - maintaining previous decisions and using them for adjudication.

In LFCs there is both horizontal and vertical stare decisis. Vertical stare decisis means adherence to higher court - for redistricting this means Supreme Court precedents. Horizontal stare decisis is adherence to precedent within a court's own circuit or within all circuits subordinate to the Supreme Court[77]. For redistricting, this would mean the other LFCs, as most LFCs operate in the mixed three-judge panel district courts.

The value of precedent as a variable in judicial decision-making is most valued in older formal legal models, and less so in more modern understandings, such as the attitudinal or strategic models[78]. However, while the Supreme Court is importantly not technically bound by precedent[79], the lower federal courts are effectively bound and do

[77] Posner, *The Federal Courts,* 376

[78] Epstein and Knight discuss the role of stare decisis in *The Choices Justices Make*. They write that these norms are ingrained in the legal community by law schools that act as though it is still "alive and well" but that precedent is more often abused in the legal community. Rather, the Supreme Court sees stare decisis as an important part of maintaining legitimacy with society, not the legal community. Instead, as I show, the LFCs have greater need for stare decisis in the legal community due to their subordinate nature. (Epstein and Knight 158-159)

[79] Carp and Stidham, *The Federal Courts,* 58

obey precedent, especially from the Supreme Court. Multiple studies have shown that LFCs follow vertical stare decisis quite consistently[80], and findings in chapter 4 of this project also support this claim. In his account of the federal courts, Judge Richard Posner explained that LFCs abide by stare decisis more than most might think. He wrote,

> Although there have been many overrulings in American law, they are rare in the day-to-day work of any appellate court, even the Supreme Court. Distinguishing a precedent to death is much more common; **yet there is nevertheless more genuine adherence to precedent than cynics will admit**, even to precedent that is not binding because it is not precedent of the same or higher court.[81]

There are multiple reasons why LFCs generally follow stare decisis and adhere to precedents and are therefore constrained by this legal principle. One reason may be the personal opinion of a judge that her duty or role is to apply and enforce precedent under the America Common Law system. Another reason may be more function, that adherence to precedent allows for smoother adjudication, creates a more consistent application of law across the U.S. and is more efficient. The most compelling reason may be the one presented by Gary Cox and Jonathon Katz in their study of the electoral consequences of gerrymandering[82]. The authors explain that because appeals of court cases, and court cases themselves, have costs they put LFCs in a unique situation. Appealing an LFC

[80] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 96; Baum, Lawrence (1980) "Response of Federal District Judges to Court of Appeals Policies: An Exploration,"3 *Western Political Q.* 217–24.; Klein, D.E. and Hume, R.J. (2003), Fear of Reversal as an Explanation of Lower Court Compliance. Law & Society Review, 37: 579-581.; Sara C. Benesh and Malia Reddick, "Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent," The Journal of Politics 64, no. 2 (May, 2002): 534-550.; Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38, no. 3 (1994): 673-96. Accessed March 3, 2020. doi:10.2307/2111602.)

[81] Posner, *The Federal Courts,* 373

[82] Cox, Gary W., and Katz, Jonathan N. *Elbridge Gerry's Salamander: the Electoral Consequences of the Reapportionment Revolution*. New York: Cambridge University Press, 2002.

ruling requires legal costs for the plaintiff and defendants and opportunity costs for the higher courts, here the Supreme Court. Due to these transaction costs, it is not easy for either the parties in the case or the Supreme Court to appeal every case. Therefore, when the LFC rules within the bounds of precedent, the higher court has no reason to act and the LFCs have some latitude. However, when an LFC goes beyond the what the Supreme Court would "tolerate" the cost of an appeal is more reasonable[83].

Cox and Katz' economic explanation explains that LFCs can likely avoid being overruled or having their cases successfully appealed to the Supreme Court by following stare decisis. These findings comport with other studies of the Supreme Court. Among the aspects that most directly lead to approval of cert by the Court are disagreements among the application of law in the circuits[84] and "flagrant disregard of announced doctrine" or precedent[85].

This conclusion is further supported by an anecdote in Mark Rush's *Does Redistricting Make a Difference*. Rush describes the example of Judge Thomas Gee of the Fifth Circuit. The circuit court judge found the redistricting precedents articulated by the Supreme Court to be inconsistent and "incoherent" for application to the county redistricting case he was faced with. However, the judge still obeyed the precedent in his finding nonetheless.[86]

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[83] Cox and Katz, *Elbridge Gerry's Salamander,* 71-72, (Cox and Katz are applying this directly to redistricting in reference to their model, but note the similar logic used by Murphy 1964, O'Brien 1984, and McCubbins, Noll and Weingeist 1995)
[84] Perry, H. W. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, Mass.: Harvard University Press, 1991, 246-252.
[85] Perry, *Deciding to Decide,* 267-268
[86] Rush, Mark E. Does Redistricting Make a Difference? : Partisan Representation and Electoral Behavior. Baltimore, Maryland: Johns Hopkins University Press, 1993.

Many scholars have looked at this question of how closely LFCs follow precedent from the Supreme Court. The results follow Cox and Katz' explanation: LFCs broadly follow the precedent of the Court, especially when it is specific, with some attitude toward the LFCs' or judges' own preferences. Complete noncompliance is uncommon[87].

Precedent and stare decisis, both vertical and horizontal, create likely the most important and clear constraints on LFCs for redistricting. This legal principle restricts the decisions that LFCs can make, and the criteria they can favor within a remedial redistricting plan, to those that are within the bounds of precedent and are unlikely to be appealed and overruled. For redistricting, this means that standards and precedents from the Supreme Court, as well as the areas void of standards which are effectively unconstrained by stare decisis. These standards are explored in detail in Chapter 3.

B. U.S. Article III Courts

Article III of the U.S. Constitution declares 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."[88] Since *Baker v. Carr***,** these have been the courts that have adjudicated many of the most difficult redistricting conflicts. "Article III courts" is a term used to define these specific federal courts in distinction from other "federal courts" that have been established under the legislative branch and operate in a different jurisdiction, with other mandates and for separate cases, such as tax courts[89], or other federal tribunals like military courts or administrative courts.

[87] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 96; See footnote 81
[88] U.S. Const. art. III, § 1
[89] Article I Courts

Article III courts are importantly not the only type of federal courts, but they are the courts known best to regular citizens of the U.S. They include district trial courts, circuit appellate courts and the Supreme Court. These courts are primarily and predictably constrained by Article III of the U.S. Constitution. However, they are also constrained by acts of Congress, such as the Judiciary Act of 1789[90] or the Rules Enabling Act of 1938[91], as well as their own internal rules and hierarchy.

Thinking about the LFCs as "Article III courts" helps one see what are unique American federal court characteristics distinct from general common law conceptions or state court designs. This can be seen in the legal constraints that act upon Article III courts as well as the political and structural constraints. Furthermore, emphasizing Article III allows one to separate the LFCs from the Supreme Court. As the connective tissue, Article III and its Congressional progeny highlight the legal constraints that act on LFCs but not the high Court, as well as those that act upon both.

a. Life Tenure only with Good Behavior (Legal Constraint)

The second sentence of Article III states, "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."[92] This sentence, rather than outlining constraints, explains the great powers before a federal judge or justice. He cannot have his salary reduced for partisan or political reasons, or even for a bad judgement. The appointment tenure is

[90] This law created the first federal judiciary with circuits and districts and clarity on jurisdiction. It is both legal and structural, creating constraints as well as powers on the loose design of the courts in Article III by giving it shape.
[91] Created rules for civil procedure for Federal courts, stronger distinction between state and federal laws for the first time in many cases (not admiralty or equity though) Posner, *The Federal Courts,* 49
[92] U.S. Const. art. III, § 1

undefined and available for life given good behavior. However, this "good behavior" requirement is a constraint on judges and therefore federal courts. It prevents LFCs from acting in overtly corrupt ways in redistricting cases.

There have been fifteen examples of U.S Article III federal judges who have been impeached by the U.S. House of Representatives, eight of whom were convicted by the Senate and removed[93]. This doesn't include the dozens of other impeachment charges that began or were introduced throughout history. Judges were impeached and convicted for charges of intoxication[94], waging war on the U.S.[95] bribery[96], perjury[97] and other charges. These examples show that there are real teeth to Article III, Section I and that federal judges can be impeached for "bad behavior" and criminal activity. There are further examples of judges who were impeached but not convicted, such as James Peck in 1831, who was accused of abusing his contempt power. This further illustrates the willingness of Congress throughout U.S history to apply the impeachment power to LFCs.

Although this impeachment power can also be applied to the Supreme Court, according to the Constitution, in reality it has only been tried once. Samuel Chase was impeached, but acquitted in 1805. Spaeth and Segal use this as an example of how the Attitudinal Model works and why the Supreme Court is insulated from political accountability by this clause[98]. Epstein and Knight also point to this power as one of the aspects that allows their Strategic model to work. They wrote,

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[93] "Impeachments of Federal Judges | Federal Judicial Center," accessed March 16, 2022, https://www.fjc.gov/history/judges/impeachments-federal-judges.
[94] John Pickering, 1804
[95] West Humphrey 1862
[96] Alcee Hastings, 1989; G Thomas Porteous 2010
[97] Walter Nixon 1989; G Thomas Porteous 2010
[98] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 94

> The institution of life tenure also influences justices' goals. Instead of acting to maximize their chances for re-election justices act to maximize policy. To understand the effect of this institution one has only to think about the kinds of activities in which a justice running for office would engage in as opposed to a justice attempting to influence policy.[99]

This is clearly not as true for the LFCs. They certainly do not face voters and can expect life tenure and no reduction in pay with "good behavior." However, in the context of this larger theory, LFCs can expect more use of the impeachment power from Congress, greater accountability to multiple aspects of the federal government and a stricter expectation of stare decisis. All of these factors limit the effect of this clause as discussed by Spaeth and Segal and Epstein and Knight, although still nominally applicable across the whole U.S. judiciary.

Although the bar of treason, bribery, or high crimes and misdemeanors may be a low one for judicial behavior, it certainly constrains individual judges and therefore courts from certain actions on redistricting cases. It also may empower mild misbehavior and selfish judgements. Judge Posner notes that life tenure and the "divorce" of pay from performance can make judges more individualistically minded and less committed to the institution, as well as weakening the sticks and carrots of a circuit chief justice[100]. It removes the motivation of not being fired[101]. These insights, while useful, may be less relevant with redistricting cases which are primarily conducted with three-judge panels

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[99] Epstein and Knight, *The Choices Judges Make*, 17
[100] Posner, *The Federal Courts,* 347
[101] Posner, 336

b. No Control over Docket and the Rise in Caseload (Legal Constraint)

Another legal constraint is that, unlike the Supreme Court, the LFCs have no control over their own docket. In this way, LFCs are closer to Article III of the Constitution and the early judiciary acts from Congress. They must take valid cases and controversies that satisfy the standing and justiciability requirements in their jurisdiction. Since The Judges Act of 1925, many of the obligatory appellate responsibilities of the Supreme Court were eliminated and the certiorari system was instituted. This allowed the justices themselves to approve of which cases would be heard on appeal in addition to the Court's small number of original jurisdiction cases. The attitudinal model uses the ability to Control its own docket as a unique and important quality for the Supreme Court to have policy making powers[102].

Because the LFCs are not able to control their own docket there are two substantial constraints as consequences.

First, they must decide cases that come before their courts. They cannot avoid a case on its merits and wait for more readily settled precedent. It is the inverse of the case or controversy requirement. While on one hand they cannot rule on cases that are not real, they also cannot avoid cases that are.

Second, the lack of ability to control its own docket means that a LFC sees a much higher caseload than the Supreme Court, and one that has been increasing over time. The growing caseload costs money, time and opportunity for LFCs, where resources and judges are not increased at a commensurate rate with the cases[103]. Judge

[102] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 93
[103] Posner, *The Federal Courts,* 130

Posner discusses the rise of caseloads for LFCs as one of the main topics in his book. He points to new laws, new Constitutional amendments and new interpretations of the law as some of the key reasons for the increase in cases in the 20th century[104], importantly explaining that in common law or constitutional interpretation law as opposed to dispute resolution, the expansion of caseload is inevitable[105]. The consequences of the increased caseload on LFCs includes a greater use of law clerks[106], more unpublished and summary opinions[107], increased use of sanctions[108], shorter oral arguments at trial[109], and greater deference to administrative agencies.

These time and resource constraints caused by the increased caseload because the LFCs do not control their own docket is a great example of why LFCs are different from the Supreme Court and need a different model for research. Here, these constraints and the consequences of an increased caseload would have a clear effect on redistricting cases and choices. These cases would face a resource shortage like any other case, but the subject matter may require more resources than other cases. The result of these resource constraints on LFCs may alter the decision making of the court on restricting cases, further incentivizing solutions from other redistricters. Additionally, when LFCs are forced to create their own redistricting maps for proper relief, LFCs may turn to special masters, the defendants and plaintiffs, or outside advocates create and present redistricting plans that can be used.

[104] Posner, 106-107
[105] Posner, 133
[106] Posner, 139, 186
[107] Posner, 162-165, 180-183
[108] Posner, 183
[109] Posner, 160-162

A lack of control over the docket among LFCs and the associated rising caseload places constraints of time and resources that are substantial. This may incentivize the use of special masters to help the courts with redistricting or deference toward other institutions.

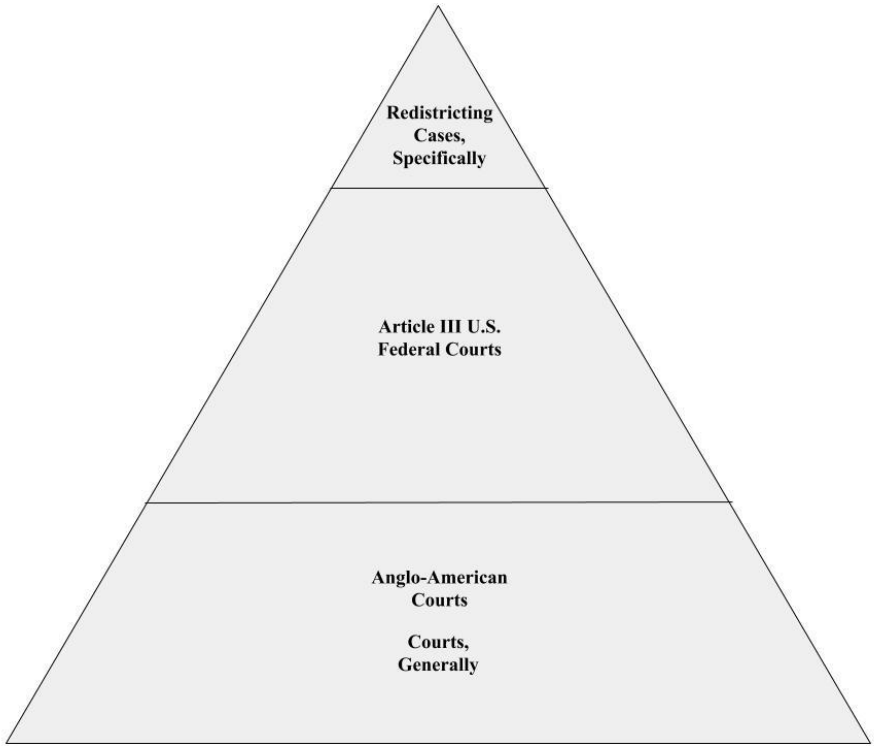
C. LFCs in the Redistricting Subject Area (Legal Constraint)

While one can think of LFCs in the context of their role as Anglo-American Common Law courts, courts generally, or as Article III federal courts with unique jurisdictions and responsibilities, when an LFC faces redistricting cases specifically, there are additional considerations and constraints. Like with the two other levels of the hierarchical understanding of LFCs, the redistricting-specific area has legal constraints as well as structural and political constraints.

Thinking about LFCs in a specific policy area is important for two reasons. First, the constraints at this level are the most impactful and specific to the details of the case. While the common law concept of line of cases or stare decisis is at work on every case, the redistricting-specific precedents LFCs must consider when adjudicating a new malapportionment case do much more to limit the actual actions the court can take to fashion a remedy. Second, when the LFCs are operating in a specific subject area, all of the constraints from the broader understandings of the court are still at work. One can picture the court's constraints as a pyramid (Fig. 2.1), with the subject area specifics at

the top. This is the narrowest set of constraints, but the more basic and foundational constraints are still there, either underlying the specific ones or acting simultaneously.

When an LFC is considering a redistricting case, it is constrained by the three categories of constraints - legal, structural and political - operating on the three levels of the pyramid all together and at once. This is especially important with redistricting cases, because they are typically heard by a three-judge panel that is immediately reviewable to the Supreme Court, operating as a court rather than a single judge. It is doubtful that anyone would be conscious of the multiple orders of constraints operating simultaneously when they're focused on adjudicating a complicated redistricting claim, but this framework and emphasizing the constraints on LFCs with redistricting cases specifically helps one isolate the constraints that are most important, impactful and helpful for



1 - Figure 2.1 – Pyramid of Constraints

predicting and understanding LFC action on redistricting plans that are drawn or influenced.

a. U.S. Constitution (Legal Constraint)

The chief legal constraint for LFCs generally is the U.S. Constitution. The U.S. Constitution is the foundational document that codified the rights with which people have challenged redistricting plans. Although the U.S. Constitution contains many of the details necessary for reapportionment and redistricting, including the requirement for a decennial census and a reallocation of House members based on population, these instructions are too vague to help adjudicate modern redistricting cases. Instead, the portions of the Constitution most important to LFCs adjudicating redistricting cases are the 14th and 15th Amendments. The 14th Amendment Due Process and Equal Protection Clauses have been the key legal language and rights guarantees at the heart of redistricting litigation since *Baker*.

While the Constitution surely constrains LFC behavior on redistricting directly, what complicates this is that most of the Constitutional rights used in redistricting cases are filtered through the Supreme Court, which develops them into judicially manageable standards. However, this doesn't discount the direct application of Constitutional law by LFCs for obvious or egregious violations. For example, an LFC could easily apply the 15th Amendment rights to vote without racial discrimination to a particularly blatant gerrymander, like that in the landmark *Gomillion v Lightfoot* case. As shown in depth in chapters 3 and 6, and throughout this project, most LFCs rely on Constitutional interpretation and guarantees of associated rights through application of Supreme Court precedent.

b. Statutes (Legal Constraint)

A secondary legal constraint on LFCs facing redistricting cases are statutes that may limit their relief options. Historically, Congress has passed laws that specified the criteria that states should favor in redistricting. The Apportionment Act of 1911 required equal population, contiguity and compactness. However, this law was undone with the Reapportionment act of 1929 and the *Wood v Broom* Supreme Court decision[110]. There have been no similar laws passed since then.

Today, there are only two Congressional statutes that constrain LFCs with redistricting cases. The first is 28 U.S. Code § 2284, which requires three-judge district courts to convene for apportionment cases at the congressional or statewide levels, and is covered with much more depth as a structural constraint. The second is a 1967 law[111] that requires the use of single-member districts for Congress, only allowing at-large elections for states with one member of the House.

It is notable that Congress could create more laws to restrict and limit the types of redistricting plans created or influenced by LFCs, as it did in 1911. Whether or not this is likely, it is possible and would have a substantial effect. In the absence of this activity, statutory constraints are like Constitutional constraints - more theoretical than influential. Supreme Court standards instead fill the vacuum with an undoubted relative strength, constraining LFCs more than any other legal factor.

Further, LFCs need to consider state legal requirements as well. Although, the LFCs are not bound by state requirements, in *Upham v Seamon* and *White v Weiser* the Supreme Court has made clear that LFC plans should be cognizant of state goals where

[110] Wood v. Broom, 287 U.S. 1 (1932)
[111] 2 U.S. Code § 2c

they do not interfere with Constitutional or statutory harms of the redistricting plan[112]. In the *White* opinion, the Court explained, "a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence does not detract from the requirements of the Federal Constitution[113]." However, as law professor and former special master for state redistricting Nathaniel Persily has noted, few court-drawn maps have been challenged or overturned for not following the state requirements meaning that this is a relatively weak constraint.

c. Supreme Court Standards (Legal Constraint)

Since *Baker*, the Supreme Court has fashioned numerous judicially manageable standards to connect the Constitutional rights that plaintiffs claimed with a possible remedy for relief in a redistricting plan. Absent clear constitutional or statutory guidance, it is Supreme Court standards created in precedent that serve as the guiding and constraining directives for LFCs in redistricting cases. It is the most important and influential constraint on LFCs.

The entirety of Chapter 3 is devoted to the explanation of the political development of these Supreme Court standards, illustrating how they may impact and constrain LFC actions at any given point in time for any sub-type of redistricting claims (malapportionment, racial gerrymandering or partisan gerrymandering).

II. Structural Constraints

[112] Persily, Nathaniel. "When judges carve democracies: a primer on court-drawn redistricting plans." *Geo. Wash. L. Rev.* 73 (2004): 1131, 1135.
[113] White v. Weiser, 412 U.S. 783 (1973), quoted in Persily

Structural constraints on LFCs are the factors that affect the form of adjudication - the way in which cases are heard or decided. The initial design of the institution can create structural constraints as can laws and norms or common practices. Like legal constraints, structural constraints also impact the ultimate actions LFCs take on redistricting cases and the type of maps they make or influence. This section highlights the most critical structural constraints for LFCs broken into the three levels of hierarchy.

A. American Common Law Courts

a. Triadic Structure (Structural Constraint)

In *Courts, a Comparative and Political Analysis,*[114] Martin Shapiro defines the ideal or prototypical court in four parts. He explains a court as "1. an independent judge applying 2. preexisting legal norms after 3. adversary proceedings in order 4. to achieve a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong[115]." Every aspect of this definition highlights specific constraints that impact a court's ability in redistricting cases. Although explained in ideal or theoretical terms, these constraints are real and concrete. Each of these characteristics will be explored more fully, in more specific terms related to the U.S. Article III lower federal courts. However, one aspect of Shapiro's definition that is useful and unexplored elsewhere is the notion of the prototypical court as a triadic structure.

The triadic structure, as defined by Shapiro[116], refers to one of the oldest and most universal forms of dispute resolution in the world. In simple terms, when two parties get into a dispute, they look for a third and impartial person or party to resolve the dispute.

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[114] Shapiro, Martin M. *Courts, a Comparative and Political Analysis*, 1981.
[115] Shapiro, *Courts,* 1
[116] Shapiro, 1

This dynamic can take the form of mediation or arbitration, but also as the form of the modern court. A modern court, or courts generally, are "clearly the least consensual and most coercive of triadic conflict resolving institutions[117]."

There are two features of this theoretical, foundational understanding of courts that Shapiro outlines that are germane to redistricting. First, courts as triadic structures replace consent between the two parties with law and office as the means of resolution. Although this may sound obvious to laymen, it is significant that the parties are bound by decisions based in rules they had no part in making and allows for a more hostile relationship among the parties in the triad. It endangers the notion of legitimacy of the judge to the two litigants because the introduction of the interests or rights of the regime are introduced[118]. This is compounded in public law cases where one of the litigant parties is the government.

Second, because the triadic structure of a court replaces consent with law and creates a less stable dynamic, it forces judges to aim for neutral principles of judgement[119]. Applying to principles of law that will be perceived by the litigants as neutral, allows for the appearance of fairness and maintains the balance of the triad. Neutral principles are a significant part of redistricting litigation and the holy grail of judicial involvement. If the federal courts were able to interpret neutral principles of the law, neutral standards of redistricting, then gerrymandering would be easily justiciable. It is significant that this is an aspect of the redistricting litigation also exists in the most ancient and universal form of dispute resolution. Neutral principles are not just required

[117] Shapiro, 1, 8
[118] Shapiro 36
[119] Shapiro 8,

for fair redistricting, but are a necessity for the legitimacy and fairness of the triadic structure of a court based in law.

B. U.S. Article III Courts

a. Regional Organization (Structural Constraint)

In a study of the U.S. federal courts, scholars Robert Carp and Ronald Stidham explain simply that the "difference between the Supreme Court and the circuit courts is that circuit court policy-making is regional."[120] When the Supreme Court decides a case of high precedential value or creates a standard in a policy area like redistricting, it has a national influence on circuits and districts across the U.S. However, when individual circuits and districts take redistricting cases, they are more likely to confront regional issues. The fourth or fifth circuits may expect more racial gerrymandering cases, while the sixth and seventh may see more partisan cases and the ninth faces issues with commissions drawing maps.

The regional design of the LFCs is a structural constraint that has an impact on the decision-making of judges as well as who is likely to be appointed to become a judge. However, research also finds that regional differences may be less significant than ideological differences in the courts[121].

b. Not the Court of Last Resort (Structural Constraint)

An necessary quality explicit in the Attitudinal model[122], and one included in the strategic model, is that the Supreme Court is the court of last resort. By the structure of the federal judiciary, the LFCs are not the court of last resort. District or circuit court

[120] Carp and Stidham, *The Federal Courts,* 22
[121] Stidham, Ronald, and Robert A. Carp. "Exploring Regionalism in the Federal District Courts." *Publius* 18, no. 4 (1988): 113–25. https://doi.org/10.2307/3330336.
[122] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 96.

decisions are appealable by definition. This is a critical constraint on LFCs and one of the main reasons that unconstrained policy-making models like the strategic or attitudinal cannot apply to LFCs - if the judges or court strictly follow their ideal points and policy preferences, they are likely to be overruled or reprimanded. The fact that LFCs are not the court of last resort is the structural constraint that is married to the legal constraint of precedent and stare decisis - it is a reason why LFCs generally follow Supreme Court standards and precedent.

The fact that LFCs are not the courts of last resort present important structural constraints. First, the statutory requirement that apportionment and some civil rights cases are heard by three-judge panels means that almost all major redistricting cases are heard by this now-rare type of federal court. In addition to the three judge "district court" design, this requirement also means that the cases are directly appealed to the Supreme Court rather than following the typical three-step process. This could act as a structural constraint in that it creates a greater feeling of urgency for the judges in the panel or a greater threat of being overturned and rebuked by the top court. Additionally, although the threat of appeal is ever present, very few cases are granted cert by the Supreme Court. Therefore, although not the Court of last resort, the LFCs are typically the highest-level court that a case gets to. The threat however, is enough to constrain LFC action as shown in the stare decisis examples.

C. LFCs in Redistricting Subject Area

a. Three Judge Panels (Structural Constraint)

The use of three judge panels is the most significant structural constraint on LFCs in redistricting cases. Three-judge panels are not used exclusively for redistricting and

reapportionment cases, as Article III courts, LFCs have three-judge panels for on the courts of appeals for multiple subject areas. Three-judge panels were historically a common form of adjudication created on an ad-hoc basis[123], but now they are less often used. In 1976, Congress severely limited the use of three-judge panels, except for reapportionment in Congress and the state legislatures, and some civil rights cases[124]. These three-judge panels, with a mix of circuit and district judges, are the first federal court to hear redistricting and reapportionment cases and are directly appealable to the Supreme Court.

The unique structure of three-judge panels is one of the key reasons why an institutional theory of LFC redistricting is more useful than a purely behavioral, judge-focused approach. In addition to the unconstrained nature of the Supreme Court, the attitudinal and strategic models also emphasize individual decision making of a static panel of justices. Something similar could conceivably be done using a rational choice model with judges in LFCs on three-judge panels, but the panels are dynamic and include a rotating combination of judges, so it would be functionally impossible. Instead, the three-judge panel highlights the importance of institutional constraints acting uniformly across LFCs.

One way that the three-judge panel constrains LFCs is that it requires a two-judge majority to make a decision. This limits the decisions an individual judge will make and therefore a LFC can make. At least two judges must find a shared or compromised ideal point to come to a court decision. It also constrains in terms of opportunity and resource costs.

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[123] Posner, *The Federal Courts*, 5.
[124] Carp and Stidham, *The Federal Courts*, 29; 28 U.S. Code § 2284

It has been well established that the most important detail for analyzing three-judge courts is the ideology of the judges composing the panel. It has been shown that when the panel has a majority of judges appointed by Democratic presidents, a liberal outcome is more likely, and when appointed by Republicans, a more conservative outcome is more likely[125]. Ideological voting is found for affirmative action, campaign finance, sex discrimination, sexual harassment, piercing the corporate veil, disability discrimination, race discrimination, and review of environmental regulations but there was no difference for other subject areas such as federalism, criminal appeals, and takings of private property, because there is less ideological divide over these areas.

Researchers have further looked at this question of ideology in relation to redistricting. Gary Cox and Jonathan Katz specifically focus on three-judge panels to assess the electoral consequences of the Reapportionment Revolution. The scholars set out to answer why Democrats in the House had a seemingly invulnerable majority prior to 1994. They found that the Reapportionment Revolution Supreme Court malapportionment standards and the numerousness of Democrat-appointed federal judges cemented an incumbency advantage favoring Democrats in redistricting maps that was not present before 1966 and lasted almost 30 years. An important aspect of Cox and Katz study was a model of the interaction of the partisan composition of the three-judge panel for a redistricting plan as well as the partisan control of the branches of state government. The authors found that not only did having a Democratic majority on the three-judge panel bias plans toward Democrats, but that each additional judge on a panel was as favorable to the party as if they took the State's upper or lower houses. They explained,

[125] Sunstein, Cass R., David Schkade, and Lisa Michelle Ellman. "Ideological voting on federal courts of appeals: A preliminary investigation." *Virginia Law Review* (2004): 301-354.

> Democratic courts supervised plans that had more pro-Democratic bias, while Republican courts supervised plans that had more pro-Republican bias, controlling for partisan control of state government… responsiveness tended to be higher in plans written by unified states facing friendly rather than hostile courts...All three models' results suggest that a party's getting one more judge on the supervising panel affected bias of the resulting plan roughly as much as its getting one more branch of govt. This is a dramatic indication of how much the courts mattered in determining the characteristics of the plan ultimately implemented.[126]

Cox and Katz find these important results using three separate models analyzing data from 1964 through 1970. However, the authors argue that their data does not conflict with analysis from the 1970s or 1980s[127] showing no overall bias in redistricting during these decades, instead they contend that the 1960s entrenched this bias for roughly 30 years[128]. This however does not contradict their findings on three-judge panels.

Clearly, the unique structure and dynamics of a three-judge panel is a major constraint on LFCs in redistricting, shaping the eventual redistricting plans, with a probable bias toward the ideological preferences of the majority of the judges. The partisan dynamics of three-judge panels that made redistricting plans are treated fully in chapter 5.

b. Use of Special Masters, Different Methods of Mapmaking (Structural Constraint)

When LFCs draw or influence a redistricting plan, there are several methods that they can use to complete the task. As Persily explained, there is an "unsurprising" "lack of uniformity" among the ways that LFCs choose to create or adopt new redistricting

[126] Cox and Katz, *Elbridge Gerry's Salamander*, 87, 92
[127] Cox and Katz, 87, 92
[128] Cox and Katz, 103

plans[129]. Unlike a traditional court decision adjudicating a dispute with a written opinion, creating a new redistricting plan requires novel tools of equity. In practice, this has meant that oftentimes the judges do not actually create the map themselves.

There are four common ways that federal courts create redistricting plans[130]. First, courts may draw the map themselves. This is especially common when only a few districts need to be changed and the judges have a good idea of what is required[131]. Second, the court may draw the plan themselves but with the help of an outside expert. These two court-led approaches are useful when time constraints are a major concern[132]. Third, the court may not draw a map themselves, but instead adopt a map from among several alternatives offered. This requires less labor by the judges, with maximum control but risks a set of alternatives that are all deficient[133]. This can be a deferential step that the courts take, and, if it fails, the court will have to try one of the other approaches.

The fourth option is the use of a special master. A special master can be a retired judge or a redistricting expert to whom the task of creating a new redistricting plan is delegated to by the LFC. Special masters are resource intensive, requiring a legal team and time, but also allow for the judges to be more personally removed from the mapmaking to avoid conflict of interest risks. However, the involvement of the court varies with each special master and each LFC - some communicate frequently, others rarely[134].

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[129] Persily, *A Primer,* 1148
[130] There is a nearly endless supply of options courts can use
[131] Persily, 1149
[132] Persily, 1149
[133] Persily, 1149
[134] Persily, 1148

All four of these methods highlight the importance of the institutional focus of this theory and the LFC as the unit of analysis. If it were judges, two or three of the methods used would create credible distance between a judge and his creation. Instead, using LFCs as the unit of analysis encompasses all four plans under the court umbrella. As Persily explained, all are at least "supervised by a federal court."

The process of LFCs when drawing or influencing a redistricting plan is explained in greater detail in Chapter 4. In the context of this theory, what is important is that the use of special masters and other methods both illustrate the constraints of a lack of time, resources and subject matter expertise as well as constrain LFCs themselves by limiting the autonomy normally experienced by a single judge. Further, as Chapter 6 illustrates, judges may even alter districts in a map prepared by a special master or outside experts to meet the desires of the court.

III. Political Constraints

What are here called "political" constraints are the factors that shape LFCs regarding the political authority within the U.S. political system. These are the rules, norms and informal principles that shape judicial thinking and constrain LFC action in redistricting and other areas. These constraints are "social" in a certain sense as they deal with the relationship of courts to other institutions and groups, including the legal community, the Executive Branch, the Legislative branch, the Judicial branch and the American public. In many cases, the political constraints are more difficult to define than the legal or structural constraints, but they are just as real and influence LFC action nonetheless at all three levels of hierarchy.

A. American Common Law Courts

a. Generalist Judges (Political Constraint)

A political constraint that generally applies to common law courts and specifically U.S. courts is the "generalist character of the courts." Like the other general constraints, it such a simple characteristic of the courts as institutions that at first it may seem an insignificant constraint, however, the definitional generalist design of courts constrains the court's ability to address more complicated issues, such as redistricting.

Donald Horowitz explains this constraint well in relation to the complications courts face when dealing with the rise of social policy cases in public law during the 20th century, which can include redistricting and its subsidiary concerns. He wrote,

> That judges are generalist means, above all, that they lack information and may also lack the experience and skill to interpret such information as they may receive. On many matters, after all, the expert may know nothing of the particulars before him; what he does know, however, is the general context and he can locate the issue in its proper place on the landscape. Judges are thus likely to be doubly uninformed, on particulars and on context. This makes the process by which they obtain information crucial for social policy issues are matters far from the everyday experience… the adjudication process conspires in a dozen small and large ways to keep the judge ignorant of social context. This may of course be regarded as a vestigial influence of the earlier, less ambitious functions of adjudication, structured as it was to make law only as the byproduct of responding to individual conflicts. Vestigial or not it is with us still...[135]

Horowitz explains that this "generalist" character may very well be seen as a "valuable attribute" by many,[136] but as he explains it, it is undoubtedly a constraint in adjudication that shapes outcomes - virtue or vice.

The generalist nature of federal courts in particular can be seen as a constraint on subject matter expertise, time, resources and application of law, all of which are

[135] Horowitz, *The Courts and Social Policy,* 31.
[136] Horowitz, 31

constraints that will be further addressed. This constraint also substantially underscores the importance of the role of gathering information in redistricting.

b. Membership in a Community of Judges (Political Constraint)

A key, universal constraint on judges in courts generally is the understood membership in a community of judges. More amorphous in definition than the triadic structure, the perception of membership in a professional community is a powerful force that tempers the most extreme actions of courts. The effect of this membership in a community of judges can manifest itself in a variety of norms. Although directly related to behavior, this constraint is undoubtedly institutional.

In his article on the changes to the American public law litigation in the 20th century, Abram Chayes points to this membership in a community of judges as a powerful factor that transcends this shift. He wrote,

> [a]n amalgam of less tangible institutional factors will continue to operate to shape judicial performance in the public law system as in the past: general expectations as to the competence and conscientiousness of federal judges; professional traditions of conduct and performance; the accepted, often tacit canons and leeways of office. These are amorphous. They mark no sharp boundaries. Their flexibility and vagueness can be abused. But other kinds of constraint are no less vulnerable; and the historical experience is that egregious violation has invariably activated a countervailing response.[137]

Chayes combines professional expectations and public expectations for what a judge should be as important, if unofficial constraints on judicial decision making and behavior. It is easy to see how this individual constraint can affect the whole of the court and its actions.

[137] Chayes, Abram. "The role of the judge in public law litigation." *Harv. L. Rev.* 89 (1975): 1281.

The most important aspect of this membership to the community of judges is that it is the undergirding force that constrains judges on other norms and informal rules. As Posner explained, membership in this community leads the individual efforts of a judge to feel like the collective efforts at a larger project and underscores the usefulness of and adherence to other constraints, such as stare decisis or judicial restraint[138]. In *The Federal Courts,* Posner wrote,

> ...every judge, trial and appellate, is a member of the community of judges composed of the predecessors of the current judges as well as the current judges themselves. Judicial decision-making is collective in a profound sense. The importance of institutional values in such a setting should therefore be, but apparently is not, self-evident.[139]

Membership in this community of judges is an idea that is self-enforcing and acts as an internal and informal method for accountability based in one's idea of self that limits the actions an LFC will take.

c. Judicial Independence (Political Constraint)

Judicial independence is a foundational aspect of Anglo-American courts and one importantly shapes all of the behavior of U.S. federal court actions. William Blackstone called the "distinct and separate existence of the judicial power" one of the most important characteristics for public liberty, saying that life, liberty and property would disappear without a judiciary separate from the legislative and executive and based in "fundamental principles of law"[140]

[138] Posner, *The Federal Courts* 381- 382
[139] Posner, 382
[140] William Blackstone, Commentaries, 259-260

Federalist 78 echoes Blackstone but with a greater independence of the courts - Independence that allows the courts to challenge an act of the legislature if it is contrary to the Constitution. Publius wrote,

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[141]

The judicial independence of the courts may seem so obvious as to be taken for granted, but this characteristic of the courts is critical and constrains its behavior. Distinct from the executive and legislature, the court must maintain the appearance of independence even as the role of has developed over time. This is especially important in public law cases such as redistricting challenges. If the court appears to be not independent, favoring either the federal government in a racial gerrymandering case or the state in a challenge to a redistricting map, the legitimacy of the court is hurt and the rights of citizens may be harmed. This concept is intimately related to the greater concern over legitimacy that constrains the courts. These foundational ideas of independence remain in modern litigation related to redistricting and constrain behavior to act more independent, echoing the notion of neutral principles outlined by Shapiro[142].

[141] *The Federalist Papers*, No. 78
[142] Shapiro, *Courts,* 8

B. U.S. Article III Courts

a. Ambition for Higher Office (Political Constraint)

Another constraint absent from the Supreme Court in the attitudinal model and present in LFCs is the ambition for higher office.

While Supreme Court Justices may have achieved their ultimate goal, one can assume that judges in LFCs may have higher ambitions, especially district-level judges on the panel. Spaeth and Segal state, "we cannot assume that those interested in higher office will necessarily vote their personal policy preferences[143]."

This constraint is simple, but powerfully political. It means federal judges and therefore LFCs can be assumed to not strictly vote policy preferences. Like with stare decisis, ambition for higher office is another constraint that would logically limit extreme actions by the LFC that could be considered partisan or political, such as an explicit or stated partisan bias in crafting a redistricting map.

b. Accountability to others U.S. Institutions (Political Constraint)

Both LFCs and the Supreme Court have to worry about accountability to other U.S. institutions in real terms as a political constraint. LFCs also have to consider accountability within the federal judiciary.

All Article III courts are constrained in their decisions by the expectation of checks and balances by the other branches of the federal government if they overstep their area of control or don't meet their duties. As Epstein and Knight write in their strategic model, "The institution of the American separation of powers system serves as a constraint on justices acting on their personal preferences[144]." Congress has a number of

[143] Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited,* 95
[144] Epstein and Knight, *The Choices Judges Make,* 150

tools to check judicial action laid out in the Constitution. Congress can limit Article III jurisdiction, freeze salary, impeach and remove judges or justices, change the size or structure of the federal judiciary, increase the caseload and myriad other rule changes that could burden the courts. Congress also exercises the appointment power, which could surely change the court over time if wielded strategically with the executive. Of course, the most powerful tool that Congress can use to hold the courts accountable is to simply pass new bills that undue the purpose of important rulings. As Epstein and Knight explain,

> The separation of powers system... along with informal rules that have evolved over time such as the power of judicial review and as each branch of government with significant powers and authority over its sphere. At the same time it provides explicit checks on the exercise of those powers; each branch can impose limits on the primary functions of the others... policy of the United States emanates not from the separate actions of the branches of government but from the interaction among them... if the court did not take into account Congress's preference and place the policy precisely where it wanted it would give the committee's incentive to introduce legislation to override his decision[145].

In the strategic model, considering congressional policy preferences is an important variable in a justice's strategic decision making. In this model, the same calculus can occur, but, in combination, this consideration is a larger constraint on the LFCs to enforce rulings that will not be overruled, with Congress as just one possible opponent.

The executive branch can also constrain Article III courts. Like Congress, the Executive has a constitutional role in the appointment process, which gives the President substantial power over who will become the judges and justices, albeit with necessary help from the Senate and typically over a long period of time. But, as scholars have shown there is partisan bias in three-judge panels populated by judges appointed by a

[145] Epstein and Knight, 139-140

president of that party[146]. The second power that the executive has over the courts is that the branch can simply refuse to follow or enforce the rulings. Epstein and Knight point to this threat as a danger in the Supreme Court. They warn that, "government actors can refuse, implicitly or explicitly, to implement particular constitutional decisions, thereby decreasing the Court's ability to create efficacious policy[147]."

William Howell in his well-known study of executive action[148] finds that this fear is not unfounded. Howell calls this an "underappreciated aspect of the politics of unilateral action" where when "judges rule, and especially when they rule on presidential policies, executive enforcement is not always forthcoming[149]." Howell points to two examples where not only did the Court consider the policy preferences but that the federal courts "retreat from certain rulings for fear that presidents will ignore their orders[150]": the integration of southern schools after *Brown* and the conflict between Abraham Lincoln and Chief Justice Roger Taney related to the *Ex parte Merryman* case. Howell credits this dynamic between the federal courts and the Executive for shaping the modern federal judiciary[151].

While all Article III courts have to be accountable to the Executive and Legislative branches, only LFCs are accountable to a hierarchy of administration within the federal judiciary. A single district court judge can expect to be accountable to the Chief Justice of her circuit, the circuit judicial councils, the Judicial Conference of the

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[146] See: Cox and Katz, *Elbridge Gerry's Salamander*
[147] Epstein and Knight, *The Choices Judges Make*, 144
[148] Howell, William G. *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton, N.J.: Princeton University Press, 2003.
[149] Howell, *Power Without Persuasion,* 140
[150] Howell, *Power Without Persuasion*, 140
[151] Howell, 144-145

United States, and the Supreme Court Chief Justice[152]. The Judicial Conference of the United States includes the chief justices from each circuit as well as one district court judge from each circuit. The Chief Justice is the head of the whole federal judicial administration and the only member of the Court to participate in administration of the system. The federal judiciary generally has a weak hierarchy except at for the preeminence of the Supreme Court[153]. However, in addition to these administrative bodies, LFCs can also be checked by the Supreme Court by appeals of decisions. This doesn't just constrain decisions that deviate from precedent, as previously mentioned, but also cases decided incorrectly on the merits, misapplication of the law or other issues.

The accountability to these federal institutions clearly would constrain LFC behavior for all subject areas, especially one as explicitly political as redistricting.

C. LFCs in Redistricting Subject Area

a. Legitimacy (Political Constraint)

"Judicial activism", "judicial constraint", "judicial policy making", "legislating from the bench" and judicial independence are all concepts that relate to the idea of legitimacy - to the idea of the federal courts' ability to act credibly in a certain space or on a specific subject, or how far they can act credibly. Legitimacy of federal courts ultimately comes to a political relationship between the courts and the public. Especially in redistricting, the LFCs are politically constrained in their actions by what the public will tolerate and what the courts can do while remaining to appear legitimate.

[152] Posner, *The Federal Courts,* 12.
[153] Posner, 347-348

The understanding of court legitimacy is well-explored and extensive. However, the best description of what legitimacy may mean to LFCs working on redistricting plans may also be one of the vaguest. "In making policy, the judiciary's legitimacy rests, at least traditionally, upon its acting judicially," Sheldon Goldman and Thomas Jahinge wrote in an account of the federal courts as a political system from the 1970s[154]. "In other words, the historic rationale for allowing judges to pronounce national policies based on constitutional law was that judges were expected to be judge-like. This implies certain standards of faithfulness to the law impartiality objectivity and professionalism[155]."

Goldman and Jahinge's definition of what judicial legitimacy means is short on details, but that might be right. It is unlikely that "legitimacy" means a specific set of behaviors are off limits or an explicit threshold of a decision, instead it is a constraint constant across the institution interpreted differently by individual judges and LFCs. What is critical in understanding how judges are constrained by legitimacy are the ideas and appearance of impartiality, objectivism and professionalism. This makes the likelihood explicitly partisan redistricting plans less likely from LFCs and the appearance of objective, unbiased plans more likely. At the very least, due to the constraint of legitimacy we can expect that any bias will be hidden from plain view.

Epstein and Knight discuss legitimacy norms in their strategic account, as this is a concern across all federal courts. The authors explain that legitimacy norms are an important constraint on the decision making of Supreme Court justices for their accountability to the American public. Legitimacy norms are the way that justices

[154] Goldman, Sheldon., and Jahnige, Thomas P. *The Federal Judicial System; Readings in Process and Behavior*. New York: Holt, Rinehart and Winston, 1968.
[155] Goldman and Jahninge, *The Federal Judicial System,* 34.

express the rule of law as a principle in practice. Epstein and Knight use two specific norms as examples: sua sponte[156] and stare decisis[157]. By disfavoring the creation of new issues and following precedent as settled law, the justices are sending the message to the public that they are acting legitimately and in line with the law. These legitimacy norms can be so powerful, even at the Supreme Court, the authors write, that they can constrain a justice into following precedent in a decision, even if they disfavor the concept of stare decisis[158]. The authors wrote,

> Because the justices operate within the greater social and political context of the society as a whole, they need to be attentive to the informal Norms that are like down and beliefs about the rule of law in general and the role of the Supreme Court in particular. To the extent that these rules affect the way the American people respond decisions of the Court they also affect the justices' ability to influence the substantive content of the law[159]

Although Epstein and Knight's account is specific to the Supreme Court, the concept holds for all federal courts. Legitimacy or the appearance of legitimacy is particularly important constraint for the LFCs while acting on redistricting plans. It is a subject area that before 1962 would not be heard by courts as being too political, let alone for LFCs to step in and actually draw the redistricting maps. Due to the heightened political qualities of redistricting adjudication, it is likely that the constraints of legitimacy are also heightened. They constrain LFCs in redistricting by requiring the appearance of objectivity, nonpartisanship, impartiality, precedent boundedness, and

[156] Epstein and Knight, *The Choices Judges Make*, 159
[157] Epstein and Knight, 161
[158] Epstein and Knight, 164-165
[159] Epstein and Knight, 138

irreproachable professionalism. Otherwise, LFCs risk public backlash and a loss of legitimacy, let alone checks on their power by other U.S. institutions.

The best statement on the constraints of legitimacy in the realm of redistricting come from Justice Frankfurter in his dissent to *Baker.* He wrote,

> The Court's authority -- possessed of neither the purse nor the sword -- 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.[160]

Although the federal courts did not heed Frankfurter's warning in avoiding redistricting cases altogether since his *Baker* dissent, they have tried to walk a delicate line. While LFCs decide redistricting cases and create redistricting plans used in elections for legislative representation, they still are substantially constrained by trying to achieve the detachment that Frankfurter calls for, to maintain legitimacy and authority. Above all, the constraint of legitimacy means that even when wading into political waters, the LFC must appear neutral, fair, apolitical, unbiased and nonpartisan.

2.5 Conclusions - Connecting Constraints

The institutional theory of lower federal court action for redistricting highlights institutional constraints universal across LFCs and specific to redistricting litigation, but it also incorporates behavioral and rational choice understandings of judicial decision making. Applying these insights to LFCs as institutions, we can predict that the three-

[160] Baker v Carr

judge panels are driven by interests within the boundaries of these extensive constraints. Some LFCs may want expedience, fairness, and compactness - achievable within these constraints. Others may have biases toward a political party, incumbency or other factors that cannot be enacted to an "ideal point," but nonetheless have an impact although constrained. Due to the space within these constraints, there will not be a universal expectation of the same redistricting maps when LFCs do draw or influence a map. But, these constraints should be extensive enough to shape the plans to a certain extent and therefore create probable outcomes regardless of the powers and discretion that LFCs and judges retain.

There are many powers that LFCs retain within these constraints and certain benefits they have over the Supreme Court. LFC court decisions are substantially less publicized and therefore garner less criticism[161], for example. The lifetime tenure with good behavior is a substantial power of LFCs and judges. LFC judges have substantial discretionary powers in their courtrooms as well. These can be abused and are less potent on judicial panels, but these powers are particularly extensive[162]. The best explanation of the powers and discretion that federal court judges retain within constraints is found in Abram Chayes' exploration of the changes that had occurred to public law litigation in the 1960s[163]. Chayes outlined a number of characteristics in public law litigation that had changed and why it meant that federal courts were well-suited to these new claims including how judges were involved in fact evaluation, organizing and shaping litigation,

[161] Posner, *The Federal Courts,* 336
[162] Posner, *The Federal Courts*, 340-341
[163] Chayes, Abram. "The role of the judge in public law litigation." *Harv. L. Rev.* 89 (1975): 1281.

endogenous shaping of the lawsuit within the courtroom, a sprawling litigant structure, legislative and predictive fact inquiries, and on-going participation of the court[164].

For redistricting, the two most important qualities of this new public law litigation Chayes explored are that "relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees[165]" and that "he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy[166]." The way in which the federal courts are flexible and able to exercise a whole new litigation process for public law illustrates all of the powers that courts retain within these constraints on the institution. Judges are able to shape long-term, public policy remedies, control fact-finding, and even reorganize the litigants and court parties. These are substantial powers and extensive discretion that allow for significant variation among LFCs, especially over time, within these constraints for a subject area such as redistricting. However, these constraints also provide enough to build a hypothesis highlighting probable criteria favored by LFCs in redistricting adjudication.

Determining, organizing and analyzing the most critical constraints on LFC action is important for the development of a universal, institutional theory of LFC action. This new and original institutional theory of LFC action I developed emphasizes constraints as the main factor that impact LFC decisions on redistricting cases and court-made maps.

[164] Chayes, 1302.
[165] Chayes, 1302.
[166] Chayes, 1302.

This theory fills a void in the scholarship and helps explain lower federal court behavior more generally.

At the core of this new theory is the idea that LFCs operate similarly to the Supreme Court and models such as the attitudinal model and strategic account, but there are far more constraints that act on LFCs as subordinate courts and therefore their decision-making is less able to achieve the ideal points and policy preferences, seen in the Supreme Court. One cannot assume strictly that LFCs achieve ideological or partisan preferences with each decision or redistricting map. Instead, LFCs systematically must abide by these constraints more strictly and the correct unit of analysis are LFCs rather than judges for redistricting. In short, like the Supreme Court, LFCs operate with powers and discretion in a constrained institution, but the more severe constraints of LFCs require a novel approach and theory. Using these constraints together as variables, gives one a better understanding of LFC action in a specific subject area. Here, it is tested on redistricting.

The theory, outlined in this chapter, is useful for the broader question of - *How has the involvement of federal courts since Baker impacted the redistricting process and maps, and therefore representation in the U.S.?* - because it allows for the development of testable hypotheses for when LFCs draw or influence redistricting maps. As Justice Harlan warned in his *Reynolds* dissent, no matter how much a court wants to draw a redistricting plan according to Shaprio's neutral principles, maintaining legitimacy and the appearance of impartiality, they cannot. He wrote, "No set of standards can guide a

court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line[167]…"

When an LFC steps in to draw or influence redistricting plans, they ultimately have to make decisions as to where to place new district lines, where to leave lines, where to allow population variance and where not to. Using this theory of constraints, one can create hypotheses for where LFCs are more likely to draw these lines. By looking at a set of criteria that are commonly used and measured in redistricting plans (Chapter 5), we can compare maps across institutions and over time. Here we can make a set of hypotheses based on the individual constraints and each criterion, and what we think we can expect.

The first hypothesis, H1, is about *how, when and why the federal courts make a redistricting plan.* Based on the combination of legal, political and structural constraints, particularly stare decisis, legitimacy norms and the threat of appeal to the Supreme Court, I expect the lower federal courts to only create their own redistricting plans when it is a last resort, before an election and after deference to the proper, de jure institutions. The courts will avoid the appearance of activism or legislating and only craft remedial plans when equipped with a strong legal, political and structural defense.

[167] Shapiro, *Courts*

Hypotheses	Criteria	Constraints	LFC Expectation
H2	Population Variance	*Legal*; Supreme Court Standards; Stare decisis; Not Court of Last resort	Very little population variance; Strict adherence to Supreme Court population standards
H3	Race-based Representation	*Legal*; Constitution; Supreme Court Standard; Stare decisis; Not court of last resort	Strict adherence to Supreme Court racial gerrymandering standards;
H4	Compactness	*Combined;* Supreme Court Standards; Statutes; Generalist character; Regional basis; Powers	Districts more compact on average than legislature-drawn
H5	Protection of Political Subdivisions	*Combined;* Supreme Court Standards; Statutes; Generalist character; Regional basis; Powers	More protection of subdivisions than legislatures and commissions
H6	Continuity	*Combined;* Supreme Court Standards; Statutes; Generalist character; Regional basis; Powers	Consistent continuity
H7	Competitiveness	*Political;* Legitimacy; Accountability; Ambition for higher office; judicial independence; Membership in community of Judges; Three-judge Panels	More competitive than legislatures; Less competitive than commissions
H8	Incumbency Protection	*Political;* Legitimacy; Accountability; Ambition for higher office; judicial independence; Membership in community of Judges; Three-judge Panels	More protective of incumbents than unified legislatures; Less than bipartisan; more than commissions
H9	Partisan Symmetry	*Political;* Legitimacy; Accountability; Ambition for higher office; judicial independence; Membership in community of Judges; Three-judge Panels	Slight bias toward majority party; appearance of nonpartisanship in court documents; Less bias than unified legislatures; More than bipartisan legislatures

2 - Table 2.2 – Hypotheses and Constraints

The rest of the hypotheses - addressing the questions *What are the criteria that lower federal courts favor when making a redistricting map? How do these criteria compare to the criteria favored by other redistricting institutions, such as commissions and legislatures?* - can be viewed in four broad categories. First, the lower federal courts are substantially constrained when they face the choice of whether to draw their

redistricting plan. The combination of legal, structural and political constraints that act on the LFCs will make them hesitant to take on this unusual task for a court unless other processes fail. I expect courts to exhaust all other legal options before resorting to remedial map making, which will then likely be done defensively conscious of constraints like stare decisis, legitimacy and the threat of appeal.

Second, the malapportionment and racial gerrymandering cases will be heavily constrained by the legal constraints, especially the principle of stare decisis, Supreme Court Standards and the fact that this is not the court of last resort. If LFCs were to go against these constraints, they may face some of the accountability seen in the political constraints, but not in the same way as LFCs would when acting overtly political. Instead, malapportionment and racial gerrymandering - H2 and H3 - represent the two areas most clearly settled in redistricting jurisprudence. This entire theory is premised on the idea that LFCs are limited by the additional constraints they face as subordinate courts to the Supreme Court in the federal system. These two criteria offer a perfect site to test that theory. We expect to see substantial constraints on the LFCs in malapportionment and racial gerrymandering with strict adherence to Supreme Court standards. What exactly these standards are and how they change over time are explained in detail in Chapter 3.

Second, the most "political questions" of partisan symmetry, incumbency protection and competitiveness are to be acted upon unsurprisingly by the "political" constraints. Because there are no Supreme Court standards for these "partisan gerrymandering" measurements, the legal constraints and precedents will play a lesser role. The structural constraints will also be active, but not to a greater extent than with the

other criteria. Based on prior research, one can assume that three-judge LFCs will be biased to one extent or another toward a party, but we also know that the constraints of legitimacy, accountability, ambition for higher office, judicial independence, and membership in a community of judges make the LFCs favor action that appears unbiased, nonpartisan and "fair." For this political group - H7, H8, H9 - we can expect these mostly political constraints to temper partisan bias explicitly in court opinions and documents, with a plan that has slight bias, that may rise above the bias of unified legislatures and below nonpartisan commissions.

Third, the traditional criteria of compactness, continuity and political subdivisions (H4, H5, H6), may be the least constrained by LFCs and possibly the least consistently used or predictable. Without the legal constraints of settled Supreme Court precedent or political constraints of explicitly partisan concerns, these traditional criteria would be more constrained by the statutes of the state, Supreme Court precedent for other aspects of the case, and the generalist character of federal courts. In addition to these constraints, this is an area where LFCs have more opportunity to utilize discretion and powers. One would expect a slight bias to conservative favor of these traditional criteria - compactness, contiguity and protection of subdivision - more than a legislature that's goal is gerrymandering. However, this bias may not be significant. A favor toward traditional principles fits well with the normative constraints of a membership of judges, neutral principles and understandings of fairness, all of which are difficult to empirically test.[168]

[168] The structural constraints do not influence the hypotheses as heavily because they act across LFCs. These constraints should be present in all of the cases and therefore of limited effect, whereas the political and legal constraints are more targeted to certain areas than others.

LFCs have discretion within constraints for all criteria and some variation can be expected based on the time period of the cases, the region, the individual judges and the circumstances specific to the case. However, these critical constraints provide for the ability to make general predictions about expectations of LFC action on average. These three groups of criteria - Settled Law (malapportionment and racial gerrymandering), Political Criteria and Traditional Criteria - can be ordered from most constrained to least constrained by the evidence in this chapter. Legitimacy concerns and close enough adherence to precedent to avoid adverse outcomes are the two overriding constraints that can be seen as important on all redistricting plans.

3.0 DEVELOPMENT OF SUPREME COURT STANDARDS FROM *BAKER* TO *RUCHO*

In 2004, the Supreme Court decided *Vieth v. Jubelirer*. The case dealt with a claim of the partisan gerrymandering of Pennsylvania's congressional districts by the General Assembly. Unlike many of the influential Supreme Court cases on redistricting, *Vieth* is not notable for its majority opinion or precedential value. In fact, the court's opinion was a mere plurality. Instead, it was the concurrence by Justice Anthony Kennedy that carried the most attention over the next 15 years. While concurring in the dismissal of the partisan gerrymandering claim, Kennedy disagreed with the argument of the plurality opinion written by Justice Antonin Scalia.

The disagreement between the Court's plurality opinion and Kennedy's concurrence focused on the same important concept: Judicially manageable standards. A "judicially manageable standard" is an important term, but also one that lacks a firm definition from the Court[169]. It has been used by various justices to mean both an input into the constitutional decision-making process as well as an output such as a measurement or test[170]. At its most foundational level in relation to the federal courts and redistricting, a judicially manageable standard is a necessary piece of the equation for determining the justiciability of a political question going back to *Baker v. Carr*, like the requirement of a "fundamental right" in a substantive due process case. Judicially

[169] Fallon Jr, Richard H. "Judicially manageable standards and constitutional meaning." *Harvard Law Review* (2006): 1274-1332, 1281.
[170] Fallon, 1283

manageable standards can be defined as unbiased rules, tests or sets of rules used as the connective tissue between Constitutional and statutory interpretations and real, specific claims, cases and controversies to allow for judicial relief. One Person, One Vote is a clean and simple standard connecting the concept of equal protection for voting rights as interpreted in the 14th Amendment to the real specific claims of constituents in malapportioned districts. The standard is judicially manageable in that federal judges can apply the standard to cases to analyze whether there is a harm or violation of the 14th amendment as well as use the same standard to fashion appropriate, legal relief.

In *Vieth,* Kennedy disagrees with the plurality opinion that there are no judicially manageable standards to decide partisan gerrymandering cases and that there never will be any. Instead, he argues that there are simply not yet any standards that exist, but there may be at some point, maintaining the justiciability of partisan gerrymandering under the *Davis v Bandemer* precedent. Kennedy wrote that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases," concluding that "if workable standards do emerge to measure these burdens, however, courts should be prepared to order relief."[171]

Kennedy's *Vieth* concurrence was viewed by many scholars and advocates as a call to create a workable, manageable standard. He made the argument that if one could create a judicially manageable and workable standard, with a precise and limited rationale, based on invidious intent, and founded in comprehensive and politically neutral

[171] Vieth v. Jubelirer, 541 U.S. 267 (2004)

standards, he or she could challenge extreme and unconstitutional partisan gerrymandering in the Supreme Court[172].

While the *Vieth* case is notable for its focus on partisan gerrymandering, the search for judicially manageable standards in many ways is *the history* of Supreme Court jurisprudence for redistricting, reapportionment and gerrymandering.

Although there has long been discussion of the Supreme Court's "search for standards" for redistricting in law journals and scholarly research, the Court has not been idle or inert. It has been very active, developing, refining and redefining real standards necessary to enforce the Constitutional requirements of equality for voting and representation central to redistricting adjudication since *Baker*. While in some areas the Court is still searching unsuccessfully, such as for standards to measure unconstitutional gerrymanders and to help judges draw the lines by some neutral principle, as Kennedy in *Vieth* and Justice Harlan in his *Reynolds* dissent explain. On the other hand, the Court has "found" many standards. Not always straightforward or progressive, the development of these standards is important for the study of redistricting in the federal judiciary. Supreme Court standards on redistricting provide the connective tissue between the high court and the Constitution and the lower courts and the actual case, facts and maps that constituents and voters will live under and experience representation. The standards allow for a unique vantage point to examine both the legal understanding and the real-world consequences for any given case. And the Court has declared firm, judicially manageable

[172] The *Vieth* concurrence was heavily influential in the 2018 and 2019 partisan gerrymandering cases such as *Gill v Whitford* and *Benisek v. Lamone*.

standards on redistricting and reapportionment time and time again in the decades since *Baker*.

Therefore, to get at the larger purpose of this project and to better understand the consequences of federal court action in redistricting between *Baker* and *Rucho*, as well as which precedents affect the criteria chosen when LFC make redistricting maps, it is important to study the judicially manageable standards created by the Supreme Court during this time period. Studying Supreme Court standards is a critical variable for understanding *how* and *why* lower federal courts (LFCs) act. The standards laid down by the U.S. Supreme Court as precedent are the guiding principles for LFC action on redistricting. As explained in the previous chapter, LFCs are importantly constrained by precedent and the principle of stare decisis for legitimacy and autonomy. LFCs have been shown to be largely obedient of Supreme Court precedents. Following standards created by the Supreme Courts is the best route to following precedent for subject areas such as redistricting that lack other clear constitutional or statutory guidance. Supreme Court precedents both give LFC judges standards to act upon and check LFC behavior when LFC courts act on new territory or go beyond their scope. *Understanding the Court's standards are simply critical for predicting and explaining LFC map-making and redistricting decisions*[173]. Additionally, examining cases during this time period allows

[173] This analysis is not ignorant to the ideological realities of the Court over this time period. The Warren Court was certainly more liberal and activist in the 1960s, such as with *Baker*, and the Burger and Rehnquist were more conservative and restrained in the 1980s and 1990s, such as with *Shaw.* However, Court ideology or bias are not the purpose of this analysis. The purpose is neither normative nor interested in the individual decision-making for certain Court decisions. Instead, this analysis is concerned with the standard-making of the Court at any given time, whether with a conservative or liberal majority, and how those standards and precedents then impacted redistricting in the lower federal courts (LFCs). Some dissents are included in the discussion, often to highlight the theoretical implications of the Court's new standard, but the emphasis of this explanation is what *is* and what *was*, not *ought* or *could*. It is interested in *what* the Court did, not necessarily *how* or *why*, in order to look at the *how* and *why* of LFCs. It is an

for a fuller understanding of the development of jurisprudence on redistricting in the Supreme Court since *Baker*.

This chapter is a completely original analysis of Supreme Court standards on redistricting. By compiling these cases, organizing them this way and applying a political development framework, I am contributing a new way of thinking about federal court redistricting as a whole and a fresh analysis of well-known cases. By emphasizing the development of standards in categories, I narrow the focus of these cases to *just the standards*, shedding light on the legal thinking underlying redistricting and the aspects that will be a real constraint and influence on LFCs when they undertake map making.

Further, this original Supreme Court case analysis allows for readers to find exactly which standards and precedents LFCs needed to consider for a given year, by looking at either the individual analysis of cases or Table 3.3. For example, if one wanted to know what criteria a LFC was using to draw a state legislative map in Ohio in 1983, one would need to know that legal constraints of stare decisis and precedent that would impact the LFC's decision making. By looking at 1983 on Table 3.3 or tracing the individual cases in each category in this analysis, one can easily see that 1.in terms of population variance the *Reynolds/Mahan* standards dictated close by not exact population equality with an effective allowable deviation of 10%, 2. The 1982 Voting Rights Act amendments and *McDaniel* standards for race-conscious districting applied and 3. The *Gaffney* standard for partisan concerns should be used for federal court deference to the state.

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examination of what standards were implemented and when, and what legal foundations they are based upon, and ultimately what were the consequences of these standards (chapter 4).

This original case analysis of Supreme Court judicially manageable standards for redistricting allows for anyone to view the multiple orders of standards that would impact LFC decision making for any year between 1962 and 2019, as well as understand where that standard came from, how it developed and where it went afterward. This analysis contributes to both legal and political science scholarship as a new analysis and a useful research tool.

3.1 The Political Development of Supreme Court Redistricting Standards

There have been many excellent works of scholarship on the redistricting and reapportionment Supreme Court cases, including revealing histories of the court as they faced landmark decisions[174], legal analysis of judicial reasoning[175], and political science work on the consequences of redistricting cases[176]. However, while these approaches are useful for learning more about the cases, justices and the facts surrounding them, the best approach to understand federal court redistricting is to examine Supreme Court standards through an American political development framework.

Political development is a way to study political change in distinction from old Whiggish concepts of inevitable progress[177] or snapshot examinations of moments or rational choice "games". Using political institutions[178] as its substance, the form of political development is a study of "durable shifts in governing authority" - A change in

[174] For example, Powe, L. A. Scot, and Powe, L. A. Scot author. *The Warren Court and American Politics*. Cambridge, MA: Belknap Press of Harvard University Press, 2000
[175] For example, Spaeth and Segal, *The Supreme Court and the Attitudinal Model Revisited*
[176] For example, Carson and Crespin 2004
[177] Orren and Skowronek, *The search for American political development* 123
[178] Often historical institutionalism, Orren and Skowronek, 118, 133

the direction of institutional behavior and control over others that lasts for a period of time and has an impact. This definition, from Steven Skowronek and Karen Orren's examination of American Political Development, provides a useful framework for studying the U.S. Supreme Court on redistricting, reapportionment and gerrymandering. It is based in the tradition of historical institutionalism that emphasizes timing, sequence and feedback[179].

Along with Skowronek and Orren's concept of "intercurrence[180]," or "a polity constructed through multiple, asymmetric orderings of authority[181]", this in-depth understanding of political development allows this chapter to take a more comprehensive and systematic approach to studying court opinions between *Baker* and *Rucho* without bogging itself down in minutiae. Instead of simply seeing how the Court ruled at various times or fitting its rulings into a normative narrative of legal progress, this approach allows for an empirical examination of change over time.

Using the Supreme Court as the research site, I take each of the landmark Supreme Court rulings during this time period to map how the governing authority of the Court changed over this time and how these changes affected other institutions. I am chiefly concerned with how the Court's political development of judicially manageable standards for redistricting impacted the LFCs - a different order of authority operating

[179] Glenn, Brian J. "The two schools of American political development." *Political Studies Review* 2, no. 2 (2004): 153-165, 76, 156.
[180] ("Intercurrence ... refers to the simultaneous operation of different sets of rules to politics structured by a resolution in the basic principles of social organization and governmental control and it describes the disorder inherent in a multiplicity of ordering rules." Orren and Skowronek, *The search for American political development*, 118)
[181] ("the concept of intercurrence, of a polity constructed through multiple, asymmetric orderings of authority, provides a perch from which we get a clear view. Intercurrence puts movement and change at the center point of political analysis. The intercurrent polity may be held together in a relatively quiescent state for a time by artful arrangements hammered out at rarified levels of government…." Orren and Skowronek, *The search for American political development*, 182)

simultaneously and contemporaneously with the Supreme Court on the same subject matter.

Using the political development approach, this chapter follows the line of cases of reapportionment, redistricting and gerrymandering through the U.S. Supreme Court. Within this analysis, I bring out three separate overarching categories of standards:

1. *Population Standards: Urban vs Rural*
2. *Racial Gerrymandering Standards: Majority vs Minority*[182]
3. *Partisan Gerrymandering Standards: Democrats vs. Republicans*

Each category contains a multitude of individual strands of precedent and lines of cases themselves.

Within each of these categories, across a roughly chronological timeline, I focus specifically on the standards that each ruling created, both for Supreme Court and LFC adjudication, emphasizing both the legal foundation and the real outcomes. Tracing the development of these standards across the three categories and over time illustrates how the Court refines and enlarges the role of the federal judiciary throughout the process up until the Roberts Court, when avenues to adjudication for partisan gerrymandering and racial gerrymandering Voting Rights Act Section 5 Preclearance are completely eliminated (See: Figure 3.3).

These findings highlight the importance of path dependence in Supreme Court redistricting jurisprudence, where standards are rarely rolled back and instead entire avenues to adjudication must be foreclosed to reduce the Court's authority. Chiefly, however, this analysis highlights the changing, evolving nature of precedent over time

[182] When discussing racial gerrymandering, the general language focuses on majorities and minorities. In the specific context of this project, the majority is almost always White Americans, and the minority population is often Black Americans. However, as discussed, there are critical court cases related to the minority rights of Latino and Native American residents in redistricting and gerrymandering as well.

and therefore the changing standards to which LFCs must adhere when drawing or influencing redistricting maps.

3.2 Pre-Baker Standards

Baker v Carr in 1962 is the beginning of the "Reapportionment Revolution" and the start of federal court redistricting adjudication for all intents and purposes. However, it is far from the beginning of redistricting in the U.S.

While the federal courts were not involved in redistricting in a meaningful way prior to the 1960s, looking back historically at redistricting establishes the preeminence of "standards" in the redistricting process. The search for a manageable standard or a neutral principle, advising whomever to redistrict from an unbiased standpoint has always been a goal and an impossibility for redistricting. Starting with the foundations of redistricting and reapportionment illustrates how firm, judicially manageable standards are always elusive.

From a political philosophy standpoint, redistricting and reapportionment are critical exercises in any representative democracy to maintain accurate representation. However, with reapportionment, a conflict of values and principles over who and what will be represented and how it will happen is inevitable to occur. John Locke identified this problem as early as 1689, discussing the need for reapportionment as well as the problems inherent in the process.

In the *Two Treatises of Government,* as part of his larger discussion of executive prerogatives, Locke explained the need for reassessing the allocation of representatives based on the population shift and economic dynamism of any place. He wrote,

> Things in this world are in so constant a flux, that nothing remains long in the same state. Thus people, riches, trade, power, change their stations; flourishing mighty cities come to ruine, and prove in time neglected desolate corners, whilst other unfrequented places grow into populous counties, fill'd with wealth and inhabitants. But things not always changing equally, and private interest often keeping up customs and privileges, when the reasons of them are ceased, it often comes to pass, that in governments, where part of the legislative consists of representatives chosen by the people, that in tract of time this representation becomes very unequal and disproportionate.[183]

Populations change, people move, industries change and wealth moves. These dynamics mean that static apportionment of representation for a popular legislature is doomed to fail. Locke labels this as a problem "every one must confess needs remedy[184]."

Locke also points to the concerning question of *who* should reapportion. Most options he finds problematic. He argues that the people should not reapportion because it is akin to a revolution and dissolution of the constitution, and that the legislative cannot reapportion itself because it is corrupting and they do not have the authority. Locke suggests a prince and his prerogative power as the solution. And even within Locke's definition of the reapportionment problem, it is unclear what is being represented. Is it the population that is shifting or the business interests that have migrated or the geographic space that both occupy? He also points to the issues of self-interest, partisanship and incumbency protection, that will arise when a legislature reapportions itself. Although

[183] Locke, John, and Peter Laslett. *Two treatises of government*. Cambridge England New York: Cambridge University Press, 1988, 372.
[184] Locke, 372

Locke's discussion of rotten boroughs in 1689 is not a direct analog to the issues of redistricting in modern America, it does highlight the endemic bias and inevitable conflict that come from such a practice while simultaneously underscoring why such a practice is necessary for a truly representative democracy.

About a century later, America's Founding generation had the opportunity to articulate the early standards for redistricting and reapportionment in the United States. These standards are not only important because they create the form for the federal government, but the Constitutional language about reapportionment is the foundational standard used by the federal courts in the 20th century.

At ratification, the Constitution said very little about the practice of reapportionment and redistricting. Article I, Section 2 explains that the House of Representatives will be "chosen" by the people of the several states and that "representatives and direct taxes will be apportioned among the several states … according to their respective numbers." The section continues, "the actual enumeration shall be made within three years after the first meeting of Congress of the United States, and within every subsequent term of ten years, in such manner as directed by law[185]." On its face, this section seems more straightforward than Locke's discussion - clearly emphasizing the preeminent role of population as the source of representation in the House, with representation of place lying more in the Senate. However, reviewing the Notes of Debates in the Federal Constitution[186] and the Federalist Papers it becomes clear

[185] U.S. Const. Art. I, § 2,
[186] Madison, James. *Notes of debates in the Federal Convention of 1787*. Athens, Ohio: Ohio University Press, 1984, 244.

that what was being represented was often in doubt and the infamous and condemnable three-fifths clause only further complicates matters.

During the Constitutional Convention several delegates raised the question of whether property and wealth ought to be counted along with population for representation and taxation, in what would become the Article 1, Section 2 apportionment framework. For example, Gouverneur Morris argued that the central value of property in the role of government necessitates its inclusion into the apportionment equation[187]. However, involving wealth or property into the calculation of representation would have created substantial difficulty for how to measure specific wealth of inhabitants and the states - some form of additional assessment alongside the census. This eventually led to the use of population as a proxy for wealth as well as population. Advocates argued that there was a high enough correlation between wealth and population in a geographic territory that using population alone was sufficient. For example, Nathaniel Ghorum pointed to a previous census in Boston which found significant similarities between the number of inhabitants and the city's wealth as evidence of this use in the Constitution[188].

Although settling on population as a sufficient proxy for measuring real property and wealth, the remaining issue of how enslaved people ought to count was substantially discussed in the Debates.

After the three-fifths ratio was agreed to, and the Constitution was signed, Madison defended the ratio as a unique measurement balancing between property and personhood. In Federalist 54, he clarifies that the "number of people" is the "standard" for representation and taxation for a state. In one sense, this number represents the

[187] Madison, *Debates,* 244
[188] Madison, 275

"personal rights of people" that are being represented in Congress, in the other it serves as the proportion of wealth a district has that can be directly taxed by Congress. But he also defends the use of the three-fifths ratio describing enslaved people as "being considered by our laws in some respects, as persons, and in other respects as property,[189]" facing punishment for crimes like a resident and being at the will of a master like property. The argument continues stating that as property alone, enslaved people have no place in the computation of apportionment, and as slaves, they do not deserve the full count of a citizen.

Looking at the Constitution and these founding documents it is clear that the earliest principle for representation, apportionment and districting was for distribution of both people and wealth or property. However, it is also plainly stated and defended that the standard for such a principle is to be population although with a racist formula for calculating and measuring population. The inclusion of the three-fifths clause and the defense found in Federalist 54 further illuminate the thinking behind this standard.

Beyond the Constitution, and the convention and ratification debates, the next most important aspect for understanding the development of judicial standards for redistricting in the Supreme Court[190], is the 14th Amendment.

First, Section 2 of the 14th Amendment rewrites Article I, Section 2 of the Constitution, explicitly changing the apportionment calculus, removing the three-fifths provision and apportioning based on all people regardless of race - A wholly new representational standard.

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[189] *The Federalist Papers,* No. 54

[190] Article III is critical in any understanding of the Supreme Court's functions and the 9th and 10th amendments certainly could give a strong basis for redistricting by state legislatures and commissions.

Second, and most importantly, Section 1 of the 14th Amendment provides for the equal protection of all persons in the United States' jurisdiction. Section 1 reads,

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[191]

The Equal Protection Clause would become a critical Constitutional foundation for the Court's first redistricting standards during the 1960's Reapportionment Revolution, nearly 100 years after the 14th Amendment was passed, helping establish the One Person, One Vote standard. The Due Process Clause of the 14th Amendment is also a critical feature in redistricting litigation as is the 15th Amendment in relation to racial gerrymandering claims.

While the U.S. Constitution and the 14th Amendment became crucial legal tools in the Court during the 20th Century, they had little impact on redistricting during the 19th Century. Instead, 1849's *Luther v Borden*[192] was a dominant force.

Luther was a Supreme Court case related to a political disagreement bordering on revolution and war in Rhode Island in the 1840s. At issue was that the 1663 royal charter that founded the Rhode Island colony was still its basis for government and determined its suffrage rights. In 1841, reformers drafted a new constitution with universal white, male suffrage, which was ratified by towns across Rhode Island and elected Thomas Dorr as governor. The Governor elected under the royal charter constitution, Samuel King, led a less substantial constitutional convention with minor changes and refused to

[191] U.S. Const., Amend. 14
[192] Luther v Borden 48 US 1 (1849)

acknowledge the other radical document or its elected governor. Eventually, King declared martial law in Rhode Island to stamp out Dorr and his supporters. *Luther v Borden* refers to players on either side of this conflict, one who raided the others home, and whether or not the martial law, or either government, was legitimate.

The facts of this case are important because they are related to representation and apportionment, and they are extreme. The case involves armed forces and a disagreement over the type of regime that should govern U.S. citizens - and who has the right to vote. More fundamentally however, an impetus for the radical constitutional convention is that the royal charter heavily favored landed elites. This meant that rural areas received substantially more apportionment of legislative seats and therefore better representation than the urban citizens. The urban citizens are the ones who led the "revolution" for a new constitution that elected Dorr. This is a powerful example of the timeless nature of these conflicts that appear again and again in the 20th century, notably with *Baker.* However, in *Luther* the conflict was taken to more extreme ends; citizens acted locally first to remedy the situation through local democracy rather than turning to the courts; and there was not the racial component of urban versus rural seen in many 20th century cases.

While the facts of the case are compelling for contextualizing future redistricting and malapportionment conflicts, it is the standard in Chief Justice Roger Taney's opinion that had a lasting impact on the federal courts. Noting the seriousness of the question before the Court, Taney makes the argument that while the Constitution does charge the federal government to act in this instance, with the Guarantee Clause and provisions for emergency powers and interference with domestic insurrection, these are properly the

purview of the Congress and the Executive. The federal courts should not interfere in these areas. Taney concluded,

> Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government and establishing a new one in its place is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.[193]

Taney's decision in *Luther* is what officially started what became known as the "political question doctrine." Building upon notions of the separation of Constitutional branches and offices in *Marbury v. Madison*[194], Taney developed the fully formed standard that the federal courts could not adjudicate cases or controversies that substantially involved a "political question." Political questions were nonjusticiable by the courts because "they had been superficially delegated to a different institution, were intrinsically mixed up with policy judgements, or lacked an adequate standard that could guide judges."[195]

[193] Luther v. Borden, 48 U.S. 1 (1849)
[194] Marbury v Madison, 5 US 137 (1803)
[195] Gillman, Howard., Graber, Mark A, and Whittington, Keith E. *American Constitutionalism*. New York: Oxford University Press, 2013.

The *Luther* decision and the political question doctrine became the dominant standard for redistricting and reapportionment questions in the decades following the case. Reapportionment, redistricting and gerrymandering were issues best left to Congress or local governments.

In the 20th Century, there are several examples where the political question doctrine from *Luther* was used as the standard to declare redistricting controversies nonjusticiable.

In 1932, *Wood v Broom*[196], saw the Court sidestep the issue of redistricting based on a separation of powers. The 1911 Congressional Reapportionment Act required compactness, contiguity and equal population for Congressional districts. However, the Court declared that these standards were no longer required by states because they were not reenacted for the following reapportionment cycle in a 1929 act. This case was later used as evidence that the Court had exercised jurisdiction on reapportionment questions before[197], and while it did so, it did not override the high threshold of the political question doctrine to require anything of states. It simply practiced a more common action by the Court of declaring a law valid or invalid in the subject area.

The most important appearance of the political question doctrine in redistricting before *Baker* is seen in 1946's *Colegrove v Green*.

In *Colegrove*, three Illinois voters sued the state for having noncompact and malapportioned districts based on both the U.S. Constitution and the 1911 statute at issue in *Wood v. Broom,* upon which the lower federal relied as a precedent and standard in its

[196] Wood v Broom, 287 US 1 (1932); Frequently cited case but ultimately processing little precedential value
[197] Baker v Carr, 369 US 186 (1962)

dismissal of the case. Justice Felix Frankfurter wrote the Court's opinion in *Colegrove*, arguing for the case's nonjusticiability as a political question under the *Luther* standard. Frankfurter's opinion emphasizes that what the plaintiffs are asking from the Court is not only imprudent, but far past the duty and ability of the federal judiciary. He wrote,

> We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature, and therefore not meet for judicial determination… The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity...In effect, this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois … Of course, no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system...To sustain this action would cut very deep into the very being of Congress. *Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts, because they clearly fall outside the conditions and purposes that circumscribe judicial action. ...The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action, and, ultimately, on the vigilance of the people in exercising their political rights*[198].

Frankfurter's language in the Court opinion is forceful and straightforward. Echoing the standard in *Luther,* Frankfurter argues clearly that the question of malapportionment and redistricting lies outside of the purview of the Courts, especially when it comes to relief. He explicitly states that federal courts cannot "re-map" Illinois. His oft-quoted warning not to "enter the political thicket" puts the onus on the state

[198] Emphasis added, Colegrove v Green, 328 US 549 (1946)

legislature and Congress to act. This case is also notable for which areas of the Constitution is references. Unlike future cases which rely heavily on Article I, Section 2 and the 14th Amendment Equal Protection Clause, here Frankfurter references Article I and Article IV, in a similar fashion to *Luther*[199]. Frankfurter succinctly summarized his opinion in *Colegrove* during his dissent in *Baker* two decades later, writing,

> *Colegrove* held that a federal court should not entertain an action for declaratory and injunctive relief to adjudicate the constitutionality, under the Equal Protection Clause and other federal constitutional and statutory provisions, of a state statute establishing the respective districts for the State's election of Representatives to the Congress.[200]

Colegrove also saw Justice Wiley Rutledge concurring with the judgement of the Court, but with more skepticism of Frankfurter's opinion. He did not want to foreclose jurisdiction over apportionment questions under the political question doctrine, but instead set a high bar, which was not achieved in this case.

Justice Hugo Black dissented in *Colegrove* and was joined by Justices William O. Douglas and Frank Murphy. Although Frankfurter's opinion is the most important in *Colegrove* for this study of the impact of federal court redistricting because it set the dominant standard for judicial action in the decades leading up to *Baker* - judicial non interference - Black's dissent is also notable for its prescient nature. The argument made in Black's dissent is similar to the argument that is ultimately made in *Baker.* Black makes clear that 1. Malapportionment is a harm and violation of the 14th Amendment Equal Protection Clause, 2. It is not beyond the jurisdiction of the Courts based on the political question doctrine and 3. That the federal courts have the power and ability to

[199] Luther v Borden
[200] Baker v Carr

provide relief in cases of malapportionment and redistricting based on the Constitutionally granted equity powers. Black wrote in his *Colegrove* dissent,

> Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit...It is true that the States are authorized by § 2 of Article I of the Constitution to legislate on the subject of congressional elections to the extent that Congress has not done so. Thus, the power granted to the State Legislature on this subject is primarily derived from the Federal, and not from the State, Constitution. But this federally granted power with respect to elections of Congressmen is not to formulate policy, but rather to implement the policy laid down in the Constitution that, so far as feasible, votes be given equally effective weight. Thus, a state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted… It is true that voting is a part of elections, and that elections are "political." But, as this Court said in *Nixon v. Herndon,* supra, it is a mere "play upon words" to refer to a controversy such as this as "political" in the sense that courts have nothing to do with protecting and vindicating the right of a voter to case an effective ballot. The Classic case, among myriads of others, refutes the contention that courts are impotent in connection with evasions of all "political" rights. Wood v. Broom, 287 U. S. 1, does not preclude the granting of equitable relief in this case.[201]

Despite the argument in Black's dissent, Frankfurter's *Colegrove* majority opinion was the dominant standard for the federal courts when faced similar cases during the 1940s and '50s. The federal courts did not act on malapportionment and the states also did not act, allowing for substantial malapportionment across the U.S. in the first half of the 20th Century[202]. Many states in Congress or state legislatures had apportionment systems that heavily favored rural areas at the expense of urban vote dilution.

In 1950, in the case *Peters v South[203],* the Supreme Court dismissed a case that challenged the constitutionality of Georgia's county unit election system for the

[201] Colegrove v Green
[202] Bullock, Charles, *Redistricting: the most political activity in America.* New York: Rowman & Littlefield, 2010, 27-32.
[203] Peters v South, 339 US 276 (1950)

Democratic primary, involving statewide offices such as U.S. Senator, under the 14th and 17th amendments. Among the precedents that the Court relied on were *Broom* and *Colegrove.*

Although Frankfurter's warning to not enter the political thicket was the dominant judicial standard of the time, it did not mean that there was never action on redistricting cases from the federal courts. In 1960, the Court did decide *Gomillion v Lightfoot*[204].

Gomillion was a case concerning the 1957 Alabama Legislature law that redrew the boundaries of Tuskegee, Alabama in an irregular 28-sided shape in order to redistrict all but a few Black Americans outside of the city limits, negating their voting power. The plaintiffs sued stating that Alabama was violating their voting rights and discriminating based on race according to the 14th Amendment's Due Process and Equal Protection Clauses as well as the 15th Amendment. The Court found in favor of the plaintiffs, stating that the state did discriminate and violate the rights of Black voters in the city.

However, the Court was careful to explain the standard it was creating with this ruling - it was not one of judicial interference in redistricting generally. In the Court's opinion, Frankfurter wrote, "This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama." However, the Court argued that the state so aggressively violated the Constitution that it was not protected by federalism, judicial conservatism or the political question doctrine. Creating a clear judicial standard for Court action, the majority concluded,

[204] Gomillion v Lightfoot, 364 US 339 (1960)

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here[205]

Frankfurter also addresses in the *Gomillion* decision why the precedent of *Colegrove,* while remaining a valid precedent and standard, does not apply in this instance. He wrote,

> The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. *When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.* In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.[206]

Importantly, the *Gomillion* decision rests on the 15th Amendment prohibition on violating voting rights based on race. In a dissent, Justice Charles Whittaker argues it should instead be based on the 14th Amendment Equal Protection Clause[207], foretelling of a future standard to be used in redistricting and racial gerrymandering. However, though used by the plaintiffs in the complaint, the majority does not use the 14th amendment as Constitutional evidence for rights violations in *Gomillion*.

Gomillion established the standard for the Supreme Court to act in redistricting, but only in narrow circumstances and with a high barrier to entry. *Gomillion* is an

[205] Gomillion v Lightfoot
[206] Emphasis added, Gomillion
[207] Gomillion, Whittaker dissent

example of an egregious gerrymander on its face, including the shape of the district drawn. It specifically targets a racial minority, in an area with a longer history of racial disenfranchisement. It violates voting rights based on rights in both its intent and effect. And the court opinion takes the time to state that normally the Court would not get involved in state redistricting if it is not such a violation of federally protected rights.

Gomillion sets a limited, but critical standard for Court action in state activities. This becomes important in redistricting cases and especially important in racial gerrymandering. But, at the time it does not create a sufficiently new standard to undo the strength of the nonjusticiability and political question standards for most redistricting cases set by *Luther, Broom* and *Colegrove.* That takes a few more years.

3.3 II. Population Standards - *Rural v. Urban*

The first category of judicial standards for redistricting concerns the first set of standards that arose chronologically. Starting with *Baker v. Carr*, the Supreme Court took on a variety of cases following up on the justiciability of malapportionment cases in what would become known as the Reapportionment Revolution. This not only led to a substantial change in the way reapportionment worked in U.S. politics, but it also produced the more coherent and consistent set of judicially manageable standards. The population standards developed from the progeny of *Baker* remain the firmest foundation of redistricting jurisprudence in the Supreme Court and federal judiciary as a whole.

Looking at the landmark cases in a snapshot (Table 3.1), one can see the development and enlargement of the population standards. Beginning with *Baker,* which

dealt with malapportionment but did not strictly create a new population standard, standards became more specific and actionable over time. They became judicially manageable. First the standards locate the Constitutional basis for the harm, then they allow for a remedy to be fashioned and finally the standard provides the connective tissue between the two to first test for the harm and second fashion the remedy based on the same principle.

There is no standard more important for federal court redistricting than *Baker v. Carr*. The landmark Supreme Court case was initially argued in the spring of 1961 before being reargued in the fall and decided in May of 1962. There have been many reports on the controversial nature of the case, the internal anguish felt by the justices such as Justice Whittaker and the gravity of *Baker*[208]. Chief Justice Earl Warren called *Baker* the "most important case of his tenure" on the Court[209].

Baker involved the malapportionment of the Tennessee state legislature based on counties. The details of the 1962 case closely mirrored 1946's *Colegrove v Green*, as well as the more general reapportionment trends throughout the United States. Tennessee had not reapportioned consistently since 1901 and now there were legislators representing rural districts with far fewer residents than districts in urban areas. The plaintiffs in *Baker* argued that the malapportionment in Tennessee violated the 14th Amendment of the Constitution due to its lack of standardized apportionment and inequality of representation. They sought a remedy of a court-ordered injunction to prevent future

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[208] For example, Hasen, Richard L. *The Supreme Court and Election Law : Judging Equality from Baker V. Carr to Bush V. Gore*. New York: New York University Press, 2003.; Powe, *The Warren court and American politics*.

[209] Abumrad, Jad. *Radio Lab Presents: More Perfect Podcast.* Podcast audio. June 10, 2016. https://www.wnycstudios.org/podcasts/radiolab/articles/the_political_thicket

elections from being held under the 60-year-old apportionment plan. The three-judge panel dismissed the suit due to the nonjusticiability of the question, echoing the *Colegrove* decision 15 years earlier. They also cited a lack of judicially manageable relief.

When the Supreme Court ultimately decided *Baker,* the 6-2 majority redefined the political question doctrine in *Luther* and overturned the nonjusticiability precedent from *Colegrove. Baker* established a new standard - one which would lead to the birth of several more critical standards. The case was a profound statement on the power of the federal courts, and the new standard declared redistricting and reapportionment controversies to be justiciable issues under the 14th amendment - legislative redistricting was no longer a political question closed off from federal court relief.

The *Baker* decision did not establish a judicially manageable standard for measuring unconstitutional malapportionment or redistricting, and it did not establish a standard for granting remedy or relief. However, it established justiciability so that these standards could be created by the federal judiciary in subsequent cases. It established that the 14th amendment provided a possible judicially manageable standard for redistricting.

The court opinion in *Baker*, written by Justice William Brennan, makes a substantial legal argument with close accounting for precedent, first establishing the Court's jurisdiction and plaintiff's standing on the subject and then the justiciability of redistricting. While discussing jurisdiction, Brennan points to "an unbroken line of precedents" that establish Court jurisdiction on the subject of reapportionment, including *Wood v Broom* and *Colegrove*[210]. Discussing jurisdiction in distinction from justiciability

[210] Colegrove v Green

creatively contextualizes these precedents in a way where Brennan can situate *Baker* in the line of cases of *Colegrove*, without fully overturning the 1946 case. He added that *MacDougall v Green*[211] and *South v Peters* are also in the line of cases of *Colegrove* and assert federal court jurisdiction on this question again and again, holding that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint."[212] Brennan also established the plaintiffs' standing before directly addressing justiciability.

Directly addressing justiciability concerns, Brennan argued that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[213] He asserted that the LFC had "misinterpreted" *Colegrove* in determining the malapportionment in *Baker* to be a nonjusticiable political question. This quote illustrates the narrow lane Brennan was determined to occupy, not uncommon among Court opinions, overturning the precedents' nonjusticiability standard without trying to directly eliminate the standards of precedent or the value of stare decisis in the federal judiciary.

Brennan directly addresses *Colegrove* and *Gomillion* in this justiciability argument. Discussing *Gomillion,* Brennan stated that the Court was able assert its power and protect Constitutionally guaranteed voting rights against the racial redistricting "cloaked in the garb of the realignment of political subdivisions"[214] - protecting rights from "manipulation" under the guise of politics. As Brennan described the facts that the Court's opinion in *Gomillion* found that "a statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because

[211] MacDougall v. Green, 335 U.S. 281 (1948)
[212] Baker v Carr
[213] Baker v Carr
[214] Baker v Carr

the mechanism employed by the legislature is a redefinition of municipal boundaries" and that "when a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected rights,"[215] means that *Colegrove* does not foreclose federal court justiciability when a Constitutional right is being infringed upon. Part of the standard that Brennen described means that the Constitutional harm in redistricting is not limited to *Gomillion's* 15th Amendment or a racial discrimination. Brennan's opinion is careful to use *Colegrove* in the context of *Gomillion* to make its case for federal court justiciability of redistricting.

Brennan's argument over justiciability establishes six criteria to test for whether case or controversy is nonjusticiable, building on, instead of destroying, the *Luther* precedent. While this test serves as one judicially manageable standard for facing future questions of justiciability based on political questions, it serves the more subject-specific goal of building the argument as to why redistricting and reapportionment do not fit the political question criteria and are therefore justiciable in federal court. Brennan ended his argument succinctly, writing,

> We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment. The judgment of the District Court is reversed, and the cause is remanded for further proceedings consistent with this opinion[216].

The concurring opinions in *Baker* build upon Brennan's argument, with Douglas further exploring the implications. Douglas argued that the justiciability standard could be

[215] Baker v Carr
[216] Baker v Carr

enforced by federal courts through relief understood under the principles of equity[217]. He also added that the situation presented in *Luther* was unique and that the principles of judicial deference to Congress or the Executive for political questions was not something that should become a general principle or apply to voting rights in modern America[218]. Justice Clark concurred in a similar fashion, suggesting various forms of remedy that the Courts could consider[219]. Both were suggesting possible judicially manageable standards to hold legislators accountable, connecting the 14th Amendment rights to judicial powers for harm relief.

Justice Frankfurter, joined by Harlan, forcefully dissented from the *Baker* majority. Frankfurter argued for the maintenance of the standard he articulated in *Colegrove* - the standard wrested in the *Luther* decision more than a century early. He wrote,

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[217] Baker; Douglas concurring, "**T**he justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity. feel strongly that many of the cases cited by the Court and involving so-called "political" questions were wrongly decided

[218] Baker; Douglas concurring, "The statements in *Luther v. Borden,* 7 How. 1, 48 U. S. 42, that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable. Of course, the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course, each House of Congress, not the Court, is "the Judge of the Elections, Returns, and Qualifications of its own Members." Article I, Section 5, Clause 1. But the abdication of all judicial functions respecting voting rights (7 How. at 48 U. S. 41), however justified by the peculiarities of the charter form of government in Rhode Island at the time of Dorr's Rebellion, states no general principle. It indeed is contrary to the cases discussed in the body of this opinion -- the modern decisions of the Court that give the full panoply of judicial protection to voting rights. Today we would not say with Chief Justice Taney that it is no part of the judicial function to protect the right to vote of those "to whom it is denied by the written and established constitution and laws of the State."

[219] Baker; Clark, concurring "The federal courts are, of course, not forums for political debate, nor should they resolve themselves into state constitutional conventions or legislative assemblies. Nor should their jurisdiction be exercised in the hope that such a declaration as is made today may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief. To my mind, this would be nothing less than blackjacking the Assembly into reapportioning the State. If judicial competence were lacking to fashion an effective decree, I would dismiss this appeal. However, like the Solicitor General of the United States, I see no such difficulty in the position of this case. One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present, and might be more effective."

> The Court's authority -- possessed of neither the purse nor the sword -- 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...In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.[220]

Frankfurter's dissent includes the employment of U.S. and British history as evidence of redistricting, reapportionment and gerrymandering over time, and for why the federal courts should not enter this "thicket."

But Frankfurter's whole argument is a broader one, and one that strikes at the importance of the *Baker* decision. The dissent explores the questions at the heart of political philosophy: Who should rule? How should a constitution work? What is the basis of representation?

Frankfurter saw the overturning of the *Luther* and *Colegrove* precedents by the majority as a dangerous shift in governing authority in the history of the U.S. federal and state governments - an untenable step in American political development. The federal courts now not only had the power to take, hear and decide redistricting cases, they very well might have the ability to reshape legislatures across the U.S., including Congress, and redefine what representation may be with only the guidance of the amorphous principles of equity.

Harlan, who joined Frankfurter in the *Baker* dissent, similarly foresaw these issues. In their warnings, both justices touch upon many of the stickiest questions that the

[220] Baker v Carr, Frankfurter dissent

courts eventually face in the policy arena - of determining illegal partisan gerrymandering, of how to remedy racial vote dilution, and of where to draw each line.

Baker ushered in the new federal court standard of justiciability for redistricting cases. No longer nonjusticiable, political questions, the federal courts began to take on more cases dealing with the key questions in all of their possible permutations: state legislatures, state senates, federal legislatures, local legislatures, multi-member districts, proportional representation, counting residents, counting voters, water districts[221] etc. After *Baker*, the Court moved quickly to establish firmer standards for the actual adjudication of redistricting disputes. Over the course of two years, with *Reynolds v Sims,* the Court would establish a completely new standard for federal judicial action that was manageable and based in the Constitution.

In 1963, the term after *Baker*, the Court decided *Gray v Sanders*[222]*. Gray* involved the constitutionality of Georgia's statewide primary election county allocation scheme, which was based upon tiered voting units based on population. The case dealt with facts strikingly similar to *Peters v South*[223]*.* The facts of *Gray* are important because, as Douglas wrote in the Court's opinion, *Gray* is unlike *Baker, Gomillion* or the Constitution on its face. It does not deal with malapportionment under the 14th amendment like *Baker*, racial discrimination at the state level that is subject to federal oversight as in *Gomillion,* or the malapportionment of the federal Senate found in the U.S. Constitution. Despite these factual differences, the Court still views the

[221] Water districts are one of the exceptions to One Person, One Vote - Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 733-35 (1973)
[222] Gray v. Sanders, 372 U.S. 368 (1963)
[223] Peters v South

apportionment scheme as unequal under the 14th amendment and articulates a clear standard: One Person, One Vote. Douglas wrote,

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing - one person, one vote[224].

The *Gray* decision, like the *Baker* decision, does not go all the way to demanding complete population equality of all legislatures across the U.S. It is another incremental step toward that standard. Instead, it uses the five venerated U.S. writings to establish what the 14th amendment equal protection clause should mean for districting. It comes to the same conclusions of the Founders during the debates on the Constitution - a simple use of population - but with a very different line of reasoning, no accounting for property or wealth, and a different basis. In effect, the Court in *Gray* said: judges should use the standard of population equality (found in the Declaration of Independence, the Gettysburg Address, the 15th, 17th and 19th amendments) to test whether there is a violation of the 14th amendment equal protection clause and to fashion a remedy/ provide relief - One Person, One Vote.

Wesberry v Sanders again moved the standard for the Court forward. *Wesberry*, argued in 1963 and decided in 1964, also dealt with malapportionment in Georgia, this time related to the Fifth Congressional District, which was “grossly out of balance” with the other districts in the state based on population. The apportionment was based on a 1931 law. Dismissed by the lower federal court for lack of equity under the *Colegrove* standard of nonjusticiability of redistricting as a political question,[225] the Supreme Court

[224] Gray v Sanders
[225] Wesberry v Sanders, 376 U.S. 1 (1964)

found equity in the standard of One Person, One Vote used in *Gray*, although with different constitutional footing.

The Court opinion in *Wesberry*, written by Justice Hugo Black, returns to the Founders and the Constitutional convention. Black makes the argument that the concept of representation in the House of Representatives is and ought to be firmly based in population[226] - specifically equal population. While the initial cases of *Gray* and *Baker* dealt with state action and therefore the 14th Amendment Equal Protection Clause, the *Wesberry* opinion is founded in an interpretation of Article I informed by history. Black wrote,

> We hold that, construed in its historical context, the command of Art. I, § 2 that Representatives be chosen "by the People of the several States" means that, as nearly as is practicable ... It would be extraordinary to suggest that, in such statewide elections, the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta. *Cf. Gray v. Sanders,* 372 U. S. 368. We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. *To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention*[227]. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.[228]

In *Wesberry*, the Court articulated two important standards. First, the Court applied the standard of One Person, One Vote to Congressional reapportionment,

[226] Wesberry v Sanders
[227] Emphasis added
[228] Wesberry, Black Opinion

building on the more general declaration of this standard in *Gray*. The Justices further developed the standard in *Wesberry*, adding the language "as nearly as practicable." This judicial verbiage makes the standard particularly manageable for testing the constitutionally of an apportionment and fashioning a remedy - it is a high threshold of population equality.

Second, the Court based this "as nearly as practicable" standard of population equality in Article I, Section 2 of the Constitution. Although there is no language of "population equality" to this extent in Section 2, by combining Article I, Section 2 with the founding debates and documents the Court strengthens its argument. The source of the standard is significant. In *Wesberry* the Court is able to come to a similar conclusion and standard as seen in *Gray* but with distinct legal sources. This strengthens the One Person, One Vote standard by broadening the Constitutional basis and therefore adding more legitimacy.[229]

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[229] Justice Harlan dissented in *Wesberry* deconstructing the argument that Article I, Section 2 should be the basis for a clear standard of population equality among Congressional districts. Hueing closely to the *Colegrove* opinion, the *Baker* dissent and especially the *Luther* opinion, he argues that this action of Congressional district equality clearly is within the power of the U.S. Congress to mandate under Article 1, Section 4. Harlan argues that the plain language of Article I, Section 2 says nothing about equal populations and that there is no source for the Court to act with *Wesberry,* writing "Once it is clear that there is no *constitutional* right at stake, that ends the case."# Harlan is particularly concerned about the Court overstepping its bounds within the political system, risking its legitimacy as mentioned by Frankfurter in *Baker*, and becoming the source of reform and judicial activism (Wesberry; Harlan dissenting, ""This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds, but equally upon recognition of the limitations on the Court's own functions in the constitutional system. What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court, in my view, does a disservice both to itself and to the broader values of our system of government.") Although Harlan's dissent is less important than the majority opinion when examining the development of standards for redistricting in the Supreme Court. It is useful when looking at the political development of the American political system more broadly in the time period. The concerns that Harlan highlights in *Wesberry* are related to 1. The abdication of redistricting issues from Congress to the states, which allows Court action and 2. The shift in governing authority of reform in the American political system, from Congress to the Courts, and

Reynolds v. Sims was also decided in 1964, just mere months after *Wesberry. Reynolds* is the most complete statement on the Court's thinking about standards and population standards for redistricting. The Court's opinion, written by Chief Justice Earl Warren, picks up where the *Baker* opinion leaves off, addressing many of the questions raised but unanswered in the 1962 case. Where *Baker* opened the door to federal court justiciability, with specific standards for adjudication to come later, *Reynolds* explicitly states the standards for first testing the constitutionality of a state's legislative apportionment scheme and secondly for fashioning a remedy.

Warren starts the *Reynolds* opinion by recontextualizing *Baker*. While much of the actual opinion in *Baker* concerned the jurisdiction of the court in redistricting and what is required for a political question in the *Luther* doctrine, Warren pulls a cleaner standard from the decision in *Reynolds*. He wrote, "We indicated in *Baker,* however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme." The effect of *Baker* was that the 14th Amendment provides the Constitutional right for federal court action - and *Reynolds* explains what the action is. *Reynolds* adds force to the standard in *Baker* - states need to act on the standard of population equality required by 14th Amendment, if not, the courts *will* act to ensure compliance.

This is a critical step in the development of federal court involvement in redistricting and reapportionment. It is the loaded gun behind the door. Constitutional compliance is required by all redistricting institutions. If they fail, the federal courts will

whether or not it is "durable" in Skowronek and Orren's terms, or whether it is destined for loss of legitimacy in the Court.

now act to ensure this compliance. The eventual method for ensuring compliance and legality would be remedial map making by LFCs. What *Baker* started in theory, in jurisdictional and justiciability developments, *Reynolds*[230] started in practice -population equality is required, the LFCs will draw maps if they need to, and they have one standard to guide them: One Person, One Vote.

In addition to contextualizing *Baker,* the *Reynolds* opinion also addresses *Gray* and *Wesberry.* While noting the differences with *Gray* and *Wesberry*, because they deal with statewide elections and Congressional districts, and each restricts the states differently, and feature different Constitutional concerns[231], Warren explained that there is a common principle being employed in all three. In *Reynolds,* the Court is looking to make sure the same standard of the two Georgia cases should apply to state legislatures. He wrote,

> *Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.[232]

Ultimately, the Court continued in the line of cases, applying the One Person, One Vote standard to all state legislatures in *Reynolds.* However, unlike *Gray* and *Wesberry*, the *Reynolds* opinion addresses several other concerns important to redistricting. First, the *Reynolds* decision clarifies that legislators in state houses and senates explicitly

[230] Along with Wesberry
[231] The 15th, 17th and 19th amendments for *Gray* and Article I, Section 2 for *Wesberry*
[232] Reynolds v. Sims, 377 U.S. 533 (1964)

represent residents, not places or property[233]. Second, many of the apportionment discrepancies deal with the question of rural districts and urban districts. In both *Colegrove* and *Baker* malapportionment was at issue due to old apportionment acts that had not been updated to account for urbanization and the shift in population. The result were state legislatures with outsized representation for rural areas with districts underpopulated relative to the growing cities. This issue, central to the vote dilution argument in *Baker*, was put to rest in *Reynolds,* with Warren stating that urban and rural areas needed to have equal population and location of voters doesn't matter to the Constitution[234]. Third, the Court opinion also established that state legislatures, by adhering to these population requirements, could not have state senates that were malapportioned by place like the U.S. Senate.

All three of these conclusions were based on the 14th Amendment and the equal population standard. The absence of a state senate based on place is a logical extension of the standard, leaving the U.S. Senate as the sole body constitutionally able to be malapportioned. These developments as collieries to the standard of One Person, One Vote help make the standard more judicially manageable.

[233]Reynolds v Sims; Warren opinion, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

[234] Reynolds v Sims; Warren opinion, "Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids "sophisticated, as well as simple-minded, modes of discrimination." *Lane v. Wilson,* 307 U. S. 268, 307 U. S. 275; *Gomillion v. Lightfoot,* 364 U. S. 339, 364 U. S. 342. As we stated in *Wesberry v. Sanders, supra"*

Overall, *Reynolds* established two critical and long-lasting standards for the federal courts.

First, it established the judicially manageable standard of One Person, One Vote "as nearly of equal population as is practicable" for both houses of state legislatures based on the 14th Amendment and *Baker* precedent. It is a subtly different and lower standard than the Congressional standard in *Wesberry* of "as nearly as practicable" and still allows for some representation of place[235]. Although this lower threshold of equality applies to states, it ends the dispute between rural and urban America by requiring equal representation of constituents throughout a state regardless of location and does not allow vote dilution. Warren explains the Court's constitutional reasoning in the opinion,

> Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown v. Board of Education,* 347 U. S. 483, or economic status, *Griffin v. Illinois,* 351 U. S. 12, *Douglas v. California,* 372 U. S. 353. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures...A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the

[235] Reynolds; Warren opinion, "By holding that, as a federal constitutional requisite, both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. … In *Wesberry v. Sanders, supra,* the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in *Wesberry* -- equality of population among districts -- some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid so long as the resulting apportionment was one based substantially on population and the equal population principle was not diluted in any significant way."

> clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws, and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people.' 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[236].

Warren's opinion makes a compelling argument and fleshes out how the 14th Amendment provides the judicially manageable standard that *Baker* alludes to. The analogy of representation on the basis of place as well as race provides an important explanatory tool.

The second important standard that *Reynolds* develops is the way that federal courts should use the One Person, One Vote for relief. Although the Court does not spell out a clear standard for creating a remedy, it emphasizes the importance for federal courts to act. Like *Baker, Reynolds* provides for the lower federal courts to act, but without a clear standard except for "equity" principles. He wrote,

> "We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to, and should, consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or

[236] Reynolds v Sims

> embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in *Baker v. Carr,* "any relief accorded can be fashioned in the light of well known principles of equity."[237]

This comment by the Court on relief, reads with a humble tone but gives important directive standards to the lower courts. If there is a violation, the courts must act. If there is an imminent election, they must act quickly. They have some latitude to allow an election with a malapportioned map, but equity is still the guide for remedy. From this excerpt, equity and impending election, comes judicial map making of legislative districts. Although, *Reynolds* does not have explicit explanations for how the LFCs must draw the district lines or whether to favor political subdivision lines or compactness, as Harlan argues in his dissent quoted in the introduction.[238] This concluding statement does not provide a clear assessment of how lower federal courts should act in practice. The standard provides guidance, but no requirements or procedures. A vacuum remained in the standard.

When there was time before an election, LFCs remained deferential to the legislatures immediately after *Reynolds*, protecting their legitimacy. LFCs often gave legislatures another chance at redistricting quoting that reapportionment "is primarily a matter for legislative consideration and determination, and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so," from *Reynolds*.[239] This is among the most-often quoted parts of the *Reynolds* decision in LFC decisions during the 1960s, when LFCs give initial deference to the legislatures to try

[237] Reynolds v Sims
[238] Reynolds v Sims; Harlan dissent
[239] Reynolds v. Sims, 586 of 377 U.S.; 1394 of 84 S. Ct

reapportioning again in line with the Supreme Court standards laid down in the landmark case.

Decided on the same day as *Reynolds, Lucas v. Forty-Fourth General Assembly of Colorado*[240] also stated the supremacy of population equality as the sole standard for apportionment of state legislative districts. The case involved a more complicated apportionment scheme that was not malapportioned through decades of neglect, but rather a formula that combined population with other factors to decide apportionment. The Court declared population to be the sole factor used in deciding constitutional equality in *Lucas* and discounted the argument that because the state's voters recently passed the plan it should remain. *Lucas* foreshadowed the cases ahead for the Court - specific, rare or unique exceptions to the *Reynolds* standard that the federal courts would have to cull throughout the states to install this new standard of equality as the Law of the Land.

Following *Reynolds,* there are several cases that deal with population standards. However, these cases are less philosophical and create fewer standards. Population and apportionment standards after *Reynolds,* refine and clarify the standards in *Reynolds, Gray* and *Wesberry*. They do not challenge the constitutional bases of these cases. They do not challenge the standard in *Baker*. Instead, these cases continue to wrestle with the vacuum that *Reynolds* concludes on - How the lower courts should provide relief and how the standard of One Person, One Vote should be implemented.

[240] Lucas v. Forty-Fourth Gen. Assembly of Colorado, 377 U.S. 713 (1964)

These post-*Reynolds* cases illustrate the political development of judicially manageable standards for redistricting in the federal courts. The standard build upon each other as precedent. The standards become clearer and more specific, but also more complicated and granular. The major questions of 1. Justiciability, 2. location of constitutional rights and 3. measurement of violation, have been established and now must be built upon.

The 1960s saw several more subnational redistricting cases related to the 14th Amendment equal protection harm and the *Reynolds* precedent and standard. The Court found consistently in these cases, refining the standard for areas not previously ruled on. But there were no significantly new standards approaching the levels seen in the early 1960s.

Burns v Richardson[241] in 1966, clarified the role and power of LFCs using equity principles to fashion remedies under the 14th Amendment. The lower courts had a strong jurisdiction to oversee and ensure federal constitutional compliance but "a state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional . . . should not be restricted beyond the clear commands of the Equal Protection Clause."[242] *Burns* allowed for the continued redistricting or gerrymandering on political grounds. As long as the population of the districts were equal enough to satisfy the One Person, One Vote standard, legislatures could draw the lines how they saw fit. Here, the court stated, that incumbency protecting gerrymanders are not invidious[243].

[241] Burns v. Richardson, 384 U.S. 73 (1966)
[242] Burns v Richardson
[243] Burns v Richardson

In 1967, in *Swann v. Adams*[244] and subsequently in *Kilgarlin v Hill,*[245] the Supreme Court ruled that state legislatures must deliver a compelling explanation for why there are population deviations among districts. To follow the *Reynolds* standard, state legislatures may have only minor deviations in population and these deviations must be "based on legitimate considerations incident to the effectuation of a rational state policy…Minor variations from a pure population standard must be nondiscriminatory and justified by state policy considerations such as integrity of political subdivisions, maintenance of compactness and contiguity in legislative districts, or recognition of natural or historical boundary lines."[246] These two 1967 decisions are simple applications of the *Reynolds* standard to specific circumstances that are helpful for LFCs in fashioning remedies. When a LFC asks, "what level of deviation is unconstitutional under *Reynolds* standard?", the judges are able to look for justification of the deviations by the legislature and judge their permissibility under *Reynolds*. *Swann* further limited LFCs ability to leave unconstitutional plans in place while being deferential to the legislature for a new plan that complied with the *Reynolds* criteria.

However, the *Reynolds* standard alone was not enough to adjudicate malapportionment in the states. LFCs continued to get questions about how to practically apply the One Person, One Vote standard. *How much deviation was allowed? How was this different for federal districts versus state districts?* These questions persisted before the federal courts and rose to the Supreme Court docket at the end of the decade.

[244] Swann v Adams, 385 U.S.440 (1967)
[245] Kilgarlin v. Hill, 386 U.S. 120 (1967)
[246] Swann v Adams

On April 7, 1969, the Court decided *Kirkpatrick v. Preisler*[247] and *Wells v. Rockefeller*[248]. Both cases were related to small population variances among congressional districts, *Kirkpatrick's* in Missouri and *Wells'* in New York. Using the *Wesberry* standard and Article I, Section 2 of the Constitution because the case dealt with Congressional districts, the Court established that there could be no "de minimis" variations allowed for congressional districts because this was antithetical to the Constitutional standard of equal representation "as nearly as practicable." The Court wrote,

> The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," *Wesberry v. Sanders, supra,* at 376 U. S. 18, the "as nearly as practicable" standard requires that the State make a good faith effort to achieve precise mathematical equality. *See Reynolds v. Sims*[249]

The Court decided that states would have to provide justification for every variation made from mathematical population equality. Further, the Court stated that claims of malapportionment for the sake of compactness, as in *Kirkpatrick*, we suspect claims[250]

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[247] Kirkpatrick v. Preisler, 394 U.S. 526 (1969)
[248] Wells v. Rockefeller, 394 U.S. 542 (1969)
[249] Brennan opinion, Kirkpatrick v Preisler
[250] Brennan opinion, Kirkpatrick v Preisler "Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing...In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances.

and that partisan or political justifications were insufficient to justify population variation.

Kirkpatrick (and Wells) pushed the debate for the One Person, One Vote standard to its logical, mathematical end. The *Reynolds* and *Wesberry* standards no longer left room for variation of population on political or partisan ends, or for other "traditional" ends like compactness that could be used earnestly or for corrupt ends like racial gerrymandering.[251]. But, with *Kirkpatrick*, it provided a two-prong test for measuring unconstitutional malapportionment: *Is it mathematically equal? If not, are the variations justified?*

In 1971, *Whitcomb v Chivas*, a case of both population standards and racial gerrymandering, declared that multimember districts were not inherently unconstitutional under the One Person, One Vote standard. It also contained a comprehensive statement on the development of population standards over this time period. The Court wrote,

> The line of cases from *Gray v. Sanders,* 372 U. S. 368 (1963), and *Reynolds v. Sims,* 377 U. S. 533 (1964), to *Kirkpatrick v. Preisler,* 394 U. S. 526 (1969), and *Wells v. Rockefeller,* 394 U. S. 542 (1969), recognizes that "representative government is, in essence, self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies… *Reynolds v. Sims,* 377 U.S. at 377 U.S. 565. Since most citizens find it possible to participate only as qualified voters in electing their representatives, "[f]ull and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Ibid.* Hence, apportionment schemes "which give the same number of representatives to unequal numbers of constituents," 377 U.S. at 377 U. S. 563, unconstitutionally dilute the value of the votes in the larger districts. And hence the requirement that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis[252].

[251] This requirement for absolute equality of population was altered for state legislatures with *Mahan v Howell* in 1973. Mahan v. Howell, 410 U.S. 315 (1973)
[252] Whitcomb v. Chavis, 403 U.S. 124 (1971)

As the Court explained, clearly the population standard to be gleaned from this mixed set of state and congressional level cases is that equal population is paramount for all apportionment and constitutionality. Restating these standards in 1971, the Court highlighted how the foundational cases collide with the newer cases, and emphasized the importance of these original standards as the governing principles of federal court action. As the line of cases develops and the courts face new challenges within these ideas, the foundational standards are critical even as they are redefined.

After *Baker,* there were two lanes of population standards that developed. First, there were the congressional apportionment standards under *Wesberry* and Article I, Section 2, and second there were the subnational standards under *Gray/Reynolds* and the 14th Amendment Equal Protection Clause. However, between 1964 and 1973, these differences were downplayed as the One Person, One Vote standard was applied generally across the board. In *Whitcomb*, the Court combines the subnational and congressional level cases into a single statement about the importance of equal population among districts for voting rights. However, whatever equivalence between the two lines of cases under the One Person, One Vote umbrella existed was upended in 1973.

In *Gaffney v Cummings*, a 1973 case dealing with both partisan gerrymandering concerns and malapportionment at the state level in Connecticut, the Court definitively differentiated between the two lines of cases. The Court wrote,

> We concluded that there are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth Amendment and *Reynolds v. Sims,* 377 U. S. 533 (1964), and its progeny. Noting that the "dichotomy between the two lines of cases has consistently been maintained," 410 U.S. at 410 U. S. 322, we

> concluded that "the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds v. Sims,*" *id.* at 410 U. S. 324, that test being that districts in state reapportionments be "as nearly of equal population as is practicable," *Reynolds, supra,* at 377 U.S. 577, and that, "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature…Moreover, the *Reynolds* court also noted that "some distinctions may well be made between congressional and state legislative representation," and that "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."[253]

The Court made clear that there would be two separate standards at work for federal judges to test the constitutionality of apportionment for congressional districts and the state legislatures. For Congressional districts, federal judges should use the *Kirkpatrick* standard of mathematical equality - One Person, One Vote means the equal counting of votes for every person based on Article I, Section 2 and flowing from *Wesberry.* For state districting, judges ought to use a less exact standard, ensuring that states made an honest and good faith effort for districts as nearly of equal population as is practicable but mathematical equality is not realistic and some deviations are appropriate if founded in "rational state action." *Gaffney* also addressed partisan gerrymandering concerns.[254] However, the Court stated that "judicial interest should be at its lowest ebb" when considering a state's political power distribution. This principle of judicial noninterference in state affairs echoes in the allowance of more population variation at

[253] Gaffney v. Cummings, 412 U.S. 735 (1973)
[254] Elaborated on later

the state level than the federal - a compromise between the complete nonjusticiability of *Colegrove* and the mathematical exactness of *Kirkpatrick.*

While *Gaffney* established the difference between the two lines of cases and their standards, other cases in the same term established the new state standard in positive terms. *Mahan v Howell*, also decided in 1973, also used *Reynolds* to create a distinction between the lines of cases and limit the mathematical exactness requirement of *Kirkpatrick* for state legislative reapportionment. *Mahan*[255], along with *City of Virginia Beach v. Howell*[256] and *Weinberg v. Prichard*[257] - all decided in 1973 - helped elucidate the clear new standard for state legislature districts under the 14th Amendment Equal Protection Clause rather than the more stringent Article I, Section 2 requirements of *Kirkpatrick.* Some level of state population variation among districts would now be allowable if it could be justified by a "rational state policy."

Also decided this term was *White v Weiser*. The Supreme Court case upheld the *Kirkpatrick* standard for a Texas congressional plan under Article I, Section 2 of the U.S. Constitution. Deviations must be unavoidable and justified - otherwise deviations are unconstitutional - but *White* allowed for population variance of 9.9% in Texas state legislative districts between the largest and smallest. The Court also upheld the ability to gerrymander for incumbency protection under *Burns* in the case.[258]

[255] Mahan
[256] Decided with Mahan
[257] Decided with Mahan
[258] White v. Weiser, 412 U.S. 783 (1973)

Gaffney, Mahan, *White* and all of these cases taken together provided for the positive new standard of state redistricting - an effective de minimis of 10%[259] if justified by "rational state policy."

The year 1973 represented the final flurry of fighting in the Reapportionment Revolution. The "shot heard round the world" in *Baker* led to a substantial need for the federal courts to develop judicially manageable population standards to deal with malapportionment cases. With *Gaffney, Mahan* and the associated cases in 1973, the Court ended much of the debate over how the federal courts should adjudicate population variance and how state legislatures were allowed to redistrict. While this represented the last major grouping of cases, it doesn't represent the final actions by the Supreme Court on redistricting or malapportionment. The Court took on many racial and partisan gerrymandering cases during this time period and up through today. In 1983, the Court decided another important population case, *Karcher v Dagget,* this one also concerned with partisan gerrymandering, like *Gaffney,* making a shift in redistricting claims.

Karcher developed a test for judges using the One Person, One Vote standard, through the precedents in *Wesberry* and *Kirkpatrick*, founded in Article I, Section 2. The case challenged the requirement for mathematical equivalence based on the U.S. Census because it undercounts residents and is not itself mathematically accurate. The Court

[259] Brennan dissent in *Gaffney,* "Nevertheless, the Court today sets aside the District Court's decision, reasoning, as in the Connecticut case, that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in Abate v. Mundt, 403 U.S. 182 (1971), where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line has been drawn at 10%-deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.

found that the very high threshold of equality demanded under Article I[260] still exists and states must use the best Census data available and continue to justify and variance. The Court wrote,

> Two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided, the apportionment scheme must be upheld. If, however, the 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… Adopting any standard other than population equality, using the best census data available... would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain de minimis level of population differences was acceptable, they would doubtless strive to achieve that level, rather than equality.[261]

Kracher is most notable as the Court's early rejection of a partisan gerrymandering claim, however it is also significant that it maintained the *Kirkpatrick* standard of no de minimis variation for Congressional districts. It is an important statement in the *Wesberry* line of cases following the *Gaffney* and *Mahan* decisions.

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[260] Karcher v. Daggett, 462 U.S. 725 (1983), ."Article I, § 2, establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Wesberry v. Sanders,* 376 U. S. 1, 376 U. S. 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore, the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." *See id.* at 7-8, 18. As we explained further in *Kirkpatrick v. Preiser:"[T]he 'as nearly as practicable' standard requires that the State make a good faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U. S. 533, 377 U.S. 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." 394 U.S. at 394 U. S. 530-531. Article I, § 2, therefore, "permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." Id. at 394 U. S. 531. Accord, White v. Weiser, 412 U.S. at 412 U. S. 790.*

[261] Karcher v Daggett

There are very few significant Supreme Court cases after *Karcher* related to population variation standards. In 1989, in *Board of Estimate of City of New York v. Morris*, the Court found that the subnational *Reynolds* standard applied to New York City Borough representation.[262] In 2016, in *Evenwel v Abbott*, the Court declared that districts ought to be drawn based on total population as opposed to registered voters or some other group based on history and judicial practices under the One Person, One Vote jurisprudence.[263]

The judicially manageable population standards for redistricting were mature and fully developed by the *Gaffney* decision*,* let alone *Karcher*. After *Karcher*, most other subsequent and significant cases of redistricting for the Supreme Court deal with other issues, with partisan or racial gerrymandering.

Looking at the Supreme Court's history of population standards and malapportionment cases together allows us to learn several important lessons for the larger study of federal court action on redistricting. Primarily, it shows that once the Court overturned the *Colegrove* precedent with the decision in *Baker* that redistricting and reapportionment did not pose a political question and was therefore justiciable, the Court needed to establish a judicially manageable standard based on a constitutional harm with a method of measurement and identification of the harm and a guide for relief or remedy. Once the Court declares that it can act in a "policy arena" or subject area, precedential law requires standards to be created. While *Baker* allowed for LFCs to develop their own relief under the guidance of equity, the reality of viewing these cases

[262] Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989)
[263] Evenwel v Abbott 578 US _ (2016)

together and in hindsight, illustrates how the Supreme Court needed to rule on its own standards - supplying a universal law throughout the federal judiciary.

Second, it explains that the primary concern for the American political system in redistricting was malapportionment. Congressional districts and state legislative districts were consistently malapportioned prior to federal court involvement. The fact that this was addressed before the other systemic issues of racial or partisan gerrymandering that would eventually come before the courts could be for a number of reasons[264]. Malapportionment may have simply been so egregious and unfair that it posed a problem of immediate need of relief and only the courts would act. Or, it may illustrate the quantifiable nature of malapportionment and the American history of principles of equality - realized or not - providing the court with concrete substance to fashion a standard. If the Court were to take on the other qualities of redistricting and gerrymandering that arise in cases later, it would likely lack firm constitutional backing and measurements on its face. For example, if the Court took up the complaint of a "lack of compactness" of the Illinois districts in *Colegrove*, it would have substantial functional trouble regardless of the 10th Amendment claims of federal interference or no clear constitutional right for compact districts - or districts at all. Instead, the Court's early decisions after *Baker* were dominated by equal population cases, which are quantifiable and quantifiably unequal.

Third, and related to the second point, the federal courts require incremental steps to get to the ultimate judicially manageable standards. If the Court in *Baker* were to rule that the case was justiciable, and that under the 14th amendment equal protection clause

[264] Of course, Gomillion predates Baker

equal population for districts is mandated but that for the Tennessee state legislature that can have some variance but that the Tennessee congressional districts should have no variance because their equality is based on the Article I, Section 2 language, then the Court would risk its legitimacy and spur many more lawsuits. The development of the standards between *Baker* and *Karcher* only make sense - legally or logically - when viewing them incrementally. This incremental development of standards represents the realities of path dependence that started with *Baker* and the nature of precedential law in the American federal judiciary. The standards developed and changed over time as they were applied to new cases, facing new challenges and requiring altered solutions shaped by prior choices, standards and decisions.

Fourth, the development of Supreme Court population standards for apportionment illustrates the durable shift the federal courts have taken in the U.S. federal system and in states. Even by the 1980s, in the population cases, it is clear that the governing authority that the Federal courts gained from *Baker* had only grown. There was no retrenchment toward Congress taking back the power on malapportionment rules. There was no return of powers to the states to malapportion their districts. The federal courts' claims to rule over apportionment and the legality of their standards and decisions only grew stronger, deeper and more granular over time. *Gaffney* and *Mahan* may represent the return of some minor latitude to the states, but only under the authority of the federal courts. It is a substantial shift in the American political system and one that represents a durable shift from state to federal and from legislature to courts.

Finally, as shown in Table 3.1, the development of population standards can be viewed as a way in which American precedential law has worked successfully in the

Supreme Court. If one views the malapportionment of congressional and state legislative districts as unconstitutional and unfair, then the development of the standards shows how the Supreme Court can use all of its tools to create not one, but two, sets of judicially manageable standards that are still in use today.

Year	Case	Standard	Law
1962	*Baker v. Carr*	Redistricting justiciable as not a political question - 14th Amend. As constitutional harm	14th Amendment
1963	*Gray v. Sanders*	**One Person, One Vote, in statewide elections**	Declaration of Independence, Gettysburg Address, 15th, 17th, and 19th amendment Standard
1964	*Wesberry v. Sanders*	**One Person, One Vote "**as nearly as is practicable" **for Congressional Districts**	U.S. Constitution, Article I, Section 2
1964	*Reynolds v Sims*	**One Person, One Vote for state legislatures (both houses)**	14th Equal Protection clause
1968	*Avery v Midland*	**One Person, One Vote for local**	14th Equal Protection clause
1969	*Kirkpatrick v Preisler/Well v Rockefeller*	No 'de minimis' variation - **One Person, One Vote means mathematically equa**l; variance must be explained with appropriate reasons	U.S. Constitution, Article I, Section 2
1973	*Gaffney, Mahan, etc*	Different standards for State and Congress - States allow more variation	14th Equal Protection clause
1983	*Karcher v Daggett*	No 'de minimis' variation - Onus on state to justify variation	U.S. Constitution, Article I, Section 2

3 - Table 3.1 – Development of Malapportionment Standards

Malapportionment is no longer an issue of substantial conflict in American politics. Both the *Reynolds/14th Amendment* and *Wesberry/Article I* standards have proven durable and have been largely accepted by the public. One Person, One Vote has become the law of the land and a legitimate use of federal court power to enforce this standard.

3.4 Racial Gerrymandering Standards - *Majority v. Minority*

The political development of judicially manageable racial gerrymandering standards is both more straightforward and more complicated than the population and malapportionment standards. Racial gerrymandering has the strongest Constitutional and statutory backing for founding a judicially manageable standard with the 14th and 15th amendments and Voting Rights Act of 1965 (VRA). However, the method for identifying a racial gerrymander, for quantifying a racial gerrymander, and for providing relief are far more unclear and undefined than with malapportionment. The development of racial gerrymandering standards in the Supreme Court is a story of trying to solve these problems - how to provide the directions for the LFCs to connect the Constitutional rights, backed by statute, to minority constituents in real world districts that will have an actual effect on elections.

It is difficult to define what a "racial gerrymander" is. This is a fundamental hurdle for the Supreme Court to overcome when creating a manageable standard. In the abstract, a racial gerrymander would be the use of redistricting to purposely exclude or dilute the voting power of a racial group in a geographic area. The *Gomillion* case is both one of the earliest decided racial gerrymandering cases and one of the most clear-cut. The

redistricting in *Gomillion* was facially egregious as well as a capital "G" gerrymander - The boundaries of the city of Tuscaloosa were redrawn to be an irregular shape and specifically exclude almost every black resident. The 14th Amendment and the 15th Amendment provide clear Constitutional rights for federal courts to adjudicate egregious racial gerrymanders. These two post-Civil War amendments provide standards for LFCs and the Supreme Court to simply strike down "clear racial gerrymanders." The development of racial gerrymandering standards on the Supreme Court shows that the areas where standards are needed are when the intent or purpose, and perhaps the effect, are not obviously discriminatory based on race or minority group status.

In practice, most racial gerrymanders have been more complicated than *Gomillion*. Most racial gerrymanders historically are purposeful efforts by legislators and political operatives to exclude and dilute Black or Hispanic votes. Although this intent may be clear, what is more difficult to perceive is what this intent looks like and what is the best way to racially gerrymander. How do you recognize it? What if it's subtle? Is it worse to "pack"[265] Black voters into one district and exclude them from others? Or "crack"[266] voters across four districts where they may have political allies? How does the court determine intent? There are surely examples of accidental or incidental racial gerrymanders where the true goal is a Republican partisan gerrymander or a malapportionment-favoring rural areas. The Court has had to look at this issue repeatedly - Does the intent matter if the effect is racial gerrymander? How does one find the true

[265] Packing is one of the common gerrymandering techniques, maximizing a population to maximize the number of wasted votes. Pack one district to free up the surrounding districts for opposition success
[266] Cracking, another common technique, fractures a compact and numerous populations into multiple districts to dilute the group's voting power so they never have a majority

intent? How does one measure a racial gerrymander? Fashion a remedy? Make sure that the remedy isn't itself a new form of racial gerrymander?

A critical aspect of understanding the role of the federal judiciary in redistricting between *Baker* and *Rucho* includes the actions of the Supreme Court and the judicially manageable standards they created around racial gerrymandering. By tracing the landmark cases in racial gerrymandering over time and following the standards the Court uses, one can see how the Court both changes its thinking on racial gerrymandering and shifts its enforcement over time, impacting the actions LFCs can take when drawing redistricting plans on their own.

Although the *Baker* decision and the Reapportionment Revolution are politically and temporally located in the Civil Rights Era, few of these cases directly engage in the racial component of malapportionment. Others explore the way in which "urban" and "rural" are coded language and the role of malapportionment played in limiting racial voting power.[267] But from the perspective of studying the political development of judicial standards, few of the early reapportionment cases directly engaged with notions of racism. *Gray* cites the 15th amendment as one of its sources of equality in American political history to make the claim to the One Person, One Vote standard, but also cites the 17th and 19th.[268] *Reynolds* and the other landmark cases speak to the paramount importance the Court wants to give to equal value of votes, and the dangers of dilution

[267] "*V.0. Key, wrote in 1950 that 'by the overrepresentation of rural counties in State legislatures, the whites of the black belts gain an extremely disproportionate strength in State lawmaking.'"'*Crea, Robert M. (2004) "Racial Discrimination and Baker v. Carr; Note," Journal of Legislation: Vol. 30: Iss. 2, Article 5.

[268] Gray v Sanders

and inequality.[269] Many of the landmark cases were in the South, in states such as Georgia, Tennessee, Alabama, Florida and Louisiana. It is hard to imagine that much of this does not have racial meanings and subtext, but it remains largely absent from the explicit language of these decisions

Instead, what would become the most important statement on racial gerrymandering during this era was the 1965 Voting Rights Act (VRA). The VRA in combination with the 14th and 15th Amendments are the legal sources that the Supreme Court draws on to create manageable standards for federal courts related to racial gerrymandering. The Voting Rights Act of 1965 was a Congressional statute explicitly designed to "enforce the 15th Amendment." There are two sections that are directly relevant to redistricting: Sections 2[270] and 5[271].

Section 2 states that no state or "political subdivision" can "deny or abridge" a citizen the right to vote based on race through any "voting qualification or prerequisite to

[269] Reynolds v Sims

[270] SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

[271] SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

voting or standard, practice, or procedure." This eventually came to be understood as vote dilution of minority voters in relation to districting.

Section 5 creates the requirement for preclearance from federal courts or the justice department for any new "standard, practice, or procedure" to ensure that it isn't "denying or abridging the right to vote on account of race or color." The plans submitted could not have the purpose or effect of retrogressing minority voting power. Section 5 applies to specific states and localities specified with coverage formulas in Section 4, that have a proven record of disenfranchising voters based on race, including through Jim Crow laws. Among the many tools that were used for black voter suppression and oppression included racial gerrymandering and malapportionment.

The first racial gerrymandering case of this era predated *Baker.* As previously discussed, *Gomillion v Lightfoot* was a 1960 racial gerrymandering case. The standard that the Supreme Court created with *Gomillion* was not one explicitly against racial gerrymandering, although it was applicable to that, rather it was a stronger precedent for *Baker.* The Court decided that a state cannot be insulated from federal judicial interference by the 10th amendment, the political question doctrine or anything else just because their action is within the state or locality if that state action infringes on a federally protected right.[272] In *Gomillion*, the Court applied the 15th amendment rights of the Black citizens who were gerrymandered out of the city, to overcome the *Colegrove* barrier and act on redistricting before *Baker.*

[272] Gomillion v Lightfoot

In the decade after *Gomillion*, the Supreme Court barely addressed racial gerrymandering directly. The VRA provided plenty of statutory power for the federal government to act on voting rights. But the Supreme Court did not take on any redistricting challenges during the 1960s related to VRA enforcement or racial gerrymandering.

Whitcomb v Chivas[273] in 1971 brought the question of multi-member districts and racial discrimination to the Supreme Court. Although the LFC decided that there was voter discrimination against a "ghetto" area of Marion County, Indiana, which had a significant Black population, the Supreme Court overruled this decision and the court-ordered statewide reapportionment. The Supreme Court instead found that multimember districts were not "inherently invidious or violative" to the equal protection clause, or that single member districts would be a superior solution for any group, including racial groups.

Also in 1971, the Supreme Court decided *Connor v Johnson*. The case was a challenge to an LFC-drawn map under section 5 of the VRA. The Court found that LFC maps did not require Section 5 preclearance[274]. This only applies to federal court-drawn plans - not plans made by state courts. The decision also stated that LFCs should favor single-member districts in remedial plans[275]. The case was important for LFCs, giving some guidance on VRA implementation, but it did not articulate a racial gerrymandering standard.[276]

[273] Whitcomb v. Chavis, 403 U.S. 124 (1971)
[274] Connor v. Johnson, 402 U.S. 690 (1971)
[275] Connor v Johnson
[276] All federal court plans should still meet the standard of VRA5 however, and avoid retrogression, the Court stated in McDaniel v Sanchez (1981)

The next significant racial gerrymandering case the Court ruled on was *Beer v. U.S.* in 1976. This case applied the 1965 Voting Rights Act to reapportionment in a city council arrangement in New Orleans. At issue was the LFC ruling that the apportionment scheme was discriminatory because the majority of seats favored white voters while the majority of the city's residents, but not voters, were black. The seven-person city council included two at-large members who would likely win with a white majority. The LFC, using Section 5 of the VRA, contested the city's plan for the reapportionment because it would "abridge the voting rights" of the black citizens. However, because the at-large seats had existed since before 1964, they were not susceptible to the VRA under its own rules, the Court found.

The 5-3 majority ruled that in order to use VRA Section 5 to strike down a reapportionment plan, federal courts must rule that the new plan is worse than the previous plan. This was the "retrogression" standard. States had to show that new plans were static or progressive, but not retrogressive in terms of minority voting power. Plans did not have to be optimal for minority voters under this interpretation, they simply had to be better. The Court set a seemingly low bar of improvement as the guiding standard for courts examining redistricting and reapportionment under the VRA. The Court opinion, written by Justice Stewart, said,

> [A] legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of § 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.[277]

[277] Beer v. United States, 425 U.S. 130 (1976)

A new plan must discriminate based on race itself to be struck down. A plan that incorporates elements with the effect of racial vote dilution that existed prior to the 1964 deadline in the VRA are permissible in new plans under this standard.

Although *Beer* dealt with a racial question, the VRA and reapportionment, the specific questions weren't about racial gerrymandering, the merits did not involve Congressional or state legislative districts, and the particular scheme is not universal. However, it did have the effect of establishing a limited view of Section 5 as the standard for reapportionment in the federal judiciary.

The Supreme Court saw another case that dealt indirectly with racial gerrymandering and had a substantial impact on the development of racial gerrymandering standards in 1980.

City of Mobile v. Bolden was a case related to city government and racial vote dilution, like *Beer.* In *Mobile,* the majority of the Court continued along a similar logic to *Beer* finding that the city's at-large electoral system was not violative of 14th or 15th amendment rights of Black residents. With a plurality opinion, the Court stated that 15th amendment guarantees prohibitions on "discriminatory denials or abridgements" of the freedom to vote only - not the election of candidates preferred by racial voting blocs. Further, the plurality stated the 14th amendment Equal Protection Clause does not require proportional representation and that "disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution."[278] The plurality set the the standard for unconstitutional vote dilution as "purposeful discrimination." In order to violate the 15th amendment, the Court plurality declared that a plaintiff would need to

[278] Mobile v. Bolden, 446 U.S. 55 (1980), plurality opinion

demonstrate the discriminatory intent of the defendants, not just the effect. In a concurrence, Justice Stevens suggested a standard for testing the constitutionality of electoral system like this under the 15th and 14th amendments using the *Gomillion* precedent.[279]

Although the *Mobile* decision carries some of the same caveats as the *Beer* decision (a city government, a narrow issue, etc), and the plurality decision of the Court means a more limited precedential value than a majority opinion, this case highlights the powerful role of the Supreme Court in redistricting at the time.

By 1980, the Court had already largely established the population standards for malapportionment with *Gaffney*, but racial electoral questions were unsolved and, as plaintiffs claimed, in need of relief from the federal courts. Despite the VRA and improvements from Jim Crow-era voting discrimination, states and localities were still manipulating apportionment and districting for racial discrimination and the Court had not made a clear ruling that set a federal judicially manageable standard to deal with discriminatory effects. Instead, the *Mobile* decision stated that only purpose and intent could show racial voting rights discrimination under the 15th Amendment and therefore under the Section 2 of the VRA, which the Court called a restatement of 15th

[279] Mobile v Bolden, Stevens concurrence "(1) whether the political structure is manifestly not the product of a routine or traditional decision, (2) whether it has a significant adverse impact on a minority group, and (3) whether it is unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority; and that the standard focuses on the objective effects of the political decision, rather than the subjective motivation of the decisionmaker. Under this standard, the choice to retain Mobile's commission form of government must be accepted as constitutionally permissible even though the choice may well be the product of mixed motivation, some of which is invidious.

amendment.[280] This standard would not lend itself to flurry of federal court activity by activists and voters looking to overturn gerrymanders.

The *Mobile* plurality opinion uses the precedents of *Reynolds* as evidence for the limitations of the 14th Amendment Equal Protection Clause in election guarantees, but the case also largely reads like *Colegrove*, clarifying the constraints of the Court and federal judiciary for action in this arena - limiting the *Gomillion* standard of federal court action to intervene on a state harm of a Constitutional right.

Stevens' concurrence is a better example of a standard on the horizon to test for racial discrimination in electoral systems, through redistricting or reapportionment, but like the plurality opinion, it emphasizes the role of intent. The fact that Stevens' test is based on *Gomillion* does well to place this issue as one in this line of cases, and still in search of a standard.

However, by 1982, the Voting Rights Act of 1965 was extended and amended for the third time. The 1982 amendments were important for the political development of federal judicial standards on racial gerrymandering and were directly related to the Court's opinion on *Mobile*. According to a Senate report, *Mobile* was the motivation for the 1982 amendments to Section 2[281] because it simply equated Section 2 of the VRA to the 15th amendment and found that only discriminatory intent mattered, not effects. Instead, the 1982 amendments emphasized a "totality of circumstances" test, where many factors could be considered to measure whether a practice, such as redistricting, had discriminatory effect on a racial group's equal participation in the political process.

[280] Presto, Jennifer G. "The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne." *NYU Ann. Surv. Am. L.* 59 (2003): 609, 613
[281] Presto, "1982 Amendments" 613

Section 2 of the VRA would be violated under the 1982 amendments when the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[282] A non-exhaustive list of the factors that federal courts could consider included,

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[283]

The 1982 Amendments provided the federal courts with a new standard for VRA adjudication as well as a check on their interpretations. Now, the Court could no longer employ the *Mobile* standard of a narrow understanding of race-based electoral discrimination. Congress had clarified the VRA required that the Courts now had to look at the effects of an electoral practice and look at a number of factors in addition to invidious purposes.

[282] Thornburg v. Gingles, 478 U.S. 30 (1986)
[283] S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29., https://www.justice.gov/crt/section-2-voting-rights-act

The 1982 VRA amendments provide a counterexample to the narrative of Congressional inaction spurring judicial activism in the redistricting policy area. Here, Congress does not simply take action by passing a law, but it updates the law repeatedly and in 1982 it updates the law to push back on a judicial interpretation - redefine the law's purpose (and effect). Despite this example of Congressional action, the larger narrative of a shift toward judicial authority that starts with *Baker* remains after the 1982 amendments. First, the 1982 amendments are not a statute on redistricting and reapportionment generally. They say nothing about the standards for malapportionment or partisan gerrymandering, and in fact they say very little about racial gerrymandering. Although clearly applying to racial gerrymandering, Congress does not lay out specific standards for measuring or adjudicating gerrymanders in this update. Secondly, although Congress passed the 1982 amendment, the new law as well as the original 1965 VRA both cede significant authority to the judiciary in practice. The VRA itself requires the federal courts to act as a clearinghouse for implementation, not unlike an executive branch department with substantial latitude after receiving appropriations from Congress. Congress may have reasserted its original purpose on the VRA or updated the language to apply to new circumstances in 1982, but the job of interpreting constitutional and statutory harms in individual electoral laws and systems on the ground lay clearly with the federal courts - the courts are the institutions that would have to measure a election law against the "totality of circumstances," determine legality and fashion a remedy.

In 1986, the Supreme Court applied these 1982 VRA amendments to racial gerrymandering in a significant case, *Thornberg v Gingles*[284]. *Thornberg* was the first

[284] Thornburg v. Gingles, 478 U.S. 30 (1986)

landmark case to use Section 2 of the VRA and racial gerrymandering together after the amendments. The suit was brought by Black residents in North Carolina in 1982, prior to the enactment of the VRA amendments and in response to the purpose-only standard of *Mobile*. The plaintiffs alleged that the North Carolina state legislature was apportioned and districted in a way, with single and multi-member districts, so as to dilute votes based on race - a violation of VRA Section 2 under the totality of circumstances test. The LFC found in favor of the plaintiffs, declaring that the seven districts that were challenged in the North Carolina legislature did dilute the votes of Black citizens. The Supreme Court affirmed and reversed in part, but most importantly, they established a new and venerable standard for VRA Section 2 adjudication in redistricting.

The unanimous, 9-0 decision had a fractured opinion, with Justice Brennan writing for the Court, and a variety of justices concurring with different parts. However, there was broad support for the establishment of a three-part test that has become the critical precedent for VRA Section 2 racial gerrymandering claims. The Court's opinion again dismissed claims that multimember districts are inherently discriminatory[285] before it established a standard for how federal courts should test for VRA Section 2 violations for vote dilution in legislative districts based on a totality of circumstances. The court wrote,

> Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. 1. Stated succinctly, a bloc voting majority must *usually* be able to defeat

[285] White v Register, 412 U.S. 755 (1973)

> candidates supported by a politically cohesive, geographically insular minority group. The relevance of the existence of racial bloc voting to a vote dilution claim is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. Thus, the question whether a given district experiences legally significant racial bloc voting requires discrete inquiries into minority and white voting practices.2. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and consequently establishes minority bloc voting within the meaning of § 2. And, 3. in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election. In a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one election or a few elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election.[286]

Among all of the redistricting cases examined since *Baker*, this is one of the clearest examples of the Court purposefully establishing a judicially manageable standard. The three-part test that the Court created allows for federal courts to connect the VRA Section 2 protections, channeling the 15th amendment voting rights, to the real-world legal claims of vote dilution harms plaintiffs will bring, incorporating the 1982 amendments, but adapting to the real needs of judges on the bench. This standard is a three-part, sequential test for vote dilution. Restated the test requires judges to examine a case and ask if the challenged districts have:

> 1.A racial or language minority group "sufficiently large and geographically compact to constitute a majority in a single-member district" (compactness and numerousness)

[286] Thornberg v Gingles

> 2. The minority group is "politically cohesive," voting together as a bloc (minority bloc voting)
> 3. The majority votes sufficiently together as a bloc to defeat the minority's preferred candidate often (majority voting bloc)[287]

This three-prong test allows courts to find the preconditions for illegal vote dilution, and lets plaintiffs show that, along with the totality of circumstances, that this electoral system has discriminatory effects and is a violation of Section 2. This test applies to gerrymandering and redistricting as well as multimember districts and at-large districts.

After *Thornberg,* the next important racial gerrymandering case was *Shaw v Reno* in 1993. Unlike *Bolden* and *Thornberg*, *Shaw* was not directly concerned with Section 2 of the VRA or overturning a recent precedent. Instead, *Shaw* got to the justiciability of racial gerrymanders more generally under the 14th Amendment Equal Protection Clause common in malapportionment cases streaming from the VRA Section 5 preclearance requirement.

Shaw was another North Carolina case, this time related to Congressional redistricting after the state gained seats following the 1990 Census. The state originally created one majority-minority district. However, after looking for approval from the attorney general under Section 5 of the VRA, the state was told to create another majority-minority district, which ended up being expansive and irregularly shaped. Five North Carolina residents sued the state and federal officials saying that the majority-minority districts were actually racial gerrymanders themselves in violation of the 14th Amendment Equal Protection Clause. The plaintiffs argued that the "two districts concentrated a majority of black voters arbitrarily without regard to considerations such as compactness, contiguity, geographical boundaries, or political subdivisions, in order to

[287] Thornberg v Gingles

create congressional districts along racial lines and to assure the election of two black representatives."[288] The LFC claimed a lack of jurisdiction over federal defendants including Attorney General Janet Reno. The Supreme Court in a 5-4 decision found that the 14th Amendment Equal Protection Clause did apply to race-based redistricting and that it required strict scrutiny.

The Court addressed a number of issues in *Shaw*, but was also careful to differentiate the case from Section 2 VRA vote dilution cases and partisan gerrymandering claims.[289] The Court opinion, written by Associate Justice Sandra Day O'Connor, was concerned with the use of race as the main factor for redistricting, specifically when it is joining people together in an irregular shape. This strict understanding of "gerrymandering" echoes *Gomillion* and more traditional notions of redistricting, that highlight compactness, contiguity and political subdivisions. In *Shaw,* O'Connor argues that the irregular shape of the second majority-minority district drawn in North Carolina had the effect of connecting two disparate groups of black voters for no reason other than the color of their skin. She wrote,

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that

[288] Shaw v. Reno, 509 U.S. 630 (1993)

[289] Shaw v Reno, syllabus "The classification of citizens by race threatens special harms that are not present in this Court's vote-dilution cases and thus warrants an analysis different from that used in assessing the validity of at-large and multimember gerrymandering schemes. In addition, nothing in the Court's decisions compels the conclusion that racial and political gerrymanders are subject to the same constitutional scrutiny; in fact, this country's long and persistent history of racial discrimination in voting and the Court's Fourteenth Amendment jurisprudence would seem to compel the opposite conclusion. Nor is there any support for the argument that racial gerrymandering poses no constitutional difficulties when the lines drawn favor the minority, since equal protection analysis is not dependent on the race of those burdened or benefited by a particular classification, *Richmond* v. *J. A. Croson Co.,* 488 U. S. 469,494 (plurality opinion). Finally, the highly fractured decision in *UJO* does not foreclose the claim recognized here, which is analytically distinct from the vote-dilution claim made there. Pp. 649-652.

> members of the same racial group-regardless of their age, education, economic status, or the community in which they live-think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.[290]

To counteract the concern that states or the justice department in their implementation of Section 5 of the VRA were creating redistricting plans that were akin to "apartheid," The Court argued for a new judicial standard - when race is the "overriding, predominant force" in a gerrymander or redistricting plan, it should receive as much strict scrutiny under the 14th Amendment as any other state legislation classifying citizens by race.[291] The Court applied previous understandings of the 14th Amendment related to race directly to redistricting in *Shaw*. The Court wrote,

> Classifications of citizens based solely on race are by their nature odious to a free people whose institutions are founded upon the doctrine of equality, because they threaten to stigmatize persons by reason of their membership in a racial group and to incite racial hostility. Thus, state legislation that expressly distinguishes among citizens on account of race-whether it contains an explicit distinction or is "unexplainable on grounds other than race," … must be narrowly tailored to further a compelling governmental interest. ... Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption… That it may be difficult to determine from the face of a single-member districting plan that it makes such a distinction does not mean that a racial gerrymander, once established, should receive less scrutiny than other legislation classifying citizens by race. By perpetuating stereotypical notions about members of the same racial group-that they think alike, share the same political interests, and prefer the same candidates-a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract. It also sends to elected representatives the message that their primary obligation is to represent only that group's members, rather than their constituency as a whole. Since the holding here makes it unnecessary to decide whether or how a reapportionment plan that, on its face, can be

[290] Shaw v Reno
[291] Paraphrase of decision

> explained in nonracial terms successfully could be challenged, the Court expresses no view on whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim.[292]

In the decision, the Court sidestepped creating a precedent on the constitutionality of majority-minority districts, but did address the central tension in the case. On one hand, this decision pointed to the use of race as the predominant factor in redistricting as inherently suspect under the 14th Amendment. One the other hand, it acknowledges the necessity of using race as a predominant factor to comply with the VRA. By using the familiar language of "strict scrutiny" and "narrowly tailoring" the Court is able to fashion a decision that is itself narrow. Subsequent the decision, LFCs could use the *Shaw* standard to pay special scrutiny to racially based redistricting plans, but allow for plans that are more narrowly tailored to the requirements of the VRA, likely including those that use traditional redistricting criteria such as compactness and maintenance of political subdivisions of communities of interest - more closely hewing to the principles in the VRA Section 2 test of *Thornberg* of compactness, numerousness and voting blocs.[293]

The 1990s saw the largest number of significant racial gerrymandering cases come before the Court. Two were decided in the same term as *Shaw*: *Growe v Emison* and *Voinovich v Quilter. Growe*, decided several months prior to *Shaw,* found that federal courts should be more deferential to the state when fashioning replacements for unconstitutional gerrymanders. The Court wrote that, "states have the primary duty and responsibility to perform that task, and federal courts must defer their action when a State, through its legislative *or* judicial branch, has begun in a timely fashion to address

[292] Shaw v Reno

[293] In the *Shaw* dissent, justices made the argument that this precedent would require more scrutiny on districts with a higher number of black voters than any other voter and could lead to consequences outside of the goals of the VRA

the issue."[294] This limited the LFCs power to act proactively in fashioning new reapportionment plans. *Growe* also reasserted the validity of the *Gingles* three-part test.[295]

Voinovich v Quilter, also decided in 1993 before *Shaw*, clarified some of the qualities of Section 2 of the VRA that were used incorrectly by the district court in the case, according to the Supreme Court. The unanimous Court in *Voinovich*[296] explained that while federal courts could only create a majority-minority district to fix a legal violation, states could create these districts for purposes other than addressing a legal wrong. The Court reaffirmed the validity of the *Thornberg* three-part test to test for Section 2 harms. The Court stated "no view on the relationship between the 15th amendment and race-conscious redistricting." And the Court overruled the finding of a 14th amendment violation for malapportionment based on the *Mahan* precedent allowing for more variation in population (up to 10 percent.) These refinements and clarifications further developed the *Thornberg* standards.

In 1994, the Supreme Court decided *Johnson v DeGrandy*[297]. This case, concerning a consolidation of cases dealing with Section 2 of the VRA and the *Gingles* test in a statewide Florida claim, helped further elucidate the *Gingles* test. The Court stated that,

> While proof of the *Gingles* factors is necessary to make out a claim that a set of district lines violates § 2, it is not necessarily sufficient. Rather, a court must assess the probative significance of the *Gingles* factors after considering all circumstances with arguable bearing on the issue of equal political opportunity...The District Court was accordingly required to assess the probative significance of the *Gingles* factors critically after

[294] Growe v. Emison, 507 U.S. 25 (1993)
[295] Growe v Emison
[296] Voinovich v Quilter 507 U.S. 146 (1993)
[297] Johnson v. De Grandy - 512 U.S. 997, 114 S. Ct. 2647 (1994)

> considering the further circumstances with arguable bearing on the issue of equal political opportunity. We think that in finding dilution here the District Court misjudged the relative importance of the *Gingles* factors and of historical discrimination, measured against evidence tending to show that in spite of these facts, (one of the challenged districts) would provide minority voters with an equal measure of political and electoral opportunity.[298]

Johnson does not create a wholly new judicially manageable standard for LFCs facing VRA claims of voter dilution, but it does explain how LFCs should apply the *Gingles* test to claims - whether they be multimember or single-member districts, district-specific or statewide claims. Following the *Johnson* precedent and standard requires LFCs to use the *Gingles* test as a necessary precondition. The LFCs must consider this result along with the totality of circumstances *and* history. In *Johnson*, a new and relevant concern was whether the number of districts in which a minority group forms a majority is roughly proportional to its population in the region[299].

In 1995, the Supreme Court continued the trend of high-profile racial gerrymandering decisions with its ruling in *Miller v Johnson*[300]. The case involved a Congressional districting scheme that was redrawn as a result of VRA Section 5 preclearance requirements, with plaintiffs challenging the plan for the impermissible use of racial factors. The LFC struck down the plan on the grounds that it was an unconstitutional racial gerrymander in violation of *Shaw* and the 14th Amendment. The Supreme Court agreed in the 5-4 decision.

Georgia's redistricting plan was struck down as an unconstitutional gerrymander in *Miller* because race was used as the *predominant* factor and the plan was not

[298] Johnson v Degrandy
[299] From League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006)
[300] Miller v. Johnson, 515 U.S. 900 (1995)

sufficiently narrowly tailored to achieve state interest in the *Shaw* standard. This case further cemented the role of *Shaw* and clarified its use. The Court's decision is in a direct dialogue with the LFCs, in explaining how to apply the *Shaw* standard. LFCs must be cautious with racial gerrymandering cases and assume that states are acting neutrally, with the burden of proof on the plaintiff to prove that race was the predominant factor. Evidence of the use of traditional redistricting qualities such as compactness, are not exonerating evidence, because, though they may be present, traditional factors may have been subordinated below race[301] as the predominant factor and therefore still deserve strict scrutiny under the 14th amendment. Advising LFCs, the Court wrote,

> Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State." ... Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decision making is inherently suspect … until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed… The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.[302]

This language from Justice Anthony Kennedy in the majority opinion is not completely upending precedent in any way. But the audience of LFCs for this section is clear and Kennedy's emphasis of how the lower courts should proceed is notable. The opinion specifically advises how to use *Shaw* in practice in the courtroom.

Further, in *Miller,* the Court again clarified *Shaw* more generally, pointing to the tension between the VRA and the 14th Amendment. If the VRA requires race-conscious

[301] Miller v Johnson
[302] Kennedy opinion, Miller v Johnson

electoral institutions, but the 14th Amendment prohibits race-based discrimination, the space to thread the needle is narrow. The Court explains that *Shaw* and strict scrutiny requires redistricting plans that comply with the VRA principles of anti-discriminatory purpose and effects, but not compliance with justice department VRA Section 5 preclearance alone. The court wrote,

> While there is a significant state interest in eradicating the effects of past racial discrimination, there is little doubt that Georgia's true interest was to satisfy the Justice Department's preclearance demands. Even if compliance with the Act, standing alone, could provide a compelling interest, it cannot do so here, where the district was not reasonably necessary under a constitutional reading and application of the Act. To say that the plan was required in order to obtain preclearance is not to say that it was required by the Act's substantive requirements. Georgia's two earlier plans were ameliorative and could not have violated § 5 unless they so discriminated on the basis of race or color as to violate the Constitution. However, instead of grounding its objections on evidence of a discriminatory purpose, the Justice Department appears to have been driven by its maximization policy. In utilizing § 5 to require States to create majority-minority districts whenever possible, the Department expanded its statutory authority beyond Congress' intent for § 5: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. The policy also raises serious constitutional concerns because its implicit command that States may engage in presumptive unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' Fifteenth Amendment authority, into tension with the Fourteenth Amendment.[303]

In 1996, the Court continued to develop the *Shaw* and now *Miller* standards by deciding *Bush v Vera*[304]. The Texas congressional redistricting case was decided 5-4, striking down three Congressional majority-minority districts as unconstitutional racial gerrymanders. The majority emphasized that when race is the predominant factor and traditional criteria are subordinate, these cases deserve strict scrutiny, citing *Miller*.[305]

[303] Miller v Johnson, syllabus
[304] Bush v. Vera, 517 U.S. 952 (1996)
[305] Bush v Vera

This case was novel for its emphasis on the inclusion of better data and computer programming used in creating the irregularly shaped districts that were challenged, but the decision did not add substantially to the *Miller* precedent. Arguments from Texas that the irregular shapes were due to community of interest or incumbency preferences were struck down. Not because political gerrymandering was unconstitutional - the Court did not claim that - but because the Court declared race to be the predominant factor in drawing these gerrymanders.

Once the districts were subject to strict scrutiny, the Court explained that VRA Section 2 compliance was a compelling state interest but that the plan needed more targeted means for compliance. For example, a majority-minority district can exist and be noncompact to achieve a compelling state interest like VRA Section 2 compliance, but it must still be narrowly tailored for this goal. The compactness of the minority group is more important than the compactness of the district as a whole.[306] The plurality stated that majority-minority districts were not themselves enough to require strict scrutiny.[307] Scalia, joined by Thomas, voted with the majority but wrote separately from the plurality, stating the majority-minority districts require strict scrutiny in and of themselves.[308]

In 1997, in *Abrams v Johnson*, the Court looked at the LFC-drawn map that came out of the *Miller v Johnson* decision two years prior. The claim was brought against the map that it violated both the VRA and the One Person, One Vote Standard. However, the Court decided that when LFCs draw the maps, they are not held to the same VRA Section 2 standards as legislatures or initial drafters. “On its face, Sec. 2 does not apply to a

[306] From LULAC v Perry
[307] Bush v Vera, plurality opinion
[308] Bush v Vera, Scalia opinion

court-ordered remedial redistricting plan, but we will assume courts should comply with the section when exercising equitable powers to redistrict," the Court wrote.[309] This case is important for the study of LFC redistricting, but isn't a substantial development in the Court's standards. At no point was a court-drawn map found in violation of Section 2 of the VRA and the courts still have the same vote dilution standard as legislatures.[310] *Abrams* also made clear that the VRA section 5 standard of nonretrogression was a good standard for LFC maps, although not a statutory requirement. Additionally, retrogression should be measured by the most recent VRA-compliant and Constitutional plan that was legally enforceable, even if that was a plan being overturned for malapportionment.[311]

In 1999 and then again in 2001, the Supreme Court decided *Hunt v Cromartie*[312] and *Easley v Cromartie*[313]. These cases were related to *Shaw v Reno* and *Shaw v Hunt*[314] in subject matter and fact, again dealing with North Carolina' 12th Congressional District. *Hunt* in 1999 applied the standard of *Shaw* as developed in *Miller* and *Bush,* here criticizing the summary judgement of the district court, reversing and remanding the decision.

In 2001, the Court decided *Easley*, a continuation of *Hunt* with a new name. The Court found that because race so closely correlated with partisanship in North Carolina, the plaintiffs had not provided sufficient evidence that the predominant factor for drawing the gerrymandered district was race as opposed to party. *Easley* followed the *Shaw* standard not only with the literal district in question, but also in the same line of cases as

[309] Persily, *Primer,* 1142; Abrams v Johnson
[310] Persily 1142
[311] Persily 1145
[312] Hunt v. Cromartie, 526 U.S. 541 (1999)
[313] Easley v. Cromartie - 532 U.S. 234, 121 S. Ct. 1452 (2001)
[314] Shaw v. Hunt, 517 U.S. 899 (1996)

Miller and *Bush. Easley* allowed for a development on *Shaw*. Specifically, *Easley* explained that majority-minority districts with high partisan correlation to race have a high burden of proof on the plaintiffs to show that race, rather than party, was the predominant factor to trigger *Shaw* and strict scrutiny. In the Court opinion, the Court clearly states this corollary standard,

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.[315]

In the 2000s, racial gerrymandering continued to be adjudicated using the two streams of existing standards: The *Gingles/Johnson* VRA Section 2 standards on one hand for vote dilution and the *Shaw/Miller/Bush* VRA 5 and 14th Amendment standards on the other for retrogression, majority-minority districts and racial gerrymanders.

In 2006, *LULAC v Perry*, used the *Gingles* test again to determine VRA Section 2 violations[316], although many aspects of the case were concerned with partisan gerrymandering claims. *LULAC* maintained the *Gingles* standard and incorporated facets of the *DeGrandy, Miller and Bush* precedents.

The *Gingles* test standard was further developed in 2009 by *Bartlett v Strickland*[317]. The case, applying Section 2 of the VRA to North Carolina, declared that it is the number of voting age residents in an area, not the number of total minority

[315] Easley v Cromartie
[316] LULAC v Perry
[317] Bartlett v. Strickland, 556 U.S. 1 (2009)

residents, is what is critical in determining VRA Section 2 vote dilution. The requirement for Section 2 would be a "Black Voting Age Population" (BVAP) of 50 percent plus one. A state only needs to draw a new district under VRA Section 2 when there is a population that is both compact and can form a majority of voters, as the *Gingles* test states. The population at issue in this case and with this interpretation only reached 39 percent. The clarification by the Court does not alter the function of the *Gingles* test, but obviously alters a court's use of the test by shifting the metrics used.

One of the most important cases on racial gerrymandering and voting rights in the history of the Court was decided in 2013. *Shelby County v Holder*[318] struck down the eligibility formula of Section 4 of the VRA, effectively neutering the preclearance requirements of Section 5 of the VRA. The Court declared Section 4 unconstitutional because it was outdated and therefore no longer responding to a current crisis. The plaintiffs brought the suit under the 14th, 15th, 10th amendments and the Article 4 of the Constitution. The Court's decision was itself somewhat narrow and did not strictly eliminate Section 5 of the VRA, allowing Congress to pass a new preclearance formula.

VRA Section 5 represented a substantial lane of adjudication for racial gerrymandering between 1965 and 2013. Many of the cases that came to the Supreme Court started as a plan that was struck down by a LFC or redrawn upon the command of the justice department as part of the preclearance process. The *Shaw* standard, which was largely accepted as a judicially manageable standard in 2013, comes from VRA Section 5 use and adjudication. *Shelby Co.* represents a significant shift in redistricting

[318] Shelby County v. Holder, 570 U.S. 529 (2013)

jurisprudence. It illustrates how a lane to adjudication can be closed without retrenchment or elimination of a related judicially manageable standard.

VRA Section 5 was also impacted in the federal courts by *Ashcroft v Georgia*[319] in 2003. This case limited the understanding of what was required under VRA5. Now redistricting institutions could use majority-minority districts and "influence districts" more freely without risking retrogression, whereas in the past courts tried to strictly maintain at least the same number of majority-minority districts. Here the plan, backed by black leaders in Georgia[320], wanted a greater spread of minority voters across districts, rather than a large concentration in a few districts. The case was influential and upended the *Beer* expectation of nonretrogression for majority-minority districts. It is unclear to what extent this development applied to LFCs[321].

In 2015, the Supreme Court decided *Alabama Legislative Black Caucus v Alabama*[322], a challenge to an Alabama redistricting scheme as a racial gerrymander. The plaintiff argued that the *Shaw* and *Miller* standards under the 14th amendment should be used to declare the state a racial gerrymander. Using *Shaw, Miller* and *Bush,* the Court stated that the LFC was incorrect in analyzing the case as a statewide claim and instead racial gerrymanders must be determined at a district-by-district level, although with the knowledge of statewide factors and circumstances. The court further decided that the lower court also erred in deciding that race was not a predominant factor because it was used on balance with other traditional redistricting criteria - echoing *Miller,* the Court

[319] Georgia v. Ashcroft, 539 U.S. 461 (2003)
[320] Georgia v. Ashcroft
[321] Persily, *Primer,* 1145
[322] Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015)

again explained that this is not have the predominant criteria standard should work. Race can be predominant even if other factors, such as compactness, are satisfied.

In 2017, the Supreme Court found that North Carolina had committed an unconstitutional racial gerrymander in its post-2010 redistricting plan in *Cooper v Harris*[323]. The 5-3 court decision written by Associate Justice Elena Kegan found that race was the predominant factor used by North Carolina to draw two majority-minority districts and that these districts were not drawn in a narrowly tailored way to meet a compelling state interest. The state rejected the claim on 14th amendment *Shaw* standards as well as not complying with the white, majority voting bloc component in the *Gingles* test. This map was redrawn and challenged as a partisan gerrymander and decided as *Rucho v Common Case* in 2019.

At first glance, the history of racial gerrymandering adjudication at the Supreme Court may look very different than that of population standards. Of course, there are clear Constitutional provisions that should forbid racial gerrymandering if followed sincerely. The 15th Amendment is explicit in its prohibition of discriminatory election laws. The 14th Amendment has a long history of application to discriminatory practices. In 1960, two years before *Baker,* the Court asserted its authority under the 15th Amendment and struck down the 28-sided gerrymander of Tuscaloosa in *Gomillion.* And then, the Voting Rights Act of 1965 went into effect, empowering federal courts and the justice department to act on voter discrimination more directly. When the Court took on malapportionment after *Baker,* it had no similar set of clear laws to use as a foundation

[323] Cooper v. Harris, 581 U.S. (2017)

for creating judicially manageable standards to set population variance Despite these facts, the most important racial gerrymandering decisions in the Court didn't occur until decades after *Baker*.

However, instead of looking at racial gerrymandering standards historically in relation to *Baker* and justiciability, if one looks at their political development as an isolated lane of adjudication the development more closely mirrors what was viewed in malapportionment standards, just decades delayed (Table 3.2). Once a major lane of adjudication opens - *Baker for population standards, 1982 VRA amendments for racial gerrymandering* - the development of standards begins quickly. Over time multiple lanes for adjudication emerge to deal with different sets of cases, premised on different laws, with different needs for standards. These standards continue to develop on parallel tracks, both being refining and tweaked as needed, as the Court and the LFCs face new challenges. Both lanes and standards change over time, but there is no significant retrenchment in the operation of the standards themselves.

Over time, after *Baker*, the number of racial gerrymandering cases on the Supreme Court docket increased substantially, peaking in the 1990s. At the beginning, the judicially manageable standards for explicit racial redistricting (as opposed to incidental racial redistricting involved with malapportionment) were particularly narrow. As *Beer* and *Mobile* illustrated, the Court took a conservative stance to the application of the VRA to redistricting, doing so only with retrogressive plans that had proof of racial discriminatory intent. It wasn't until after the 1982 VRA amendments that the Court's modern standards really began to develop. Much like the population standards, with separate lanes of adjudication for state and congressional claims with separate standards

based on separate legal foundations, the Court developed two lanes of racial gerrymandering claims with separate standards: the Gingles standards and the Shaw standards.

The *Gingles* standard starts with the 1986 case, creating a judicially manageable standard as a three-prong test. The *Gingles* test carries the purpose of measuring claims of vote dilution under Section 2 of the VRA. The VRA as a whole and Section 2 are both Congressional statutes based on the foundation of the 15th Amendment, and in effect to give it actionable power in 20th Century America. Therefore, the Gingles test and the totality of circumstances language of the 1982 VRA amendments both are standards to allow federal courts to enforce the 15th amendment's voting rights. Over time, this *Gingles* standard which connects the Constitutional rights of the 15th amendments and the VRA to the districting maps of specific cases, was adjusted and refined. *Johnson* saw an added emphasis on the circumstances of the claim, the history of the situation and the proportionality of the minority group. *Bartlett* changed the formula for measuring a minority group from total population to BVAP. Overall, however, the *Gingles* test and core standard remains as the way to adjudicate VRA Section 2 and 15th amendment claims of racial gerrymandering and vote dilution in the federal courts.

The *Shaw* standard arrived after *Gingles*, in 1993, addressing different concerns, based on a different claim and different rights. *Shaw* provided a standard to analyze majority-minority or racially gerrymandered districts in relation to the concept of retrogression, most of which were created by preclearance requirements under VRA Section 5. Using the 14th Amendment standard used in other policy areas, the *Shaw* standard claimed that when race is shown to be the predominant factor used in drawing a

district, the federal court must apply strict scrutiny and only allow the redistricting to be used if its means are narrowly tailored to achieve a compelling state interest, which could include compliance with Section 2 of the VRA. This is the standard that was refined and adjusted the most over time and particularly through the 1990s with *Miller, Bush* and *Easley*, illustrating its development. Although VRA Section 5 preclearance claims are no longer likely after *Shelby County*, the *Shaw* standard can still exist as its legal foundation is the 14th Amendment. It provides a judicially manageable standard for LFCs to adjudicate any districting where race is suspected as the predominant factor used for that plan such as with majority-minority districts, as seen in the post-*Shelby Co.* case of *Cooper*.

There are two important differences that occur during the development of the racial gerrymandering that do not occur with the population standards. First, the racial gerrymander standards are developed in response to constrain the use of the racial-line drawing under the VRA. With cases brought by White and Black groups and voters, the Court sees its role as a constraint on the powers of the VRA. Whereas the population cases often dealt with defendants who refused to create districts with equal populations, the racial gerrymandering cases often involved states that were "complying" with the VRA by creating districts that took race into account, whether earnestly or not, for alternative purposes or not. Instead of empowering the federal courts and justice department under the VRA, the Court's standards instead ensured that it was being exercised "narrowly" and only with populations that met the necessary criteria. The judicial conservatism and restraint of the racial gerrymandering standards is in sharp contrast to the more activist standards under the malapportionment cases.

Year	Case	Standard	Law
1960	*Gomillion v Lightfoot*	States not protected from federal action when violating federal rights - Judicial Intervention for **voter dilution**	15th Amendment
1976	*Beer v U.S.*	"new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color"	Voting Rights Act (VRA) Section 5
1980	*City of Mobile v Bolden*	Only 'invidious purpose', intent of discriminatory practices matters - not effects alone	15th amendment and VRA
1986	*Thornberg v Gingles*	Three-Prong Test and Totality of Circumstances for vote dilution claims under Section 2; 1. Compactness and Numerousness 2. Minority Voting Bloc 3. Majority Voting Bloc	VRA Sections 2 and 15th amendment
1993	*Growe v Emison*	Federal courts should be deferential to states in fashioning remedies unconstitutional redistricting/ racial gerrymandering	
1993	*Shaw v Reno*	Application of 14th EP to racial gerrymanders, majority-minority districts - Strict scrutiny; narrowly tailored state plans	14th amendment, VRA 5
1994	*Johnson v DeGrandy*	Clarifying *Gingles:* VRA Section 2 claims need Gingles Test + Totality of Circumstances and History	VRA 2 and 15th amendment

4 - Table 3.2.1 – Development of Racial Gerrymandering Standards (Part 1)

Year	Case	Standard	Law
1995	*Miller v Johnson*	Clarifying *Shaw* standard: presumption of race-neutrality of state plans; burden on plaintiff to show race predominant factor; VRA Section 5 compliance not inherently a state interest;	VRA 5, 14th amendment
1996	*Bush v Vera*	Clarifying *Shaw*: When traditional criteria are subordinated and race is predominant factor, strict scrutiny applies and districts must be narrowly tailored to meet compelling state interests	VRA 5, 14th amendment
1997	*Abrams v Johnson*	Section 2 does apply to court-drawn plans on their face - Courts should still follow	VRA 2
2001	*Easley v Cromartie*	Clarifying *Shaw*:IF maj-min district + IF partisanship and race correlate THEN plaintiff must show boundaries could have been drawn differently, in compliance with racial and traditional requirements to achieve same political goals	VRA 5, 14th amendment
2003	*Ashcroft v Georgia*	Less strict VRA5 standard - Can avoid retrogression with dispersal of minority voters	VRA 5
2009	*Bartlett v Strickland*	Clarifying *Gingles*: VRA2 applies to voting age minority population, not total population	VRA 2
2013	*Shelby Co. v Holder*	Declared VRA4(b) unconstitutional, neutering VRA5 unless new action took place in Congress	VRA 4, VRA 5
2015	*Alabama Legislative Black Caucus v. Alabama*	Clarifying *Shaw*: Decide district-by-district, not statewide racial gerrymandering;	14th amendment

5 - Table 3.2.2 - Development of Racial Gerrymandering Standards (Part 2)

Second, the understanding of what types of racial redistricting was preferable for reformers and advocates shifted over time. When majority-minority districts and their maximization first seemed preferable under the VRA for advocates of racial minority voting rights. Eventually, advocates saw the use of majority-minority districts as a way to "pack" Black and Latino voters into a single district and limit their impact statewide or regionally. This shift in preferences, which still lacks firm agreement, is tied in with understandings of descriptive versus substantive representation and the high correlation between black voters and the Democratic party in the contemporary South[324].

Analyzing this long, but not exhaustive list of racial gerrymandering Supreme Court cases, allows one to follow the standards that influence the LFCs as they were created and developed over time, highlighting their legal foundations and emphasizing their purposes. After the 1982 VRA Amendments, the governing authority for racial gerrymandering is clearly shifted from Congress to the Supreme Court, which ruled over the federal courts and justice department with its *Gingles* and *Shaw* standards, constraining both racial gerrymanders and activist uses of the VRA. Looking at Table 3.2 also illustrates the durability of precedential, judicially manageable standards and their lack of retrenchment over time, even when a lane of adjudication - VRA Section 5 preclearance claims - is eliminated.

[324] See Chapter 5 for a fuller discussion of descriptive versus substantive representation in redistricting

3.5 Partisan Gerrymandering Standards - Democrats v Republicans

Partisan gerrymandering has had the shortest history of redistricting claims at the Supreme Court. This brief history is one that has been completely defined by "judicially manageable standards," or a lack thereof.

There has been substantially more written by legal and political scholars about how the Supreme Court should employ different manageable standards for the purposes of adjudicating partisan gerrymandering claims, than the Court itself has written about the subject. Unlike the development of population and racial standards for redistricting, partisan gerrymandering shows a different type of development. The Court starts with the nonjusticiability of partisan gerrymandering as a "political question," to then declaring there to be a level of partisan gerrymandering that could be unconstitutionally discriminatory, to eventually shutting the door to these claims as nonjusticiable political questions again in 2019. During the time when the claims were permissible, the Court never struck down a map or district as an unconstitutional gerrymander under the 1st or 14th amendment - or at all. However, some LFCs did strike down plans as unconstitutional partisan gerrymanders. This discord between the Court and LFCs on this issue in the 2000s is why it is important to analyze the Court's development of partisan gerrymandering standards. Though there are limited and few cases, the Court's opinions in these cases were in operation for a long period and influential. The ultimate partisan gerrymandering standard created by the Court in 2019's *Rucho v. Common Cause* is important for the whole study of LFCs action in redistricting, especially going forward, as it shuts the door to an entire lane of justiciability claims for gerrymanders - the partisan

gerrymanders that are of most concern to reformers, political scientists and many constituents.

While the barrier to justiciability fell for redistricting and reapportionment generally with *Baker,* the federal courts did not get involved with partisan gerrymandering in 1962. Questions of incumbent protection, gerrymandering for partisan power, or protections of communities of interest or political subdivisions, were largely untouched by the courts except for if they were used as an excuse for malapportionment or racial discrimination during the 1960s and '70s.[325] Partisan and political concerns have a long history in redistricting, rewarding those in power of the process at the expense of the other party. For example, Elbridge Gerry's original 'mander was a partisan redistricting scheme to gain an extra seat for the Democratic-Republicans in Massachusetts in 1812. The advantage only lasted for one election. There are plenty of texts examining the history of partisan gerrymandering in American politics[326] from Patrick Henry to computer drawn maps that give a fuller picture of the issue. However, this project and the examination of the standards created by the Supreme Court for partisan gerrymandering requires a much-focused view.

For most of the history of the Supreme Court, partisan gerrymandering was a permissible state activity that was simply part of politics and protected by the political question doctrine. Following *Baker*, the Court did not take any explicit partisan gerrymandering cases. But that did not mean the Court favored partisan gerrymandering or would not view it as a threat. It was conscious of the danger partisan gerrymandering

[325] I.e. Karcher v Daggett
[326] Engstrom, Erik J. *Partisan Gerrymandering and the Construction of American Democracy*. Ann Arbor: The University of Michigan Press, 2013.

could present and how the Court's standards may play into partisan gerrymandering. In *Reynolds,* the Court warned, "indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[327]

In 1966, in *Burns v. Richardson*, the Court protected a state's right to make political choices in its redistricting schemes, provided those choices don't infringe on the federally protected Constitutional rights of equal protection. The Court wrote, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional . . . should not be restricted beyond the clear commands of the Equal Protection Clause."[328] Partisan concerns were not ignored by the Court, but permitted when properly subordinated below other requirements.

Like race, partisanship was affected by the early Reapportionment Revolution decisions that developed population standards, but the Courts avoided directly endorsing any standard for unconstitutional partisan gerrymandering for years. It was not until 1973 that the Supreme Court directly addressed partisan and political gerrymandering with two cases - finding it an activity that did not infringe on Constitutional rights.

In *White v Weisler,* the Court argued that political purposes are not inherently invidious in redistricting.[329] While states must abide by the population standards, they have latitude for using other political factors, such as maintaining political subdivisions.

[327] Reynolds, from Karcher
[328] Burns v Richardson
[329] White v Weisler

Also decided in 1973, *Gaffney v. Cummings* provides a strong example of the Court's thinking at the time for the constitutionality and federal judiciary's role in partisan gerrymandering. The Court wrote,

> Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences, and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's, had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[330]

With *Gaffney*, the Court established a clear standard for judicial noninterference in political, partisan concerns in redistricting plans, while maintaining the federal judiciary's standard and authority on population variance. *Gaffney* presents a standard for noninterference and permissibility of certain political considerations - "There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences, and that would also be constitutional." - but it also leaves the possibility that there are political considerations that could be unconstitutional in redistricting. It does not completely foreclose the possibility of constitutional harms in partisan gerrymandering, but it does clarify that political decision making should be permissible and is in the purview of the states. Throughout this time period, the Court refused to take on partisan gerrymandering multiple times.

[330] Gaffney v. Cummings, 412 U.S. 735 (1973)

Partisan gerrymandering bubbled back up to the Court's docket a decade later. In 1983, with *Karcher v Daggett*, the Court discussed partisan gerrymandering in detail, though the case was ultimately decided on population grounds.[331] *Karcher* involved whether population variances between Congressional districts were made in "good faith" - whether they were the product of legitimate political concerns or partisan gerrymandering. In his concurrence, Justice John Paul Stevens provides an explanation of his thinking for how partisan gerrymandering fits into the larger 14th Amendment redistricting standards framework. He wrote,

> Since my vote is decisive in this case, it seems appropriate to explain how this argument influences my analysis of the question that divides the Court. As I have previously pointed out, political gerrymandering is one species of "vote dilution" that is proscribed by the Equal Protection Clause...There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others... its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well. As I have previously written: "In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders."...I would not hold that an obvious gerrymander is wholly immune from attack simply because it comes closer to perfect population equality than every competing plan.[332]

In his concurrence, Justice Stevens brings partisan, political gerrymandering into the larger discussion of redistricting harms under the 14th Amendment. He presents a path toward justiciability and standard creation for partisan gerrymandering under the 14th Amendment Equal Protection Clause. Partisan and other political concerns are also protected from vote dilution, like racial gerrymandering. Stevens also alluded to the

[331] Karcher v Daggett
[332] Karcher v Daggett

issues that computers can bring to the redistricting process, especially if the Court holds mathematical population equality above all else.

Justice Lewis Powell also pointed to the fact that there was a level of partisan gerrymandering that could be discriminatory in his dissent. He argued that the Court's standard of mathematical equality among district populations would lead to partisan gerrymandering that would be discriminatory under the Constitution. [333]

Three years later, with *Davis v Bandemer*[334], the whole Court changed its tone and took on partisan gerrymandering directly[335]. The Indiana state legislature case alleged "unconstitutionally discriminatory vote dilution" against Democrats by Republicans with their 1981 redistricting plan. The plan included a mix of single-member and multimember districts. Following an argument similar to that laid out by Stevens in *Karcher,* the Court put partisan gerrymandering in line with racial gerrymandering and malapportionment as a 14th Amendment Constitutional harm rather than a nonjusticiable issue.

Like *Baker*, *Davis* did not fully articulate a standard for *how* partisan gerrymandering claims should be handled by the federal courts. Instead, the Court built upon *Baker, Reynolds* and the racial gerrymandering cases as precedents to come to the conclusion that partisan gerrymandering is a justiciable issue that is under the authority of the federal courts, and a standard could emerge that would allow for measurement and

[333] Kracher v Daggett, Powell opinion "[T]he Constitution – a vital and living character after nearly two centuries because of the wise flexibility of its key provisions – could be read to require a rule of mathematical exactitude in legislative reapportionment." But, such mathematical rigidity may lead to "partisan gerrymandering" that results in discrimination."
[334] Davis v. Bandemer, 478 U.S. 109 (1986)
[335] Davis v Bandemer came after 1992's California Supreme Court case Wilson v Eu, which rejected reapportionment plans for partisan reasons.

remedy of an unconstitutional partisan gerrymander under the 14th Amendment Equal Protection clause. The Court wrote,

> Here, none of the identifying characteristics of a nonjusticiable political question are present. Disposition of the case does not involve this Court in a matter more properly decided by a coequal branch of the Government. There is no risk of foreign or domestic disturbance. Nor is this Court persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided. The mere fact that there is no likely arithmetic presumption, such as the "one person, one vote" rule, in the present context does not compel a conclusion that the claims presented here are nonjusticiable. The claim is whether each political group in the State should have the same chance to elect representatives of its choice as any other political group, and this Court declines to hold that such claim is never justiciable. That the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability … in light of our cases since *Baker,* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided … These decisions support a conclusion that this case is justiciable. As *Gaffney* demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable, or that the group has not been subject to the same historical stigma, may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.[336]

Although the Court claimed that the federal courts have the jurisdiction and Constitutional foundation to address discriminatory partisan gerrymandering, it is also careful to constrain the LFCs. The opinion is careful to explain that LFCs must rely on more than one or two elections to show vote dilution. The Court finds in favor of justiciability of partisan gerrymandering in *Davis,* but also strikes down the LFC decision as insufficiently rigorous.[337] In simple terms, in *Davis*, the Court claims that the federal

[336] Davis v. Bandemer

[337] Davis v. Bandemer "Relying on a single election to prove unconstitutional discrimination, as the District Court did, is unsatisfactory. Without finding that, because of the 1981 reapportionment, the Democrats could not in one of the next few elections secure a sufficient vote to take control of the legislature, that the reapportionment would consign the Democrats to a minority status in the legislature throughout the 1980's, or that they would have no hope of doing any better in the reapportionment based on the 1990 census, the District Court erred in concluding that the 1981 reapportionment violated the Equal Protection Clause.

courts can develop a standard to adjudicate partisan gerrymandering claims that are discriminatory, but it must meet a high bar.

The Court importantly did not establish or agree on any standard in *Davis* for how to adjudicate partisan gerrymandering claims. It presented the first part of a judicially manageable standard - the legal standard. But it didn't add the critical connective tissue of how to apply the federally guaranteed right to the specific harm. There were important questions that remained after *Davis.* What exactly was *unconstitutional* partisan gerrymandering compared to constitutional partisan gerrymander? Where was the threshold of vote dilution? How many elections proved durable discrimination due to the mutability of partisanship? Was intent necessary or was effect sufficient? How would LFCs create relief? Justices Sandra Day O'Connor and William Rehnquist dissented in *Davis* skeptical that the 14th Amendment Equal Protection Clause could provide any judicially manageable standard.[338]

Davis' ruling left a vacuum to be filled by advocates, legal experts and litigants hoping to present a new standard for the Court to adopt for partisan adjudication. The many theories and ideas presented, such as partisan symmetry or bias measures, are extensive and further explored in Chapter 5. But the most important legacy of these

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Simply showing that there are multimember districts, and that those districts are constructed so as to be safely Republican or Democratic, in no way bolsters the contention that there has been a *statewide* discrimination against Democratic voters...the view that intentional drawing of district boundaries for partisan ends, and for no other reason, violates the Equal Protection Clause would allow a constitutional violation to be found where the only proven effect on a political party's electoral power was disproportionate results in one election (possibly two elections), and would invite judicial interference in legislative districting whenever a political party suffers at the polls. Even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, there has been no unconstitutional violation against members of that party unless the redistricting does, in fact, disadvantage it at the polls. As noted, a mere lack of proportionate results in one election cannot suffice in this regard

[338] Davis v. Bandemer, dissent

opinions and studies was that none were adopted by the Supreme Court and that a judicially manageable standard did not emerge after *Davis.*

In 2004, nearly two decades later, the Court again took on the question of partisan gerrymandering in *Vieth v. Jubelirer*. The case alleged a partisan gerrymander as well as malapportionment. The plaintiffs based their partisan gerrymander claim on both the 14th Amendment and Article I of the Constitution. As explained in the introduction to this chapter, the Court struck down the redistricting plan in question due to malapportionment only. The plurality opinion of the Court held that "political gerrymandering claims are nonjusticiable because no judicially discernable and manageable standards for adjudicating such claims exist"[339] and that partisan gerrymanders have long existed in American history. However, because it was a plurality not majority decision, the Court did not create a new standard and precedent.

Kennedy did more to create a new standard during this time frame than the plurality decision. By not joining with the plurality and therefore limiting the precedential value of the case, Kennedy maintained *Davis* and called for a standard to be developed. Kennedy's concurrence was straightforward in its solicitation.

Kennedy explained that the 14th Amendment could provide Constitutional foundation necessary, but there were substantial hurdles to overcome. Before a manageable standard could be implemented, the Court would have to deal with, first, the "lack of comprehensive and neutral principles for drawing electoral boundaries," and second, the absence of a rule to "limit and confine judicial intervention." These two concerns were the paramount obstacles to forming a judicially manageable standard

[339] Vieth

according to Kennedy. However, in his opinion, Kennedy explained that despite these hurdles, the location of this issue in the line of other redistricting cases made action warranted. He wrote,

> A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective. The object of districting is to establish "fair and effective representation for all citizens." *Reynolds* v. *Sims,* 377 U. S. 533, 565–568 (1964). At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue...The second obstacle—the absence of rules to confine judicial intervention—is related to the first. Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden, however, are critical to our intervention. Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent...Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering. The plurality's conclusion that absent an "easily administrable standard," *ante*, at 21, the appellants' claim must be nonjusticiable contrasts starkly with the more patient approach of *Baker* v. *Carr,* 369 U. S. 186 (1962), not to mention the controlling precedent on the question of justiciability of *Davis* v. *Bandemer, supra*, the case the plurality would overrule… ….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 ...The Fourteenth Amendment standard governs; and there is no doubt of that. My analysis only notes that if a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard … that said, courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive. Excessiveness is not easily determined... Still, the Court's own responsibilities require that we refrain from intervention in this instance. The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do

> emerge to measure these burdens, however, courts should be prepared to order relief. [340]

Kennedy concurrence allows not only for standards creation under the 14th amendment, but also under the 1st amendment.[341] His opinion is both more direct and more welcoming than the *Davis* decision two decades earlier, although maintaining the same justiciability argument. Like *Davis,* Kennedy again cemented the Constitutional harm of partisan gerrymandering as "burdening representational rights," but without a manageable standard, he lacked a proper remedy. Many read Kennedy's concurrence and saw a call to action. To them, he wrote "If one can create a **judicially manageable and workable standard,** with a **precise and limited rationale,** based on **invidious intent,** and founded in **comprehensive and politically neutral standards,** he or she could challenge extreme and unconstitutional partisan gerrymandering."

For years after *Vieth,* there were many efforts to meet Kennedy's call for a standard. His call to action was important because it led to substantial investigation and development of new standards by lawyers, advocates and political scientists. Some of these standards employed older metrics, like partisan symmetry,[342] others created wholly

[340] Vieth v Jubelirer, Kennedy opinion

[341] *Vieth,* Kennedy "though in the briefs and at argument the appellants relied on the Equal Protection Clause as the source of their substantive right and as the basis for relief, I note that the complaint in this case also alleged a violation of First Amendment rights. See Amended Complaint ¶ ;48; Juris. Statement 145a. The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering...As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights...Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause.

[342] King, Gary, and Robert X. Browning. "Democratic representation and partisan bias in congressional elections." *American Political Science Review* 81, no. 4 (1987): 1252–1273.

new measurements, like the Efficiency Gap.[343] Even more than *Davis*, *Vieth* led to a flurry of writings and arguments for the use of certain standards for the courts to use in partisan gerrymandering cases.

One of the best and most impactful examples of how Kennedy's solicitation of a judicially manageable standard manifested was at the district court-level with *Gill v Whitford*[344] in 2016. The three-judge LFC struck down the Wisconsin state legislative redistricting plan as an unconstitutional partisan gerrymander, creating a judicially manageable standard in the process and embracing a social science metric to test the threshold of effects.

The LFC created a three-part test by adapting one suggested by the plaintiffs. The test would analyze whether a redistricting plan "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds."[345] The first part of the plan examines the purpose or intent of a map and looks of invidiousness. The second prong tests the effect of the plan. The LFC adopted the Efficiency Gap (EG)[346] put forward by the plaintiffs to measure the proportion of seats to votes won by the parties. The LFC set the acceptable maximum of variance in the EG at 7 percent. The third prong on this test looks for alternate reasons why the map may be biased that would dismiss the unconstitutional claim, such as political geography or natural sorting of partisans. This prong is not dissimilar to the

[343] Stephanopoulos, Nicholas O., and Eric M. McGhee. "Partisan gerrymandering and the efficiency gap." *U. Chi. L. Rev.* 82 (2015): 831.
[344] Gill v. Whitford, 585 U.S. (2018)
[345] Whitford v. Gill 218 F. Supp.3d 837 (2016)
[346] Stephanopoulos and McGhee *Partisan gerrymandering and the efficiency gap*

compelling state interest requirement in strict scrutiny race-conscious criteria, but requires a lower threshold.

The LFC's *Gill* decision serves as an important example of the hierarchy of the federal judiciary and how manageable standards are created. Although the LFC crafted a new standard, based on one created by advocates, reformers and the plaintiffs, the Supreme Court did not adopt it. *Gill* only exists as a judicially manageable standard that could have existed.

The Court did not adopt the LFC decision and instead remanded *Gill* on a standing issue in 2018. In 2019, the Court decided *Rucho v Common Cause*, which overturned *Gill* and ended the justiciability of partisan gerrymandering that began with *Davis*.

Rucho, another North Carolina gerrymandering case, decided the fate of partisan gerrymandering. Fifty-seven years after *Baker*, the Supreme Court ruled that partisan gerrymandering claims were not justiciable in the federal courts because they represented a political question beyond the bounds of the federal judiciary's role. Chief Justice John Roberts wrote the 5-4 opinion for the Court. He cited every landmark redistricting case in his argument, from *Gomillion* and *Shaw* to *Marbury* and *Baker*. Ultimately, *Rucho* concludes that partisan gerrymandering is nonjusticiable based on a separation of powers argument. Excessive partisan gerrymandering is an issue that the Court does not condone, but that should be addressed by Congress through its election's powers or by state and local governments through their own constitutional requirements. Roberts concluded,

> No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province

> and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch, at 177. In this rare circumstance, that means our duty is to say "this is not law." [347]

Like a mirror image of *Baker* 57 years prior, *Rucho* shut the door on partisan gerrymandering claims in the federal courts. The lanes of adjudication of racial gerrymandering and malapportionment that flow from *Baker* remain open, but *Rucho* marks the end of a major subject area after *Baker* in the federal courts.

Unlike population standards or racial gerrymandering standards, the Court's history of partisan gerrymandering standards is shorter and more nuanced. It is a narrative of a failure to launch, but the *Davis* and *Vieth* standards should not be ignored. Although, the Court never developed a judicially manageable standard for connecting the Constitutional harm to a measurement, "test" or remedy, doesn't mean that it was insignificant. For more than three decades, between 1986 and 2019, a certain "extreme" level of partisan gerrymandering was a justiciable issue under the 14th Amendment Equal Protection Clause. Though this never led to the same development of standards as was seen in the other lanes of adjudication, such as after *Baker*, it nonetheless influenced LFC caseload and decisions, as illustrated with *Gill.*

The decision in *Davis* is a strong statement on the authority and the duty of the federal courts to act on partisan gerrymandering. Although this did not lead to the same political development of standards for partisan gerrymandering seen with malapportionment or racial gerrymandering, it had a similar effect on the political development of the federal courts themselves. With *Davis*, the Court claimed greater

[347] Rucho v. Common Cause, No. 18-422, 588 U.S. (2019)

authority for the federal judiciary in the American political system, taking another aspect of redistricting under its purview to guarantee federally protected rights.

3.6 Judicially Manageable Standards Over Time
The Changing Lanes of Adjudication

It is easy for modern politics to become unmoored from the profound ideas and the fundamental rights that created the American government. The concept of inherent equality of every human in the Declaration of Independence. The constitutional structure for a liberal democracy. The ethos "that government of the people, by the people, for the people, shall not perish from the earth." The promise of federal protection for fundamental rights in the Civil War amendments. Modern politics often drifts from the foundational to the immediate. Contemporary concerns and specific circumstances can lead to judgement and policy absent historical depth. The development of judicially manageable standards breathes new life into these principles - places Constitutional guarantees in a practical form, for judges to use in the specific circumstances and situations of a case - making the inflexible rule of law practicable in the judgement of man. The development of judicially manageable standards by the Supreme Court on the subject of redistricting illustrates how the Court brought the fundamental rights of equality from the Enlightenment and Reconstruction Era to the specific circumstances of malapportionment, racial gerrymandering and partisan gerrymandering in the 20th and 21st Century U.S. Viewing these standards together shows both the political development

of redistricting standards within the federal judiciary as well as the political development of the federal courts in the larger political system.

This analysis of population, racial gerrymandering and partisan gerrymandering standards in the Supreme Court does not cover every issue of redistricting that arose in the Court after *Baker*. The Court also decided on the constitutionality of redistricting commissions[348] and how the federal courts should deal with single member or multi member districts[349]. However, this analysis of dozens of landmark redistricting and reapportionment cases between the 1960s and 2010s does illustrate the political development of the federal judiciary as well as the individual standards and lanes of adjudication for redistricting since *Baker.*

Writing about the creation and implementation of the judicially manageable standards after *Baker,* American law scholar Rick Hasen explained how there was so much concern that a standard would not be found right after the landmark ruling. However, a standard; a particularly straightforward, simple and manageable standard - One Person, One Vote - was found quite quickly. Hasen argues that there are benefits to the periods when the Court does not answer this call quickly - when the "search" for a standard is prolonged. He wrote,

> [W]hen the Court does not articulate a manageable standard, it leaves room for future Court majorities to deviate from or modify rulings in light of new thinking about the meaning of democracy or the structure of representative government, or based on experience with the existing standard. It also allows for greater experimentation and variation in the lower courts using the new standard. Following modification and experimentation, the Court appropriately may articulate a more manageable standard. The benefits of an initial unmanageable standard no doubt come with costs as well: greater administrative costs, increased

[348]Arizona State Legislature v. Arizona Independent Redistricting Commission, 576 U.S. (2015)
[349] States can use either form; Federal Courts must favor single-member districts when creating their own plans (*Voinovich*, etc)

> straying by the lower courts from Supreme Court majority pronouncements, and a decreased ability of political actors to rely upon Supreme Court precedent. But lack of Court competence in political matters suggests that those costs are worth bearing, at least for a time, as the Court and lower courts explore the contours of new equal protection rights created in election law cases.[350]

Hasen's observation helps shed light on what is seen in this analysis, but with a larger scope than Hasen allows. The development of judicially manageable standards is slow, messy and incremental. But ultimately it allows for standards that better fit the political needs of a given subject and moment. Hasen's argument specifically pertains to when the Supreme Court does not articulate a manageable standard. He said it allows for "experimentation and variation" in the LFCs, where a new standard could be created and percolate back up to the high court. However, the evidence shows this can occur even when manageable standards are present - *Miller* and *Bush* worked to amend *Shaw* for example. And that "unmanageable standards" can ultimately lead to no workable standards as with *Davis* or *Vieth.* Hasen's point is important - it highlights the role of the Supreme Court and the LFCs - the dialogue between standards and circumstances, between authority and experimentation.

Thinking about this slow and complicated development of standards is helpful for understanding the Supreme Court, LFCs and redistricting. If one only looks at one case or line of cases, one learns little information about how the Court and the LFCs interpreted law and put it into practice, or how and why certain redistricting maps affected representation. It is too limited, ahistorical and case-specific. However, taking this chapter's comprehensive approach makes it possible to understand how the Supreme

[350] Hasen, Richard L. "The Benefits of Judicially Unmanageable Standards in Election Cases under the Equal Protection Clause." *NCL Rev.* 80 (2001): 1469.

Court was operating regarding redistricting over time in a way that explains its influence over the LFCs. This analysis demands the use of the political development framework explained by Orren and Skowronek[351] to understand redistricting in the federal judiciary between *Baker* and *Rucho* because it requires examining "a polity constructed through multiple, asymmetric orderings of authority"[352] over time. Viewing all of these cases together (Table 3.3), allows one to understand the multiple modes of order in action at once, improving our understanding of both the shift of authority in the federal judiciary in the larger American political system and the shifts in the individual lanes of adjudication within the federal judiciary.

Within the whole American political system, these cases show a durable shift of the federal courts' authority in the redistricting realm as a key element of the political development of the federal courts. Starting with *Gomillion*, the Courts asserted the federal government's authority to act in this arena due to federally guaranteed Constitutional rights. In *Baker,* the Court asserts its own authority for the federal courts to protect these rights. In the VRA of 1965, Congress ceded the authority to the federal courts directly. Eventually, with *Gingles, Shaw* and *Davis*, the Court asserted itself further, toppling the legitimacy barrier at each step for new subjects. This shift that begins with *Baker* is nominally a shift in governing authority from Congress to the courts. Functionally, it is a shift from the unregulated state actions to federal supervision by the courts. Congress has at no time stepped back in to take responsibility over the subject area of redistricting beyond the 1982 amendments to the VRA.

[351] Orren and Skowronek, *The search for American political development*
[352] Orren and Skowronek, 182.

Within the federal judiciary, the political development of redistricting and reapportionment adjudication illustrates the durable shift toward multiple orders and multiple standards based on multiple rights or interpretations of the same rights. As shown in Table 3.3, when the federal judiciary develops its standards, the claims a plaintiff can credibly make expand enormously. Suddenly, there are multiple orders operating simultaneously. There are lanes to adjudication that open for malapportionment and then racial gerrymandering and the partisan gerrymandering. Within these first two lanes, sub-lanes open, based on the type of malapportioned districts or the type of racial gerrymandering claims.

It is notable that as these standards and lanes develop over time, they at first are ill-defined and expansive and then become more constrained, targeted and refined. However, there is no retrenchment on any of standards that are created - the Court does not limit its authority in this way. Instead, the Roberts Court closes lanes of adjudication wholesale, eliminating access to the existing standards. With *Shelby County*, the Roberts Court effectively eliminated the VRA Section 5 lane of adjudication, but not wholly the *Shaw* standard under the 14th Amendment. The standard persisted, while the main lane of adjudication that led to *Shaw* cases disappeared. Similarly, with *Rucho*, the entire lane of partisan gerrymandering adjudication was eliminated. However, the Court maintained that there were excessive partisan gerrymanders, just that the Court should not be the institution to rule on them.

To get a better sense of the political development of redistricting standards at the Supreme Court, and specifically how these standards constrain LFC actions, it's critical to look at them all together. Using Table 3.3, one can easily see the multiple simultaneous

orders by following a row across for any given year. Table 3.3 includes not just these lanes of adjudication, but also the map-making constraints delivered by the Court since *Baker*. This table lets one jump back into any given year since *Baker* and view the immediate constraints of Supreme Court Standards on a LFC.

For example, a single case dealing with an irregularly state senate district drawn with 45 percent Black, Democratic voters having a 5 percent population variance would be adjudicated so differently at different times - a Supreme Court justice or LFC would have different considerations based on time and the multiple orderings of standards at a given time. In 1960, this hypothetical case would be nonjusticiable. In 1964, the state senate districts would need a roughly equal population under *Reynolds*. In 1970, mathematically equal under *Kirkpatrick's* developed *Reynolds* standard. In 1973, *Gaffney* and *Mahan,* would relax the state legislature population standards. In 1986, the district would be reassessed under the *Gingles* test and the 1982 VRA Amendments and beg the possibility of a partisan gerrymander under *Davis*. In 1996, arguments could be made in multiple lanes of adjudication: under the *Reynolds/Mahan* precedents and the 14th Amendment Equal Protection Clause; under the *Gingles/Johnson* precedents with a test, history and totality of circumstances based on the 15th Amendment and the VRA; under the *Shaw/Miller/Bush* precedents and the VRA and 14th Amendment on racial grounds; and under *Davis* and an undefined partisan gerrymandering standard based on the 14th Amendment. In 2003 it might all be different because of *Easley.*

Understanding how nonjusticiability developed into five separate lanes of adjudication and standards for the federal judiciary is critically important to understanding how the LFCs operate on redistricting - It is an integral piece to

understanding why LFCs favor the criteria and factors they do when they draw or influence a redistricting plan. Understanding the development of these precedents and standards allows one to see what multiple orders of constraints from the Supreme Court are operating on LFCs at any given time. These constraints are legal, structural and political, and as is shown in Chapter 4, 5 and 6, these standards are the strongest constraints that affect 1. How and when LFCs decide redistricting cases, 2. how that changes based on subject area over time, 3. When and why to draw a redistricting map, 4. And which criteria they will favor when actually creating a new redistricting map.

As the analysis in this project shows, LFCs favor population equality and racial representation above all other criteria and in distinction to other institutions. As this chapter shows, these are the areas with the strongest direction, guidance and judicially manageable standards from the Supreme Court.

Years	Courts	Malapportionment		Racial		Partisan	LFC-Drawn Plans
		State/Subnational	Congress	Vote Dilution/VRA2	Nonretrogression/VRA5	Partisan Gerrymandering	District Court-Drawn plans
1960	Warren Court	***Colegrove*** (Nonjusticiable Political Question)		***Gomillion*** (States are not protected from federal actionif they infringe upon federally protected rights; 14th and 15th)		***Colegrove/Luther*** (Nonjusticable political question)	***Colegrove*** (Nonjusticiable Political Question)
1961							
1962		***Baker*** (Justiciable; 14th EP)					***Baker*** (Principles of Equity)
1963		***Baker/Gray*** (One Person, One Vote - Statewide primaries; Declaration of Independence, Gettysberg Address, 15th, 17th and 19th Amendments)					**One Person, One Vote**
1964		***Reynolds*** (One Person, One Vote for State House and Senate; 14th EP)	***Wesberry*** (One Person, One Vote for Congress; ArtI, S2)				
1965							
1966							
1967							
1968							
1969							
1970		***Kirpatrick/Reynolds/Wesberry*** (One Person, One Vote - Mathmatically equal populations 2-Part Test: Is it mathematically equal? If not, are the variations justified?)					**OP, OV + VRA**
1971						***Burns*** (State only restricted by 14th EP in creating remedial apportionment plans)	***Connor v Johnson*** (VRA5 does not apply to LFC-drawn plans; single member districts preferred)
1972							
1973		***Gaffney/Mahan*** (Different standards for state and federal)	***Kirkpatrick/Wesberry*** (One Person, One Vote - As equal as possible; ArtI, S2)				
1974				**VRA/*Gomillion*** (Federal protection of voting rights; from discrininatory electoral institutions; 14th and 15th)			
1975							
1976							
1977				***Beer*** (New apportionment only violate VRA5 is retrogressive; VRA 5, 15th)			
1978							
1979							
1980							**OP, OV + VRA (w/ *Connor)***
1981				***Mobile*** (Only invidous intent, purpose - not effects; VRA, 15th)			***McDaniel v Sanchez*** (Federal courts should still meet the noretrogression standard of VRA5 although not required to get preclearance; Plans adopted byut not drawn by LFCs need preclearance)
1982							
1983				**1982 VRA Amendments** (Addition of "totality of circumstances" to VRA2 - Not just intent, purpose; 15th, 14th, VRA)		***Gaffney*** (" judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties...")	
1984							
1985							
1986	Burger Court						
1987				***Gingles*** (Three-Prong Test and Totality of Circumstances for vote dilution claims under Section 2; 1. Compactness and Numerousness 2. Minority Voting Bloc 3. Majority Voting Bloc; VRA 2 and 15th)	**1982 VRA Amendments** (Addition of "totality of circumstances" to VRA2 - Not just intent, purpose; 15th, 14th, VRA)		
1988							
1989							
1990							
1991							
1992							**OP, OV + VRA (w/ *Connor, McDaniel)***
1993					***Shaw*** (Application of 14th EP to racial gerrymanders, majority-minority districts - Strict scrutiny when Race is the predominant factor - requires narrowly tailored plans for compelling state interests; 14th EP, VRA 5)		***Growe*** (LFCs deferential to state courts when simaltaneous) ***Voinovich*** (LFCs can only make maj-min distritcs to fix wrong; states have more latitude)
1994							
1995					***Shaw/Miller*** (VRA 5, 14th EP)		**OP, OV + Growe + VRA (w/ Connor, McDaniel)**
1996							
1997							***Abrams*** (VRA 2 did not apply to LFC maps; VRA5 and VRA2 should still be used as standards)
1998							
1999							
2000					***Shaw/Miller/Bush*** (VRA 5, 14thEP)		
2001							
2002					***Shaw/Miller/Bush/Easley*** (VRA5, 14th EP)		
2003					***Ashcroft*** (VRA5 doesn't require such concentrations in Maj-min; Can avoid retrogression with more diffuse minority voting plan)	***Davis*** (Partisan gerrymandering is a justiciable issue if unconstitutionally discriminatory vote dilution; No standard; 14th EP)	
2004	Rehnquist Court						
2005				***Gingles/Johnson*** (3-part Gingles test, totality of circumstances and history)			
2006							
2007							
2008							
2009							
2010					***Shaw/Miller/Bush/Easley/Ashcroft*** (VRA5, 14th EP)		
2011							
2012							
2013							
2014							
2015							
2016		***Mahan/Reynolds*** (One Person, One Vote - Some flexibility on pop. to 10%; 14th EP)	**Karcher/Kirkpatrick/ Wesberry** (One Person, One Vote - As equal as possible - No de minimmis ; ArtI, S2)				
2017						***Vieth*** (Still in search of a manageable standard; 14th EP or 1st)	
2018	Roberts Court			***Gingles/Johsnon/Bartlett*** (BVAP not total pop for VRA2)	***Shelby County/Shaw*** (VRA 5 preclearance no longer required for VRA 4 regions - ArtIV, 10th, etc)		**OP, OV + *Growe* + VRA (w/ *Connor, McDaniel, Abram)***
2019						***Rucho*** (nonjusticiable)	

6 - Table 3.3 – Judicial Redistricting Standards 1960-2019

4.0 TRENDS AND THEMES IN LFC REDISTRICTING CASES FROM BAKER TO RUCHO

To answer the question of *how has the involvement of the federal courts since Baker impacted the redistricting process and maps, and therefore representation in the U.S.?* It is first necessary to answer *What have the federal courts done with redistricting cases since 1962?* This requires an analysis of the whole federal judiciary - of the lower federal courts (LFCs) as well as the Supreme Court.

Political science research on the federal judiciary often neglects the role of the LFCs, focusing instead solely on the Supreme Court. One may think that these subordinate courts are unimportant for observation because of their general adherence to Supreme Court precedent - one could intuit the actions of LFCs generally by relying on SCOTUS standards. However, as shown in Chapter 3, Supreme Court judicially manageable standards are not always present. When they are present, they are far from comprehensive. Standards not only allow, but often require, substantial latitude in judicial decision making and action. Therefore, although LFCs generally adhere closely to precedent and are constrained by stare decisis and standards from the Supreme Court, they are still empowered to act with significant variance and impact within these constraints.

To understand what the federal courts have done and what the consequences of these actions are, requires an in-depth exploration of LFC action in combination with Supreme Court decisions. That is exactly what this chapter does for redistricting and reapportionment.

LFC cases for redistricting are more numerous and granular. They deal with specific plans, in specific places for specific people. LFCs are concerned with the details and conflicts in the democratic process that rise to the level of a federal justiciability. Some are sprawling public law litigation that feature years of judicial management, oversight and on-going relief. Others are frivolous, moot, nonjusticiable or unimportant and dispatched with a summary dismissal. This chapter takes an extensive look at LFC decisions on redistricting cases between 1960 and 2019. It shows how the role of LFCs is extremely different from that of the Supreme Court in redistricting. But it is also importantly shaped and constrained by the high court.

The role of LFCs differs substantially from that of the U.S. Supreme Court in the federal judiciary. As shown in Chapter 3, within redistricting litigation, often Supreme Court decisions didn't solve the specifics of a case, such as how the Tennessee legislature should be apportioned in practice, but rather provided new judicially manageable standards for courts and legislatures to use when facing future cases and controversies. LFCs on the other hand are geographically bound tribunals typically of one or three judges who are tasked with deciding the case or controversy at hand. With redistricting and reapportionment litigation, LFCs are the site of the activity. They are the location of execution for the principles of judicial action articulated in *Baker.* While the Supreme Court has been said to make or interpret law, the LFC can more easily be argued to be applying law - undisputedly using stare decisis and looking to the high court for judicially manageable standards.

Just because LFCs have a different and subordinate role in the American federal system than the Supreme Court does not mean that they are weak. LFCs have substantial

latitude to reorganize cases in party and focus, craft creative and ongoing remedies, and change public policy at the subnational level.[353] This is particularly true with public law litigation and the exercise of equity powers that started in the 1960s, such as the school integration cases that led to bussing. These powers are also on full display with apportionment, redistricting and gerrymandering litigation. The redrawing of a state's legislative districts may be the ultimate version of a LFC's constitutional equity powers. LFCs are the courts that have to fashion the specific remedy for the specific case or controversy. If a state's legislative map violates a constitutional principle, then the LFCs have to ensure that a state has a legal map before the next election whether redrawn by the legislature, the plaintiff or the court itself.

This chapter looks backward from the recent past, analyzing all LFC litigation related to reapportionment, redistricting and gerrymandering between 1960 just before *Baker v Carr* through 2019's *Rucho v Common Cause*. The data collection and analysis shown in this chapter, of redistricting cases in the LFCs and over this time period, is completely original and unprecedented. It highlights important descriptive statistics showing the full picture of federal court involvement in redistricting since 1960 as well as specific trends within this time frame. This analysis is also matched with the Supreme Court landmark decisions and judicially manageable standards outlined in Chapter 3 to highlight the responsiveness of LFCs to the high court and support the hypothesis of LFC precedent boundedness.

To complete this analysis, I built an original dataset of more than 1,200 LFC cases between 1960 and June of 2019. This dataset includes cases of legislative redistricting at

[353] Chayes, Abram. "The role of the judge in public law litigation." *Harv. L. Rev.* 89 (1975): 1281.

the Congressional, state and local level, including county, city, town and other local governments[354]. The hundreds of court cases feature only LFC cases, coded to include the type of court used in the case (one judge or three-judge), the subject matter of the claim (malapportionment, partisan gerrymandering, racial gerrymandering, VRA2 violation, VRA5 violation), and the outcome of the case among other factors.

This chapter analyzes the data in four parts, answering the *how, what, why and when* of LFC action on redistricting cases. First, in Trend 1, I use this original dataset in combination with existing scholarship to map a "typical" process of judicial decision making for redistricting litigation in the LFCs. In Trend 2, I give an overview of all LFC cases, highlighting trends in the types of redistricting cases, constitutional claims, and outcomes, over time and space. In Trend 3, I use the data to illustrate the responsive relationship between LFCs and the Supreme Court in three types of redistricting claims - malapportionment, racial gerrymandering and partisan gerrymandering. Finally, in Trend 4, I show *when* LFCs commonly draw the redistricting maps for Congressional and state legislative districts themselves and why the timing of these actions are the most important precondition for this exercise of federal court powers.

This chapter's analysis bolsters some conventional wisdom in redistricting scholarship with original data and findings. Trend 1 illustrates how LFCs are often reluctant to act until an election is imminent, giving other redistricting institutions a number of chances to comply with the law and standards. Trend 2 shows how common malapportionment, racial gerrymandering claims have been, and how concentrated cases are in the American South. Trend 3 provides evidence of the LFC compliance in relation

[354] Some states have unique legislative structures. For example, Louisiana features parish police juries as an administrative unit rather than a county board seen in many other states.

to Supreme Court standards, which also supports the theory and hypotheses of Chapter 2. Trend 4 explains why the "redistricting cycle" of years that end in "2" is the locus of most state and Congressional redistricting and deserves the most scholarly attention.

However, this analysis also contributes a variety of novel findings to the redistricting and legal literature. Trend 1 shows that while LFCs are deferential to de jure redistricting institutions and reluctant to intercede and make a redistricting plan, they do not relinquish power. LFCs retain the option and multiple methods to create their own redistricting plans at each step of the process. Trend 2 shows the dominance of local redistricting issues on the LFC docket. Although state and Congressional plans get the majority of legal and scholarly attention, especially regarding Supreme Court standards, it is the local redistricting schemes that take up the plurality of LFC caseloads. Trend 3 illustrates how not only are LFCs responsive to the Supreme Court, but that this relationship is a two-way street with Supreme Court landmark decisions often following rises in LFC caseloads. Trend 4 digs deeper into the "redistricting cycle" to expose how not only are LFC-made plans more likely in years ending in "2" but they are more likely at certain times of the year, such as the spring due to primary election schedules.

4.1 Trend 1

How: Common Redistricting Procedures in the Lower Federal Courts

By analyzing more than 1,200 LFC cases related to redistricting from 1962 to 2019, I have synthesized the data into the common procedures that LFCs have used historically. This analysis shows the steps and decisions LFCs typically make in how to

proceed with redistricting claims, when to be deferential and when to be active. Ultimately this analysis lets me describe the common process of LFC action when facing a redistricting case. This process is outlined in a flowchart (Figure 4.1) and described in detail as Trend 1.

This study is informed by the 2005 article from law professor and redistricting expert Nathaniel Persily, a "Primer on Court-Drawn Redistricting Plans" in *The George Washington Law Review*.[355] While Persily, who has acted as a court-appointed expert for LFCs in redistricting litigation in multiple cases, provides good insider observations into the process and its sprawling permutations of LFC redistricting, my outsider analysis supports some of Persily's findings, differs from others and allows for a more comprehensive exploration of the procedure of historical LFC action on redistricting.

In my analysis of LFC redistricting procedure, LFC actions appear slightly more hierarchical and inconsistent than Persily outlined. There is such a variety of case types. Some deal with malapportionment, partisan gerrymandering claims or racial vote dilution - or all of them. Some use three-judge panels. Some have single-judge courts. There are state legislature cases, Congressional challenges, local at-large malapportionment maps, and combinations of multiple plans. Some cases consider both state plans but find only the senate unconstitutional and the house legal by a thin margin. The outcomes and remedies of these cases vary substantially even when all of the facts seem similar. One court may use a special master where another allows for the legislature to use the illegal

[355] Persily, *Primer;* Persily, has an intimate understanding of the choices courts have to make with redistricting litigation. In the article he explained the law, procedures and "substantive decisions" that federal courts face when they draw maps. But, more than anything, Persily's article highlights the wide variation in the courts when they take on redistricting litigation in consideration, procedure and outcome.

map on short notice before instituting a new plan. Many of these details and outcomes change over time.

Despite the variety of the redistricting cases that LFCs see, there are two major general lessons that can be taken from analyzing the commonalities of LFC cases together.

First, the legal principles and Supreme Court standards are the paramount concern to the LFCs in these cases. Whether deferential or active, the LFC decisions are filled with citations to precedent of Supreme Court and LFC decisions. Because of this, One Person, One Vote population equality is the preeminent concern for both map assessment and map making. Secondarily, the concerns over racial gerrymandering and vote dilution from the Voting Rights Act, its 1982 amendments and the Supreme Court standards are key for both legal assessment and map making. Over time, the use of single-member districts (as opposed to multi-member or at-large schemes) and unchanged legislature sizes became LFC standards as well. These findings comport with the conclusions of Chapter 3. The One Person, One Vote requirement and racial standards were those that became the best defined and most clearly connected to constitutional rights.

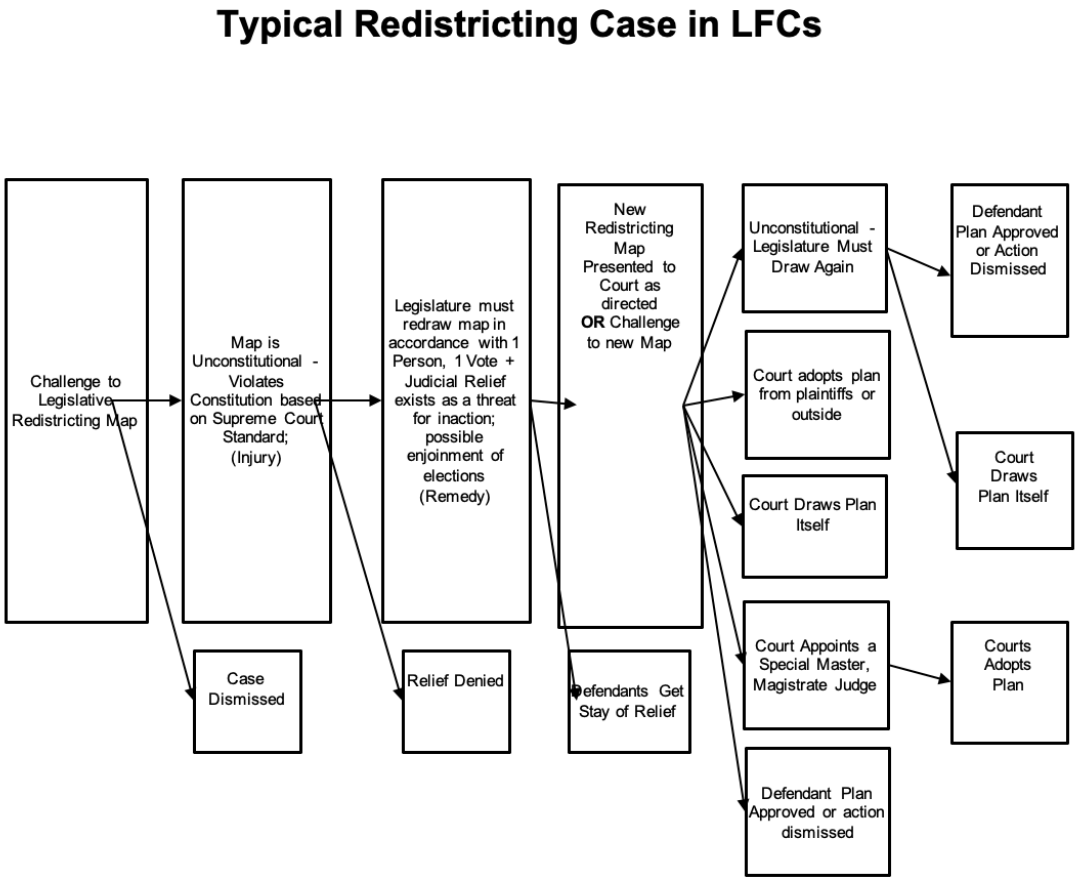
After these legal constraints, LFCs have more latitude to respond to the specifics of the case. Or, put another way, after the statutes, constitution and Supreme Court standards, the LFCs have a vacuum of guidance from the Supreme Court where the LFCs can act according to "principles of equity." As Persily explained, the chief qualities used in assessing and drawing new maps were compactness and maintenance of political subdivisions. These qualities were favored when comparing multiple maps, but were not compelling government interests in and of themselves sufficient to overcome violations

of population equality or racial concerns under the 14th Amendment and the VRA, as supported by the Chapter 5 analysis. Many opinions dodged political questions, such as incumbency protections. For example, incumbency protection was allowed by LFCs in maps drawn by others, but could not be a compelling state interest justifying other violations, such a racial gerrymander or unequal district population.

Second, the deference and restraint by LFCs shown again and again in these more than 1,200 LFC cases between *Baker* and *Rucho* clarify the importance of both precedent and legitimacy for the lower courts - the constraints of law and politics are major factors on LFCs in redistricting litigation. LFCs are hesitant to use the equity powers to fashion relief as a new redistricting map until all other options are exhausted or time is of the necessity. If they were to act quickly, redrawing malapportioned maps initially when finding a violation, LFCs would violate the legal constraint of the precedent, of deference from *White v Weisler* as well as the political constraint of judicial legitimacy norms that Frankfurter warns of in the *Colegrove* opinion - completely entering the political thicket. The dataset supports the importance of these political and legal constraints described in the institutional theory of LFC action described in Chapter 2.

In addition to these two major takeaways, looking at the hundreds of LFC cases together allowed for me to develop a prototypical decision tree based on this data to illustrate a common LFC procedure on cases challenging the legality of redistricting maps. Figure 4.1 and the associated description of the flow chart contribute critical tools for legal and political scholars to understand the possible actions LFCs can take for a

given redistricting case when accounting for past decisions the court has already made based on how LFCs have decided cases historically.[356]



2 - Figure 4.1 – Typical Judicial Process on Redistricting Cases

The first step for redistricting cases in the LFCs requires a lawsuit[357]. Typically, the defendant is the institution responsible for the creation of the map or the elections in a location. State legislatures or election officials are typically defendants for state legislative and Congressional redistricting cases, while counties, cities and municipalities

[356] My findings and the descriptions of the flow chart consider many of the details outlined by Persily in his general primer.
[357] Persily, *Primer,* 1132

as well as state election officials are for local cases. Plaintiffs have been individual voters, taxpayers or residents who have standing and suffered a harm, as well as groups and parties. Over time, there have been an increasing number of suits by organizations as opposed to individuals, such as the NAACP, the League of Women Voters or Common Cause, as well as political parties.

This case or controversy requirement, as explained in Chapter 2, is foundational, but it also acts as a real constraint on LFCs and defines their role in the redistricting process. LFCs are not policing redistricting maps to look for violations (outside of any preclearance requirements.) LFCs will not judge a map before it is passed into law or challenged. This requires an interested party to challenge the legality of redistricting or reapportionment. This is important to consider when looking at LFC action on redistricting - which populations had legal advocates and which did not, at which periods of time and in what places. Early in the Reapportionment Revolution, in the 1963 LFC case *Drew v Scranton*[358], the court clarified its role - it could not issue an advisory opinion on a map. You cannot challenge a map that was not passed into law. These are the known unknowns of this LFC redistricting analysis.

Once the case passes the hurdle of case or controversy - as well as mootness, ripeness and standing requirements - the LFC takes on the case. Over time, the typical procedures requested by the two parties have changed. Consistently, parties ask for summary judgement, defendants request dismissal for various reasons, and both sides request three-judge courts as required in 28 USC 2284.[359]

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[358] Scranton v. Drew, 379 U.S. 40 (1964)

[359] Pursuant to 28 U.S.C. § 2284(b)(3), a single judge "shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." This limitation on a single district judge's authority to hear and

The three-judge court is typically assembled for apportionment decisions of Congressional and state legislative districts as well as Voting Rights Act cases, which includes many redistricting cases. The three-judge court functions as a district court and is directly appealable to the Supreme Court. It is composed of some mixture of circuit and district court judges from within the circuit where the case is being heard. Three-judge panels are not required and rarely used for local redistricting controversies unless concerning serious VRA section 5 violations. Table 4.1 illustrates the typical court types and procedural arrangements.

Case Type	**Court Type**	**Appeal Type**
Congressional, State Senate, State House districts	Three-Judge District (1 or 2 District Judges and 1 or 2 Circuit Judges)	Directly to SCOTUS
All VRA5 Cases	Three-Judge District Court (1 or 2 District Judges and 1 or 2 Circuit Judges)	Directly to SCOTUS
Local Cases (County, City, Town, Boards of Supervisors, Parishes, Police Juries)	One-Judge District Court	To Circuit of Appeals
Appeals of Local Cases (County, City, Town, Boards of Supervisors, Parishes, Police Juries)	Three-Judge Circuit Court	En Banc Circuit Court and/or SCOTUS

7 - Table 4.1 – Judicial Procedure by District Type

determine a preliminary or permanent injunction application is triggered only in proceedings in which the convening of a three-judge district court is required. Page v. Bartels, 248 F.3d 175, 186 (3d Cir. 2001). Pursuant to 28 U.S.C. § 2284(a), "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of Congressional districts or the apportionment of any statewide legislative body." Congress has provided that a three-judge district court "shall be convened" when: (1) required by an Act of Congress (such as section 5 of the Voting Rights Act); or (2) "an action is filed challenging the constitutionality of the apportionment of Congressional districts or any statewide legislative [*2] body." 28 U.S.C. § 2284(a)

In addition to the procedural motions that define the type of court and trial, the details of the lawsuit that the plaintiffs bring are important to the outcomes of LFCs in redistricting after the LFC takes the case. In some cases, the plaintiffs request that elections be enjoined under the existing map if it is declared unconstitutional. In some cases, this is not requested and then the LFCs may or may not prevent elections. In general, the redistricting map that is challenged either is declared unconstitutional or the lawsuit is denied or dismissed. In some cases, the map may be approved.

The next step is that if the map is declared unconstitutional, typically the defendants are required to redraw the redistricting map in accordance with law. The LFC may provide specific guidelines based on the violation. The LFCs may threaten judicial action if the redistricting institution doesn't redraw in a timely manner - a threat to redraw the map themselves. The LFC may provide a schedule for the parties to reconvene and present the map for approval. The LFC may invite both parties to present maps or include the public more broadly. The LFC may simply declare the map unconstitutional without clearer instructions. The typical outcome is that the LFC has the legislature redraw the map with some future expectation of presenting the map to the court.

LFCs in redistricting litigation are consistently deferential.[360] LFCs are deferential to legislatures, redistricting bodies, state courts and subnational redistricting principles. When a LFC takes a redistricting case and finds that the reapportionment scheme or redistricting map violates the law, it typically allows the legislature or institution tasked with redistricting, such as a commission, to give the process another chance. There are numerous precedents LFCs cite when allowing legislatures a second chance at

[360] Persily 1132 - 1135

redistricting, including *White v Weisler* in 1973, *Wise v Lipscomb* in 1978, *Growe v Emison* in 1993, *Abrams v Johnson* in 1997. *Wise v Lipscomb* reads, "The [Supreme] Court has repeatedly held that the business of 'redistricting and reapportioning legislative bodies is a legislative function which the federal courts should make every effort not to preempt.'[361]

This principle of LFC deference was there from the start. In 1965's *Davis v Cameron*, the LFC decision articulated that courts should only redistrict as a last resort - "judicial relief becomes appropriate only when the legislature fails to act." Legislatures should have a reasonable opportunity to re-redistrict - what Persily calls a "second bite of the apple." LFCs must also be deferential to the state courts when there is litigation on the same map, if there is time, according to *Upham v Seamon*[362]. Additionally, LFCs should give deference to state redistricting principles that are not violative of federal standards, which often leads to preference for traditional redistricting criteria such as protection of county lines.

My analysis of more than 1,200 LFC cases related to redistricting, reapportionment and gerrymandering supports Persily's emphasis on the principle of judicial deference. I found that LFCs did not merely practice deference in most instances but preached its importance in nearly every opinion. This expression of the importance of difference was important when the LFC did act in fashioning judicial relief, expressing those efforts of deference failed to work and imbuing the court with legitimacy.

The exercise of deference by the LFCs was one area that provided consistency in redistricting litigation in the federal courts and is a critical aspect of the court's decision-

[361] Wise v. Lipscomb, 437 U.S. 535 (1978)
[362] Persily

making process. Often this deference meant that the legislature would repair the legal defects of the map and then present the new map for approval by the courts. At other times deference would fail, the legislature would not present a legal or appropriate plan and then the court would either have to draw a new one itself or select from other plans provided by the public or plaintiffs.

After the initial redistricting institution has been given a second chance to make the redistricting map, the possible outcomes vary substantially. Many times, the new map is submitted for approval by the defendant legislature and is approved by the three-judge court. Sometimes, a new suit is leveled against the defendants either for making another violative map or for inaction or untimeliness in making the second map. If the second map is not approved by the LFC, then the court may draw a new map. The court may adopt a map from an outsider. The court may allow the legislature a third chance. The LFC can appoint a special master who will draw a map for the court.

Third, because of the principle of judicial deference in redistricting litigation, court-drawn maps are rare and only after all other options have been exhausted. By allowing the legislature or other state institutions to have multiple attempts, this also can create constricted time frames for judicial map-making. Persily explained,

> In other words, courts tend to draw their own plans only as a last resort. This general rule has tremendous procedural and substantive implications for the judicial line-drawing process. First ... a court is necessarily rushed in constructing a plan if it gives the legislature until the last moment to draw its own plan. Second, the compressed time frame in which a court must operate limits the possible factors that can take into account when crafting the plan. With the luxury of time would come an ability to mediate among the opposing forces that wish to shape the line-drawing process in one way or another. In theory, a court with time on its hands could also repeatedly "improve" its plan after receiving continued input

> from interested parties. Such deliberation and deal-making is the stuff of legislative, not the judicial process. Court-drawn plans, in contrast, are emergency interim measures adopted to ensure the elections can go forward under some set of legally defensible lines.[363]

When courts draw maps, they not only have to act fast, they have a number of legal constraints and procedural powers to consider. As LFCs drew their own plans, they had to meet stricter legal requirements than the state did, by meeting both constitutional requirements and Supreme Court standards as well as trying to achieve the appearance of neutrality and fairness. Persily points to the preference for single member districts articulated in *Connor v Johnson*,[364] very strict One Person, One Vote adherence,[365] and the Voting Rights Act as the key legal constraints on LFCs when drawing a new map. Additionally, courts have procedural or structural choices for how to undertake the redistricting task themselves. They can appoint a special master, such as a redistricting expert or retired judge, to oversee the mapmaking process and present their findings to the court for approval. The court can literally draw the districts themselves either using an existing map or starting from scratch. The court can also adopt a map from the plaintiffs or an outside party that fits the requirements.[366]

Maps that are drawn by LFCs often do use a special master to complete the initial plan. If there is time, there is usually a period for feedback on the special master plan before it is instituted for an election. Additionally, when a challenged map is declared unconstitutional and the initial redistricting body is given another chance to draw the districts, often the court requests the new map to be presented for approval. When this

[363] Persily 1133
[364] Persily 1138
[365] Persily 1139-1140
[366] Perisly 1148-1149

happens, the plaintiff and other parties may also be allowed to present new maps as well. The LFC will then either approve of the legislative map, adopt one of the other partys' maps or declare all of them insufficient and make a new map, either by adapting a presented map or creating a new one. In recent years, LFCs have also been using Article I magistrate judges to assist with the often long and sprawling redistricting lawsuits. These judges eventually make recommendations to the Article III LFCs that retain jurisdiction and the final remedy options. There is no uniform way for LFCs to approach redistricting or mapmaking.

Aside from the legal constraints and the procedural options used by the LFCs to draw these remedial maps, there are still many substantive considerations that must be made to actually draw a map. These are the questions over where to draw the actual lines that are addressed in detail in the two following chapters, 5 and 6.

A lot of what drives the LFC decisions on the outcomes of a map is the election schedule and timeliness. The most important outcome is to have a constitutional map at the time elections are held. As is shown in Trend 4, there is a spike in judicial mapmaking and activism in the months leading up to the primaries and general elections in 1972, 1982, 1992, 2002, and 2012. This period after the census and before an election is crucial. Sometimes the LFC will allow the state to use an unconstitutional map in order to not interfere with elections - another form of deference. This occurs but is uncommon.

Although analyzing these cases together allows for the creation of a decision tree that maps out a typical procedure of LFCs with redistricting cases, it also highlights the substantial variety of outcomes and differences in choices. The only outcome that is clear among all of these paths and options is that the typical outcome of a LFC case on

redistricting ends with a map that meets the Constitutional standards outlined in Chapter 3. This map may be temporary or permanent. Drawn by the courts for one year or 10, adopted from the plaintiffs or a citizen, or redrawn by the legislature or commission. Regardless of the methods used by the courts and other institutions, the end result is almost always a redistricting plan that complies with Supreme Court standards and relevant laws at the time of the case.

This explanation of the typical procedure tests and validates the first hypothesis, H1, about *how, when and why the federal courts make a redistricting plan.* Based on the combination of legal, political and structural constraints, particularly stare decisis, legitimacy norms and the threat of appeal to the Supreme Court, I expected the lower federal courts to only create their own redistricting plans when it is a last resort before an election. This analysis shows that LFCs are exceptionally hesitant to act as map makers, only doing so as a last resort and after the de jure redistricting institutions have had ample opportunities to craft legitimate plans.

4.2 Trend 2

What: An Overview of Lower Federal Court Redistricting Cases from 1960-2019

To get a more comprehensive understanding of actual LFC action related to redistricting between *Baker* and *Rucho*, I reviewed thousands of LFC decisions and coded the relevant cases by subject matter, court composition, outcome, time and geography.[367] This collection and categorization of LFC decisions about redistricting

[367] I used Lexis Nexis/Nexis Uni to search thousands of LFC decisions with the search terms "apportionment," "reapportionment," "redistricting," "districting," and "gerrymandering" between 1960

allows for a deeper exploration of the role of LFCs in redistricting since *Baker*, describing trends, insights and new findings with a firm evidentiary basis. It highlights the mundane and the significant - the role of LFCs in dismissing hundreds of redistricting cases as well as redrawing legislative districts for millions of people on the eve of elections.

With this original dataset, I focused only on legislative redistricting, which included Congressional, state legislative, county, city, town and other local districts[368], but not state judicial, school, water, political party, magisterial or tribal districts.[369] [370] Additionally, this dataset is focused on cases where at least one of the aspects of the case before the court was the legality of a redistricting plan or map. These are not cases related to attorney's fees or legal questions subsequent to a court decision on the apportionment map. Further, the dataset codes individual LFC decisions in cases that may be ongoing for years. For example, if a case has one decision declaring a map unconstitutional in 1973, another decision making a map in 1974 and a third case approving a new legislative map in 1974, this is coded as three separate observations. This is because although the case ultimately ended with a different decision, the 1973 decision was still an LFC action that could have been impacted by a Supreme Court precedent at that time, the 1974 decision may have shaped an election and the second 1974 decision may have precedential value. If in another case there were four decisions: one appointing a special master, one finding in favor of a discovery motions, one adopting the special master's

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and June 1, 2019. I found more than 3,800 cases that were decided by LFCs in the 11 circuits, the DC circuit and the federal court of appeals. From these, I found 1,229 that were germane to my project.

[368] Such as Louisiana Police Jury districts

[369] I only considered cases in the 50 U.S. states, not territories

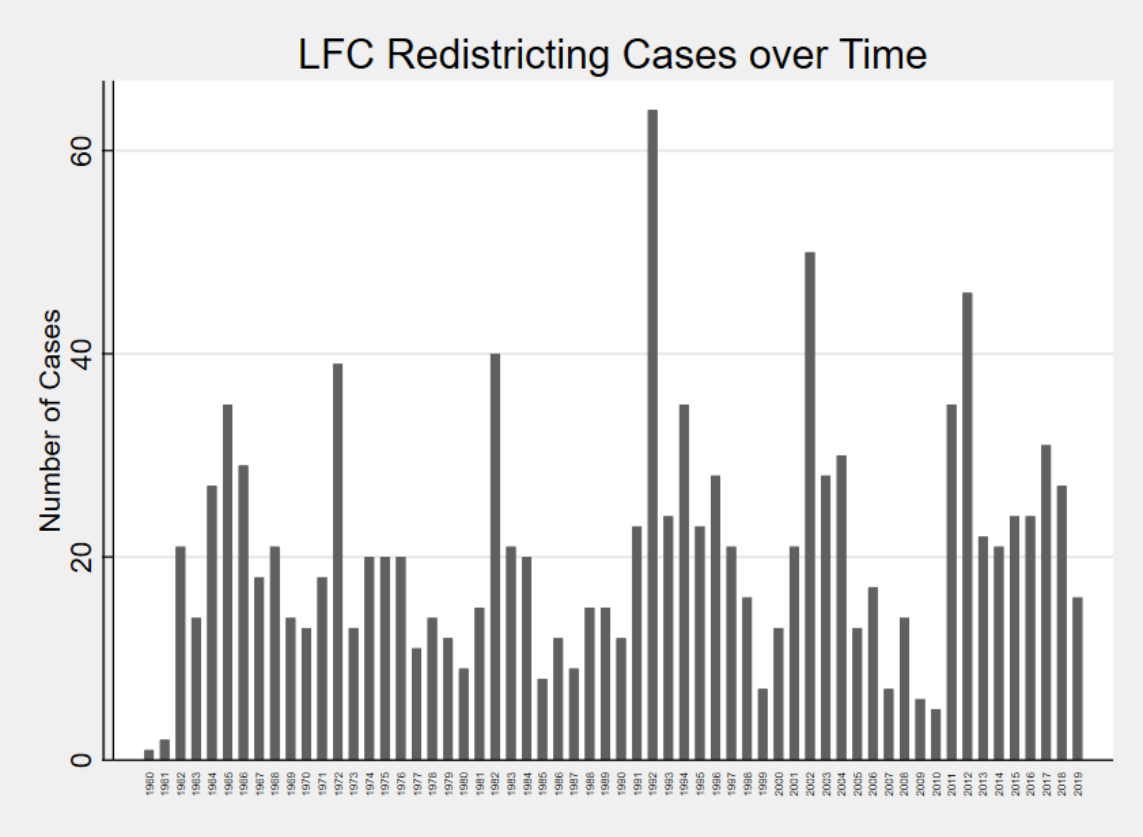
[370] Cases concerning these districts rest on the same constitutional footing and One Person, One Vote standard, but the districts themselves serve a different purpose in American democracy.

map and one deciding attorney's fees, these are coded as one observation - when the map was adopted, because that is the action that matter for the relations between the court, the legislature and the voter. Some cases deal with a map but don't end with finality and subsequent cases are not clear. Some cases were consolidated with others. Some are left ongoing. [371] [372]

This substantial data collection allows for the exploration of descriptive statistics to illustrate the real, historical LFC actions on redistricting between *Baker* and *Rucho*. This dataset shows the trends in redistricting litigation over time and space, broken out by variation in the types of courts, cases, subject matter and outcomes.

[371] This dataset includes both reported and unreported cases, but not unpublished cases.
[372] All cases are before Article III federal court judges, not Article I magisterial judges that were used in some cases. These are excluded.

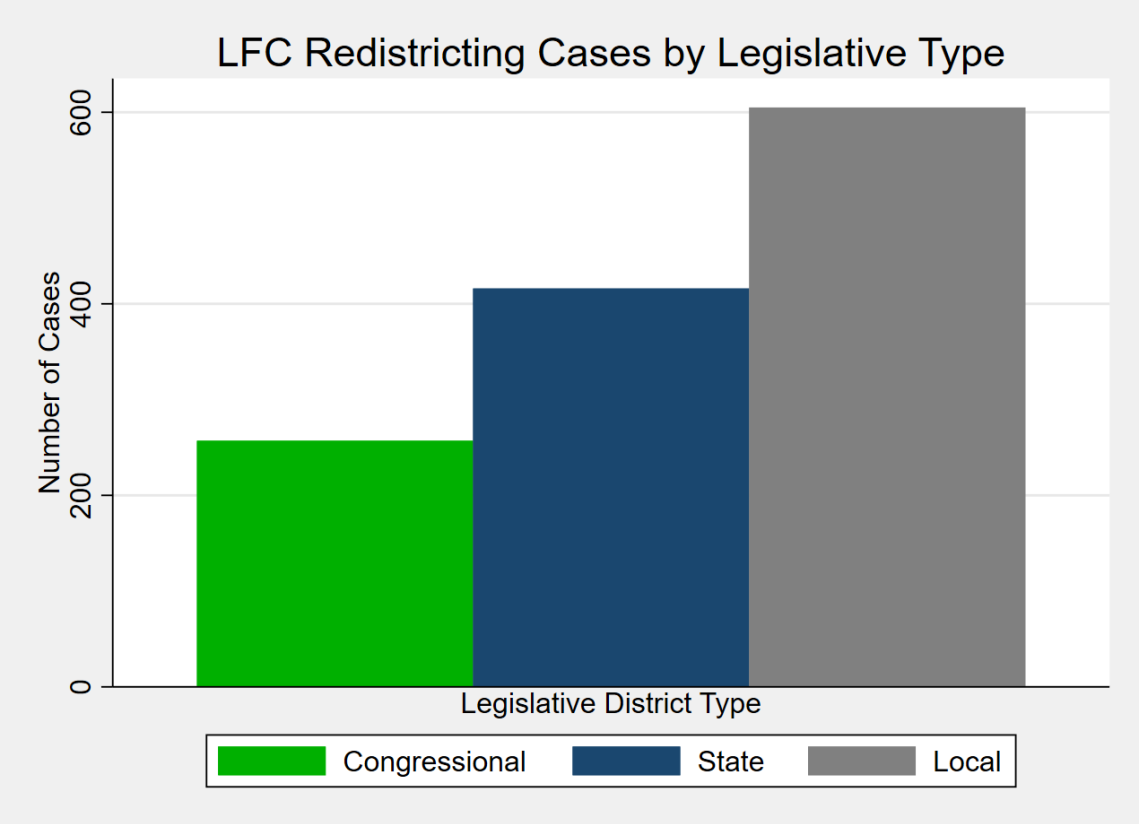
Trend 2A: LFC Dockets Over Time



3 - Graph 4.1 – Lower Federal Court (LFC) Redistricting Over Time

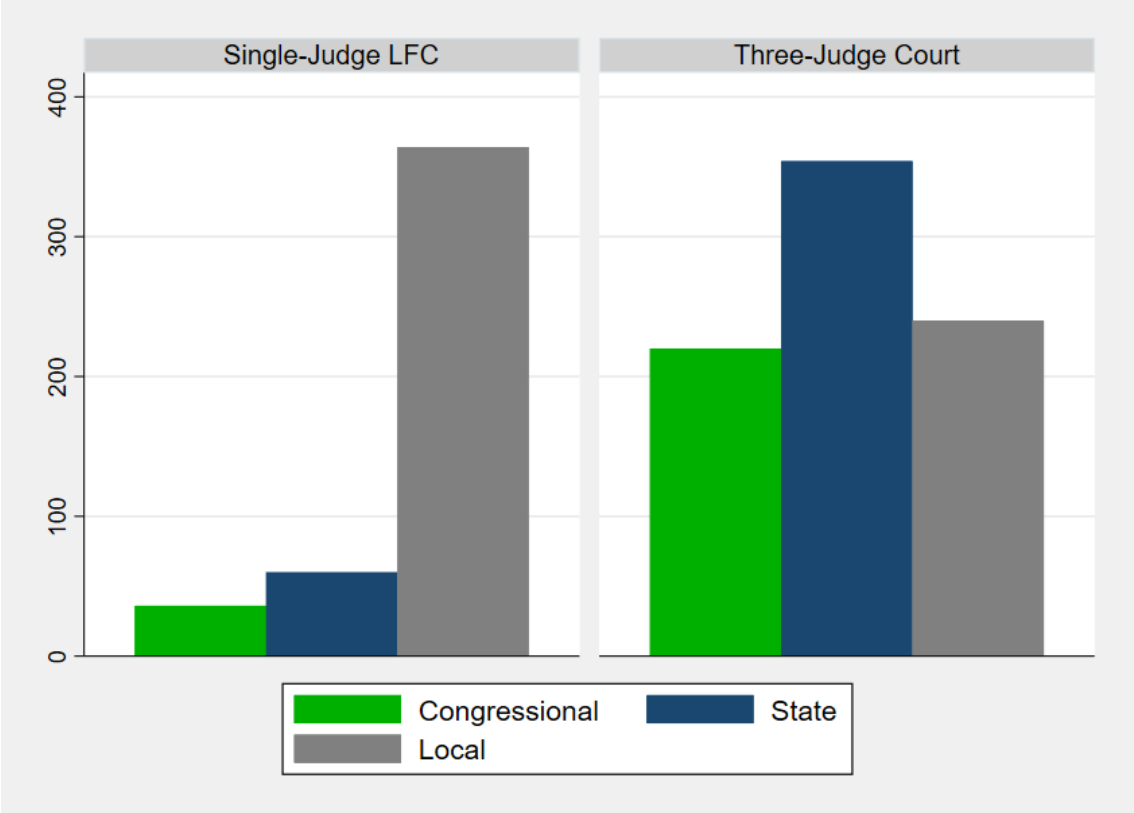
Graph 4.1 illustrates the total LFC caseload of reapportionment and redistricting cases between 1960 and 2019. You can easily see the jump from only one case in 1960 and two in 1961 to many more almost every year subsequently. The total caseload overtime gives a good general picture of the peaks and troughs of redistricting litigation - a steady flurry throughout the 1960s Reapportionment Revolution and then the spike in activity surrounding the 2's - 1972, 1982, 1992, 2002 and 2012 - when redistricting maps must be in place following the decennial census for the next election. There are many important caveats to this graph as you break down the cases by the individual variables, but Graph 4.1 does a great job of visualizing how LFC resources are being used over time and how the *Baker* decision had an immediate and last impact on the LFC docket.

Trend 2B: Districting and Court Types



4 - Graph 4.2 – LFC Cases by District Type

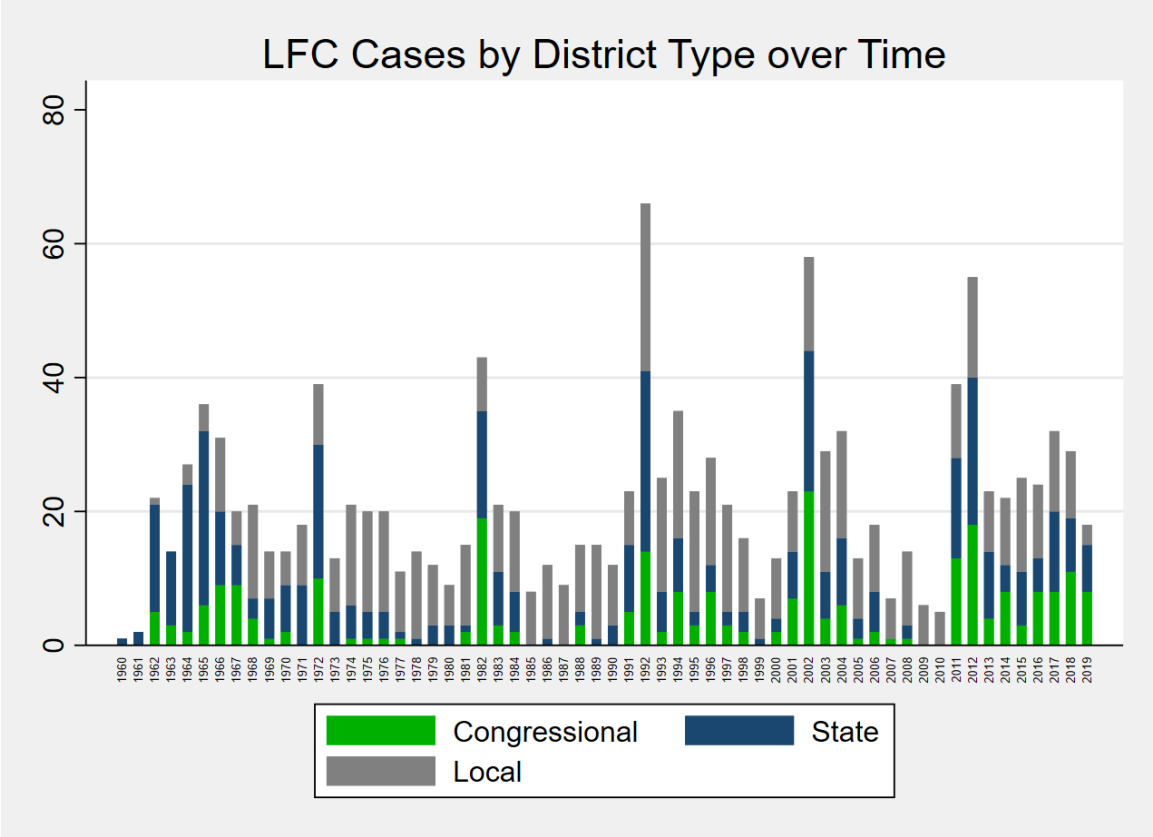
While Supreme Court decisions about reapportionment and redistricting are dominated by state and Congressional districting questions, local redistricting represents a plurality of the litigation the LFCs see. Local cases can include challenges to the districting or apportionment of county boards, towns selectmen boards, at-large election schemes that dilute racial voting power, ward redistricting schemes in cities and other local plans. Most local cases were related to racial gerrymandering or vote dilution claims. Some were related to VRA 5 preclearance or malapportionment claims.



5 - Graph 4.3 – LFC Cases by Court Type

What is significant about the dominance of local cases in the LFC docket is that this typically features a different court structure than state or Congressional claims. While an overwhelming majority of Congressional and state cases used three-judge courts, most local cases used single-judge district judges (see: Graph 4.3). Not only does this lead to a different dynamic in the court's decision making, it also has a different appeals process. Single-judge district courts go through the typical federal court appeals process, moving to the circuit of appeals. Whereas the three-judge courts are directly appealable to the Supreme Court. The fact that local cases use the typical process inflates the overall descriptive statistics of the local cases because this litigation was more protracted, bouncing between the district court and the circuit court. Many of the three-judge courts

that are coded as local in Graph 4.3 are circuit courts of appeal. Of the 605 local LFC case decisions, 406 are district court cases while 199 are circuit court decisions, which may be three-judge panels of circuit judges or en banc hearings, which are rarer. The 199 local circuit court cases make up nearly 85 percent of the total 235 circuit court cases in this dataset. All circuit cases in this dataset were reviewing single judge decisions.



6 - Graph 4.4 – LFC Cases by District Type Over Time

When one looks at the types of redistricting cases over time, the dominance of local cases becomes even more apparent (Graph 4.4). The story of redistricting cases in the federal courts is in part a story of litigants pushing the limits of what the previous ruling means. As shown in Chapter 3, when the Supreme Court decided on the justiciability of redistricting in *Baker*, soon there was a need for a standard. Once there

was a standard - One Person, One Vote - the question was how substantially does this apply? To state houses? State senates? Local governments? Soon after *Reynolds*, in 1965, there was an explosion of local redistricting cases that sought to apply this principle to their county, town or city. Here is when One Person, One Vote cases also started appearing for school districts, for judicial apportionment schemes and for single-purpose districts not included in the dataset, but considered in the analysis.

After 1965, local cases generally represent a plurality if not majority of the cases in a given year with the important exception of 1972, 1982, 1992, 2002, and 2012[373]. Throughout the 1970s, 1980s and 1990s local cases represent a significant percentage of cases, particularly cases in the middle of the decade. Few of these cases ever rise to the level of a Supreme Court landmark decision, or even to the High Court at all. Many of these local cases during the 1980s and 1990s are focused on race and Voting Rights Act compliance.

Trend 2C: Legal Claims

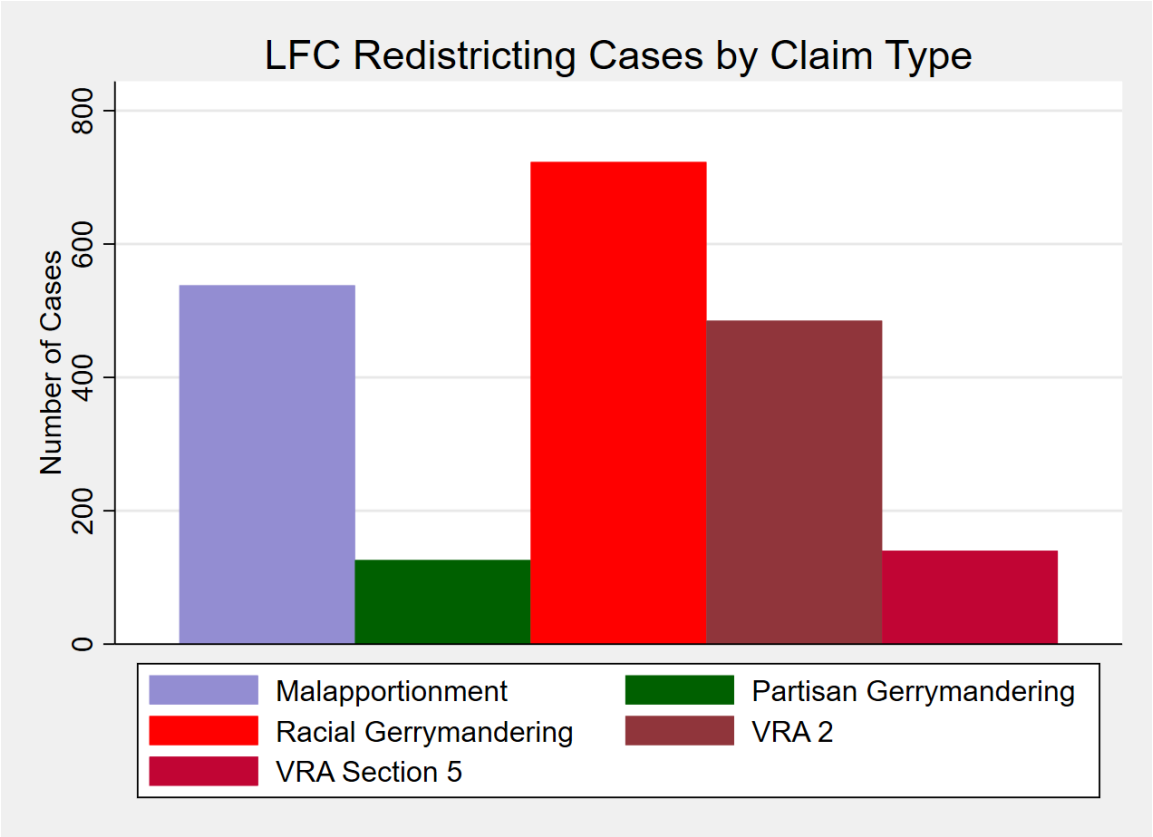
The type of legislative districts that were challenged are only one important way to look at the redistricting litigation between *Baker* and *Rucho*. Another useful way to sort this substantial data over time is to consider the type of claims that were being raised. I divided the cases into five categories of claims: malapportionment, partisan, racial, VRA2, and VRA5.

Malapportionment cases are cases where a redistricting map or scheme was challenged for having unequal populations in violation of the 14th Amendment as interpreted through the One Person, One Vote standard. Partisan claims were suits that

[373] These important "redistricting cycle" years of state and Congressional apportionment are fully discussed in Trend 4.

incorporated at least one claim of partisan gerrymandering or bias. This was often included along with other claims and frequently was dismissed even if the rest of the suit was not. The racial claim category includes all racial gerrymandering and discrimination claims under the 14th, 15th amendments as well as the Voting Rights Act. VRA2 claims were a subcategory of racial claims related to vote dilution. VRA2 claims were only coded when the suit explicitly pointed to VRA section 2 - this became very common after the 1982 Amendments, mirroring the Supreme Court's reaction as explored in Chapter 3. VRA5 claims were related to preclearance litigation either as the origin point of the lawsuit or potentially the outcome. As Graph 4.5 shows, most of the claims were racial and many of those were VRA 2 claims[374]. Many of these claims were also local. There were many decisions that featured multiple claims - the number of claims is greater than the number of decisions in the dataset.

[374] Almost all of the VRA2 and VRA5 claims were also coded as racial gerrymandering claims, but not all racial gerrymandering claims are coded as either of the VRA claims, especially prior to 1982.

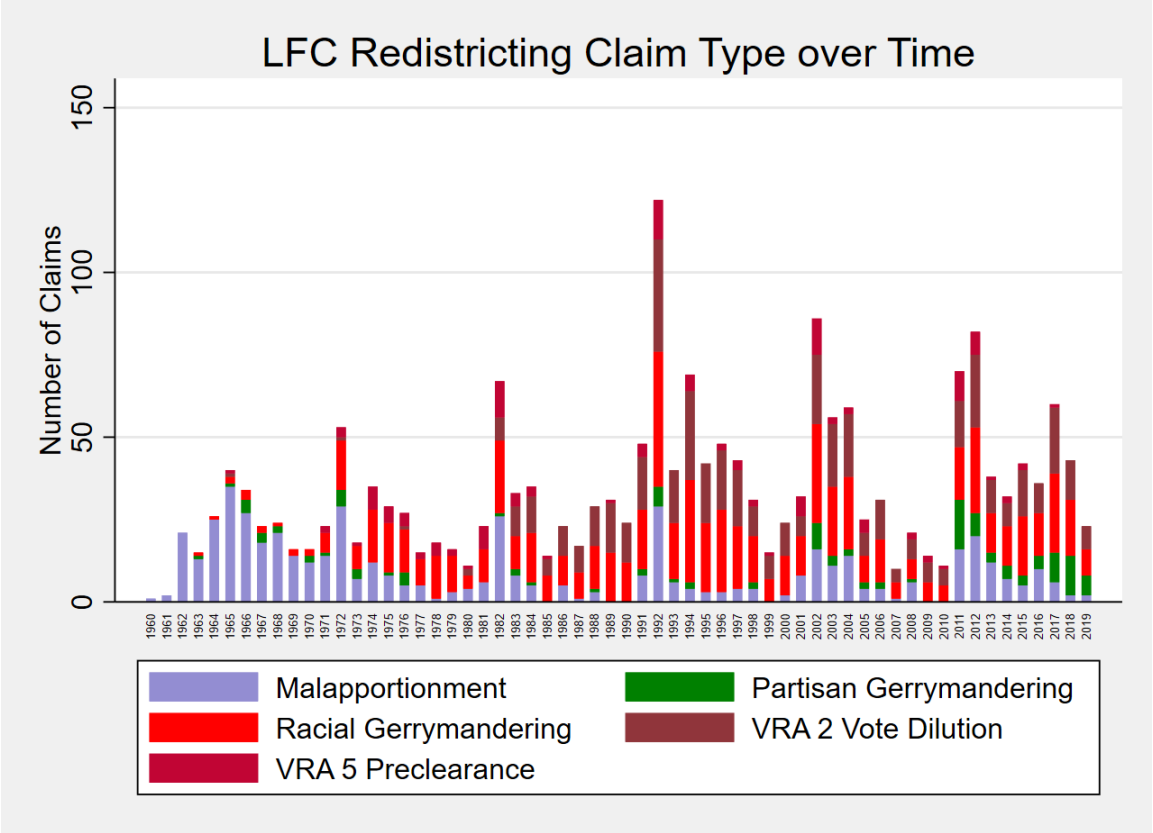


7 - Graph 4.5 – LFC Cases by Claim Type

There is substantial variation about the types of claims that were brought in redistricting suits between *Baker* and *Rucho* over time. Following the Chapter 3 explanation of the development of Supreme Court standards, most claims started during the Reapportionment Revolution with malapportionment challenges.

Malapportionment claims existed consistently in litigation over the 57 years, with particular spikes unsurprisingly surrounding redistricting cycles. Over time, there were many more racial gerrymandering claims, leading to a substantial rise in VRA2 claims following the 1982 VRA Amendments, which improved the ability of redistricting challenges based on racial voter dilution claims in the federal courts. Partisan claims are a

more recent trend, with effective partisan claims only occurring in the 2010s. Graph 4.6 illustrates how the types of trends change over time. [375]



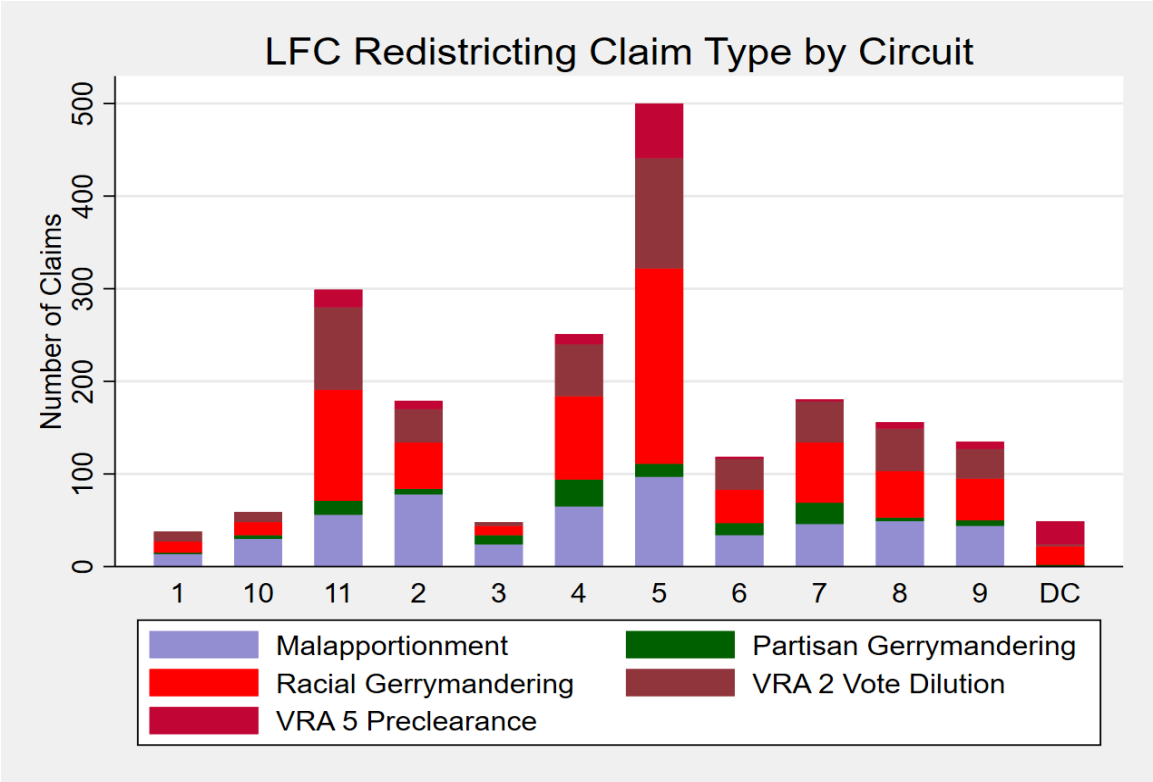
8 - Graph 4.6 – LFC Cases by Claim Type Over Time

Trend 2D: Where?

It's important to think about the types of claims that LFCs faced not just over time but also geographically, over space. The LFC caseload was not balanced evenly across the U.S. Certain federal circuits saw many more cases historically, with states in the South bringing the greatest number of cases to LFCs. Many of these cases involved at least one type of racial claim, and included a variety of state, Congressional and local cases.

[375] Many cases included multiple claims, therefore the sum of claim types exceeds the sum of cases

Although the South saw a majority of claims, the most populous states also saw repeated challenges that were often prolonged and repeated. New York, California and Illinois saw many LFC cases, especially in cities such as Chicago and New York City. Graph 4.7 and Table 4.2 illustrate the geographic variety and concentration of cases among the states and circuits.



9 - Graph 4.7 – LFC Cases by Claim Type and Circuit

The three circuits of Southern states - 4, 5 and 11 - include the most claims, and the most claims for racial gerrymandering and VRA 2 vote dilution. Texas, in the Fifth Circuit is home to the most cases, with 89, but New York in the Second Circuit has nearly as many with 81 (See: Table 4.2.) All of the claims in the DC circuit are racial claims related to preclearance as pursuit to the Voting Rights Act Section 5. The First

Circuit had the fewest claims, but also had a few claims from Puerto Rico that were not counted in the dataset.

State	Circuit	Decisions (%)
1. Texas	5th Circuit	89 (7.24%)
2. New York	2nd	81 (6.59%)
3. Mississippi	5th	66 (5.37%)
4. Alabama	11th	63 (5.12%)
5. Illinois	7th	48 (3.91%)
6. Georgia	11th	47 (3.82%)
7. North Carolina	4th	45 (3.66%)
8. Louisiana	5th	38 (3.09%)
9. Florida	11th	35 (2.85%)
10. Virginia	4th	33 (2.69%)

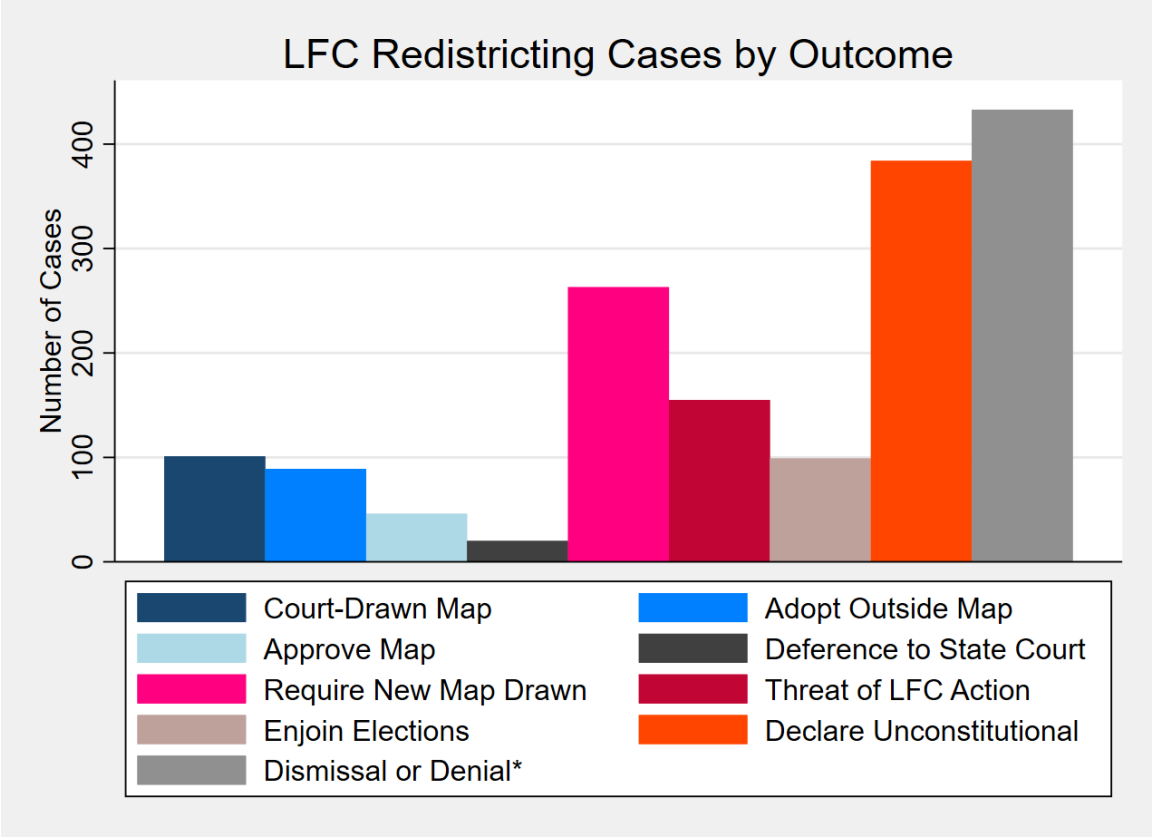
8 - Table 4.2 – LFC Cases by State

Trend 2E: Outcomes

Examining the LFC caseload based on the types of districting schemes and constitutional claims is a useful way to understand both the location and substance of legal concerns and specific conflicts both at specific points in time and their developments over time. This analysis helps provide useful descriptive statistics for understanding the totality of LFC activity and the true impact of LFCs in redistricting.

While there were more than 1,200 cases considered by LFCs during this time period, not all of these cases led to new maps or reforms to legislative districts. Many maps were dismissed or the plaintiffs call for relief was denied. However, dismissal or denial are difficult statistics to keep for such a large dataset because there is such variety of what exactly is being dismissed or denied. The plaintiffs do not ask for uniform relief,

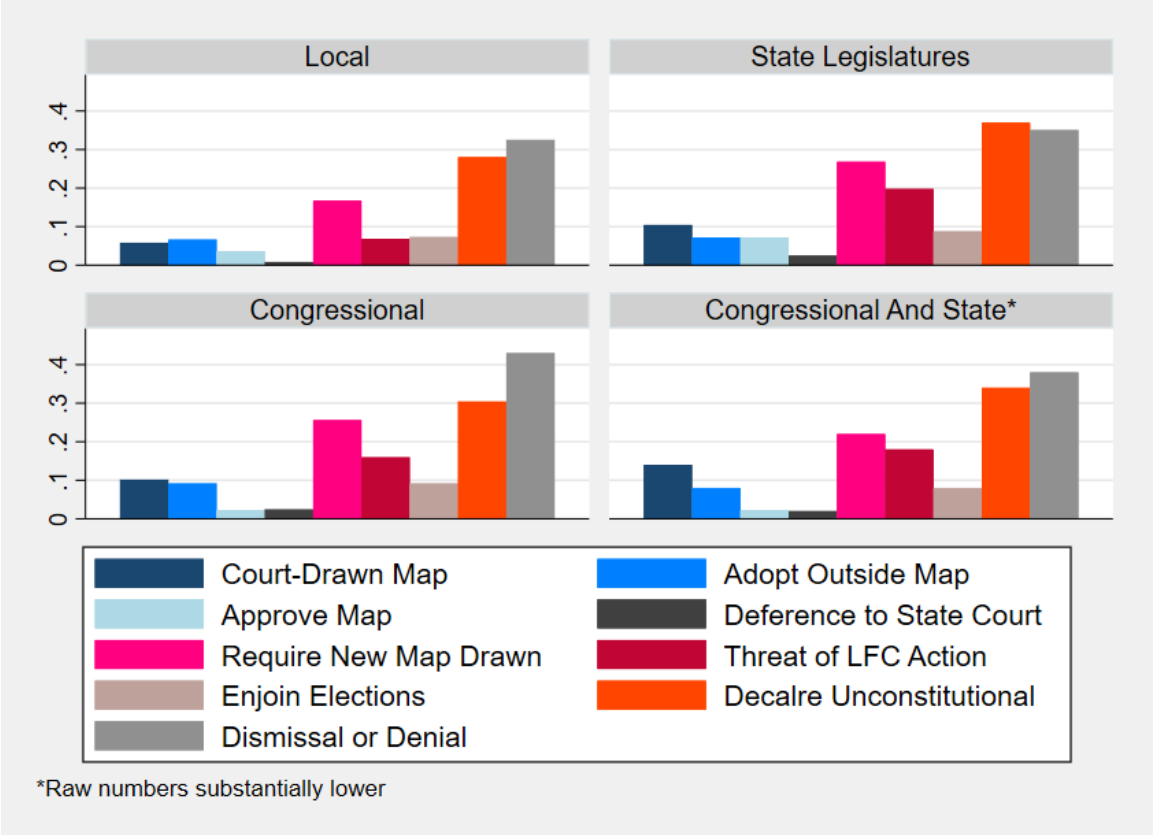
therefore even when dismissal is given, it may be dismissal of varied requests. For example, some plaintiffs may ask for the court to enjoin an election, which is denied, but that same map may be later declared unconstitutional and the legislature may be asked to draw a new district. Or a plaintiff's claim may be dismissed during a defendant's summary judgement. Or a case may be dismissed because the new map drawn by the legislature is approved or that the original claim is moot because the legislature enacted a new map outside of the federal judicial system. In short, many cases were coded as "dismissed" or "denied," but the variety of cases means this outcome is of limited analytical value to this study even though a plurality (35%) of all of the cases in the data set were dismissed or action was denied in some capacity. What can be taken from this is that it is difficult to have success as the plaintiff in a redistricting case in federal court. LFCs regularly dismissed all types and claims, across circuits and over time.



10 - Graph 4.8 – LFC Cases by Outcome

Of the outcomes other than dismissal, there are three main categories (See: Graph 4.8). The first category is that a redistricting plan is declared unconstitutional by the LFC. In some cases, this was the sole outcome: A plan was declared unconstitutional and the court's role ended. However, in many other cases, the declaration of constitutional violation was accompanied with a second category of injunctive actions including the requirement that the redistricting body draw a new map, a threat that LFCs would take action if they did not institute a new map, the enjoinment of future elections under the illegal plan, or a combination of these outcomes. It was rare for this second category of outcomes to not be paired with unconstitutionality, but some maps were declared unconstitutional, without other action.

The third category of outcomes is the most important and the rarest - when the court institutes a map. The most dramatic version of this is when the LFC draws its own map, either by itself or through a special master. Additionally, the LFC may instead choose to adopt a map submitted by a party other than the court itself. Often this is the plaintiff, but sometimes it is an amicus curiae or a person or organization that is local to the contested area. Another outcome is when the legislature was asked to redraw the map then they do and it is approved by the court.



11 - Graph 4.9 – LFC Cases by Outcome and District Type

The relationship between the frequency of these outcomes remains similar when comparing the types of legislative maps that are challenged. Dismissal and unconstitutionality are always the majority of the outcomes and the most common,

followed by demands for new maps to be drawn and other injunctive relief, followed last by court map making. State court deference is always present but simply not very common.

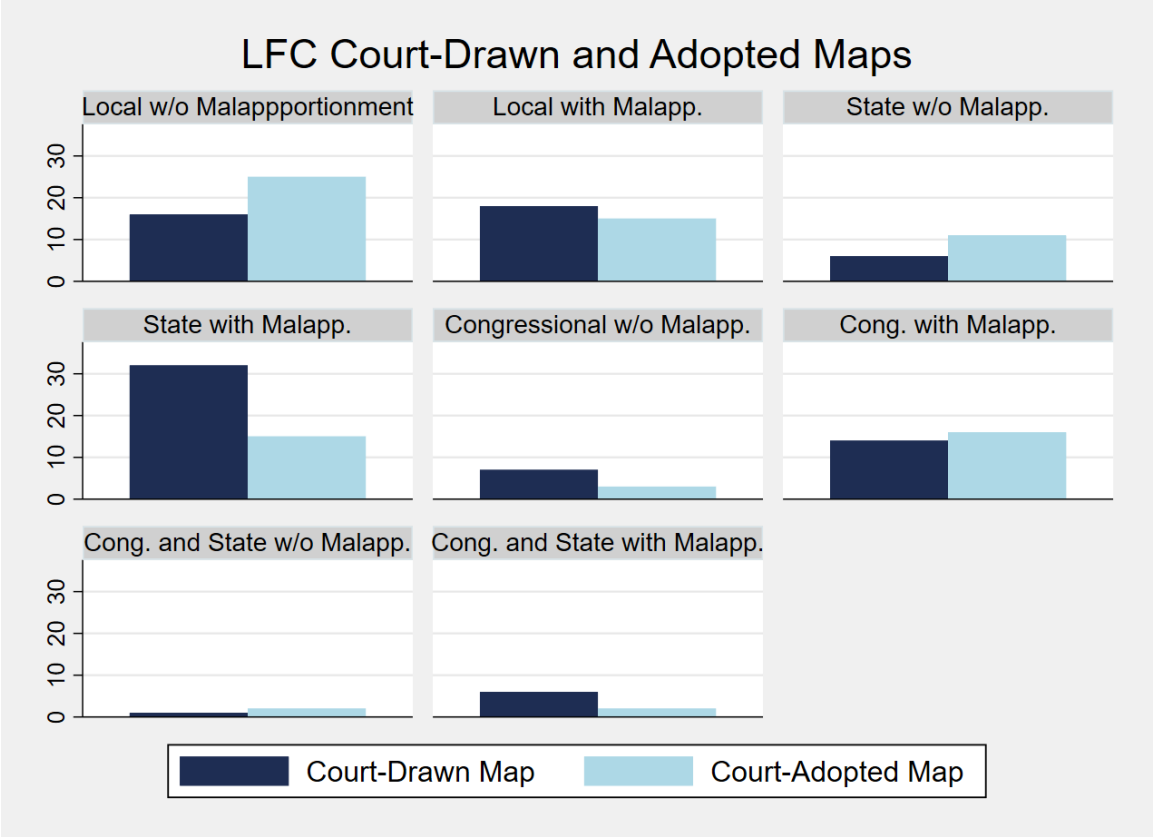
These frequencies follow when analyzing outcome by the type of claims as well. Partisan gerrymandering and VRA 5 preclearance have far fewer cases, but all five categories of claims have a similar frequency of outcomes.

Trend 2F: Court-Made Maps

The outcome of most interest for this project is when the LFCs institute their own redistricting maps. As explained in Trend 1, these are an outcome of last resort, after multiple rounds of deference to state institutions and officials.

This dataset shows that between *Baker* and *Rucho,* LFCs drew maps 101 times[376] and adopted maps 89 times. This accounts for about 15 percent of the total outcomes in the 1,200 cases. A plurality of the maps drawn - 45 - were for state legislatures - either one or both houses. About one-third of the maps drawn by LFCs were for local districts and 28 were for Congressional districting plans. A strong majority of maps drawn by courts - 70 - were in cases with malapportionment claims. Graph Set 4.10 shows the number of maps created or adopted in each combination of case types and claims Both court drawn maps and court adopted maps, in all but local cases, were more common with claims of malapportionment than with other types of claims.

[376] Not necessarily equal to 101 maps. State maps may be for both houses of the legislature or just for one.



12 - Graph 4.10 – LFC-Made Maps by District Type and Claim

It is important to consider the outcomes of maps being made or adopted by LFCs for local as well as state and Congressional districts. Although the major Supreme Court cases have emphasized the role of the federal judiciary in the state and Congressional districting when there are constitutional violations, local cases are important as well. Local cases do not only represent a plurality of the 1,200 cases, but also highlight the depth and granularity of federal judicial involvement in what has traditionally been state and local responsibilities. LFCs have decided on the new ward boundaries and county board district lines in rural and urban communities across the U.S. for more than five decades. This involvement of the federal courts in drawing local lines shows the mature political development of the Court standards on race and malapportionment, and the

ultimate change in the role of the federal courts in the American political system. As with many areas of American civil rights, the federal courts were the institution that disrupted inequality and the status quo.

However, the Supreme Court's focus on the state and Congressional districts is also warranted. State and Congressional districting schemes are significant because of the number of residents and citizens they impact and the great power of the legislatures they compose. The importance of these legislature's powers, and therefore the related elections, raise the stakes of drawing electoral districts for states and Congress - deciding who will be represented, by whom and with whom.

The drawing of maps by federal courts is the subject of this project and an important role for LFCs in redistricting cases. This analysis shows that court-drawn maps are infrequent, but they are also not trivial. It is a power that has been exercised repeatedly and consistently since *Baker*, albeit reluctantly, especially in malapportionment cases.

4.3 Trend 3

Why: Lower Federal Court Responsiveness to the Supreme Court (And Vice Versa)

Consistent and important questions in the study of the federal judiciary are how responsive are the lower federal courts to the Supreme Court in hierarchical compliance and fidelity to precedent *and* how responsive is the Supreme Court to the caseload and the need for systematic standards of the LFCs? Many scholars focus solely on the compliance of lower federal courts and state courts to Supreme Court decisions and

interpretations neglecting the role of the high court's responsiveness to lower courts. It is the two-way relationship between LFCs and the Supreme Court that is paramount. Just as it is important to understand how compliant LFCs are to ruling laid down by the Supreme Court, it is useful to know what LFC action can spur Supreme Court decisions.

Judicial impact scholarship, examining the responsiveness of lower federal court complaints to Supreme Court rulings, has found that the lower federal courts generally change decision making based on Supreme Court rulings, and are largely responsive. Early research on "judicial impact" in the 1970s overemphasized the role of several landmark Warren Court decisions and skewed analysis, showing a lack of impact from Supreme Court rulings on LFCs.[377] Subsequent research has repeatedly found that subordinate federal courts broadly adhere to superior court's rulings, both district courts with the courts of appeals[378] and circuit courts with the Supreme Court[379]. The adherence of LFCs to higher court rulings has gathered more evidence over time.[380] LFC decision making is congruent with the Supreme Court a vast majority of the time. Although there is some room for LFC judges to express policy preferences, a major study of responsiveness in search and seizure cases found that "appeals court judges are substantially constrained by the preferences of their principal [the Supreme Court]".[381]

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[377] Songer, Donald R. "The impact of the Supreme Court on trends in economic policy making in the United States courts of appeals." *The Journal of politics* 49, no. 3 (1987): 830-841, 830; Baum, Lawrence. "Responses of Federal District Judges to Court of Appeals Policies: An Exploration." *Western Political Quarterly* 33, no. 2 (1980): 217-224.

[378] Gruhl, John. "The Supreme Court's impact on the law of libel: Compliance by lower federal courts." *Western Political Quarterly* 33, no. 4 (1980): 502-519.

[379] Songer, Donald R., and Reginald S. Sheehan. "Supreme Court impact on compliance and outcomes: Miranda and New York Times in the United States courts of appeals." *Western Political Quarterly* 43, no. 2 (1990): 297-316.; Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. "The hierarchy of justice: Testing a principal-agent model of Supreme Court-circuit court interactions." *American Journal of Political Science* (1994): 673-696.

[380] Songer and Sheehan, "Supreme Court Impact…", 1990

[381] Songer, et al, 1994

More recent analysis further supports the compliance of LFCs to the Supreme Court[382], with particular attention paid to Supreme Court decisions that include explicit instructions within the opinions about the utility of specific precedent and interpretations.[383] Overall, scholarship on LFC responsiveness to the Supreme Court ranges from broad compliance to absolute compliance.

There is substantially less research on how the Supreme Court responds to LFC decisions and cases - with a greater emphasis on the Supreme Court's responsiveness to public opinion. It has been observed that justices are more likely to grant cert to cases where there is disagreement between the circuits, if there is inconsistency in the application of law is a useful guiding principle or if precedent is flagrantly disregarded by the lower courts.[384] This is a form of responsiveness. There is empirical research that supports this observation, finding that the Supreme Court uses "signals and indices" in LFC cases to strategically grant cert to assert its hierarchical control and "doctrinal preferences" over the lower courts.[385] This research is far from comprehensive, using a small sample of search and seizure cases under one Chief Justice's tenure, but is a more formal statement of the general wisdom of how the Supreme Court responds to LFC cases and decisions: The Supreme Court responds to LFC activity - particularly when

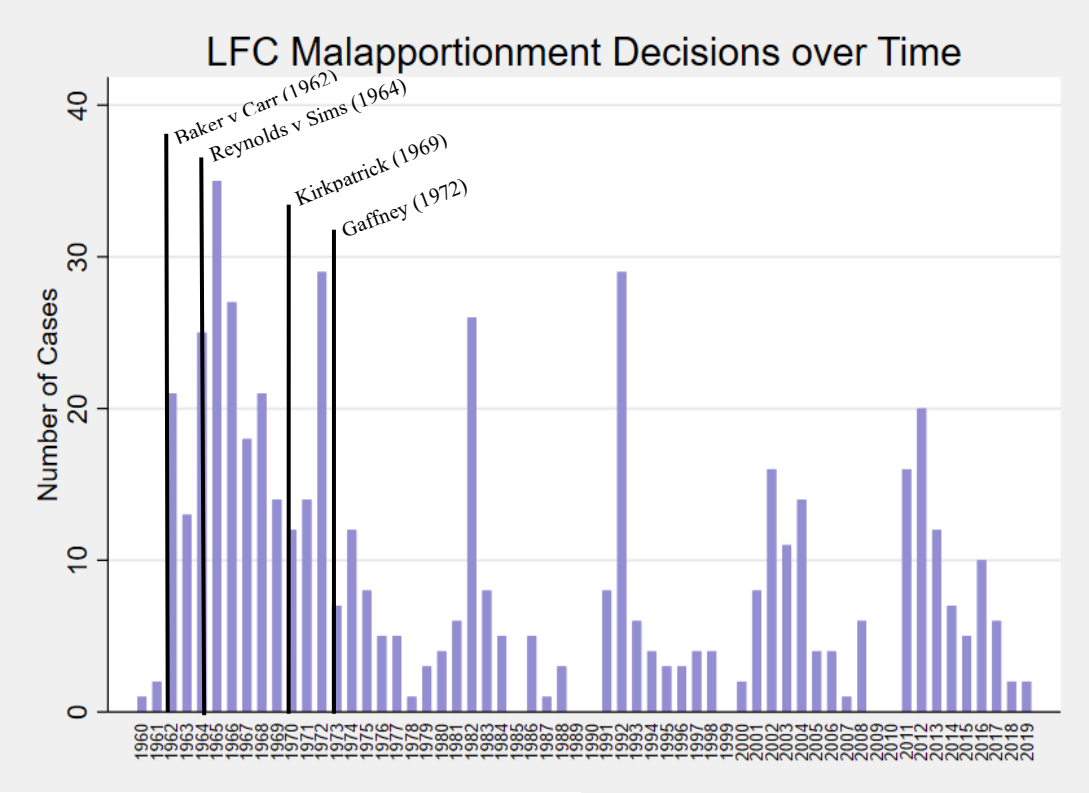
[382]Klein, David E., and Robert J. Hume. "Fear of reversal as an explanation of lower court compliance." *Law & Society Review* 37, no. 3 (2003): 579-581.; Benesh, Sara C., and Malia Reddick. "Overruled: An event history analysis of lower court reaction to Supreme Court alteration of precedent." *The Journal of Politics* 64, no. 2 (2002): 534-550.; Borochoff, Elise. "Lower court compliance with Supreme Court remands." *Touro L. Rev.* 24 (2008): 849.
[383] Masood, Ali S., Benjamin J. Kassow, and Donald R. Songer. "The aggregate dynamics of lower court responses to the US Supreme Court." *Journal of Law and Courts* 7, no. 2 (2019): 159-186.
[384] Perry, *Deciding to Decide,* 267-268, 246-252
[385] Cameron, Charles M., Jeffrey A. Segal, and Donald Songer. "Strategic auditing in a political hierarchy: An informational model of the Supreme Court's certiorari decisions." *American Political Science Review* 94, no. 1 (2000): 101-116

there is disagreement or inconsistency - in a policy area to clarify its preferences for how cases should be decided.[386]

My research supports both sets of these findings by showing how LFC caseloads respond to Supreme Court decisions and how the LFC caseloads may affect the timing of a Supreme Court landmark or influential decisions.

Using my original dataset, I break down the LFC caseload by constitutional claims and highlight key Supreme Court cases over the past 57 year. This allows for an exploration of two-way responsiveness in the federal judiciary broken out by redistricting type - malapportionment, racial gerrymandering and partisan gerrymandering - over time. This also illuminates the trends within the overall trend of caseload in redistricting at the LFCs over time shown in Graph 4.1.

[386] Echoing the Cox and Katz findings discussed in Chapter 2 - Because of the transaction costs in reviewing appellate cases at the circuit or supreme court level, following precedent often avoid appellate review for LFCs.



13 - Graph 4.11 – Malapportionment Cases Over Time

Looking at the caseload of malapportionment cases before the LFCs over time illustrates the political development of judicially manageable standards outlined in Chapter 3. The *Baker* decision kicks off a decade-long rise in apportionment cases throughout the 1960s and 1970s. This was the Reapportionment Revolution - one that played out in the Supreme Court, state legislatures and LFCs together. However, as discussed in Chapter 3, *Baker* was far from articulating a clear judicially manageable standard for judicial apportionment or deciding LFC cases. Instead, *Baker* opened the floodgates to federally judicial claims. As shown in Graph 4.11, the open gates led to dozens of cases coming to the LFCs from 1962 onward, up from one case and two cases respectively in 1960 and 1961.

The key Supreme Court cases of the Reapportionment Revolution were the *Reynolds and Wesberry* decisions, which articulated the standard of One Person, One Vote for both Congressional and state legislative districts. However, the standard was not specific enough. As discussed in Chapter 3, the standards were repeatedly refined by the Supreme Court, first by the *Kirkpatrick* requirement in 1970 for mathematical population equality among all legislative districts absent a compelling government interest and subsequently by the *Gaffney* and *Mahan* decisions in 1973 outlining different standards for Congressional and state legislative districts, where the former were required to have *Kirkpatrick*-level mathematical equality and the latter could have an effective de minimis limit of 10 percent population variance among districts.

The fluctuation in LFC caseload shown in Graph 4.11 shows a similar story to this development of Supreme Court standards. The number of LFC cases at first rose and then remained high following the *Reynolds* decision as state and Congressional districts were challenged as well as local districting schemes. It was not until after the 1973 Supreme Court decisions that apportionment case levels sustainably dropped to lower levels. Following 1973, the only pattern that is visible in LFC cases related to malapportionment are cases related to post-decennial apportionment in the first year before (ex: 1981), the year of (1982) and the year after (1983) the first major election after the U.S. Census. This is the lasting legacy of the reapportionment decisions. Every reapportionment cycle, the LFCs will see a surge in relevant cases exercising *Baker* justiciability and they will apply *Reynolds* and subsequent standards.

Graph 4.11 also shows the two-way responsiveness between the LFC and Supreme Court on malapportionment cases. When the Supreme Court decided on

justiciability of apportionment, the LFC caseload rose. When LFC cases remained high, without uniform application of how to determine population equality or different needs between Congressional and state districts, the Supreme Court needed to address the issues. When the Supreme Court did establish new standards in 1973 that addressed these different needs for state and Congressional districts, the cases related to apportionment generally decreased. These standards likely became accepted by the de facto "redistricters" of the LFCs as well as the de jure redistricting institutions of legislatures and commissions.

The cyclical rise of apportionment cases around the turn of each decade are less germane to this discussion, because there is little disagreement in the LFCs. Each cycle, the LFCs apply the standards supplied by the Court during the 1960s and '70s to the specific reapportionment maps and plans in the states. In some ways, this may be an example of the ideal version of the relationship between the Supreme Court and the LFCs. The standard of One Person, One Vote and its alterations have remained remarkably durable over several decades and have been reinforced time and time again by LFCs, redistricting cycle after cycle, with very little deviance or noncompliance by any LFCs. The two-way responsiveness and subordinate compliance of the LFCs are both well supported by this data.

Trend 3B - Racial Gerrymandering Responsiveness

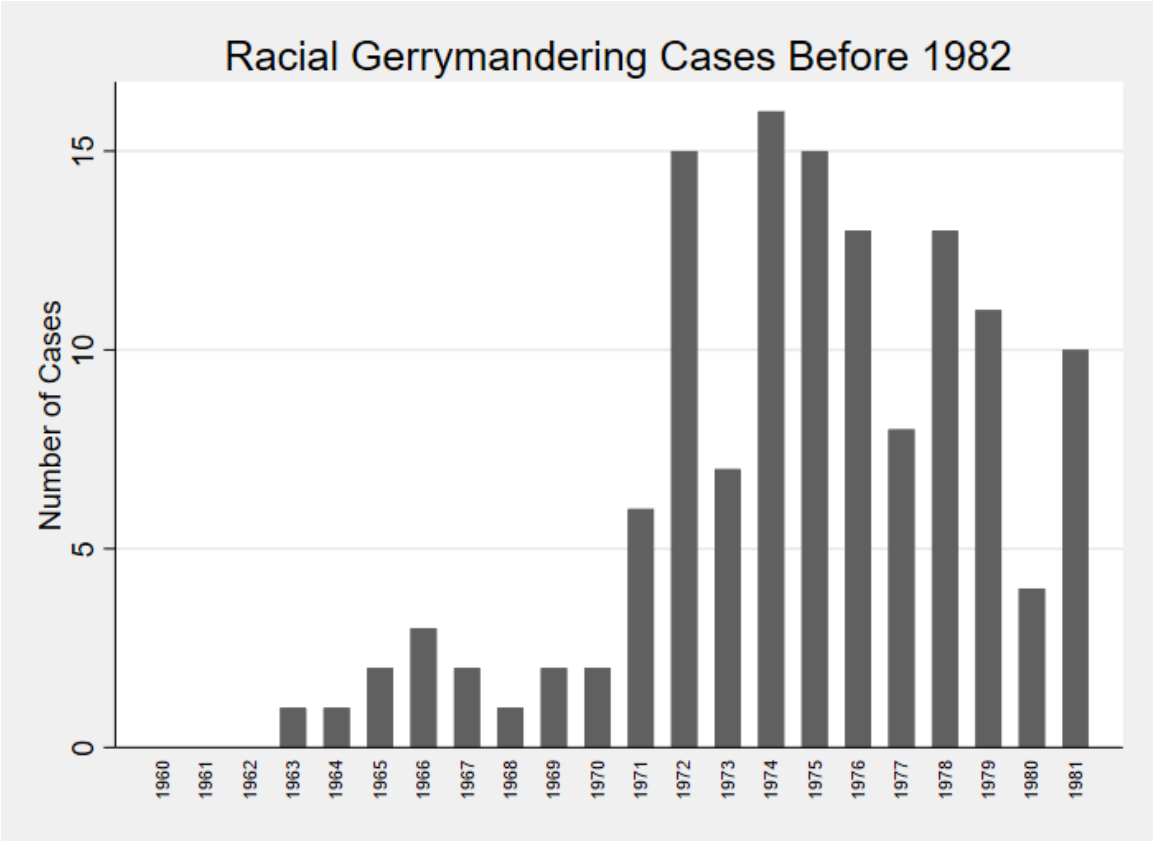
The *Gomillion* standard of federal court interference in racial districting that violates the 15th and 14th amendment pre-dates the *Baker* standard of justiciability. However, as shown in Chapter 3, this was a standard that led to relatively few federal

court cases or successful challenges of racial gerrymandering schemes and may have created a very high bar to declare racial gerrymandering.

Instead, looking at the history of LFC cases since 1960, it's clear that racial gerrymandering claims didn't start to rise until the 1970s in serious numbers (See: Graph 4.12). Of course, by the 1970s, plaintiffs could turn to the 1965 Voting Rights Act as well as the 15th Amendment and the 14th Amendment for support in making their constitutional claims of harm, as well as building on the progress of malapportionment claims in the federal courts. In the 1970s, the Supreme Court had not articulated clear standards for measuring unconstitutional racial gerrymandering or providing relief, under the 14th Amendment or the VRA, and the LFC caseload remained higher throughout the decade. In the race-based cases that LFCs faced before 1982, most were related to local districting schemes. Ninety-six of the 132 racial gerrymandering claims before 1982 - about 73 percent - were local claims of racial vote dilution or voter infringement at the local level. About 65 percent of the decisions during this time period - 63 individual decisions - were in the Fifth Circuit, composed of Texas, Louisiana and Mississippi.

What is especially notable in these racial gerrymandering cases before 1982 was that because so many of them were local, most had a single-judge court arrangement that was appealable to the circuit court. This made for more redundancy in the caseload at this time period, but also substantially more activity - especially in the Fifth Circuit. Similarly, although the VRA had become law in 1965 and was amended twice in the 1970s, it was not clear how applicable it was to redistricting and was not used often or successfully by the plaintiffs or courts in this time frame. Although some cases made claims of illegal vote dilution by race, there were only five claims that explicitly based

their claims on VRA Section 2 prior to 1982. The VRA Section 5 preclearance requirement was more common in the time period, with 39 claims prior to 1982, with many in the 1972 redistricting cycle.



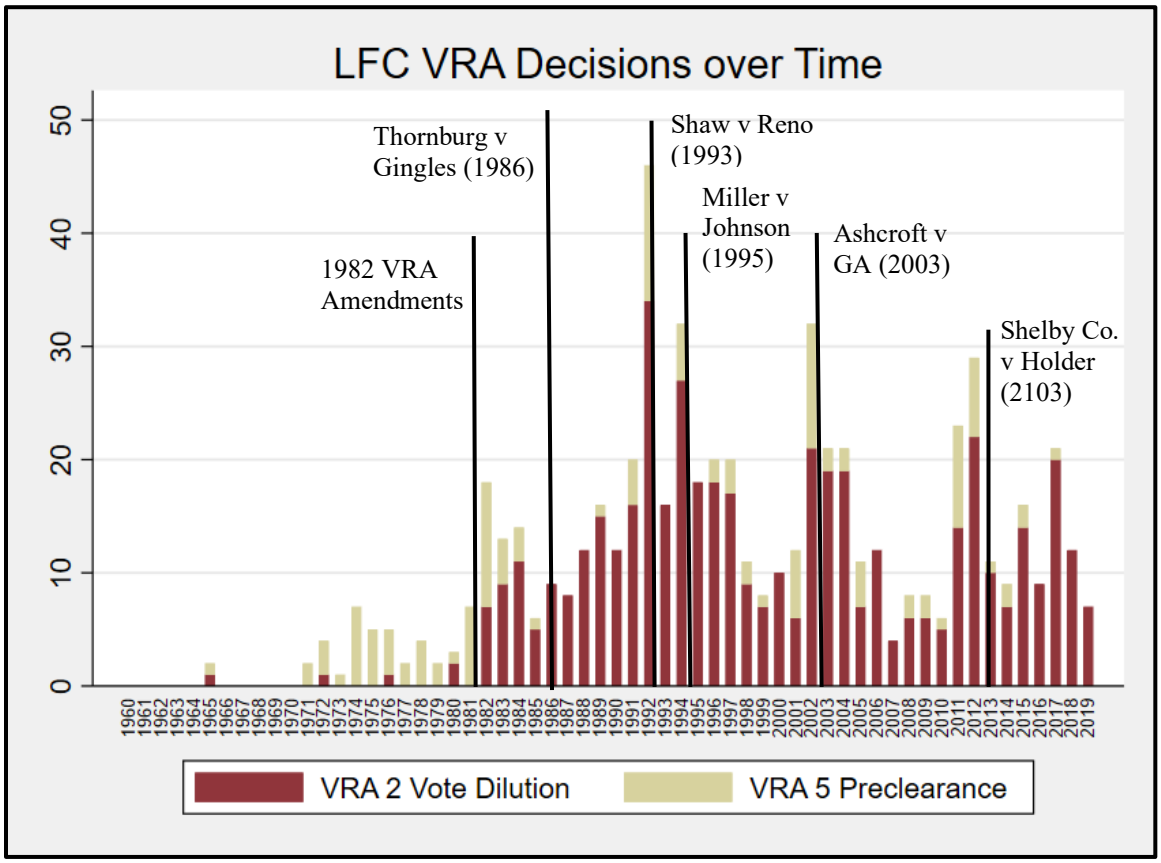
14 - Graph 4.12[387] - Racial Gerrymandering Cases 1960-1982

Looking at the Pre-1982 racial gerrymandering cases one can see a similar relationship between the Court and the LFCs as with apportionment. Following the Reapportionment Revolution and the involvement of local cases in apportionment litigation in the wake of *Reynolds*, there is a rise in racial claims, especially at the local level. These claims and the VRA in particular do not have a clear standard for federal court assessment or enforcement. While the LFCs function without a clear standard, the

[387] Includes VRA2 and VRA5 Claims during this time period as well

Supreme Court makes two important rulings. First, the Court rules in *Beer* that VRA 5 claims should be judged on the nonretrogression standard - if a new plan is not worse than the previous plan then it is not violative of the VRA and Constitution and can receive preclearance. Second, the Court decides *Mobile*, which drastically limits the LFCs ability to apply the VRA Section 2 vote dilution principle to redistricting. The Court states that intent and purpose are required for a VRA 2 violation - not just the effect of vote dilution. The rising case load is addressed by the Supreme Court with two standards addressing the two key aspects of the VRA for redistricting. The LFC docket responds with a slight decrease in cases.

However, unlike the story of malapportionment in the Court and LFCs, the racial gerrymandering path has an important institutional interlocutor. In 1982, in response to the *Mobile* ruling, the U.S. Congress provided a new standard for LFCs in the form of the 1982 VRA Amendments. The 1982 Amendments, as discussed in Chapter 3, made clear that the effect of vote dilution was sufficient as a constitutional harm for racial gerrymandering and clarified that the VRA does directly apply to redistricting plans. As Graph 4.13 illustrates, following the 1982 Amendments, there was a substantial rise in racial gerrymandering claims, especially for VRA 2 violations.



15 - Graph 4.13 – Racial Gerrymandering Cases 1982-2019

Shortly after the 1982 Amendments, the Court decided *Gingles*, which created a clear test and standard for LFCs for VRA2. Throughout the rest of the history of LFC racial gerrymandering cases, as shown in the graph, you can see that as the cases peak the Court articulates and clarifies the standards, particularly with *Shaw.* As discussed in Chapter 3, *Shaw* resolved the longest on-going issue among LFC racial gerrymandering cases and maps - how were effects and intent for racial gerrymanders to be assessed. After *Shaw*, LFCs could apply the compelling state interest rationale. *Miller* built upon the *Shaw* standard. The Supreme Court responded to the LFC docket with clearer standards in *Shaw* and *Miller*. The LFC caseload responded with a decrease.

As the Supreme Court asymptotes illustrate, the Court addresses increases and controversies in caseloads as they rise, over time, until it ultimately neuters the VRA 5

preclearance requirements in 2013's *Shelby County v Holder.* The Supreme Court is generally responsive and attentive to the LFC docket on racial gerrymandering and VRA concerns specifically.

LFCs also follow the Supreme Court. The responsiveness of the LFCs to the Supreme Court is best seen in the qualitative assessment of the decisions themselves. Of the hundreds of VRA2 claims that came before LFCs after 1982, there was such strict adherence to the *Gingles* test and standard regardless of whether it was a local case with a single judge, a circuit court reviewing a local case or a three-judge court deciding Congressional districts before an election. The variation of case types that is obvious with a quick analysis of this dataset did not affect lower court compliance. The LFCs were consistently responsive to Supreme Court rulings and standards. They followed *Mobile* and then they followed *Gingles*, even though the two cases provided completely opposite standards for analyzing similar redistricting plans.

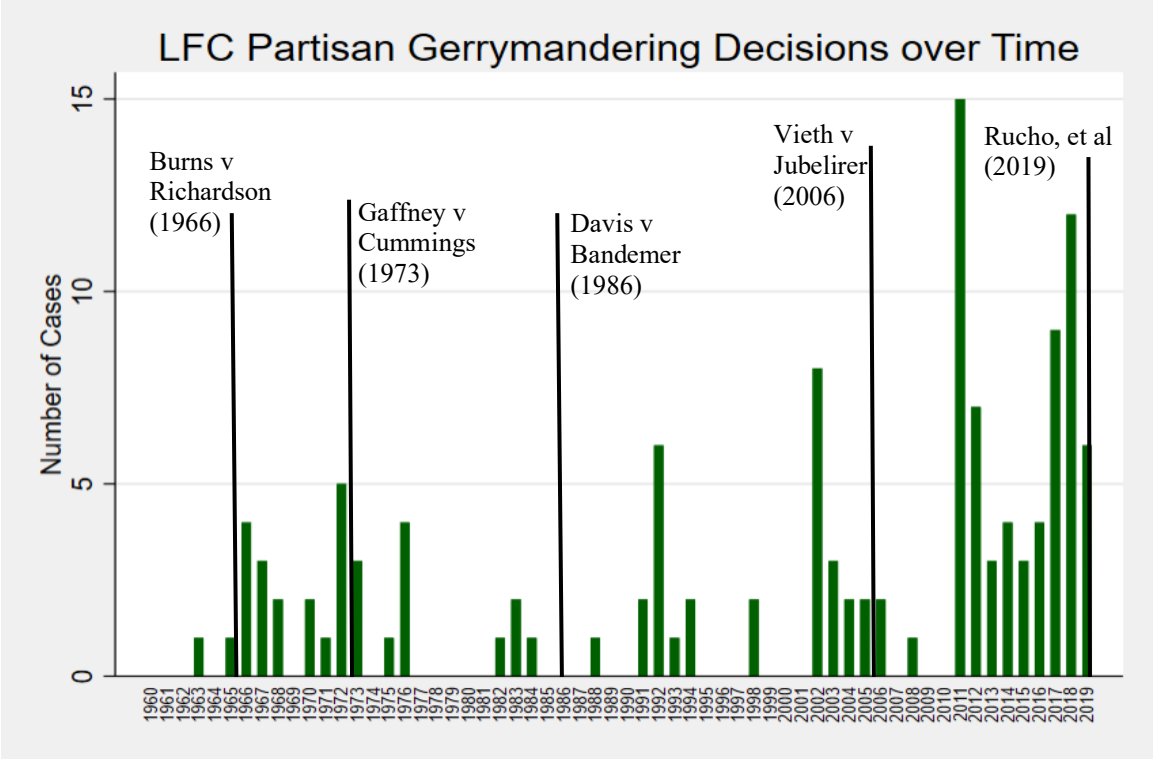
The LFC was responsive and obedient to the Supreme Court rulings. Over time, LFCs did not face many novel legal concerns in racial gerrymandering, instead they faced many variations of claims on the same legal bases. For example, in the 1980s many racial redistricting cases were related to at-large vote dilution cases in the South and cities for Black voters. By the 1990s there were many more claims by Hispanic voters and Native Americans in the West and Southwest

.

Trend 3C: Supreme Court Responsiveness in Partisan Gerrymandering

The story of political development of redistricting standards in Chapter 3 tells an unfinished narrative. It starts with malapportionment standards, then racial standards and

then a search for partisan standards that eventually ends with the elimination of these claims from federal court justiciability. When looking at the LFC caseload during this same time frame, differences between both malapportionment and racial gerrymandering emerge but the overall trend of responsiveness remains.



16 - Graph 4.14 – Partisan Gerrymandering Cases Over Time

What sets partisan gerrymandering at the LFC level apart from other claims, is simply how few claims there have been. Looking at the LFC caseload for partisan gerrymandering claims, the total numbers are far below the other claims, only peaking in the 2010s. Many of these partisan claims were as part of cases that included multiple claims - typically the partisan claim would be dismissed, while a racial gerrymandering claim may go forward, for example. The other difference in this data is that there is no peak surrounding 1986's *Davis v Bandemer*. This landmark case opened a pathway, although without articulating a clear standard, for the justiciability of partisan

gerrymandering claims. The fact that there is no response to *Davis* in the LFC caseload represents the lack of a clear standard for anyone to easily implement. Similarly, the lack of the caseload preceding *Davis* in the LFCs is surprising. Normally one would expect to see the Court take action after substantial LFC activity in a policy area. The exact reason for a lack of activity here is unknown. One explanation is that many cases had implicit partisan concerns, but did not make explicit partisan claims and were therefore not coded as partisan claims. However, the implications of racial gerrymandering in certain regions had clear partisan implications. These implications were addressed by the Supreme Court directly in the North Carolina cases in the late 1990s and early 2000s.[388]

While the LFC caseload of partisan gerrymandering may be absent or buried in the data surrounding *Davis*, the responsiveness is clear in the 2000s and 2010s. There is steady activity with a handful of cases following the 2000 redistricting cycle, around the same time that partisan gerrymandering started receiving much more scholarly attention as well. This period saw two sprawling cases in New York and Texas that filled the LFC caseload across the claim types and used a variety of resources. The early 2000s cases eventually lead to the *Veith* decision in 2006 where Justice Anthony Kennedy made his famous call for a justiciable standard on partisan gerrymandering claims. As the graph shows, when this call was combined with the 2010 redistricting cycle, the market of LFC cases responded in kind with a massive jump in partisan gerrymandering cases and claims.

The cases in the 2010s dwarf all of the cases of partisan gerrymandering claims that came before them. This is the first period where the relationship between the LFCs

[388] Such as Shaw v Reno

and the Supreme Court on partisan gerrymandering can really be viewed. The LFCs decided on the partisan gerrymandering cases in a variety of ways - The *Whitford v Gill* LFC case is a useful example. The three-judge court eventually ruled in a 2-to-1 decision that the state legislature was unconstitutional partisan gerrymandering and implemented a three-prong test, with the Efficiency Gap as a metric and the test as a judicially manageable standard. The Supreme Court responded to this decision and other similar decisions across the U.S. - dealing with partisan claims at the state and Congressional levels; with Democrats and Republicans as defendants; with racial confounding claims and without - in the 2019 *Rucho* decision that ended federal court justiciability of partisan claims. If this study and dataset were continued into the future, one would expect to see a significant decrease in partisan claims in 2019, 2020 and 2021, mostly dealing with the repercussions of this decision before eventually stopping altogether.

Federal court responsiveness of partisan gerrymandering claims certainly is not as clear cut as malapportionment and racial gerrymandering when viewing the whole timeline. However, by considering the small number of cases before 2000 overall, the confounding racial claims of the time and how well the 2010s and future predictions would fit the theory of responsiveness, it is clear that partisan gerrymandering can also illustrate the responsive and functional relationship between LFCs and the Supreme Court. Once there was substantial activity in the LFCs, then the Supreme Court ruled decisively. One would expect the LFCs to respond to the *Rucho* ruling with fewer cases and dismissals of those claims, with partisan claims migrating instead to state courts. Looking back at this question after more years of data collection could provide a more robust example.

4.4 Trend 4

When: A Timeline of a Typical Redistricting Cycle in LFCs

Despite the lowering of the legitimacy barrier for federal court redistricting with *Baker,* as this review of LFC decisions shows, federal courts have remained remarkably hesitant to draw redistricting maps. This reality comports with the theory of LFCs outlined in Chapter 2, where LFCs as institutions are constrained in multiple ways, including by structural hierarchy, legal precedent and legitimacy concerns. This is supported by the review of LFC responsiveness and this data analysis in Trend 3 and the typical procedure outlined in Trend 1.

Although the drawing of redistricting maps by LFCs may be rare, this dataset shows that it has occurred more than 100 times, and for a federal court to ever create a legislative map remains a remarkable political act. When viewing the rarity of federal court redistricting, the most important question is: W*hat are the preconditions for federal courts to draw a redistricting map?* The answer is simple - *the most important factor is timing*.

LFCs draw redistricting maps most often after the legislature redistricts in the second year of a decade but before the federal elections of the third year of a decade, for example between July 2011 and November 2012.

This constricted time frame provides two necessary preconditions for LFC redistricting. First, there needs to be a valid legal violation. One way this can occur is that the de jure redistricting institution draws a redistricting map and passes it into law, but it is legitimately challenged in federal court by a party and the court finds it to violate law. The other way is that there is political gridlock or inaction in the de jure redistricting

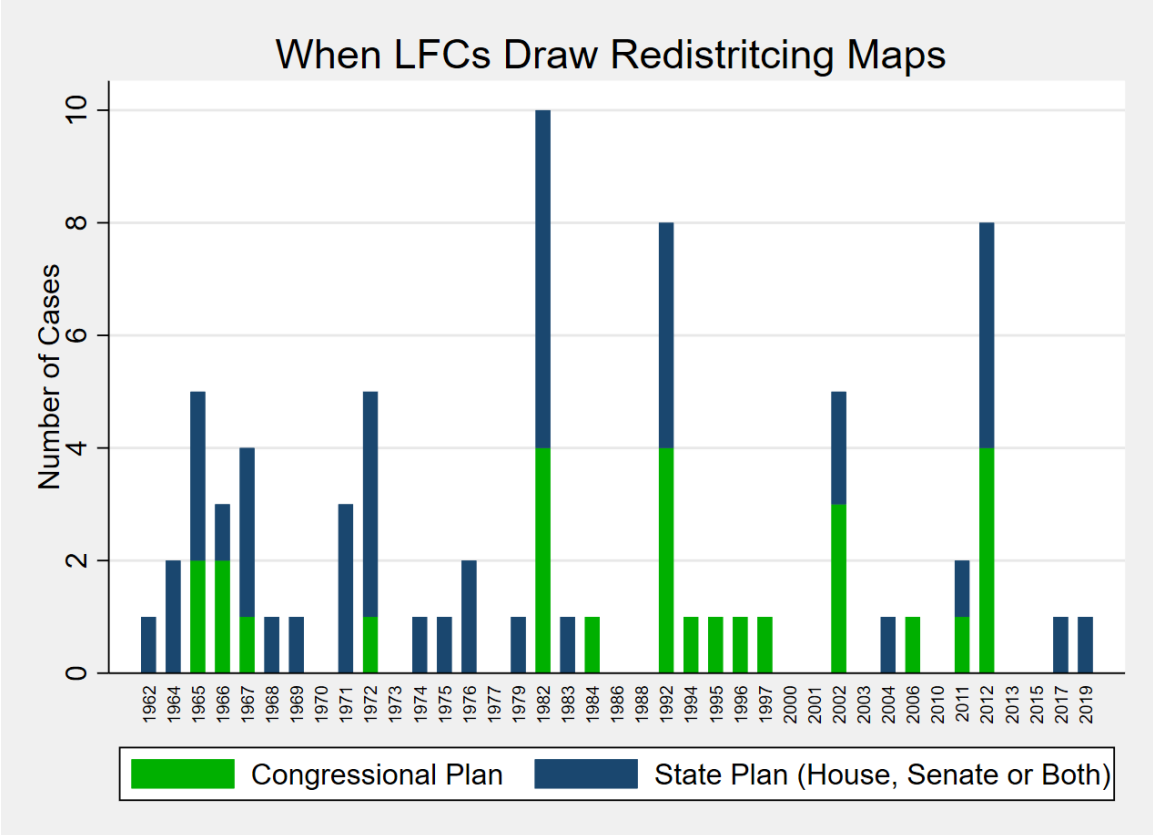
institution following the new U.S. Census, often through split party control over state government, which leads to no new redistricting map. When this inaction is challenged by a party in federal court, the LFC often will find that the old redistricting map that is still in use is unconstitutionally malapportioned because nothing has accounted for the change in population the new Census shows since the last map was drawn.

These legal violations re-emphasize the importance of the case or controversy requirement and other preconditional requirements in American common law jurisprudence, and how they have concrete effects on public policy and democratic representation. Therefore, the LFCs won't be deciding a case until the federal Census is completed and the results are delivered to states - especially if states are gaining or losing seats in Congress - and that state's redistricting institutions have time to create new redistricting plans. This is typically completed by the middle to the end of the second year of a decade - 1971, 1981, 1991, 2001, 2011.

Second, the upcoming elections create the need for immediate action. To avoid the consequences of these legal violations of malapportionment or racial gerrymandering, a valid redistricting plan must be implemented prior to the election. Because the third year of a decade holds Congressional elections and is so close to the Census, the LFCs take this as the best time to implement a new map. While federal elections are held in November of even years, the primaries for these elections are held earlier - often in the spring. This creates a bind for the LFCs and other redistricting bodies. The district lines should be settled before the first primary election - otherwise the people who win the primary would be competing in different districts or wards come the fall. This would only lend itself to greater political meddling and harm to voters. Therefore, LFCs must decide

whether or not to exercise equity power to draw, adopt or approve a new redistricting plan before the primaries of the third year of a decade - 1982, 1992, 2002, 2012 - when facing an unconstitutional plan.

Looking at Graph 4.15, one can see how this constricted timeframe between the end of a redistricting cycle ending in "1" and the primary election season in a year ending in "2" leads to LFC action. The number of maps drawn by LFCs for state and Congressional districts spiked significantly during 1972, 1982, 1992, 2002 and 2012. Most other years have zero or one maps created by a court for state or Congressional districts, but these years see multiple maps created by LFCs in a pinch.



17 - Graph 4.15 – LFC-Made Maps Over Time

Magnifying this long-term pattern of judicial map-making in the "2" years, there is a trend that occurs *within the year* as well. Briefly stated, activity follows this general pattern:

- **19X0/20X0: The U.S. Census Occurs**
- **19X1/20X1: States Redistrict and Reapportion Congressional and State Legislative Districts**
- **Summer through Fall 19X1/20X1: Initial Challenges to the New State Maps**
    - The first cases are brought to the LFCs. These may be mostly concerned with procedural questions (consolidation of related claims, change of venue, convention of a three-judge court, allowance of interveners, questions of evidence)[389]
- **Late 19X1/20X1 through Early 19X2/20X2: LFCs Rule on the Merits; Deference to States**
    - Following the procedural motions, LFCs will either declare maps unconstitutional or dismiss the claims and deny relief. If the challenged map is declared to violate the Constitution, this is when the LFCs will give the legislature or state government another chance to create a plan. This is typically with a strict and shorter time limit than is seen with mid-decade cases. The plaintiffs and public may also be asked to submit a plan. Typically, these orders include an explicit timeframe for the defendants to present the new map.
- **19X2/20X2 Spring and Summer: Period of LFC Activity**
    - Leading up to the primary season, or right on the eve of primary elections, LFCs will act to either approve defendant maps, adopt plaintiff or public maps, or draw their own maps. This may be

[389] There was a rise in the number of motions related to subpoenaing documents related to redistricting motives in the 2000s and 2010s - possibly due to the rise in partisan claims and importance of intent in such claims

done with some extra time built in if the court expects to order a special master to draw the plan and still meet the original election date. LFCs are similarly hesitant to delay election dates as they are to draw maps, but this may occur if time is an extreme obstacle.

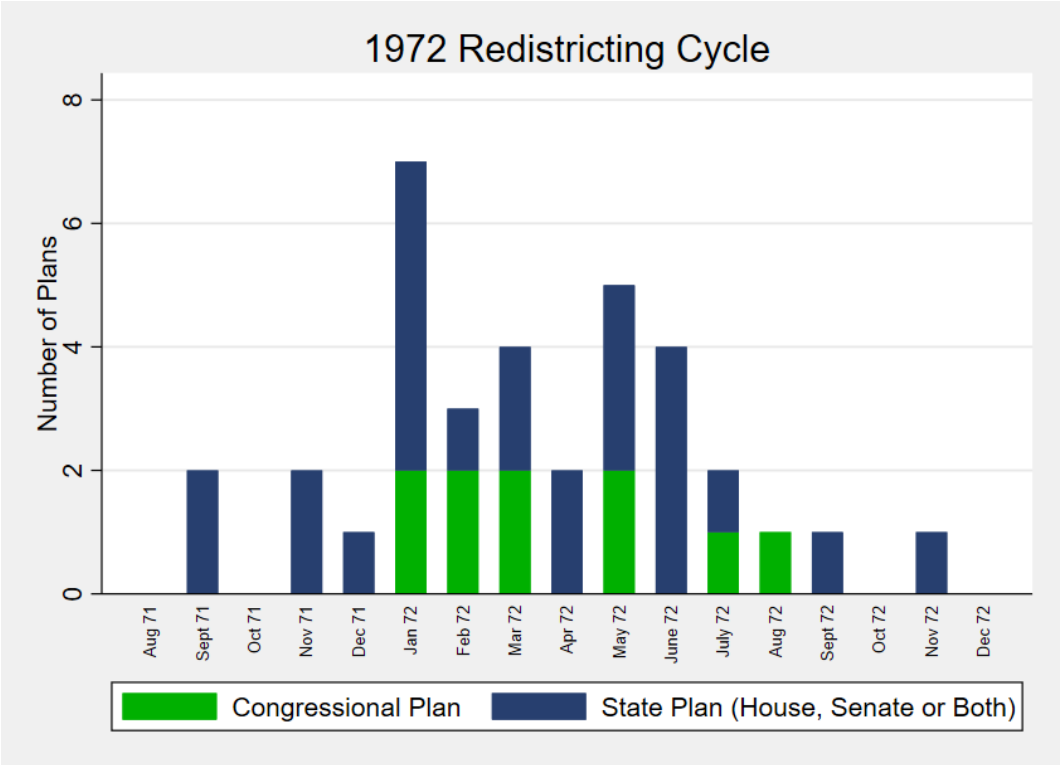
- **19X2/20X2 August through November: Emergency Action**
    - LFCs want to avoid interference between primaries and general elections, and also want to avoid interfering with elections, but under certain circumstances action may be warranted before the general election. There may be some late challenges and emergency requests for enjoinment or injunctions during this time frame as well.
- **19X2/20X2 After November: Settling Things**
    - After the election, many of the ongoing state and Congressional cases become about attorney's fees and other procedural matters related to the preceding case[390]. Most new challenges concern local cases, as they do until the next redistricting cycle.

This typical cycle of redistricting and LFC action is repeated decade after decade. Graphs 4.16 through 4.20 show the trend playing out from 1972 through 2012. The cases rise and fall with regularity over this time frame while the specific conflicts may vary. These graphs illustrate how the data supports this general outline of LFC timing. Timing remains the most important factor for whether LFCs decide to draw a redistricting map themselves.

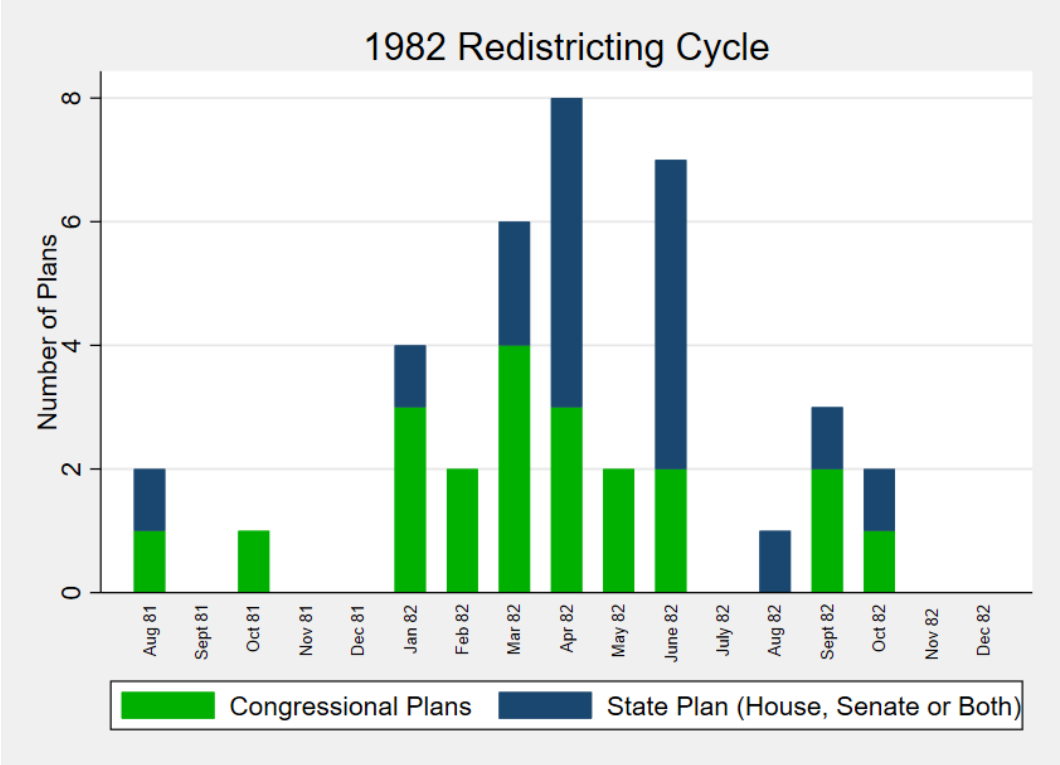
This analysis only further validates the first hypothesis, H1, about *how, when and why the federal courts make a redistricting plan.* Based on the combination of legal, political and structural constraints, particularly stare decisis, legitimacy norms and the

[390] Not included in this dataset

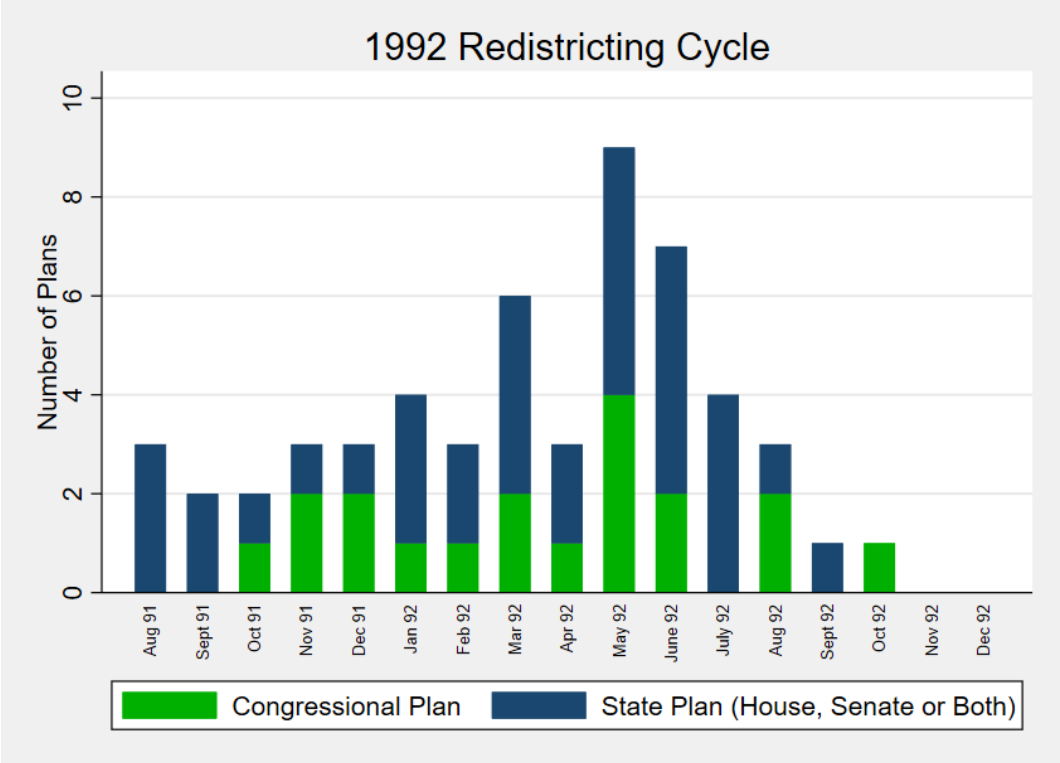
threat of appeal to the Supreme Court, I expected the lower federal courts to only create their own redistricting plans when it is a last resort before an election. This trend bolsters the conclusions from Trend 1 and further shows that LFCs are exceptionally hesitant to act as map makers, only doing so as a last resort and close to an impending election.



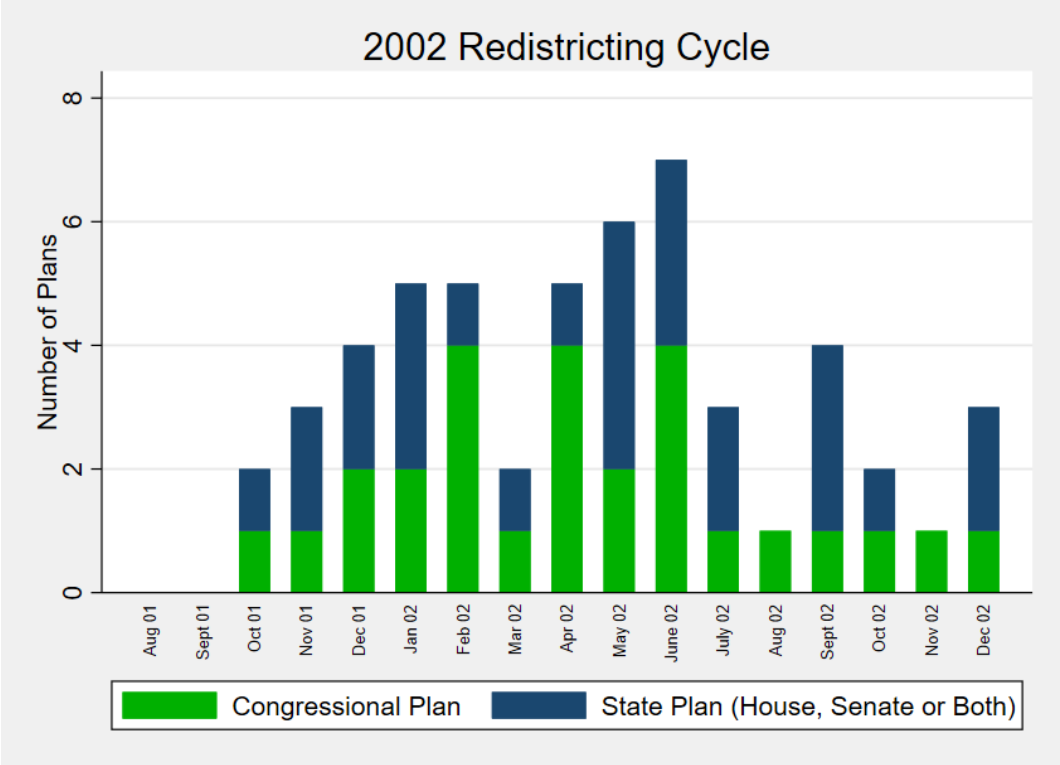
18 - Graph 4.16 – LFC-Made Maps 1972 Redistricting Cycle



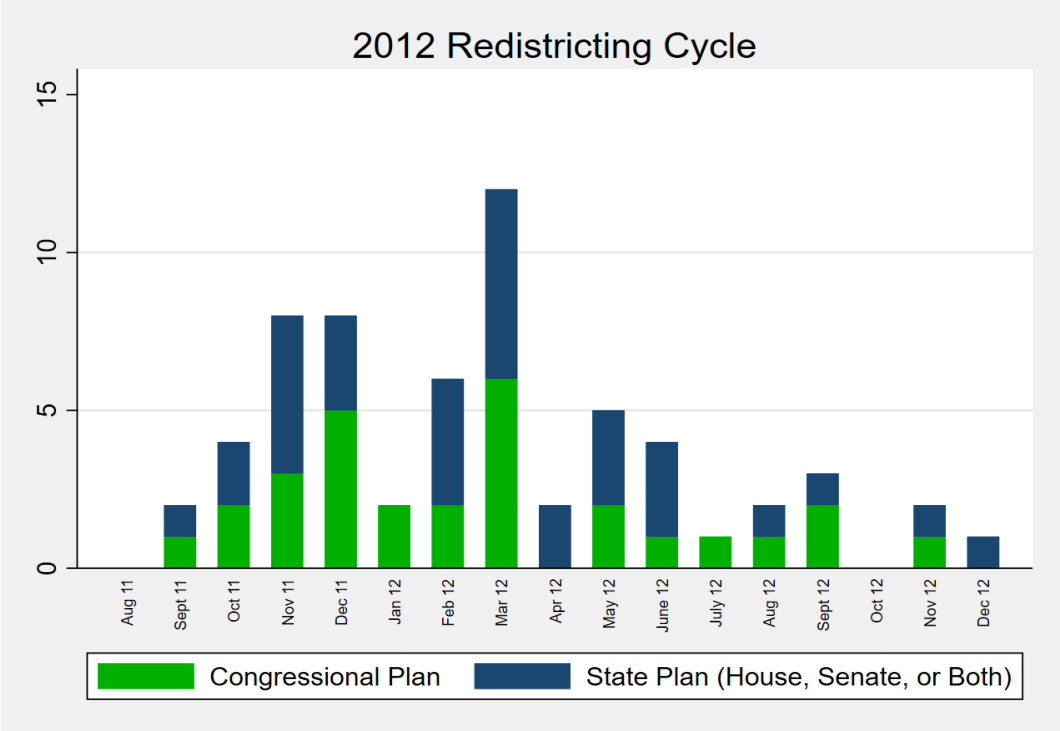
19 - Graph 4.17 - LFC-Made Maps 1982 Redistricting Cycle



20 - Graph 4.18 - LFC-Made Maps 1992 Redistricting Cycle



21 - Graph 4.19 - LFC-Made Maps 2002 Redistricting Cycle



22 - Graph 4.20 - LFC-Made Maps 2012 Redistricting Cycle

Conclusions

This chapter's analysis reveals what LFCs have actually done when it comes to redistricting. It shows the types of redistricting that are most common, the constitutional claims that are most popular, and how outcomes vary, as well as how much all of this changes over time and space.

State and Congressional redistricting cases are most common following the redistricting cycle, while local cases were more spread out and more common overall.

States in the American South saw the lion's share of the cases, with the Fifth, Eleventh and Fourth Circuits having consistently heavy caseloads. Northern cities also saw many local cases.

Malapportionment claims were most common in the Reapportionment Revolution of the 1960s but consistently peak every redistricting cycle. Racial gerrymandering claims rose substantially following the 1982 VRA Amendments and fell after related Supreme Court rulings, while remaining high throughout the 1980s and 1990s, especially in the South and for local cases. Partisan gerrymandering caseloads only recently grew substantially leading to a slew of decisive Supreme Court rulings. This data set provides evidence that is supportive of existing theories of LFC responsiveness to the Supreme Court and great evidence of Supreme Court responsiveness to LFC caseload and subject matter.

Two of the greatest insights from gathering this data and analyzing it are the "typical" processes and procedures I outline in this chapter.

First, by reviewing hundreds of cases, the typical pattern of *how* LFCs take action on redistricting became clear. The Figure 4.1 decision tree of Trend 1 shows the process

that LFCs typically follow to review redistricting maps and how it can end up with the court itself drawing or adopting a new map. The recursive nature of deference to state institutions and reluctant action found in the typical process is the most important part of this decision tree and illustrates the effect of legal and political constraints on the LFC. This account gives a fuller picture of the choices that LFCs must make before drawing a map and supports some of the insights of Persily's "Primer."

Second, the account of *when* LFCs redistrict provides the best predictor of LFC map-making: timing. The process of LFC decision making and deference to state institutions takes place on a more or less predictable time table after a redistricting cycle. However, the common choices of deference and hesitancy driven by institutional legal and political constraints give way when LFCs are under the pressure of time to install a legal map before an election.

Cases that are related to malapportionment also lead to most of the maps drawn or adopted by LFCs, especially for state and Congressional districts. This is another important precondition for judicial map making. It highlights the compliance and responsiveness of LFCs to clear Supreme Court precedent and standards - malapportionment has the clearest standard for violating a constitutional right, assessing a constitutional violation and for drawing new districts. It provides the best guidance from the Supreme Court for LFCs to connect the specifics of the case to the rights of an American.

Examining the comprehensive dataset of more than 1,200 LFC decisions between 1960 and 2019 leads to different conclusions than the overview of the Supreme Court

cases in Chapter 3. Both analyses together show the totality of federal court action on redistricting, and examining the several differences between these two explorations illuminates key facets of how the judiciary functions.

First, this exercise was new. The Supreme Court decisions on redistricting cases are popular and well-researched. This dataset of LFC decisions is original and novel - there has never been an exploration of what LFCs have done with redistricting over this time period.

Second, the institutional differences of the Supreme Court and the LFCs were emphasized in the two analyses. The exploration of Supreme Court decisions revealed a development of Constitutional thinking and theoretical prescriptions on what the role of the federal courts should be and what redistricting could do and could not do. The LFC decisions were more concerned with the specific details and merits of the cases, applying Court precedent and law to solve the issue in dispute - Ought versus was in two levels of the federal judicial hierarchy.

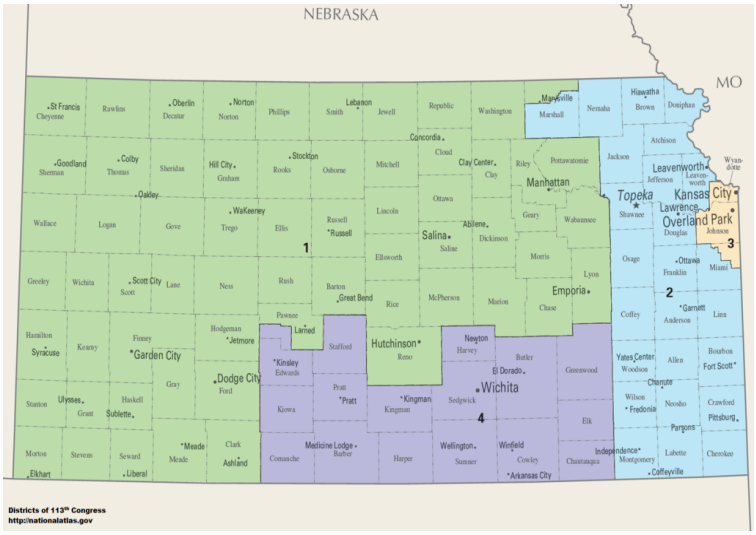
Third, the far greater number of cases in the LFCs versus those in the Supreme Court allowed for the discovery of trends and patterns. Looking at more than 1,200 cases over a number of decades, rather than dozens over the same time frame in the Supreme Court illustrated many of the key descriptive patterns and trends to emerge in case type, claim type, caseload and more. This similarly highlighted the importance of local redistricting cases in LFCs that were largely absent from the Supreme Court.

Overall, these twin analyses provide two scholarly functions. On one hand, the study of the development of redistricting standards in the Supreme Court and cases in the lower federal courts provides an extensive case study that illustrates general behavior

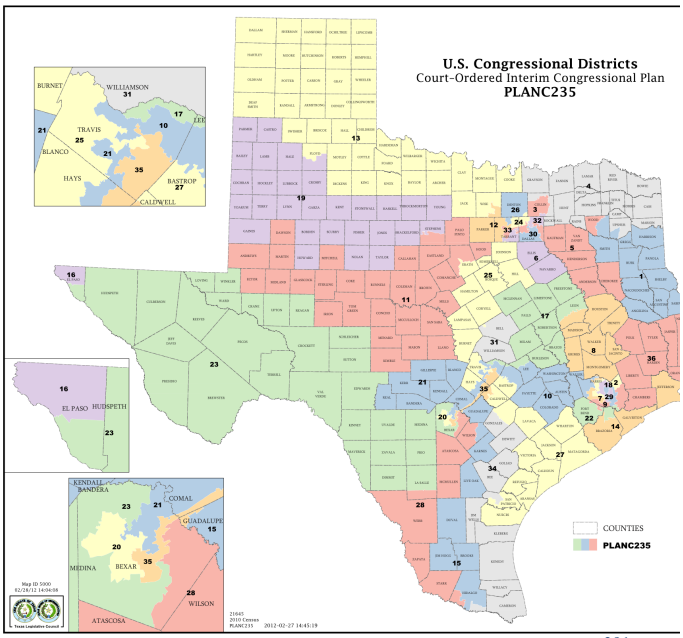
between the two levels of courts. Here we see the mutual responsiveness, the concrete need for standards, the impact of precedent on LFC timelines and the behavior and action of judges and courts over decades. Second, these analyses provide a comprehensive understanding of redistricting litigation in the federal judiciary from 1962 to 2019, covering every legal claim, every case, every year and every place. It allows scholars to understand the philosophical underpinnings of concrete LFC action via the Court standards and the real-world consequences of Supreme Court decisions via the LFC case dataset. For example, it shows how the Court applied a principle of equality to the claim of malapportionment with practical reverberations through LFCs every redistricting cycle for decades. Together, these analyses explain how the federal courts operate and how they have impacted redistricting.

Based on the analysis of this data collection, we know legislative map making from LFCs is constrained, rare and reluctant, but we also know it occurs regularly as part of the LFC's role in the U.S. political system since the 1960s. The next two chapters look at what happens when LFCs actually do draw the legislative district lines. These questions ask if these constraints continue to shape the criteria that LFCs use, what criteria do they use, how does this compare to other redistricting institutions and how well do LFCs understand the criteria they are using. Chapter 5 takes a comprehensive look at the criteria used in LFC-made maps using a large, original dataset and quantitative analyses. Chapter 6 uses a small number of case studies and LFC court opinions to see what criteria judges say they use when crafting a plan and how this data compares to the quantitative findings.

5.0 THE 'UNWELCOME OBLIGATION': A QUANTITATIVE ANALYSIS OF LFC REDISTRICTING



23 - Figure 5.1 - Kansas' 2012 Congressional District Map



24 - Figure 5.2 - Texas' 2012 Congressional District Map [391]

[391] Ross Ramsey, "Redistricting: Maps, Stats and Some Notes," The Texas Tribune, March 2, 2012, https://www.texastribune.org/2012/03/02/redistricting-maps-stats-and-some-notes/.

25 - Figure 5.3 - California's 2012 Congressional District Map[392]

Following the 2010 Census, every state in the U.S. received demographic data for decennial routine and responsibility of redrawing legislative district lines. As is typical, the 2010 redistricting cycle saw a variety of institutions draw the new legislative maps. Ahead of the 2012 elections, federal courts drew the redistricting maps for both Texas and Kansas' congressional districts. California on the other hand was one of the states that successfully used a commission to draw its congressional district lines. Looking at these three maps (Figure 5.1, 5.2 and 5.3), it is not immediately apparent how the Texas and California maps are different or how the Texas and Kansas maps are similar. The maps drawn by the lower federal courts (LFCs) do not have obvious and glaring

[392] "Small-Scale Data | U.S. Geological Survey," accessed March 26, 2022, https://www.usgs.gov/programs/national-geospatial-program/small-scale-data.

cartographical marks that act as institutional signatures when compared to the commission-drawn California map. In fact, to the naked eye, the large states of Texas and California look much more similar to each other than Texas and Kansas, with small districts clustered by the cities and sprawling districts outside of the urban centers.

However, just because there is no obvious difference or similarity to the naked eye between these maps with limited information displayed, does not mean that institutional differences don't exist. What these three figures and the 2012 example do show, is that in order to answer the core questions of this research project - *What criteria do federal courts favor when they redistrict? How do these compare to other institutions? And what does this mean for representation under a LFC-drawn map?* - one needs a complex, data-driven approach that can compare a large number of plans over time to explore the systematic characteristics of the plans created by each institution, and ultimately understand what characterizes a LFC-drawn plan.

This chapter does just that. By using quantitative measurements created by political science and legal scholars, novel measurements created by myself and a large, original data set of redistricting plans, this chapter is able to test my theory and hypotheses (Chapter 2) by comparing redistricting plans created by different institutions on more than a dozen important empirical criteria, which translates to specific outcomes for political representation. Specifically, this quantitative analysis allows one to see exactly which criteria are favored most highly by the LFCs when they make a redistricting map and how these favored criteria compare to those used by other institutions.

The results show that LFC-drawn maps favor four criteria, while disfavoring others. LFC-drawn maps favor (1) strict population equality of districts, (2) proportional minority representation through minority-majority districts, (3) general compactness of districts and (4) some partisan bias toward the majority party of the three-judge panel. LFC-drawn maps do not substantially favor the criteria of competitive elections, incumbency protection and the other traditional redistricting criteria (like the protection of political subdivisions), above the average of all redistricting institutions. Especially notable from these findings is that the LFCs may create districts that use the "neutral" criteria of compactness, but do not use the "fair" criteria of competitiveness that many reformers advocate for.

This chapter begins with the explanation of the research design, data collection and review of the relevant scholarship on redistricting quantitative measurements. It then covers three sets of quantitative analysis: the institutional historical results, the multivariate regression analysis, and the analysis of court-drawn maps based on the partisan composition of the three-judge panel. Finally, it discusses the findings together and their implications for this project.

5.1 Design, Data and Literature

In this chapter, I leverage a number of quantitative social science and legal tests that have been developed to measure gerrymanders and redistricting maps to test my institutional theory (Chapter 2), and to quantify exactly what criteria LFCs value when they redistrict and see how this compares to other institutions. I use 13 tests to measure 8

criteria commonly used and valued in redistricting: Population Variance, Racial Gerrymandering, Compactness, Preservation of Previous District Cores, Protection of Political Subdivisions, Competitive Seats, Incumbency Protection and Partisan Bias. Some of these criteria have multiple tests, such as partisan bias, which include the Efficiency Gap, Partisan Bias test and the Mean-Median test, which all test different facets of partisan bias in a state-wide redistricting plan.

By using these empirical tests and measurements, I am able to both observe the criteria LFCs favor when creating a redistricting plan and compare these results to plans drawn by other redistricting institutions. This research approach yields the best results for answering the core questions of this project - *What criteria do federal courts favor when they redistrict? How do these compare to other institutions? And what does this mean for representation under a LFC-drawn map?* My research design focuses on directly answering these questions in three parts:

1. I look at the raw descriptive statistics of my data, analyzing the historic trends among redistricting institutions.
2. I use multivariate regression analysis to estimate the effects of each redistricting institution when considering important factors that could impact my results like the redistricting cycle, the size of the plan, the state's political culture and legal restrictions. This helps illuminate which criteria are truly favored by the federal courts and which are the noise of circumstance.
3. To get deeper insight into LFC use of partisan criteria, I take a third approach, which includes accounting for the partisan composition of legislatures and partisan appointment of federal courts when they are map makers, and seeing how this composition affects the three partisan tests.

Two groups of data are necessary to complete these analyses: information on the redistricting institutions that drew the maps for each cycle and legislature type, and the outcome variables - the measurements, metrics and tests that quantify each of the criteria.

A major complication for this project, and for explaining the role of lower federal courts in redistricting, is the data constraint. No one has attempted to answer these questions before, and even the scholars who have looked comparatively at redistricting institutions have not included the federal courts as their own distinct category[393]. Therefore, in order to conduct this quantitative analysis and answer the questions at the heart of this project, I needed to construct a large and original dataset. This dataset itself is a major contribution to the study of redistricting and the federal courts.

I built a dataset that covers five decades and three types of legislatures: the 1970, 1980, 1990, 2000 and 2010 redistricting cycles, and the Congressional, upper and lower state legislature plans made leading up to the 1972, 1982, 1992, 2002 or 2012 elections. Each observation in this data set is for a "plan" or a "map", which means the unique combination of a state, year and legislature type. For example, the plan used for the Massachusetts Congressional Districts for the 2002 election is a distinct unit of analysis from the 2002 Massachusetts state senate plan.

The key independent variable for this analysis is which institution drew the map used for the 1972, 1982, 1992, 2002 or 2012 election. I was able to collect this data from court records and public sources. Most maps were drawn by legislatures, commissions, state courts or federal courts[394]. I also included additional information in the dataset on the partisan composition of the state government, election results for each observation, the political appointments of federal court judges when maps were drawn and other useful background information. Further, I collected data for the 13 tests that measured the

[393] Federal courts have often been grouped with state courts despite the substantial differences in function and law.
[394] A very small number were created by governors or state constitutional amendments

8 criteria for from a variety of sources, including from government documents, publicly available data, court records and redistricting scholarship. Some of these tests are wholly original, some are adapted from existing data sources, and some were used directly from other sources[395]. These test results are my key dependent variables.

Using my institutional theory of LFC action on redistricting, which highlighted the key constraints on LFC mapmaking and their expected impact, I can create a formal multi-part hypothesis by applying this information directly to the individual criteria and tests.

- Hypothesis 1 and 2: As articulated in the theory portion, my hypothesis expects an effect on population variance and racial gerrymandering in line with Supreme Court precedent when LFCs draw the court due to legal constraints, with closer adherence than other redistricting institutions. For population variance, this would manifest itself as close to perfect equality among districts in a federal court-drawn plan. For racial gerrymandering, I expect to see the LFCs promote majority-minority districts in line with state demographics.
- H4, 5 & 6: I expect the LFCs to have an effect and favor traditional criteria such as compactness, protection of political subdivisions and continuity of districts more than partisan legislatures due to political constraints and room for judicial discretion.

[395] The redistricting institutions, population variance, competitiveness, incumbency and racial gerrymandering tests were collected and analyzed completely by myself using publicly available data outlined. Partisan measurements for the Efficiency Gap, Partisan Bias Test, and Mean-Median test were collected from Plan Score, a website run by Eric McGhee, Nick Stephanopoulos, Ruth Greenwood, Simon Jackman, and Michal Migurski with permission from Stephanopoulos. The traditional test scores of compactness, political subdivisions and continuity are aggregations I did from district level measures compiled by Carson, Crespin, & Williamson using their public replication data for 2014's "Reevaluating the Effects of Redistricting on Electoral Competition, 1972–2012" in SPPQ. All other data, such as partisanship of courts, legislatures, state governments, voting returns and court cases were collected myself.

- H7&8: I expect LFCs to not promote political criteria such as the related criteria of competitiveness and incumbency protection above average levels due to constraints over political legitimacy.
- H9: I expect LFCs as redistricting institutions generally to have a muted impact on partisan measurements such as the Partisan Bias Test, Mean-Median Test and the Efficiency Gap, with scores close to non-partisan or zero due to political constraints on the federal courts. However, I also expect to find a small partisan effect on LFC-made maps when looking at the structural constraints of the composition of the three-judge panel regarding partisanship of appointment. I do not expect a strong partisan bias toward one party or the other due to the long-time frame in the data set, but rather bias toward the majority in the three-judge panel. This hypothesis is outlined along with the tests, criteria and constraints in Table 5.1.

Each of these eight criteria represents an important quality that the mapmakers have to weigh when drawing a new redistricting plan. All of these criteria have been considered by political science and legal scholars in various contexts related to redistricting. Some of these criteria, such as partisan bias, have experienced extensive scholarly debate and multiple quantitative measurements for how to best measure this quality, others like population variance have been more contained in the courts and remain straightforward. Before analyzing the data, I will review the scholarly background of these criteria and why each is useful for comparing the institutional effects and representational outcomes of redistricting plans.

Criteria Category	Criteria	Test	Constraint	Hypothesis
Settled Federal Law	Population Variance	T1: Average Maximum Population Variance [396]	Legal: SCOTUS Standard	H2: Close adherence to population equality
	Racial Gerrymandering	T2: Racial District Proportionality Test[397]	Legal: SCOTUS Standard, VRA	H3: Promotion of racial proportionality
Traditional (Preference of State Law)	Compactness	T3: Polsby-Popper Districts Mean[398]	Political: Neutral, No law	H4, 5,& 6: Favor traditional criteria as nonpartisan, legitimate criteria in the absence of instruction
		T4: Polsby-Popper Districts Median		
		T5: Polsby-Popper Districts Below 0.2		
	Protection of Political Subdivisions	T6: Split Counties Test[399]		
		T7: Split Cities Test		
	Continuity of Districts	T8: Largest Remaining Core Test Average[400]		
Political (Preference of State Law)	Competitiveness	T9: Competitive Seats Percentage[401]	Political: Legitimacy norms, Nonpartisanship	H7&8: No consistent stance on nonpartisan political criteria due to lack of guidance/law/precedent and desire for legitimacy
	Incumbency Protection	T10: Incumbency		

[396] T1 uses the commonly established legal test of the difference in population variance between the district in the redistricting plan with the largest population variance and the one with the lowest

[397] There is no established racial gerrymandering measurement similar to that of the partisan gerrymandering tests. Therefore, I use a novel test: This score represents the simple ratio of the percentage of black and Hispanic population in a state to the number of minority-majority districts in a redistricting plan. An perfectly proportional score would be 1. Scores of 0 represent no minority-majority districts in a state with a minority population.

[398] The compactness tests only use one of the several compactness measurements. This limits the absolute knowledge about how compact each district is, but using the same test allows for easy comparison among institutions and achieves my goals for this project. Because this project uses redistricting plans as a unit of analysis as opposed to individual districts, I have aggregated district scores per state plan. The first test is an average of the Polsbly-Popper score for districts in a state. The second test shows the median score for each plan to account for outliers and geographic constraints in a plan. The third test is a measurement of the absolute number of districts in a plan that are below the Polsby-Popper score of 0.2 and therefore are very noncompact. This number is far higher for state legislatures than Congress due to the size of legislatures.

[399] The novel county and city tests measure the number of counties or cities that are split in a statewide plan, divided by the number of districts and the number of cities or counties. Higher scores means more split political subdivisions, lower scores mean fewer.

[400] See Edwards, Barry, Michael Crespin, Ryan D. Williamson, and Maxwell Palmer. "Institutional control of redistricting and the geography of representation." *The Journal of Politics* 79, no. 2 (2017): 722-726

[401] The test measures the competitiveness of the elections in the plan. This test is a simple percentage of the districts on a plan that were won by less than 60% of the vote. A higher percentage means a greater percentage of competitive seats in the plan.

		Protection Percentage [402]		
Partisan	Partisan Bias (or Symmetry)	T11: Partisan Bias Test	Political and Structural: Norm of legitimacy for nonpartisan appearance; three-judge partisan dynamic	H9: No systematic bias for LFC-Drawn maps; slight bias toward partisan majority of judges on panel
		T12: Mean-Median Difference		
		T13: Efficiency Gap		

9 - Table 5.1 – Redistricting Measurements and Criteria

5.2 Redistricting Criteria

Criteria 1: Population Variance

Population variance is the criteria in a redistricting plan that is most easily quantified, and also one of the most important. Unlike the other criteria, population variance also is the one that has the clearest legal standard and solution.

Population variance is simply the difference among the populations of the various districts in a plan. According to law and precedent, population equality is based on U.S. Census data for the number of residents in districts as opposed to citizens, registered voters or voting age population. Variance is typically calculated as the average maximum difference between the districts in a plan. It is a measurement of malapportionment and has largely been governed by the One Person, One Vote legal standard as discussed in Chapter 3. For Congressional plans, the population variance should be as close to zero as possible following the *Kirkpatrick/Karcher/Wesberry* line of cases. State legislative

[402] The test measures the incumbency protection in a plan. It is a simple measurement of the percentage of seats won by incumbents in the statewide redistricting plan.

district plans are allowed more variation, with an effective de minimis variation of 10 percent allowed, following the *Mahan/Reynolds* line of cases.

This measurement is rare among the criteria because the population variance of districts is actually regularly used in court cases. In this analysis (T1), I use the average maximum deviation to analyze the maximum population variance that exists in a statewide plan, which is my unit of analysis. Some other analyses use district-level measurements.

Criteria 2: Racial Gerrymandering

While race has been a critical part of many of the most important developments for redistricting in the federal courts since the 1960s, unlike population equality or partisanship there have been no clear tests or measurements developed to quantify a proper, legal or normative use of race as a criterion versus an illegal, improper and immoral use of race. The courts have shifted standards on race over time, as outlined in Chapter 3, dealing with vote dilution as well as Voting Rights Act guarantees of nonretrogression. But, at no time have the LFCs applied a simple mathematical formula as they have with malapportionment and population variance.

In order to compare redistricting plans for the federal courts on the critical criteria of race for this project, I created a new measurement of racial proportionality. This measurement (T2) is a novel test created in the absence of other metrics and without a normative conclusion as to the merits of majority-minority districts. It compares the of percentage of majority-minority Black and/or Hispanic districts[403] in a redistricting plan

[403] This measurement only counts districts that are either a designated Majority-Minority district of Black or Hispanic residents. It does not count influence districts or combined minority population districts. There

to the percentage of Black and Hispanic population in a state. For example, a T2 score of 0.500 means a 1-to-2 proportional ratio of majority-minority districts to minority population percentage, or that a state has 2 out of 10 legislative districts with a majority-minority population and a 40 percent statewide minority population. It measures how closely the percentage of majority-minority districts in a state's delegation matches that state's racial composition as a whole.

One reason why there may not be a clear, agreed upon measurement for racial gerrymandering or representation is that there is so much debate over what is preferable, desirable or constitutional in race-conscious districting. As shown in Chapter 3, the Court's opinion on majority-minority districts has changed multiple times over the years. I chose to use majority-minority districts as a key component as my measurement, not because they are good or bad, but because they have been the center of federal court litigation for racial gerrymandering claims and scholarly debate for decades. This debate peaked in the federal courts with the *Shaw* line of cases and continues in the scholarship.

One category of scholarship and advocacy broadly argues in favor of majority-minority districts as a short-term, progressive benefit for descriptive racial representation or a necessary correction for racial exclusion from the political process[404]. In *Race,*

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many ways to calculate race-based voting power in a district, however this measurement does capture the rigid way that the courts calculate what qualifies as a majority-minority district.
Black and Hispanic voting rights issues have been at the forefront of the concerns in state and congressional redistricting, although there have also been prominent and important redistricting cases related to Native American and Asian voting rights, especially at the local level

[404] Canon, David T. *Race, Redistricting, and Representation : the Unintended Consequences of Black Majority Districts*. Chicago: University of Chicago Press, 1999.; Butler and Cain, *Congressional Redistricting*, 1992; Davidson, Chandler. "The voting rights act: A brief history." *Controversies in Minority Voting* 7 (1992).; Grofman, Bernard, Lisa Handley, and David Lublin. "Drawing effective minority districts: A conceptual framework and some empirical evidence." *NCL rev.* 79 (2000): 1383; Kang, Michael S. "Race and democratic contestation." *Yale LJ* 117 (2007): 734.; Petrocik, John R., and Scott W. Desposato. "The partisan consequences of majority-minority redistricting in the South, 1992 and 1994." *The Journal of Politics* 60, no. 3 (1998): 613-633.; Clayton, Dewey M. African Americans and the Politics of Congressional Redistricting. New York: Garland Publishing, Inc., 2000.

Redistricting and Representation, David Canon articulated his perspective on majority-minority districts, saying not that they fix minority representation, but they can help America get closer to a pluralistic ideal. "Rather than seeing these districts as vehicles for 'authentic black representation'... I saw them as the basis for creating a broader biracial politics that would help move us closer to the pluralistic, tolerant society that Martin Luther King, Jr., dreamt about."[405]

At the same time there were also many whose findings or arguments are against the use of majority-minority districts. Scholars have found that majority-minority districts can allow for descriptive representation at the expense of substantive representation, can negatively impact minority interests, can be at the expense of larger representation of the Democratic party or can be specifically for the outsized benefit of white Democrats[406]. David Lublin, for example, wrote in *The Paradox of Representation* that majority-minority districts handed seats to Republicans in the 1994 Congressional elections, and that 30 to 40 percent Black influence districts would better serve minority substantive interests. Others, have opposed majority-minority districts as a form of racial gerrymandering in and of itself, including the *Miller v Johnson* opinion. Further, many have shown that the exact composition necessary to benefit Black constituents varies by

[405] Canon, *Race, Redistricting,* 1999, Xiii

[406] Lublin, David. *The Paradox of Representation : Racial Gerrymandering and Minority Interests in Congress*. Princeton, N.J.: Princeton University Press, 1997.; Swain, Carol Miller. *Black faces, black interests: The representation of African Americans in Congress*. Harvard University Press, 1995; Cox, Adam B., and Richard T. Holden. "Reconsidering racial and partisan gerrymandering." *U. Chi. L. Rev.* 78 (2011): 553.; Cameron, Charles, David Epstein, and Sharyn O'halloran. "Do majority-minority districts maximize substantive black representation in Congress?." *American Political Science Review* 90, no. 4 (1996): 794-812.; Polsby, Daniel D., and Robert D. Popper. "Ugly: An inquiry into the problem of racial gerrymandering under the Voting Rights Act." *Mich. L. Rev.* 92 (1993): 652.;

circumstance and location[407], or even which party has a majority in Congress beyond any districts specifically[408].

The debate over majority-minority districts is important and substantial, and beyond the scope of this project. Lublin summarizes the contentiousness of the debate saying, "debates over the best method of advancing minority representation often remain highly acrimonious, if only because racial redistricting has significant political as well as racial effects."[409] Lublin concludes that regardless of this debate, the consequences of the Voting Rights Act and positive racial redistricting has been seat loses for Democrats, the successful election of minority candidates and "a place at the redistricting table and in the halls of government" for minorities[410].

Considering this research together and for the purposes of this project - focused on the criteria that the courts and other institutions use, and how it impacts representation, some form of racial metrics is necessary, especially in relation to the number of racial claims made in LFC redistricting cases. Therefore, in absence of a clear social science measurement of racial gerrymandering or representation, and without a clear legal standard, my measurement of racial proportionality - T2 - will have to suffice as a way to measure and compare court-made maps for this project, with all of the caveats necessary. Furthermore, this novel metric can exist as a foundation for further development of much-needed racial criteria methods.

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[407] Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Miority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001)
[408] Handley and Grofman 2008 (Lublin Chapter, 148), Handley and Grofman 1998
[409] Handley and Grofman 2008 (Lublin Chapter, 149)
[410] Handley and Grofman 2008 (Lublin Chapter, 149)

Criteria 3: Compactness

Compactness has long been the preeminent "traditional criteria" for considering "gerrymandering" specifically. Compactness is a quantification of how geographically close the boundary of a district is to its center in a redistricting plan - a small circle would be the most compact district possible, while an ugly, squiggly district like the original gerrymander in 1812 would be among the noncompact. While on the surface, compactness seems like one of the simplest and straightforward criteria and considerations for drawing a redistricting map, in reality it has attracted more than 100 different ways to be calculated[411] and has had a unique relationship emerge in relation to debates over the justiciability of partisan gerrymandering. Some measurements of compactness, such as the "minimum circumscribed circle" can quantify very different districts, with different levels of compactness to the naked eye with the same numeric values[412]. The variety of these measurements and the variability of the interpretation leave compactness as a key criteria and one ripe for long-term debate. The federal courts do not have an obvious or stated standard for compactness, but there may be a vague preference for "clean" and compact districts that are traditional geometric shapes with fewer squiggly borders and boundaries not too far from the center of the district[413].

While there are dozens of measurements of compactness, three have become predominant: Polsby-Popper, Reock and Convex-Hull[414]. Each of these three tests

[411] McDonald, Michael. "The Predominance Test: A Judicially Manageable Compactness Standard for Redistricting." *Yale LJF* 129 (2019): 18.
[412] Monmonier, Mark S. *Bushmanders & Bullwinkles : How Politicians Manipulate Electronic Maps and Census Data to Win Elections*. Chicago: University of Chicago Press, 2001, 74
[413] Monmonier *Bushmanders*
[414] Reock, Ernest C. 1961. "A note: Measuring compactness as a requirement of legislative Apportionment." Midwest Journal of Political Science 5 (1): 70–74; Polsby, Daniel D, and Robert D Popper. 1991. "The third criterion: Compactness as a procedural safeguard against partisan

measures the compactness at a district level. The Polsby-Popper Test, also known as the 'isoperimetric ratio" is simply a formula[415] that calculates the relationship between the area and perimeter of the district in relation to a circle. The Reock and Convex-Hull tests are more complicated. The Reock test requires fitting the district into an efficient circle using an algorithm, whereas the Convex-hull test theoretically "ties a string" around the outer boundaries of the district to quantify its compactness.

For this project, because it is not about the details of the absolute compactness of districts, but rather the relative compactness in relation to the federal courts and other redistricting institutions, I used only the Polsby-Popper measurement[416].

While Polsby-Popper scores function at the district level, like all compactness measures, my project requires state- or plan-level measurements. Therefore, I used three different techniques to accurately aggregate the district-level scores of Polsby-Popper measurements to the statewide plan level.[417] For T3, I took the mathematical mean of all of the district scores in a plan for an average district score in a statewide plan. For T4, I took the median district Polsby-Popper score of all the districts to highlight the median compactness of the plan and account for outliers that may have impacted the mean score from T3. And, third, for T5, I included the absolute number of extremely noncompact

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gerrymandering." Yale Law & Policy Review 9 (2): 301–353; Niemi, Richard G., Bernard Grofman, Carl Carlucci, and Thomas Hofeller. 1990. "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering" [in en]. The Journal of Politics 52, no. 4 (November): 1155–1181.issn:0022-3816, 1468-2508, accessed August 26, 2017. https : / / doi . org / 10 . 2307 / 2131686. http://www.journals.uchicago.edu/doi/10.2307/2131686.; eFord, Daryl, Hugo Lavenant, Zachary Schutzman, and Justin Solomon. 2018. "Total variation isoperimetric profiles." arXiv:1809.07943. ; Carson, Crespin and Williams 2014; Ansolabehere and Palmer 2002

[415] 4*pi*A/P^2, where A = area and P = perimeter of the district)

[416] The best measurements of true compactness of districts include using a variety of metrics together, the focus here on aggregated Polsby-Popper scores is sufficient for comparison and the bounds of this project.

[417] In consultation with and special thanks to Nick Stephanopoulos from Harvard Law School

districts in a plan, with a score lower than 0.2 on the Polsby-Popper test. T5 allows for the measurement for egregious gerrymanders and shed light on the institution's overall attention to compactness.

Compactness has long been one of the key criteria for drawing a "fair" and "neutral" map for any redistricting institution. Thirty-two states require compactness as a criterion for state legislative districts, and 17 require it for congressional districts[418]. Often these provisions on compactness can be vague however, and they are not necessarily enforceable or binding. Compactness has also emerged as an important criterion in partisan gerrymandering. As is seen clearly in the amicus briefs to 2018's *Gill v Whitford*[419], while many social scientists and legal scholars put forward new measurements and judicial tests to quantify and ameliorate partisan gerrymandering in Wisconsin, others opposed this movement and suggested using traditional criteria instead, such as compactness. Compactness was seen by some amici, including a number of Republican-controlled states, as sufficient to prevent "unconstitutional" partisan bias. A recent paper in Yale Law Review by Michael McDonald articulated a more complete version of this thinking, using compactness in lieu of these social science tests as a judicially manageable way to prevent excessive gerrymandering[420].

Criteria 4: Protection of Political Subdivisions

The protection of political subdivisions refers to preserving county, town, city, district or ward boundaries within the bounds of a legislative district when drawing a

[418] "Where Are the Lines Drawn?," *All About Redistricting* (blog), accessed March 26, 2022, https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/.
[419] Gill v. Whitford, 585 U.S. ___ (2018)
[420] McDonald, "The Predominance Test"

map[421]. Like compactness, this is a traditional criterion that is broadly favored as a method for fair and neutral districting. It is similarly included as requirement in a majority of state constitutions for districts and more than a dozen congressional redistricting requirements[422], while also being difficult to enforce. There is evidence that state constitutional traditional redistricting requirements, particularly the protection of political subdivisions, has a strong constraining effect on the partisan gerrymandering of state legislative districts[423].

Like compactness and most criteria, the protection of political subdivisions is a subordinate criterion to the population equality established by the Supreme Court's One Person, One Vote standard. As discussed in Chapter 3, prior to *Baker v Carr* and its progeny, many U.S. states used town or county boundaries as the district boundaries and had the political districts as co-terminus. This made legislative district plans straightforward, but also severely malapportioned and left rural regions heavily overrepresented. Eventually, with One Person, One Vote, the population variance between municipalities ended this as a predominant criterion in legislative map making. Since *Baker*, maintaining subdivision boundaries is preferred by many but not always legally possible, and not always politically desirable depending on who is drawing the district. Some have argued that Supreme Court justices have been too swayed by the clean shapes and the appearance of boundaries at the expense less apparent, but more important cartographical data[424].

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[421] Or others, like parish boundaries in Louisiana as was the subject of many LFC cases on local redistricting

[422] "Where Are the Lines Drawn?," *All About Redistricting* (blog), accessed March 26, 2022, https://redistricting.lls.edu/redistricting-101/where-are-the-lines-drawn/.

[423] Winburn, Jonathan. *The realities of redistricting: Following the rules and limiting gerrymandering in state legislative redistricting*. Lexington Books, 2008.

[424] Monmonier, *Bushmanders,* 89

Maintenance of political subdivision boundaries in redistricting is not only desirable as a legal or political requirement, but also is simpler for constituents and allows for a representation of place and the delegate versus trustee model of representation[425]. It represents the simplest form of representative democracy - the one outlined by John Locke in the *Second Treatise* - where a locality sends a representative to the legislature. Many communities maintain this representation of place with multi-member districts, including at the subnational level in the U.S., but for the most part this project deals with single-member districts that are at odds with preservation of political subdivisions based on the equal population requirements of the One Person, One Vote standard[426].

For this project, we use two simple measures at the redistricting plan-level to compare how well each redistricting institution maintains town, city and county borders when they make a redistricting map. One measurement quantifies the number of counties split by a plan and the other measures the number of cities or towns split by a plan. These original measurements take the total number of county or city boundaries split by the plan divided by the number of counties or cities in the state divided by the districts in the plan. This allows for a clear and simple relative comparison of how each institution split town, cities and counties when redistricting while accounting for critical factors, allowing us to compare the value of the criteria itself.

[425] Butler and Cain, *Congressional Redistricting*

[426] As of 2000, only 10 states used multi-member districts for their state legislature's lower house. Multi-member districts are not a major facet of LFC cases related to redistricting. The 1982 Amendments to the VRA allowed LFCs to overturn multimember districting schemes that led to racially discriminatory effects. Thornburg v Gingles in 1986 overturned North Carolina's multimember state legislative scheme for this reason.

Criteria 5: Continuity of Districts

The continuity of districts[427] is another part of the so-called "traditional redistricting criteria" along with compactness and preservation of municipal boundaries. This criterion is simply the maintenance of the same districts from redistricting cycle to cycle - how much does the First District of Massachusetts retain the same geography as the subsequent First District of Massachusetts in the new redistricting plan? This criterion is less discussed than others, such as compactness, but has been used regularly in recent redistricting scholarship to measure how much the districts are changed from year to year[428].

The best method for measuring continuity of districts over between two plans is the largest remaining core test. This test uses geographic information system software and compares a plan district by district. For my analysis, I used the continuity scores from Edwards et al 2018 analysis[429] and adapted these findings from the district level to the plan level, using the mean score of each plan. I then used my mean measurement with my institutional variables for a full analysis. This measurement is one of the least complicated and one which I relied on others' data the most, however this allowed me to include a metric of an important variable for my novel study of federal court redistricting.

[427] Not to be confused with contiguity of districts
[428] Edwards, et al, "Institutional control," 2017
[429] Edwards et al, 2017: "We measure district continuity as the largest remaining core of a prior district. In the absence of a standard continuity measure (Butler and Cain 1992; Crespin 2005; Niemi et al. 1986), we think this approach best operationalizes preserving the cores of prior districts. We use the Missouri Census Data Center's Geographic Correspondence Engine to generate our measures of respect for political subdivisions and continuity, but its coverage is limited to 1992, 2002, and 2012, reducing the number of observations in some of our analysis of congressional districts.

Criteria 6 and 7: Competitiveness and Incumbency Protection

Competitiveness and incumbency protection are two criteria on opposite sides of the same coin. In their 1992 study of congressional redistricting and its criteria, Bruce Cain and David Butler label competitiveness as better stated as responsiveness[430]. This is a useful explanation. A competitive district is simply one that has a constituent population that allows for responsiveness to changes in voter preferences based on party. A competitive district is one that is "marginal," i.e. it can be won by candidate from either side[431]. In contrast, an incumbency protected[432] district is one that is not responsive to changes in the electorate, and is generally safe, rather than marginal, for the incumbent regardless of public sentiment.

While the Butler and Cain definition is useful in the context of larger policy and political responsiveness literature, the concept of "competitiveness" as a criterion itself has become more popular by advocates of redistricting reform. Many see competitiveness as a fair, neutral criteria and a goal to prevent both partisan gerrymandering and "bipartisan gerrymandering," which is the same as protecting incumbent legislators. The idea is that an ideal and fair legislative map should maximize the number of districts that are competitive to both parties. However, while this has become a popular sentiment as debates over partisan gerrymandering continued through the 2000s, the complications of this criteria have not changed much. Beyond geographic and demographic concerns over an ideal competitiveness level, Butler and Cain laid out a key concern in 1992: what is "competitive" exactly? They wrote,

[430] Butler and Cain, *Congressional Redistricting,* 1992, 81
[431] Paraphrase of Butler and Cain, *Congressional Redistricting,*
[432] Incumbency protection is sometimes considered a traditional redistricting principle

> Many reformers consider that one of the goals of any redistricting should be to produce a dispersion of seats from safe to marginal that will make the legislature responsive, but not too responsive, to public opinion. It would be equally undesirable for an election where there is a clear but limited movement of support to produce no change in representation or to produce 100 percent turnover. The problem, on which there is no agreement, is to decide what is the ideal degree of responsiveness to aim at.

Others have argued against competitiveness both in empirical and normative terms. In *Redistricting and Representation*[433], Thomas Brunell wrote that competitiveness is importantly different than responsiveness, because it does not consider the value of primary elections or non-electoral outcomes for measuring responsiveness of the elected to the electorate. Further, Brunel argued that constituents would be best represented in heavily partisan gerrymandered districts, where the most constituents would be represented and the legislature could mirror the overall electorate best as opposed to swing districts throughout the map[434].

Previous studies have shown that when commissions and courts (state and federal combined) draw redistricting maps, they have more competitive districts on average[435]. And, when legislatures draw maps, if they have split party control, they are more likely to draw incumbent-protected districts[436]. No one has looked at how federal courts specifically perform on these metrics. Further, competitiveness and incumbency protection are inherently a part of partisan gerrymandering measurements. A map that is substantially biased toward one party is necessarily not as competitive on a plan-wide

[433]Brunell, Thomas L. Redistricting and Representation: Why Competitive Elections Are Bad for America. New York: Routledge, 2008.
[434] Brunell, *Redistricting and Representation*, 11-15
[435] Carson, et. al, "Reevaluating the effects"
[436] McDonald, "A comparative analysis"

scale. However, partisan gerrymandering measurements also crucially measure a different set of criteria, which is discussed next.

To measure competitiveness and incumbency protection in this analysis and specifically for federal courts as redistricting institutions, I turned to two very simple, original measurements. Like other criteria, competitiveness and incumbency protection are usually calculated on the district level, however my analysis is at the plan level. Therefore, I measure the percentage of districts in a plan that are competitive and the percentage where incumbents won.

A competitive seat is one that was won with less than 60 percent of the vote in the district in the election *after* the plan was put into effect (usually 1972, 1982, 1992, 2002, 2012.)

The incumbency metric simply measured how many incumbents won in the elections after the new redistricting plan was put into effect.

These measurements are simple, but allow for 1. comparison of the federal court-drawn maps to an average value in either measurement, 2. a comparison of how the various institutions did on these metrics, and 3. a comparison of these criteria without regard for the size of the plan or the type of legislature - congressional, state house or state senate.

Criteria 8: Partisan Bias (or Symmetry)

One of the most recent criteria - and the one that has taken up the most pages in political science and law journals and advocates' amicus briefs and op-eds - has been partisan bias. Partisan bias is the criteria for how much the districts that were drawn in a plan benefit one party in relation to the electorate as a whole. There are multiple

measurements of partisan bias that value different elements of the criteria, but at its base they all measure how biased the map is toward one party or another, and therefore how gerrymandered the map is in a partisan direction.

Partisan bias, also referred to as partisan symmetry, inherently presupposes a level of fairness or neutrality as a baseline, and measures the deviation from that fair and neutral equilibrium - the exact nature of the equilibrium changes depending on the specific measurement. In contrast to many other criteria and metrics, all measurements of partisan bias are measured at the plan-level rather than the district level because a key quality of the metric is how biased the totality of the plan is through packing, cracking and tacking various districts.

Partisan bias measurements became particularly important following the *LULAC v Perry* and *Vieth v Jubelirer* decisions. In *Vieth,* Justice Kennedy stated the possibility for a judicially manageable standard on partisan gerrymandering like that used for racial gerrymandering or malapportionment. As discussed in Chapter 3, this eventually led a number of social scientists to develop and propose a variety of measurements for quantifying excessive partisan gerrymandering. These proposed measurements came before the Court in *Gill v Whitford* and *Rucho v Common Cause*. The LFC judges in *Gill* endorsed a measurement of partisan bias as a way to measure and adjudicate partisan gerrymandering under the 14th amendment. However, when the oral arguments for *Gill* were heard in the Supreme Court, Chief Justice John Roberts famously dismissed partisan bias measurements as "sociological gobbledygook."[437] With the decision of *Rucho*, etc in 2019, the Supreme Court declared partisan gerrymandering as a

[437] Gill v Whitford

nonjusticiable issue and thus jettisoned these partisan bias measurements from the federal courts.

While these measurements of partisan bias may not have immediate legal relevance, (not unlike compactness or competitiveness), the criterion of partisan bias tells us quite a bit about the maps that federal courts and other institutions make and how these maps specifically impact representation. In this analysis, I use three measurements of partisan bias, each which captures a slightly different understanding of partisan gerrymandering: the Partisan Bias Test, the Mean-Median Test, and the Efficiency Gap Test.

Discussion of bias in electoral systems and measurements of partisan bias have been around for decades. At its core, partisan bias measurements are proportions of the relationship between votes and seats, and in the U.S. two-party system this is especially important. A map or plan would have partisan symmetry and be unbiased if the votes for one party could be replaced for another party without changing the number of seats. For example, if Democrats won 60 percent of the vote and got 65 percent of the seats in the legislature, an unbiased redistricting plan would also award Republicans 65 percent of the seats with 60 percent vote share. If these seat shares vary by which party wins the votes, then the map has bias[438].

Bernard Grofman surveyed an early set of metrics that had been used in calculating partisan bias in 1983. He found that initial attempts to measure partisan bias included simply subtracted the percentage of votes from the percentage of seats or using a simple ratio of seats to votes as well as more complicated methods like a measure of how

[438] Niemi and Deegan 1978; Grofman, Bernard. "Measures of Bias and Proportionality in Seats-Votes Relationships." Political Methodology 9, no. 3 (1983): 295.

many votes are needed to gain 50 percent of the seats or a measure of the difference between ideal vote-seat curves[439]. Over time, more measurements have been developed, some of which use data from one election, others from multiple elections, others that estimate seat-vote relationships proactively before a plan is installed[440]. These measurements of partisan bias and symmetry vary from those that require substantial data and quantitative models, those that can be done with rudimentary knowledge of Excel and those designed for back-of-the-napkin calculations on the judicial bench[441]. Grofman noted in his 1983 conclusion an insight born-out by judicial history: the best measures have a mix of accuracy and simplicity.

Despite the variety and number of measurements for partisan bias and symmetry, none have emerged as the agreed upon standard[442]. Therefore, for my analysis I used three of the most prominent, that have been used in legal scholarship and political science analysis of partisan gerrymandering. These measurements are also straightforward to calculate and understand with data available.

The first measurement is the Partisan Bias Test. This is simply a measurement of partisan bias itself. This test measures the difference between seat share in a redistricting plan if the two parties had a tied vote share of 50 percent in a theoretical election. To calculate this measurement, one must change the real vote share in each district to create a hypothetical tied statewide election. For example, if the hypothetical 50-50 election led to Democrats receiving 53 percent of the legislative seats, the plan would have a 3

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[439] Grofman, Bernard. "Measures of bias and proportionality in seats-votes relationships." *Political Methodology* (1983): 295-327.
[440] Grofman, Bernard, and Gary King. "The future of partisan symmetry as a judicial test for partisan gerrymandering after LULAC v. Perry." *Election Law Journal* 6, no. 1 (2007): 2-35.
[441] Wang, Samuel S-H. "Three tests for practical evaluation of partisan gerrymandering." *Stan. L. Rev.* 68 (2016): 1263.
[442] A feature that likely also hurt its judicial prospects

percent Democratic bias. This measurement was explained and promoted by Gary King and Bernard Grofman as a quantitative test for measuring partisan gerrymandering in the courts after *LULAC v Perry*[443].

The second measurement of partisan bias is the Mean-Median Difference test. This is one of the simplest and most straightforward measures of gerrymandering and partisan bias. To calculate the Mean-Median score one just subtracts a party's median vote share from its mean vote share. The difference and its direction, shows you the skew of the district vote shares across the plan. This is particularly helpful to measure cracking and packing and other partisan gerrymandering tools. If the difference is low, then the redistricting plan has a more normal distribution of districts. This measurement was also promoted as a method for quantifying partisan gerrymandering in the courts[444].

The third measurement was the one at the center of *Gill v Whitford* in 2017: The Efficiency Gap. Created by Eric McGhee and Nick Stephanopoulos[445], this metric quantifies how many votes are "wasted" i.e. how many votes were cast above the threshold necessary to win a district in packed or cracked gerrymanders. They explain, "The Efficiency Gap is calculated by taking one party's total wasted votes in an election, subtracting the other party's total wasted votes, and dividing by the total number of votes cast[446]." This measurement ends up with one number that quantifies the efficiency of the statewide plan's vote-seat relationship, coded to represent which party benefited. The

[443] Grofman and King "The Future of Partisan Symmerty"
[444] McDonald, Michael D., and Robin E. Best. "Unfair partisan gerrymanders in politics and law: A diagnostic applied to six cases." *Election Law Journal* 14, no. 4 (2015): 312-330.
[445] Stephanopoulos, Nicholas O., and Eric M. McGhee. "Partisan gerrymandering and the efficiency gap." *U. Chi. L. Rev.* 82 (2015): 831.
[446] "PlanScore," accessed March 26, 2022, https://planscore.org.

Efficiency Gap rewards a hyper-proportional notion of representation where any vote not cast for a winning candidate or above the threshold needed to win is wasted.

These three measurements each explain one way or another, which party benefits from the redistricting plan the most for a given year. Further, these three measurements quantify the bias in the plan, but they value different qualities for a neutral map and therefore quantify different methods of representation. Together, these three metrics allow for the analysis of partisanship in the plans created by these redistricting institutions, but separately they allow for a deeper understanding of the types of partisan representation that is promoted. I collected these partisan bias measurements from PlanScore[447], and combined them into my original data set of redistricting institutions, court cases, judicial partisanship and control variables for quantitative analyses.

5.3 Part I: Historical Differences in Criteria Among Redistricting Institutions

The first step to answering the questions that lie at the core of this project - *What criteria do federal courts favor when they redistrict? How do these compare to other institutions? And what does this mean for representation under a LFC-drawn map?* - is to observe how each redistricting institution has drawn legislative maps historically. Using my original dataset of five decades of redistricting cycles, I started by looking at the raw data and simple descriptive statistics to see how the average plan made by each redistricting institution compared on the key criteria historically.

[447] Special thanks to Nick Stephanopoulos for providing me access and advice

First, it's important to consider what conditions the LFCs had when drawing a redistricting map. As explained, federal courts are rare among redistricting institutions for only acting when other methods fail or plans are already declared illegal. Further, federal courts are distinct from state courts due to their required emphasis on malapportionment and racial gerrymandering under federal law, and their discretion but lack of direction with other criteria.

Because the LFCs will only act in a crisis or partisan gridlock, the plans they draw may not be comparable to other institutions in a vacuum. However, this is the reality of when LFCs do draw redistricting maps and therefore is a necessary precondition for their action and should be understood as a constitutional aspect of their de facto role. The empirical bias essential to all LFC-made plans is that they began with some political or legal conflict or else they would not be in the LFC or meet the high bar described in Chapter 4 necessary for LFC-made plans. These facts may lead to less than perfect methodological comparisons between LFCs and other redistricting institutions, but these are necessary aspects of federal court involvement in redistricting and reapportionment since *Baker* and will always be part of the equation. Simply put, the relationship observed between LFCs and their favored criteria are not randomly assigned and they are not modal among all institutions.

Out of the 610[448] redistricting plans for Congress, state lower or state upper houses that I was able to collect data for which institution drew the plan for the 1970, 1980, 1990, 2000 and 2010 redistricting cycles, federal courts actually drew 60 - or about 10 percent - of the plans that were used in elections. There are at least an additional 27

[448] 610 observations out of a possible 713 plans when accounting for Nebraska's unicameral system and the states with only one Congressional district over the five decades.

plans that were drawn by another institution, but had their initial efforts struck down in federal court as illegal before submitting a plan that was approved by the federal court[449].

Among the 60 plans drawn by LFCs during these five cycles, 29 were for Congressional districts, 15 were for lower state houses and 16 for upper state houses. The number of plans created by the federal courts is quite different from the number of federal court cases on the subject, as shown in Chapter 4. In some cases, multiple plans were drawn at the same time, for example, South Carolina had a case in 2002 where the federal court instituted new maps for all three legislatures. Most federal court cases on redistricting do not lead to court-made redistricting plans. This is an option LFCs take only after all others have been exhausted. As shown in Chapter 4's analysis of cases, LFCs only drew state or congressional maps in about 5 percent of the 1,200 times they faced a redistricting case.

Federal court redistricting has not been spread evenly across space or time. The LFCs made 14 redistricting plans ahead of the 1972 elections, 16 for 1982, 14 for 1992, 8 for 2002 and 8 for 2010. Although southern states certainly receive a lion's share of federal court intervention for redistricting maps when including local issues, state and congressional maps are not solely concentrated in the South. The states that saw the most LFC-drawn congressional and state plans during these 5 redistricting cycles were South Carolina (9), Texas (8), Minnesota (6), Wisconsin (6) and Kansas (5). Table 2 shows the breakdown of LFC-drawn maps by federal court circuit. The Eighth Circuit with states including Minnesota, Iowa, Missouri and Arkansas had the most LFC-made plans,

[449] This is not counted as a federally drawn map in the analysis It is coded as legislature or commission based on who submitted the plan to the court, as that was the plan approved. Data for this is more difficult to find and is likely far higher.

followed by the Fifth Circuit (Texas, Louisiana and Mississippi) and the Fourth (South Carolina, North Carolina, Virginia, West Virginia and Maryland.)

LFC-Drawn Maps by Circuit	
Federal Circuit	**Percent**
1	0.00%
2	3.33%
3	0.00%
4	16.67%
5	18.33%
6	5%
7	5%
8	28.33%
9	6.67%
10	10%
11	6.67%

10 - Table 5.2 – LFC-Made Maps by Circuit

Looking beyond the circumstantial details of LFC-made maps to the full data set, we can use the mean test scores on the 13 metrics to observe which criteria LFCs have historically used for map making. Figure 5.4 and Table 5.3[450] illustrate the average scores on these 13 metrics as well as the seat share under the plan broken down by redistricting institutions.

For the Settled Law criteria or population and race, the descriptive data matches the hypotheses. The average maximum population variance in a LFC-drawn plan is only 3.14 percent, lower than every other redistricting institution and far below the overall

[450] Table 5.3 for full descriptive results

average of 5 percent. The racial proportionality test results for LFC-made maps are also greatly dispersed from the overall average and all other institutions at 0.533. In relation to the other institutions, this means that LFCs have historically created plans that had a higher proportion of majority-minority districts in relation to the minority population of the state. The LFC score on T2 is at least twice as high as any other institution.

These results for population and race-based criteria are important for several reasons. First, they show that LFC-made maps have been decidedly different from maps made by other institutions over time on these two criteria. Second, they show that LFCs truly practice what they preach in terms of law and precedent - *the criteria with the strongest Supreme Court standards are also those most emphasized by LFCs*. Third, the population statistics show that LFCs follow the One Person, One Vote standard more strictly and stringently than all other institutions have on average. Fourth, and most importantly, LFCs have historically created much more proportional race-based representation than any other institutions. The magnitude of the difference is substantial. It could highlight the centrality of race to LFC cases. It could show that LFCs allow more race-consciousness in their maps than the courts allow in some legislature-made maps. Or it could show a concerted effort by LFCs to specifically tackle race-based representation through majority-minority districts to a greater extent than any other institutions.

Analyzing the findings for Traditional Criteria shows less disparity between LFCs and the other institutions. The three compactness measurements - the mean Polsby-Popper compactness score of all the districts in a plan, the median score, and the number districts below the compactness score of 0.2 - shows that LFCs have favored this criterion, especially in relation to other institutions. LFCs on average have more compact

districts, with a higher median score and fewer extremely noncompact districts below 0.2 than most other redistricting institutions and the average. Although, the state courts seem to favor compactness much more than federal courts or any other institutions in this analysis. If federal and state courts were grouped together, as in all other analyses thus far, they would show a high bias toward compactness. However, as this analysis reveals, the federal courts favor this criterion but not to the extent that state courts do. State courts favoritism toward compactness may be compounded by state constitutional or statutory requirements to make compact districts. Additionally, LFC-drawn plans split fewer counties and cities than most institutions. For counties, LFC plans score well below the average and similarly to split legislature plans. For cities, the LFC plans below the average and similar to the scores from Republican-majority legislatures and commissions.

26 - Figure 5.4 – Descriptive Statistics on Redistricting Plans by Institution

		Federal Courts n=60	State Courts n=49	Commissions n=122	Democratic Majority Legislatures n=187	Republican Majority Legislatures n=138	Split Legislatures m=54	Overall Average
Settled Law	T1: Avg Max. Population Variance	**3.14%**	3.71%	6.73%	5.26%	4.43%	5.09%	*5.01%*
	T2: Racial District Proportionality Test	**0.533**	0.295	0.249	0.37	0.238	0.235	*0.318*
Traditional Criteria	T3: Polsby-Popper Districts Mean	**0.2898**	0.3218	0.2681	0.2269	0.2845	0.284	*0.2696*
	T4: Polsby-Popper Districts Median	**0.2815**	0.3231	0.2571	0.2192	0.2772	0.2667	*0.2608*
	T5: Polsby-Popper Districts Below 0.2	**6.063**	2.389	7.717	6.678	8.554	10.207	*7.265*
	T6: Split Counties	**0.038**	0.0718	0.0815	0.0924	0.0552	0.0272	*0.065*
	T7: Split Cities	**0.0081**	0.011	0.0066	0.0144	0.0069	0.0125	*0.0094*
	T8: Largest Remaining Core Test	**0.7662**	0.8005	0.7895	0.8236	0.7725	0.8069	*0.7945*
Political Criteria	T9: Competitive Seats	**30.65%**	40.48%	33.68%	30.14%	34.41%	39.43%	*33.35%*
	T10: Incumbency Protection	**77.48%**	69.70%	74.86%	79.01%	76.10%	78.69%	*76.99%*
Partisan Criteria	T11: Partisan Bias	**-0.28%**	-1.17%	1.69%	5.11%	-10.69%	-0.74%	*-0.22%*
	T12: Mean-Median Difference	**0.42%**	-0.25%	0.83%	2.93%	-4.45%	-0.66%	*0.36%*
	T13: Efficiency Gap	**1.32%**	-2.62%	-0.49%	3.82%	-6.62%	-2.46%	*-0.40%*
Partisan Outcomes	Democratic Seat Share	**52.80%**	56.30%	55.80%	66.50%	33.90%	50.30%	*53.10%*

11 - Table 5.3 - Descriptive Statistics on Redistricting Plans by Institution

What is notable about the final traditional criteria - largest remaining core - and the two political criteria - competitive seats and incumbency - are how similar these are across the board and for all institutions. All plans seem to preserve district continuity and incumbency at very high rates, and feature competitive seats at low rates. LFC plans had below average core retention of a previous plan's districts, but a still high score of about 75%.

LFC plans have led to about 3 in 10 seats on average having competitive elections following the plans implementation. These are elections where the winner received less than 60 percent of the vote. This was below the average percentage of competitive seats and lower than observed in most institutions. However, all metrics were low across the board and LFC plans were scored similarly to Democratic-led majorities. These results are important because of the emphasis reformers have put on competitiveness as a fair and desirable criterion to combat partisan gerrymandering. These initial findings suggest that LFCs do not follow this line of thinking and have on average created less competitive maps than other institutions.

These competitiveness findings are also interesting because they run counter to political science scholarship that has shown "courts" to make more competitive maps than legislatures. In these analyses federal and state courts have been grouped together. These descriptive results showed that while state courts have historically made the most competitive maps on average, LFCs were among the least. This is an important contribution to this previous scholarship on redistricting institutions and gives credence to the importance of analyzing state and federal courts separately, a premise underlying this entire project.

LFCs had somewhat higher than average incumbency protection rates - the percentage of a plan's seats won by an incumbent - with a score close to all three categories of legislatures. This is a surprising finding, in that one would expect LFCs to avoid incumbency like any political criteria due to legal and political constraints. However, the high incumbency rates across the board show that all plans yield high returns for incumbents at subsequent elections. The regression analysis in the next section highlights that these findings do not carry over when accounting for other variables as a substantial effect by LFC redistricting specifically.

Among the partisan criteria, this descriptive analysis shows a generally nonpartisan impact when federal courts draw redistricting plans. While each of the three tests - the Efficiency Gap, the Partisan Bias test, and the Mean-Median test - measure different aspects of the relationship between votes and seats in a redistricting plan. Here they are all coded the same from -100% to +100%, with negative scores favoring Republicans and positive toward Democrats.

The LFC-drawn plans are close to the average on the Partisan Bias score, with a slight Republican bias. When compared to the other institutions, the federal courts are actually the closest to zero - the most nonpartisan score among all institutions, with only split legislatures close behind. If the vote share was exactly 50 percent for Republicans, LFC plans would only see them translating that vote into 50.28% seat share on average. These findings follow common wisdom and scholarship, showing a large and predictable bias for partisan legislatures and less bias in split legislatures and the courts.

LFC-made plans are also near the overall institutional average and close to zero for the Mean-Median difference score. This means that the difference between the

median Democratic vote share and the mean Democratic vote share in LFC-made plans is nearly zero. LFC plans score closely to those made by commissions on this metric.

The Efficiency Gap shows that LFC-made maps wasted Democratic votes at an average rate 1.32% lower than they wasted Republican votes. LFCs made maps that on average gave a very small advantage to Democratic voters, but overall was close to perfect nonpartisanship in the Efficiency Gap. This is a wasted vote magnitude about 3 times lower than seen in Democratic majority legislature-drawn plans and five times lower than in Republican legislature-drawn plans.

The fourth partisan variable - Democratic Seat Share - shows again that LFC-made plans are close to nonpartisan. The LFC-made plans have had an average Democratic seat share of 52% across all the maps analyzed compared to a 49% average Democratic vote share. The only institution to make maps consistently closer to 50% are split control legislatures. State courts, commissions, and Democratic legislature plans favor Democratic outcomes, while Republican legislatures unsurprisingly favor Republicans. This raw measurement and simple arithmetic mean is obviously sensitive to bias in geography and history of parties in America, but it is a useful illustration of comparison for LFC-made maps to the other redistricting institutions.

Part 1B: LFC-Made State Plans versus Congressional Plans

There is a nearly even split between congressional and state legislative redistricting plans that have been made by LFCs over these five redistricting cycles: 29 to 31. Looking at the differences in the descriptive criteria used by LFCs in redistricting

plans broken down by these two types of legislatures helps illuminate the data further and explain some of the variance, as shown in Table 5.4.

Overall, the state and congressional data is mostly similar to the comprehensive descriptive findings. LFCs still adhere to the population equality better that the average, and there is a decided difference in the state and congressional variance reflecting Supreme Court precedent that Congress should be near zero and states may deviate close to 10 percent[451]. The LFC-made maps do nearly twice as well on the racial proportionality test, but to different levels in both state and congressional plans.

With traditional criteria, LFCs still favor compactness for both state and congressional plans in general and above average across the board. The protection of political subdivision lines is more inconsistent, with scores more protective of cities in states plans and counties in congressional plans than the average, and splitting more lines than average for counties in state plans and cities in congressional plans. The continuity remains slightly below average in both plan types. LFC-made plans for political criteria in state legislatures and congress again score similarly for competitive seats and incumbency, with scores near the average and consistent among institutions.

The partisan criteria are the first results to look significantly different when divided by districting type in comparison to the overall descriptive findings. Whereas the combined descriptive statistics for LFC-made maps was near zero and largely nonpartisan, these results show a slight Democratic bias in Congressional plans and a notable Republican bias in state legislature plans.

[451] Mahan standard

	LFC-Made Plans (State Legislatures ONLY)	State Leg. Average	LFC-Made Plans (Congressional ONLY)	Cong Average
T1: Avg Max. Population Variance	**5.55%**	7.28%	**0.03%**	0.04%
T2: Racial District Proportionality Test	**.761**	.375	**.437**	.225
T3: Polsby-Popper Districts Mean	**0.343**	0.312	**0.2821**	0.2498
T4: Polsby-Popper Districts Median	**0.3363**	0.3024	**0.2736**	0.2415
T5: Polsby-Popper Districts Below 0.2	**15**	14.25	**4.786**	4.167
T6: Split Counties	**0.0097**	0.0527	**0.0456**	0.0735
T7: Split Cities	**0.0028**	0.0061	**0.0096**	0.0116
T8: Largest Remaining Core Test	**0.7348**	0.7736	**0.776**	0.8099
T9: Competitive Seats	**24.57%**	27.76%	**32.96%**	37.21%
T10: Incumbency Protection	**68.78%**	67.79%	**80.78%**	81.49%
T11: Partisan Bias	**-1.52%**	0.71%	**0.54%**	-0.99%
T12: Mean-Median Difference	**-1.28%**	-0.06%	**1.56%**	1.04%
T13: Efficiency Gap	**-1.88%**	-0.94%	**3.46%**	0.73%
Democratic Vote Share	**48.23%**	54.36%	**49.32%**	49.45%
Democratic Seat Share	**50.80%**	56.04%	**53.58%**	52.66%

12 - Table 5.4 – Descriptive Statistics of LFC-Made Plans by District Type

The Partisan Bias scores, which explain the seat bias that would result from a perfect hypothetical 50% vote share, is still fairly close to zero in both districting types, but it is directionally different from the respective averages. For example, LFC-made plans have a slight bias toward Democrats in Congressional plans, whereas the overall averages favor Republicans, and LFC-made plans have a bias toward Republicans in state legislature plans while these plans overall favor Democrats slightly.

The Efficiency Gap scores mean that in Congressional redistricting plans drawn by LFCs Democratic votes are wasted at a 3.46% lower rate than Republican votes, while in state plans LFCs waste 1.88% fewer Republican votes - larger but directionally similar to the averages. Neither magnitude is enormous, but both are far larger than the nonpartisan results in the combined data and far above the respective averages. The LFC Congressional Democratic Efficiency Gap score resembles the combined EG score for plans made by legislatures with a Democratic majority: 3.82%.

Additionally, the Mean-Median scores were also above the averages. When comparing the LFC-drawn plans in relation to vote and seat shares, the state legislature results are again notable. While the average scores favored Democrats by several points, the LFC maps were closer to 50% and favored Republicans in the vote share.

Looking at the data separately by state and Congressional districting types highlights the magnitude of the differences especially for population variance and racial proportionality. The state legislative plans have drastically different measurements than the Congressional plans on these two key criteria. However, even when separated into these two categories, LFC-made plans are still notably different from all other institution-made plans. For population equality, LFC-made plans are far below the average in state legislature plans and even closer to zero for Congressional districts. For racial proportionality, LFC-made plans are double the average in each category.

5.4 Part 2: Multivariate Analysis and Estimating LFC Effects on Redistricting Criteria

The historical data for these various criteria measurements do a good job of showing us how the multiple redistricting institutions have favored certain criteria in their plans on average. However, it does not explain how these criteria may have been affected, or will be favored, specifically, by LFCs when considering unique circumstances, state political culture, over time and across space, or other important and unknown factors. In order to test my hypotheses under the institutional theory of LFC redistricting action, I use a multivariate regression analysis to estimate the effect of LFCs as a redistricting institution on these various criteria.

While many models in redistricting analysis pick one dependent variable of interest and use multiple redistricting institutions and controls as independent variables to compare the effects of these arrangements on the dependent variable of interest, here I am interested in the opposite. I am estimating the effect of one redistricting institution - the federal courts - as the redistricting institution and independent variable, and I want to see how it affects the 13 different dependent variables of the test scores to better understand the criteria that federal courts favor in map making. Therefore, I use a simplified model, without including other redistricting institutions as independent variables, to estimate the impact of LFCs as redistricters in relation to all other institutional arrangements, including state courts. When state courts are included in the model, they do not have the same effects or variables of statistical significance as the federal courts, suggesting that

these variables should not be grouped in other analyses and do not have similar outcomes just because both are courts[452].

My approach is to estimate the LFC effect as a redistricting institution with series of state- and year-fixed effects models that take the following empirical form:

$$TestDV = LFC\text{-}Made\ d\ \beta 1 + (VRA5)\ d\ \beta 2 + (Democratic\ Vote\ Share)\ d\ \beta 3 + (Plan\ Size)\ d\ \beta 4 + \varepsilon$$

This model, repeated for each of the 13 criteria tests, reveals results similar to what one can see from the descriptive statistics and broadly in-line with my hypotheses, but with important exceptions: *LFCs have a greater effect on low population variance, proportional racial representation and compactness, but little discernible effect on other traditional criteria, or political and partisan criteria*.

This model uses multiple control variables including a dichotomous variable for whether the plan was covered by Voting Rights Act Section 5 Preclearance requirements[453], a variable for the democratic vote share under a plan to account for the partisan climate of a state, and a variable for the number of districts in a plan to account for the size of a map as well as year and state fixed effects for each redistricting cycle and clustering of standard errors by state.[454] [455]

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[452] See Table 5 for the regression results; LFCs have statistically significant effects on population variance, racial proportionality, and compactness, whereas state courts only have statistically significant and negative effects on incumbency and partisan bias.

[453] This control variable is similar to a control accounting for the divergent political environment of the American South, but the VRA Section 5 provision is more germane to both redistricting and the federal courts.

[454] Similar OLS regressions with fewer control variables and state fixed effects regressions, which include more observations, have similar coefficients and the variables of statistical significance, but are not as rigorous. This model is displayed for its multiple variables of interest and strength of analysis.

[455] Control variables for vote share and district number were not used for the three partisan metrics as vote share is a constituent aspect of their calculation and they are necessarily restricted by number of districts.

Analyzing the 13 repeated models shown in Table 5.4 together, several outcomes are immediately evident. First, the number of districts in the plan, a variable used as a control for the size of the plan, is statistically significant in nearly every model for nearly every variable, but substantively has such a small effect if functionally unlikely to affect much. Second, the number of observations vary by dependent variable based on available data. All models included at least 41 states, with small plans excluded from partisan criteria analysis due to accuracy concerns on small samples[456]. Similar analyses with fewer control variables have a greater number of observations for the same dependent variables and independent variables of interest, and yield very similar results. Additionally, the statistical significance, approximate magnitude and direction of these findings hold whether one includes the other redistricting institutions independent variables and whether you separate the model by district type.

The most important result from these analyses is the statistically and substantively significant effects predicted for the variables of T1: population variance, T2: racial proportionality and T3 and T4: compactness in redistricting plans made by LFCs.

The LFCs as mapmakers have a negative and important effect on population variance for redistricting plans, meaning LFCs make districts that are closer to having zero variance and population equality. The effect size is shaped in part due to the very small sizes of variance in the Congressional plans and higher variance in state plans. This finding establishes the validity of Hypothesis 2 - LFCs will follow the clear judicial standard of One Person, One Vote established in the Supreme Court when they draw

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The number of districts control variables was also omitted from the political subdivision protection criteria because the number of districts is a constituent aspect of the tests themselves.

[456] Stephanopoulos, Nicholas O., and Eric M. McGhee. "The measure of a metric: The debate over quantifying partisan gerrymandering." *Stan. L. Rev.* 70 (2018): 1503.

redistricting plans. Absolute numerical equality may be impossible due to geographic or other constraints in a plan, but this model shows that LFCs make a greater impact than other institutions in approaching that number.

The LFC effect on the racial gerrymandering variable, T2, which approximates the ratio of the percentage of majority-minority districts in a plan to the percentage of minority residents in a state, is the most important finding. The statistical significance and positive value of the coefficient help validate Hypothesis 3 - that LFCs would have an effect toward greater racial representation in redistricting plans via majority-minority districts due to legal and political constraints. Although this principle has not been as clearly established by the Supreme Court as the One Person, One Vote standard, and there is substantial disagreement about the benefits of majority-minority districts, LFCs promote this principle of proportionality of racial representation in districting schemes to a substantial degree. The clearest law that LFCs have are the Voting Rights Act, its 1982 Amendments, with principles for non-retrogression and non-dilution of minority votes. The LFCs also have the *Shaw, Gingles* and associated standards as explained in Chapter 3. As standards however, these all may be better for judging a plan than instituting one. Therefore, it was expected that LFCs would have a positive and significant effect on this racial criterion for minority representation, but it was not clear how strong this effect would be and how much greater it would be for LFCs compared to all other institutions.

	Settled Law		Traditional Criteria				
	T1: Avg Max. Population Variance	**T2: Racial District Proportionality Test**	**T3: Polsby-Popper Districts Mean**	**T4: Polsby-Popper Districts Median**	**T5: Polsby-Popper Districts Below 0.2**	**T6: Split Counties**	**T7: Split Cities**
LFC-Drawn	**-0.0177*** **	**.1612** **	**.0276** **	**.0315** **	-1.96	.0004	.0004
	(0.005)	**(.061)**	**(.0122)**	**(.0136)**	(1.533)	(.0042)	(.0021)
VRA5 Preclearance	*collinear*[457]	*collinear*	-.0232	-.0508***	5.258	*collinear*	*collinear*
	-	-	(.0202)	(.0181)	(4.463)	-	-
Democratic Vote Share	0.0506**	.3059*	.0832**	.1086***	-4.351	-.0176	-.0017
	(0209)	(1779)	(.0366)	(.0396)	(4.313)	(.0199)	(.0061)
Number of Districts	.0006***	.002***	.0006***	.0005***	.1717***	-	-
	(.0001)	(.0004)	(.0001)	(.0001)	(.0267)	-	-
Constant	-.0195**	-.054	.2143***	.1947***	3.651	.078***	.0138***
	(.0090)	(.1084)	(.0202)	.0205	(2.308)	(.0112)	(.004)
R-Squared	.4051	.2793	.0616	.0605	.5375	.0234	.0737
Observations	153	229	250	250	250	166	166
States	47	47	48	48	48	47	47
Year Fixed Effects Present							
State Fixed Effects Present							
Standard Errors Clustered by State							
RSE in parentheses							
***p<.01, **p<.05, *p<.10							

13 - Table 5.5.1 – Regression Table of LFC-Made Maps and Criteria Part 1

[457] The Voting Rights Preclearance control variable is collinear for several of the regressions but included in all analyses for theoretical reasons. The variable captures whether or not a space was part of the VRA Section 4 formula for VRA Section 5 preclearance and therefore more likely to interact with the federal courts. This variable is similar to the control for Southern states in many analyses, capturing important differences in political history and culture. Similar variables have been used in partisan gerrymandering analysis, such as Nicholas Stephanopoulos. Results are the same whether or not the variable is included in the analyses where collinear, but is important in the Political and Partisan criteria measurements and therefore included in all analyses.

	Traditional Criteria	Political Criteria		Partisan Criteria		
	T8: Largest Remaining Core Test	**T9: Competitive Seats**	**T10: Incumbency Protection**	**T11: Partisan Bias**	**T12: Mean-Median Difference**	**T13: Efficiency Gap**
LFC-Drawn	-.0165	.0176	.0142	-.0068	-.009	.0179
	(.0205)	(.0241)	(.0298)	(.0159)	(.0093)	(.0154)
VRA5 Preclearance	*collinear*	-.0515	-.0316	.0524**	.0446***	.0206
	-	(.0961)	(.0605)	(.0237)	(.013)	(.0208)
Democratic Vote Share	.011	.0556	-.0156	.4673***	.1964***	.2501***
	(.0802)	(1533)	(.134)	(.0689)	(.0351)	(.0494)
Number of Districts	-.0001	-.001***	-.0011***	-.00004	-.0002***	-.0004***
	(.0003)	(.0002)	(.0003)	(.0001)	(.00004)	(.00009)
Constant	.8041***	.3105***	.9199***	-.2255***	-.0793***	-.0878***
	(.0439)	(.0933)	(.0716)	(.0395)	(.0217)	(.0317)
R-Squared	.0429	.122	.111	.4483	.3541	.3622
Observations	166	328	328	221	221	221
States	47	48	48	41	41	41
Year Fixed Effects Present						
State Fixed Effects Present						
Standard Errors Clustered by State						
RSE in parentheses						
*****p<.01, **p<.05, *p<.10**						

14 - Table 5.5.2 - Regression Table of LFC-Made Maps and Criteria Part 2

It is the magnitude of the effect on T2 that is so striking from this analysis. As shown in the descriptive statistics, the LFC-made plans scored substantially higher on this racial proportionality test than any other institution did. This regression lends evidence to the idea that it is because LFCs drew these maps, and it did not merely happen because of coincidence or circumstance.

The substantial effect of LFCs on T2 does not only fit my theory and H3, but it also helps illuminate the complications of the racial gerrymandering laws and implementation in the federal courts over time. If the Supreme Court, the federal judiciary and federal government had clearer laws about affirmative racial gerrymandering or promotion of majority-minority districts, we may see more affirmative racial gerrymandering and majority-minority districts in proportion to population. Instead, the laws and case law are somewhat incongruent and hard to implement. This is what has been seen with the clear standard and implementation of the population variance through the One Person, One Vote standard. There has been broad compliance among all institutions toward low population variance, especially for Congressional plans.

However, with T2, we see that the effect is so much greater for LFCs than every other institution. In line with my theory of LFC action, I expect this to be the result of a stricter compliance by LFCs to Supreme Court precedent and authority. This means that LFCs are conscious of race when redistricting and may optimize the number of majority-minority districts. But, when LFCs are reviewing the plans made by other institutions, they do not require the same level of compliance, and they may not even allow the same level of race-conscious districting under the *Shaw* standard. I think it is also likely that the Court's standards are difficult to implement by other institutions because they lack

clarity. How compact or how numerous is enough to demand a new majority-minority district? The LFC-made maps do not have to answer to another LFC to be reviewed or pre-cleared, so they do not have to answer these questions. As long as the LFC follows Supreme Court standards, the plan they implement will likely stay for at least one election. Another explanation may be that LFCs are so conscious of legitimacy and authority that they create maps that themselves are far and above the requirements of VRA 2 and 5.

The Supreme Court has established that compactness is one of the few checks on affirmative racial gerrymandering for majority-minority districts. The T3 and T4 models help illustrate the consistent importance of compactness for the LFCs as redistricting criteria.

LFCs have an estimated substantive and statistically significant effect on the compactness of the districts in the plans that they draw. The metrics of T3 and T4 measure the mean and median Polsby-Popper scores for districts drawn by various institutions. Although this sole compactness metric may be insufficient to judge the objective compactness score of LFC-drawn maps, it certainly helps illuminate the relative effect of redistricting institutions. The results for T5, measuring the number of very noncompact districts in a plan, may be a more useful descriptive statistic than predictive, with its variance and sensitivity to plan size.

Compactness, as a traditional criterion, is not surprising to be a favored criterion of the LFCs. It allows for a criterion to guide judges in the absence of clear law and without the risk of politicization and hurting the legitimacy of the institution. Compactness is neutral, but it is not necessarily fair, and it does not necessarily meet the

goals of other reformers who aim at competitiveness. These two compactness effects help validate Hypothesis 4, which argued that LFCs would favor compactness among traditional criteria.

However, the rest of the traditional criteria results disprove Hypotheses 5 and 6, and require a narrower understanding of LFC-favored traditional criteria. The effects seen in this analysis for protection of political subdivisions are negative, signaling fewer split cities or counties, but they are also small and not statistically significant. In simple bivariate OLS regressions with LFC-made plans and these dependent variables, the results are similar with statistical significance, but when the model is run with state fixed effects the standard errors rise substantially signaling the importance of state variation in this analysis. Similarly, the effect for the preservation of district cores, T8, is both statistically and substantively insignificant. As shown in the descriptive statistics, it seems most institutions draw plans that protect between 75 to 80 percent of district cores.

Revised hypotheses would emphasize the importance of compactness for LFC-made plans rather than all traditional criteria together. While it is likely that LFCs favor traditional criteria generally - due to it being viewed as fair and neutral and not facing the same political, legal or structural constraints as other criteria - LFCs do not appear to have any consistent effect on any traditional criteria other than compactness. Part of this result may be a measurement issue, because the peculiarities of borders and geography make measuring the division of towns and counties hard to measure across statewide plans. And another aspect may be that all institutions use traditional criteria, like retention of previous cores, and therefore the LFCs have no greater effect than any other institutions. What these results do show is that LFCs pay special attention to compactness

when they draw redistricting maps. The analyses of this chapter make compactness a clear Tier 2 criteria considered by the court after population equality and racial proportionality.

The effects for T9 and T10 - the nonpartisan political criteria - are small, positive and not statistically significant. This fits Hypotheses 7&8 that LFCs would not favor the criteria of competitive seats or incumbency protection and the effects would be inconsistent and not predictable. Both the descriptive and predictive statistics support the null expectations of H7&8.

These results are still notable for what they do not find. Competitiveness has often been argued for as the criteria that should be used to prevent partisan gerrymandering. Reformers advocate for competitiveness as a "fair and neutral" criterion, and this has been put into practice in state law and redistricting commissions. Competitiveness has also been ascribed as a quality of court-made plans in previous scholarship[458] when grouping state and federal courts together, but as this chapter's analysis has shown, this may need revision. However, as these results - and much of this project - illustrate, the federal courts do not view competitiveness as a fair and neutral or even important criteria for redistricting. Even prior to the fall of partisan gerrymandering justiciability in 2019, the federal courts never embraced the use of this "political" criteria.

Similarly, the estimated effects for the three partisan measurements - T11, T12 and T13 - show results that are small, directionally inconsistent and are not statistically significant, although the Efficiency Gap results are close. This fits Hypothesis 9 expectation that LFC's would have no institutional effect on the partisan tests and goes

[458] Carson, et al, "Reevaluating the effects"

part way toward disproving the null hypothesis. H9 assumed that there would not be consistent institutional effects predictable for LFC redistricting on partisan measurements, but it does expect some partisan biases for LFC-made maps when looking at the composition of the three-judge panels. This requires a separate model, which is explored in Part 3.

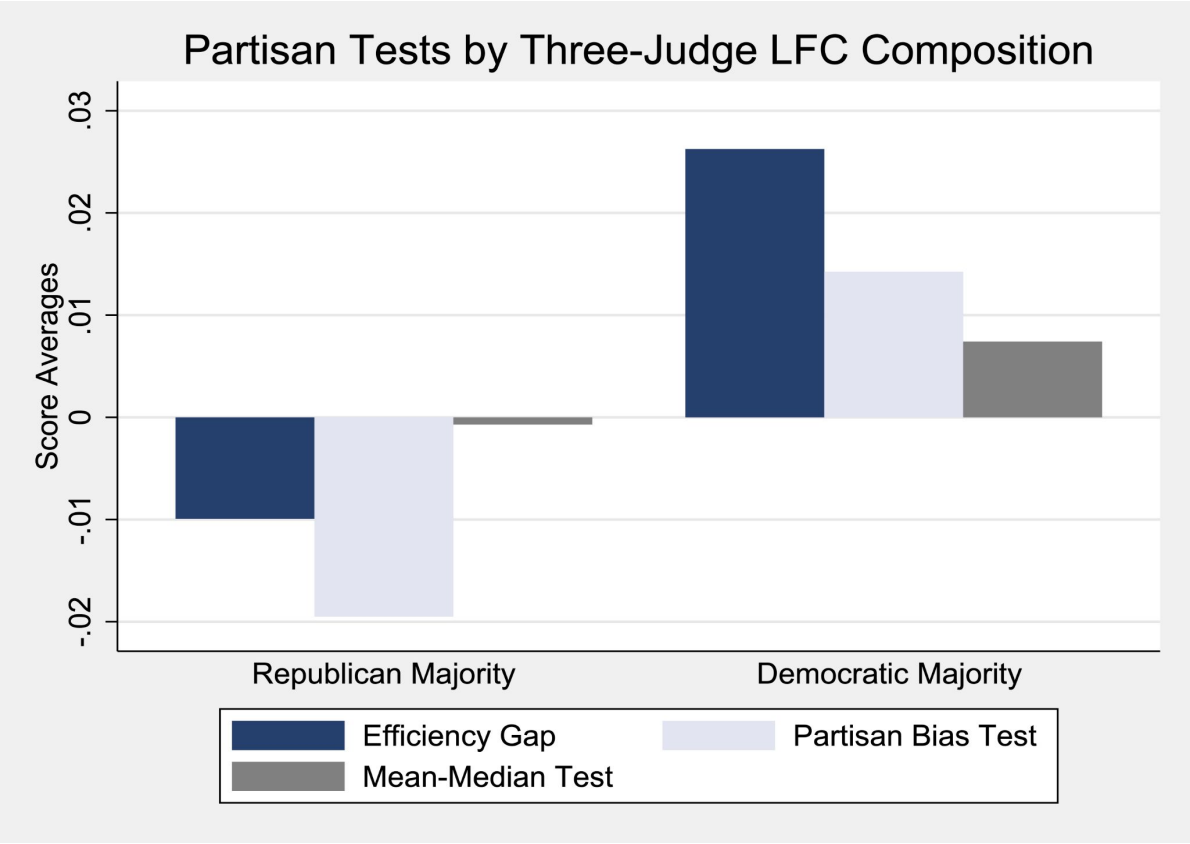
The entire 13-model multivariate regression analysis shows that LFCs as redistricting institutions value population equality, racial proportionality of majority-minority districts and compactness as key criteria for redistricting plans, with significant effects greater than seen in most other redistricting circumstances. This analysis validates hypotheses 2, 3, 4, 7 and 8; partially validates hypothesis 9 and invalidates hypotheses 5 and 6 on traditional criteria.

5.5 Part 3: The Effect of Judicial Partisanship on Partisan Criteria in LFC-Made Maps

Fully testing Hypothesis 9 and the role of partisanship in both the courts and the maps they create requires a separate approach. Although observing the LFCs purely as institutions yields no findings of consistent or systematic partisan bias, taking a more behavioral and individualistic approach by considering the partisan composition of the three-judge LFC panels shows different results. When considering the partisan appointment of each judge in a LFC panel, the data shows partisan bias for LFC-made maps with directional congruence to the party that appointed the majority of the judges on the panel.

To account for the partisanship of the federal court judges, I measure the percentage of the three-judge panel composed of Democratic-appointed judges. First, I look at the descriptive statistics that show how LFC-made maps compare on partisan criteria metrics when considering the partisan appointment of the judges. Then, I combine this data with information on the partisanship of state legislatures as redistricting institutions as well as the three partisan gerrymandering metrics. Using regression analysis, I compare the effect of LFC partisan bias to that observed in legislature-drawn maps. The results show a positive relationship between the party that appointed the majority of judges to a LFC panel and their co-partisans, but a relationship that is substantially small in relation to the biases of legislature-made maps.

The dataset shows that there is a partisan bias in the maps that LFCs have made when one accounts for the partisanship of the appointment for the judges on the panel. As Figure 5.5 shows, the mean scores on each of the three partisan metrics shifts in direction based on which party has appointed the majority of the judges on a three-judge panel crafting the map, positive for Democratic bias and negative for Republican bias. Of the 24 LFC-made redistricting plans where Democratic appointees composed the majority (2 out of 3 or 3 out of 3 judges) of the judges on the panel, there is bias toward Democrats in all three metric averages. These maps have average partisan scores biased toward Democrats, with the Efficiency Gap showing a more than 2% bias on the statewide plan in Figure 5.5. The 30 LFC-made plans where Republican appointees composed 2 or 3 of the judges on the panel also showed Republican bias on all three metrics on average, including a nearly 2% Partisan Bias.



27 - Figure 5.5 – Partisan Bias in LFC-Made Maps

When accounting for the party of the president who appointed each federal judge on the three-judge LFC in redistricting cases, the results have been striking. The 30 LFC-made plans with either 2 or 3 judges appointed by Republicans have scored on average in the Republican direction on all three partisan metrics. Of the 24 maps made by LFCs with either 3 or 2 Democratically appointed judges, all three metrics point in the Democratic bias direction. The magnitude of these descriptive findings are small, but the direction is important[459].

These descriptive statistics reveal the judicial bias on LFC-made plans historically, but they do not explain the effect that each partisan appointment could potentially have on partisan biases of a redistricting plain that a LFC may make. To

[459] MM = -0.0007 for R, 0.007 for D; PB = -0.0195 for R, 0.01425 for D; EG = -0.0099 for R, 0.02625 for D
Most LFCs were mixed partisanship. 7 were full Republican appointees, 23 were ⅔ Republicans, 22 were ⅔ Democrats and only 2 were full Democratic appointees

further explore this relationship between judges and partisan bias, I use a regression analysis to predict the effect of the partisan composition of LFC panels on the partisan biases of the maps using the three partisan metrics. However, in this dataset there are only 26 observations for LFC-made plans and each of these three partisan metrics. Therefore, although the regression results yielded positive coefficients that one would expect in line with these descriptive findings, they also have high standard errors short of statistical significance.

To overcome this data obstacle, I try another analysis of just LFC-made maps using a metric that has more observations: Democratic Seat share. Partisan Bias, the Efficiency Gap and the Mean-Median test all measure some aspect of the relationship between votes as inputs and seats as outputs to test the bias of a plan. With this regression analysis, I looked at the raw output of seat share as the dependent variable along with the previously used controls for VRA5 preclearance, democratic vote share and plan size to predict the relationship between LFC panel composition and partisan outcomes. The results show a statistically significant (p-value < 0.002) and positive (0.0374) predicted relationship between the number of Democratic appointed judges on the LFC panel and the Democratic seat share as an outcome variable.

The finding that partisan composition of a federal court panel matters for redistricting is important in and of itself due to the importance of nonpartisanship and legitimacy norms in the federal judiciary. However, without the comparison to another institution's partisanship, these results lack context and don't answer the critical question of *how political are the federal courts?*

To compare this positive relationship between partisanship of the three-judge panel and the maps they create in reference to another redistricting institution, I create a separate regression model, limited to federal courts and legislatures as redistricting institutions, to test the interaction of these institutions and their partisan composition for partisan criteria: The Partisan Bias Test, the Efficiency Gap, the Mean-Median test and Democratic seat share.

My approach for these partisan measurements is to estimate a series of state and year fixed effects models that take the following empirical form:

$$TestDV = LFC\_legislature\ d\ \beta 1 + (Democratic\_control)\ d\ \beta 2 + LFC*Democratic\_Control\ d\ \beta 3 + (VRA5)\beta 4 + \varepsilon^{460}$$

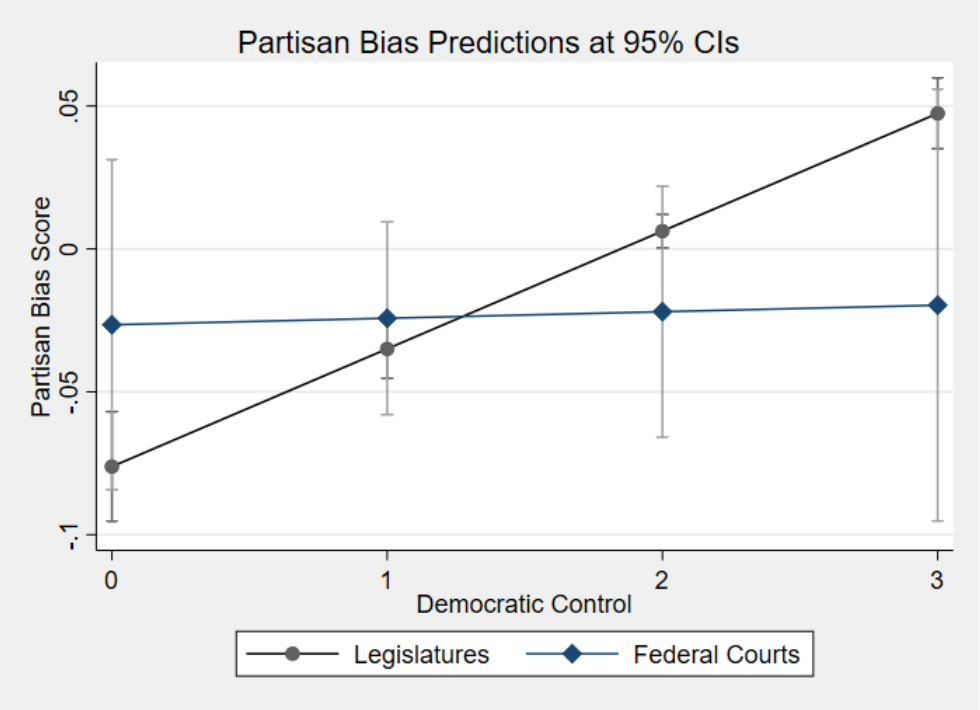
Where TestDV represents an outcome of interest: PB test score, EG test score, MM test score or Democratic seat share, all with the Democratic Party as the coded positive direction. The "LFC_legislature" variable is a dichotomous variable for the redistricting institution coded as 1 if the plan was created by a LFC and a 0 if it was drawn by a legislature. The variable "Democratic_control" is a four-point scale, coded 0-3, representing the level of control Democratic partisans have in either the LFC three-judge panel or the legislature. A "0" represents full Republican control, a "1" represents one judge appointed by a Democratic president or one body of the state government is controlled by Democrats, "2" represents two judges or bodies of state government controlled by Democrats and "3" represents full Democratic control. For the legislature,

[460] Because these partisan gerrymandering metrics include democratic vote measurements in their calculation, and feature some restrictions for districts sizes, these control variables that were used for some other regressions were not used here. Democratic vote share and number of districts are used as controls for the Seat Share model.

this represents the summation of majority party control of the lower state house, upper state house or the governor.

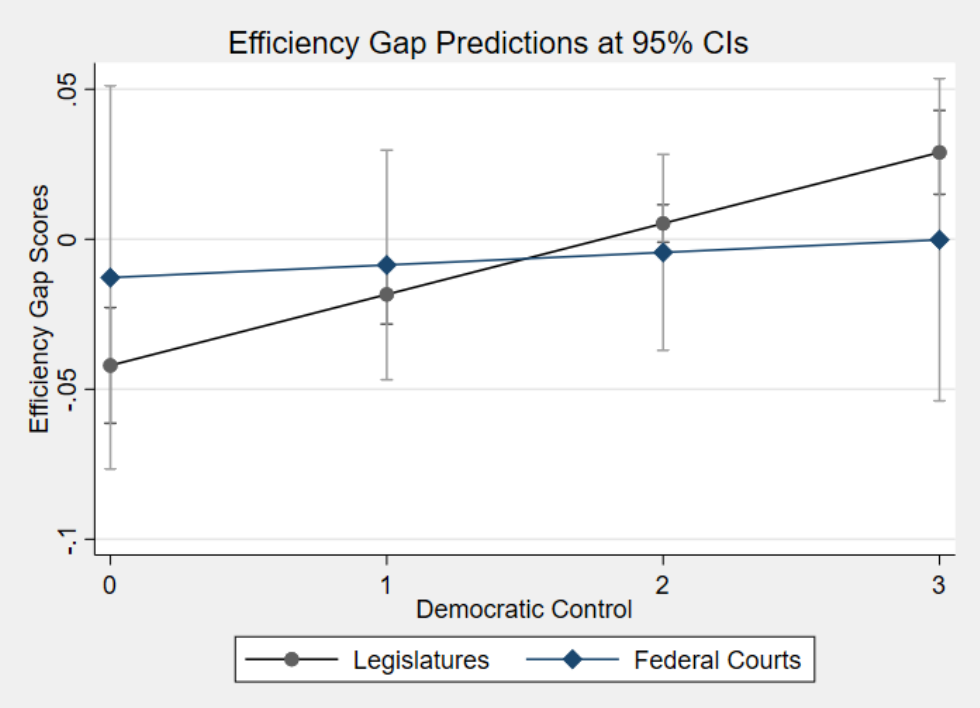
The key explanatory variable of interest is the interaction term between these two variables: *LFC*Democratic_Control β3*. If the coefficient β3 on this interaction term is statistically significant it would indicate that there is an important relationship between the partisan composition of the redistricting institution and the partisan criteria that they favor.

The three models that use these partisan gerrymandering measurements as dependent variables show relationships that are negative in relation to the legislatures. The results for Partisan Bias (Fig. 6) and Mean-Median (Fig. 8) tests are statistically significant and negative, while the Efficiency Gap (Fig. 7) is just outside of significance. All three however display a relationship where the legislature-drawn maps reflect their partisan majority with far greater magnitude and bias. The LFC-made maps are closer to zero on these key partisan metrics, as is shown in the descriptive data.



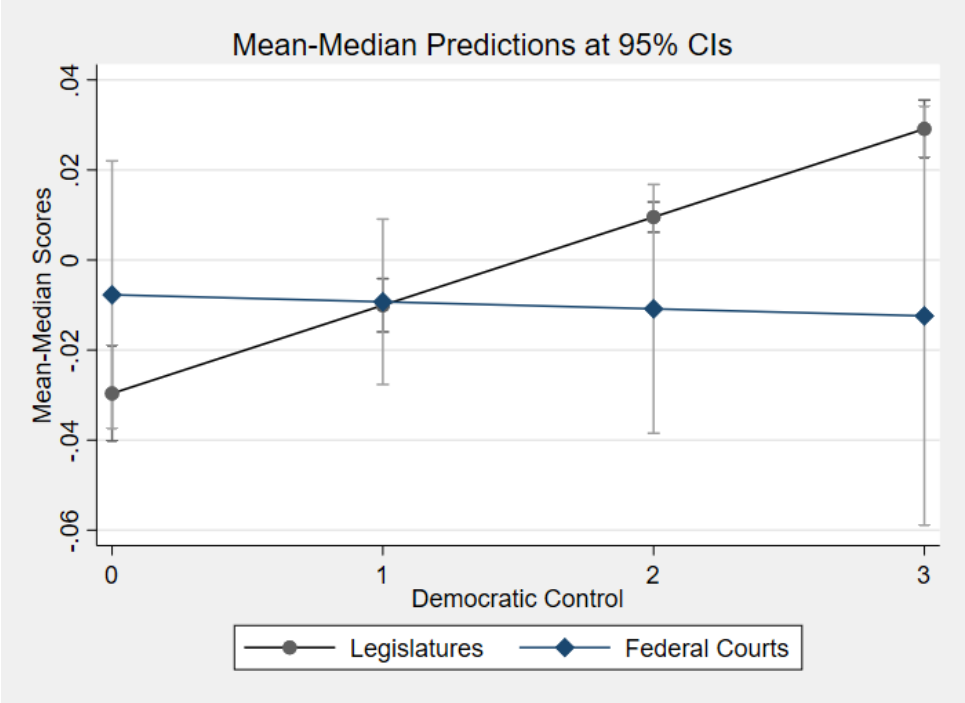
28 - Figure 5.6 – Partisanship and LFC-Made Maps Regression 1

Interaction Coefficient: -0.0389 (.0211)*; P-value 0.078;
Cons = -0.0396***; R-Squared = .5307; Obs = 173; 36 States



29 - Figure 5.7 - Partisanship and LFC-Made Maps Regression 2

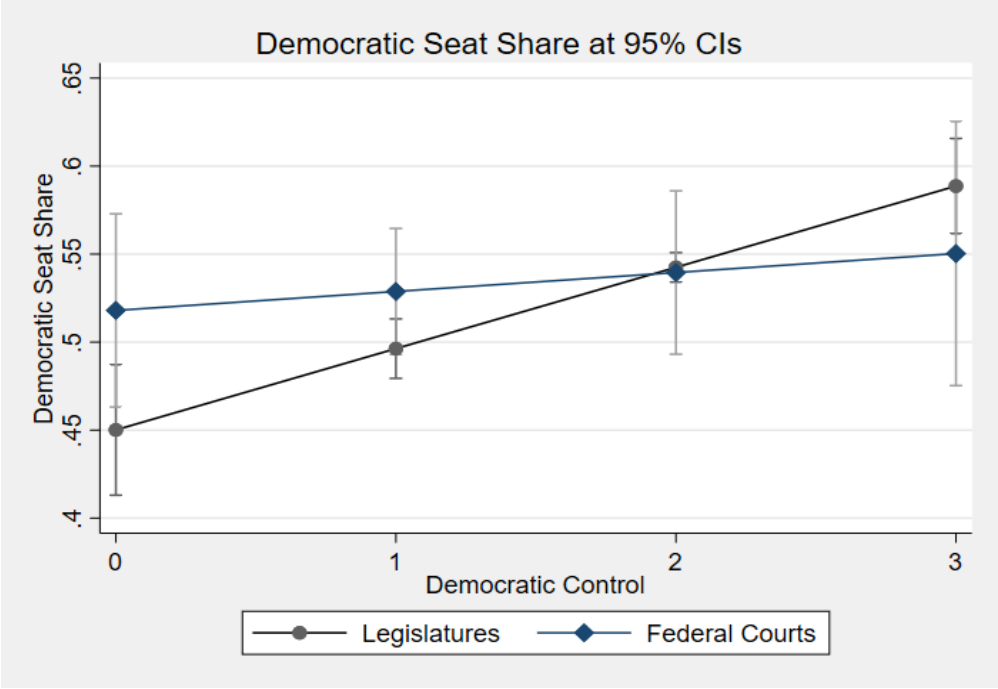
Interaction Coefficient: -0.0195 (.0179); P-value 0.284;
Cons = -0.0146; R-Squared = .3727; Obs = 173; 36 States



30 - Figure 5.8 - Partisanship and LFC-Made Maps Regression 3

Interaction Coefficient: -0.0212 (.0117)*; P-value 0.078;
Cons = -0.0168**; R-Squared = .5307; Obs = 173; 36 States

The fourth model, Figure 9, shows the same relationship between partisanship and institution, but now with Democratic seat share. Here, the interaction coefficient is significant and negative in relation to the legislature, although the relationship for both legislature and LFC-drawn maps between partisan composition and output is clearly positive.



31 - Figure 9 - Partisanship and LFC-Made Maps Regression 4

Interaction Coefficient: -0.0354 (.0211)*; P-value 0.101;
Cons = -0.077; R-Squared = .5036; Obs = 241; 44 States

Looking at these analyses together shows that the partisan appointment of judges matters. While no biases are seen on partisan metrics for the general institution of the lower federal courts as map makers, when we dig into the composition of the three-judge panels there is certainly a partisan bias. This partisan bias, although present, is less than biases seen by partisan legislative drawn maps however. These findings validate hypothesis 9, showing that there are partisan biases of LFC map-making, but they are small, lower than those viewed in legislature and they are hidden by the institutional veil.

This analysis is the first time the relationship between the partisan appointees on a three-judge panel and these partisan gerrymandering metrics - Partisan Bias, Mean-Median and Efficiency Gap scores - have been shown. What this model explains most clearly is that the number of Democratic appointees on a three-judge federal court panel is predictive of the number of seats that the Democrats will gain under that plan, and the

same with Republican appointees. Additionally, this model shows that a partisan majority on the panel matters. If all three judges are of the same party's appointment, the magnitude of seat gain can be even greater. Despite this partisan bias toward co-partisan in a LFC-made plan, the court-drawn plans are notably less drastic than the legislature-made plans. These results illustrate the partisan appointment of judges does matter for the types of maps they make and therefore the representation of partisans in a plan.

Further, and more importantly, this analysis helps get to the question of *How political are the federal courts?* Despite the professed importance and necessity of nonpartisanship for the legitimacy of the federal judiciary, there is empirical partisan bias toward the majority of the judges on a LFC panel when they draw a redistricting plan. That said, when comparing how the LFCs favor partisan criteria to other redistricting institutions, this bias is also importantly less than the bias predicted for legislative drawn maps. The question remains: *Should we expect LFCs to have no partisan biases or are lower partisan biases sufficient for the nonpartisan role the federal courts hold in the American system?*

The implications of these findings going forward are that one can predict that federal court redistricting plans will at least slightly favor the party of the majority of judges on the panel, and even more largely favor a full panel made of judges appointed by the same party. This is a notable result for the future of redistricting and one that adds another facet of the power of appointment used by the president. President Donald Trump has added 226 federal court judges in his first three years as President, 54 of whom were

at the circuit level, which rivals Barack Obama's 55 that he appointed over two terms[461]. The results here show that an advantage for either party in the presidency and appointment of judges can easily translate to a partisan advantage in state or Congressional districting plans if the lower federal courts draw the map.

5.6 Conclusions

This analysis leverages a variety of social science tests and metrics to quantify the criteria used in a given redistricting plan for the 1972, 1982, 1992, 2002 and 2012 redistricting cycles for federal and state legislative districts. By grouping the plans' test scores and measurements by the institution that created the map, this chapter tackles the question of what type of criteria did the federal courts use specifically when they were tasked with drawing redistricting maps and how do these criteria compare to the criteria used by other institutions, including state courts, commissions, and legislatures.

These questions are important because of the so-called "unwelcome obligation"[462] and unusual role that the federal courts have in the redistricting process. They are de facto rather than de jure redistricting institutions, only acting when the initial institution has failed to craft a legal map. They lack the formal constitutional or statutory instructions on which criteria to favor. They are a federal institution taking on a task that was in the exclusive purview of the states and a nonjusticiable political question until 1962. There

[461] See: John Gramlich, "How Trump Compares with Other Recent Presidents in Appointing Federal Judges," *Pew Research Center* (blog), accessed March 26, 2022, https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.
[462] Connor v Fitch 431 U.S. 407 (1977)

are few Supreme Court precedents to guide judges in the line-drawing process. Judges have little instruction on how to create a redistricting plan outside of the principles of equity. Despite all of these qualities that make the federal courts a unique institution for redistricting, they are called on to draw state and federal legislative districts every reapportionment cycle. In fact, the federal courts typically draw redistricting plans in dire circumstances, often with partisan gridlock or egregious voting rights violations.

Because the federal courts do draw redistricting plans that are used in elections at least once a decade, these decisions that they have made about which criteria to favor in a given plan really matter. As shown in this data analysis, and largely explained in the institutional theory (Chapter 2) and hypotheses, the LFC-drawn maps favor criteria, while disfavoring others. LFC-drawn maps favor (1) strict population equality of districts, (2) proportional minority representation through minority-majority districts, (3) general compactness of districts and (4) some partisan bias toward the majority party of the three-judge panel.

LFC-drawn maps do not favor the criteria of competitive elections. Competitiveness is among the most popular "solutions" to partisan gerrymandering and redistricting, regularly put forward as the key criteria by reformers. However, this analysis shows that the federal courts do not value this criterion in the way that commissions and reformers do as a fair or neutral criteria. These results run counter to other scholarship that groups federal and state courts together and finds that courts favor competitiveness. LFCs also do not promote incumbency protection and the other traditional redistricting criteria above the average of all redistricting institutions.

LFCs as institutions do not reveal any consistent partisan biases. However, when one accounts for the partisan appointments of the judges on the LFC panel, there is some small partisan bias that appears for the majority of the panel. These partisan biases are far below the level viewed in state legislatures however and beg important questions about the politicization of LFCs. A greater dataset with more observations would add to this study.

The quantitative analyses of this chapter deliver the top line answers to two of this project's core questions - *What criteria do federal courts favor when they redistrict? How do these compare to other institutions? And what does this mean for representation under a LFC-drawn map?* It is clear for the first-time which criteria LFCs do systematically and consistently favor when creating redistricting maps and legislative districts. And, it is clear how these criteria compare to those favored by other institutions - LFCs are less partisan than legislatures and importantly distinct from state courts.

6.0 WHAT THE FEDERAL COURTS SAY ABOUT THEIR OWN REDISTRICTING

In Chapter 5, we saw what a redistricting map looks like when it is drawn by the Lower Federal Courts (LFCs). LFC-made plans have a low population variance, a high proportion of racial representation and compact districts. Federal court-drawn plans do not have a substantial impact on how competitive the elections in each district will be. These plans feature less partisan bias than is seen in legislative-made maps, but LFC-made maps do feature some bias toward the party that composes the majority of the three-judge panels.

The findings in Chapter 5 go a long way to answering the questions at the heart of this project - *What criteria do federal courts favor when they redistrict? How do these compare to other institutions? And what does this mean for representation under a LFC-drawn map?* - They are especially useful when considering these results together with the analysis of LFC cases in Chapter 4. These findings give us a full picture of federal court redistricting from a systemic and institutional point of view, but they lack a perspective and insight into the specifics of the cases, the judicial thinking and the intent of the map makers.

This chapter seeks to fill these gaps with a new perspective on these same questions and, in many ways, the same data. This chapter uses four case studies of LFC court opinions where the court drew a remedial redistricting plan to add context to the systemic and institution findings of the previous chapters and to add comprehensiveness

to the overall project. Examining the specifics of a selection of the cases where LFCs actually drew the redistricting plans can go a long way to fully answering the questions underlying this project and understanding the full impact of federal court redistricting from *Baker* to *Rucho.* This additional analysis carries several benefits.

The first advantage of looking at specific cases of LFC redistricting is that it is an additional test of the hypotheses of Chapter 2 and the institutional theory of LFC behavior - further getting at *why* LFCs favor these specific criteria over others. This chapter's analysis emphasizes the intent and the purpose of the chosen criteria as the court sees it - regardless of if the judges accurately assess their own biases. Examining the cases this way helps illuminate the importance that LFCs and judges themselves place on the various constraints, especially *stare decisis* and legitimacy.

Second, using a case study analysis adds context to the findings of chapters 4 and 5 and allows for a hierarchy of criteria to be developed. Chapters 3, 4 and 5 make assumptions about the hierarchy of criteria used by LFC judges and offer evidence to support these assumptions. However, looking at the text of court opinions allows for an even greater understanding of how to sort these findings from the previous chapter, outlining the specific order of how judges and LFCs consider criteria when crafting a remedial redistricting plan. The case studies can reveal
which decisions LFCs prioritize when deciding a case and making a map and how that biases the plans that are created.

Third, case studies of court opinions allow for a comparison of the empirical measurements of criteria from Chapter 5 to the stated criteria of LFC opinions. Are judges aware that they favor compactness and population equality? Are they aware that

they do not value competitiveness or incumbency? Do they understate their biases or miss certain criteria that they actually affect? Do they overstate other criteria? Comparing the stated criteria of the court opinions to the quantitative results of Chapter 5 tests the accuracy of judicial opinions and of the judges' assessment of themselves and their maps.

Fourth, the examination of specific cases also adds a better understanding of how these cases occur. The details of specific cases add context to the procedures, processes, timelines and trends outlined in Chapter 4. The narrative benefits and controversy specifics of case studies allow for a better understanding of typical processes that have occurred over such a long period of time and in some many places. Case studies highlight both how well individual cases fit the systemic and institutional procedures as well as how specific cases can vary from the general.

This chapter takes a granular look at four specific LFC redistricting cases in four states with different histories of redistricting. The four cases include the three of the states that have had the most federal court drawn maps - Wisconsin, Texas and South Carolina. These states have seen federal court drawn legislative plans used in elections in multiple decades after reapportionment. These three states along with the fourth case, New York, allow for a diversity of exploration including the variety of legislative map types, a variety of redistricting cycles and years, a diversity of federal circuits and judges, and a range of issues being adjudicated. These four cases would not be a sufficient sample for a comprehensive analysis of LFC redistricting normally. However, these case studies are not the core analysis of this project from which conclusions will be drawn. Instead, this sample is a complementary analysis to the two large and comprehensive

analyses of Chapter 4 and 5 which cover all of the LFC redistricting cases and maps, adding a new perspective and improved analysis of the data, results and conclusions.[463]

6.1 Case #1 - Wisconsin State AFL-CIO v Elections Board 543 F. Supp. 630 - WISCONSIN - 1982

The year 1982 is not just significant as one of the first redistricting cycles following the landmark Supreme Court decision of *Baker v Carr*, which began the whole process of federal court map making for legislative districts, but it is also the year of some crucial amendments to the Voting Rights Act of 1965. As discussed in Chapter 3, the 1982 amendments to the Voting Rights Act allowed for the consideration of racial effects of redistricting plans as opposed to just racially discriminatory intent behind the plan. These amendments had the effect of countering the Supreme Court interpretation and decision in *City of Mobile v Bolden*.

The temporal proximity of the 1982 redistricting cycle to the *Baker* and its progeny means that population equality and the Constitutional standard of One Person, One Vote was still the chief concern. However, the 1982 VRA amendments help highlight how the whole redistricting calculus was becoming more complicated in the period, for every redistricting institution, especially the federal courts who acted both as discerning judges of these overlapping standards as well as reluctant map makers making their own difficult decisions about where to draw lines in the face of competing criteria.

[463] Additionally, these cases include multiple redistricting plans representing more than four observations in the dataset.

These are exactly the types of issues discussed by the U.S. District Court for the Eastern District of Wisconsin in 1982 with the June 9th decision in *Wisconsin State AFL-CIO v. Elections Board*[464], which put the Court's redistricting map into effect for state legislative districts and led to four decades of federal court map making in Wisconsin state districting eventually leading to *Gill v Whitford* and the 2019 decision of *Rucho v Common Cause* that saw the end to the justiciability of partisan gerrymandering claims.

The 1982 case of *Wisconsin State AFL-CIO v. Elections Board* is a useful case study for several reasons. First, it is an illustrative example of federal court map making for state legislative districts as opposed to Congressional districts. Second, it is the first of several federal court efforts to draw Wisconsin's legislative districts, which makes Wisconsin a modal case and one of the most interesting to investigate. Third, Wisconsin has interesting political qualities between 1982 and 2012 that make it ripe for exploration both in terms of party and political geography. Fourth, and most importantly, this map that comes out of this case is similar to the average aggregate findings of all LFC-made maps and therefore a useful representative case to understand the specifics of an individual case to shed light on the general findings. This means that this complementary analysis can help explain the underlying reasoning by specific judges in a specific case that helps explain how these decisions contribute to the criteria that is favored and which non-decision factors may be important as well.

Case Background

Wisconsin State AFL-CIO v. Elections Board started the way that all redistricting cycles in the U.S. start: with the U.S. Census. The 1982 U.S. Census saw the population

[464] WISCONSIN STATE AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982)

of Wisconsin increase by 6.5% to just over 4.7 million residents. In addition to the increase in population that the state experienced between 1970 and 1980, Wisconsin also saw a shift in population from the populous and urban Southeastern area of the state which includes Milwaukee to the more rural northern parts of the state. This meant that following the 1980 Census the active 1972 state legislative districts drawn by the legislature had substantial malapportionment. They were subsequently challenged in federal court to prevent their use in the 1982 elections.

By 1982, the outdated 1972 Wisconsin state redistricting plans included a 33-district state senate district that varied between 27.3% above and 22.5% below the new ideal population of 142,591 people based on the 1980 Census. The 99-district lower house plan included districts that were as much as 33.4% below and 29% above the new ideal norm district population of 47,531.

On February 2, 1982, the plaintiffs challenged the 1972 plan based on this malapportionment, hoping to have the active plan declared unconstitutional and have the federal court create a remedial plan. This initial case was assigned to a single federal district judge, Terence T. Evans, in Wisconsin's Eastern District. Judge Evans, "determined that the case was appropriate for treatment by a three judge panel under 28 U.S.C. § 2284, and accordingly he requested in a letter to the Chief Judge of the United States Court of Appeals for the Seventh Circuit that two other judges be appointed to form a panel to consider this case." Wisconsin Eastern District Judge Myron Gordon and Seventh Circuit Court of Appeals Judge William Bauer joined Evans on the bench to form the three-judge panel typical of redistricting and reapportionment cases[465].

[465] Bauer was appointed to the Seventh Circuit Court of Appeals by Richard Nixon, while Gordon and Evans were appointed to the district court by Lyndon Johnson and Jimmy Carter respectively.

On February 22, 1982, just weeks after the three-judge panel was formed, the court declared the active 1972 district plans for both the state senate and state legislature as unconstitutional and enjoined their use in upcoming elections. As part of this Feb. 22 motion, the three-judge federal court laid out a clear structure for how the case would proceed, including deadlines for motions to intervene. Seven parties were granted motions to intervene including the plaintiffs. Motions included submissions for full statewide plans of newly reapportioned districts, as well as less dynamic solutions with alterations of districts in and around Milwaukee only.

Wisconsin's Republican governor, Lee Dreyfus, also moved to intervene with a two-part motion to halt the case in the Eastern District and have the Wisconsin State Supreme Court take the case as part of its original jurisdiction. The three-judge federal court did not grant the motion for abstention, although the State Supreme Court did take jurisdiction of the case, which was subsequently removed to the federal court in the Western District of Wisconsin and transferred to the three-judge panel in the Eastern District on April 1.

Oral arguments began before the three-judge Eastern District federal court on April 21, 1982. Two days later, on April 23, the court issued an order stating reluctance to intervene with its own remedial plan until the de jure redistricting institutions failed to create a satisfactory plan based on the new Census figures, which were officially certified in 1981 and corrected with minor changes in 1982. The court wrote, "we were reluctant to act until convinced that all reasonable efforts to establish a constitutionally acceptable redistricting plan had been exhausted by those charged with a duty to perform."

Following the federal court's April 23 order, the state legislature, with Democratic majorities in both houses, drew reapportioned districts. The plan was passed by the legislature in May and vetoed by the governor. This vetoed plan was still considered among the potential redistricting plans submitted to the courts, but the court called it "hastily conceived" and "one of the worst efforts before us" and declined to adopt it because the plan had population deviations that appeared high and not related to the protection of political subdivisions.

On June 2, the three-judge panel issued its ruling. The court wrote, "Because the elected representatives of the people of Wisconsin have been unable to agree, we must now discharge our duty under the law." All other efforts had failed and the court would now draw a new plan. In the same order, the court issued its plan for redistricting both the state senate and state legislature of Wisconsin ahead of the 1982 elections.

The decisions in *Wisconsin State AFL-CIO v. Elections Board* goes on to explain the standards that the court used, its reasoning for its plan, and the actual plan itself. These are invaluable resources for analyzing how and why federal courts draw the maps they do and what the impact on representation is. However, it is worth first pausing to examine the process and background that led to the court making the redistricting plan. *Wisconsin State AFL-CIO v. Elections Board* exemplifies many of the qualities outlined in Chapter 4, explaining the preconditions necessary for LFC mapmaking to occur. Several of which are present here.

First, this case starts with the use of an old redistricting plan being in place. In light of both a growing population in the state and the intrastate population changes, the previous decade's redistricting map becomes unconstitutional and unusable, just as were

the redistricting plans at the heart of *Baker, Reynolds* and many Reapportionment Revolution cases. While some redistricting cases deal with challenges to new maps that will have potential discriminatory or dilatory effects, many of the challenges that led to LFC-made plans started with inaction or gridlock, an outdated plan and dynamic populations that made the status quo districting unconstitutionally malapportioned.

Second, the case sees a single judge hear the initial challenge with the case assigned to a three-judge panel of district and circuit court judges. As shown here with *Wisconsin State AFL-CIO v. Elections Board* on February 2, the first action that the federal courts take is to form a three-judge panel when the case meets the requirements.

Third, the court issues clear rules and a structure for the proceedings and receives many submittals for alternative plans. Partisan, interested, non-interested and outside party redistricting plan submissions are a consistent part of the redistricting process at the courts that are not necessarily seen in the way with legislature map making.

Fourth, there can be a conflict over whether the case should be heard in state or federal court. As is illustrated by *Wisconsin State AFL-CIO v. Elections Board,* there was an effort to take the case out of the federal court and place it into the state courts. As discussed in Chapters 3 and 4, the fight for jurisdiction between state and federal courts is frequent. The federal courts can be deferential to state courts that are already hearing the case, but because of the nature of the issues in redistricting following *Baker*, the federal courts can take jurisdiction consistently. This is potentially a strong partisan tool for a more sympathetic venue depending on the state political composition of the governor, state legislature and courts.

Fifth, this case shows that there is partisan fighting - here between the Republican Governor's veto and the Democratic legislature's plan - that prevents a new plan from being adopted, which contributes to the old plan being used and the initial cause of the claim of unconstitutionality.

Sixth - and related - the de jure redistricting institutions fail to come up with a sufficient solution, even with substantial judicial deference ahead of the elections. As discussed at length in Chapter 4, the failure of the de jure redistricting institution to draw a constitutional map is a necessary precondition for LFC action.

Seventh, the court repeats and reiterates its hesitance to make its own map. As illustrated in Chapter 4, and exemplified by this case, the federal courts will try many other avenues and wait as long as possible to avoid drawing their own redistricting map. However, with all of these preconditions met and no other constitutional solutions, the LFCs are forced to fulfill this role and responsibility as de facto redistricting institution.

Once these other options are exhausted, the three-judge panel creates its own plan, based off of the existing plan, a submitted plan or a blank map. In this case, the three-judge panel created a novel remedial plan.

In *Wisconsin State AFL-CIO v. Elections Board,* the federal court, in the end, drew its own plan. Without a computer. But, with a clear explanation of where it decided to draw the lines and why the other plans failed to meet the needs of the task.

An important part of this explanation can be found in the long appendix of the *Wisconsin State AFL-CIO v. Elections Board* court opinion issued on June 9th, 1982. The appendix is common for LFC-made maps. It lists each district of the two new court-made statewide legislative maps in long-hand. For example, the SIXTH ASSEMBLY

DISTRICT includes parts of Milwaukee County, specifically the Village of Brown Deer, the City of Glendale's wards number 1, 2, 5, 6, 7, 10, 11, and 12 as well as wards 163-169, 171, 172, 173, 178 and 179 in the City of Milwaukee. The appendix also features a table with each assembly and senate district noting its population and deviation from the ideal norm. The appendix is colder, less comprehensible and more boring than looking at a colorful redistricting map. The gerrymanders are not immediately clear. But the appendix is a clear and legal record. It adds context to the preceding court order for this federal-court drawn map of state legislative districts. It helps show how the court operates as a cartographer - it is not necessarily with a red marker on a map, carving up voters, but rather with a hierarchy of criteria preferences, none higher than the population equality visually displayed in this table.

Just prior to the appendix, at the end of the court's opinion, the three-judge federal court explained that while they are reluctant to draw the new state legislative maps, they have no choice and they will do it more in keeping with the "goals of reapportionment" than any of the other maps that have been submitted. The court wrote,

> Keeping in mind the criteria discussed above, we have reluctantly concluded that we can, by drawing our own plan, be more faithful to the goals of reapportionment than would be the case if we were to take the easy way out and merely adopt one of the plans submitted to us. For this reason, we promulgated the attached plan as our reapportionment plan.

The decision of the court to create their own redistricting plans for the state legislature and senate comes down to the judgement of what exactly these "goals of reapportionment" are. In this case, it may be fair to assume that the legislature's plan had a set of goals that included partisan advantage, incumbency protection and avoiding a court-drawn plan. The governor likely had similar goals in his veto of the legislative plan.

But, once the labor union plaintiffs brought this challenge to the 1972 plan as an unconstitutional gerrymander and the federal courts retained jurisdiction, the "goals of reapportionment" shifted to what the federal courts valued. This is in many ways the overall purpose of this entire dissertation project.

The three-judge federal court explained exactly what it saw as the goals of reapportionment for the 1982 Wisconsin state legislative plans. The court saw a hierarchy of criteria that must be considered, based in federal law and precedent, starting with population equality, with a special consideration of race and communities of interest, a subordinated consideration of traditional redistricting criteria and no consideration of partisan or political effects. These statements of priority completely align with the systematic quantitative results of Chapter 5.

After reiterating its reluctance to draw the redistricting map itself, the LFC immediately discusses the prominence of population equality among the districts as the most important guiding force for creating a reapportionment scheme. The LFC wrote that "[t]o prevent the debasement of citizens' voting power and to honor the dictates of the Equal Protection Clause, equality of population, to the extent it is practicable, is the cornerstone of any constitutional apportionment plan." For state legislative plans, this One Person, One Vote standard comes from the *Reynolds* precedent and its interpretation of the equal protection clause of the 14th amendment.

In this case, the LFC adds that court-drawn plans must meet a higher standard of population equality than legislature-made plans. Whereas state legislatures may have some deviation from ideal population equality for legitimate state interests, the court in *Wisconsin State AFL-CIO v. Elections Board* sees the role of federal courts as drawing

districts as equal as possible. For this plan, the court explains that 10% *de minimis* deviation is unnecessarily high and states a goal of deviation below 2% for its court-made map. The end result is a map the court called "the best in the history of Wisconsin" with no districts deviating more than 0.87% from the ideal norm in its plan.

Although population clearly was the most important and wide-spread criteria for this case, impacting how the court drew every single district for both the assembly and senate throughout the state, race and communities of interest also were also criteria of emphasis for the court albeit not as consistently. The guiding principle for the court regarding race and ethnicity in making the new map was at a minimum the nonretrogression standard. In its review of the plan, the court wrote, "our plan serves the constitutional mandate of not diluting minority voting strength."

This plan also served more generally to promote race- and group-based voting power for Black, Hispanic and Native Americans, as stated in its explanation of the favored criteria. For Wisconsin's Black population, the court wrote that racial considerations of voting power subordinated other traditional criteria concerns. The LFC wrote,

> Closely related to the goal of maintaining the integrity of county and municipal lines is the objective of preserving identifiable communities of interest in redistricting. One important aspect of this concern is avoiding any dilution in the voting strength of racial and ethnic minorities. Among the identifiable racial and ethnic minorities in Wisconsin, only black citizens of Milwaukee County represent a sufficiently large population in a relatively concentrated area to be an effective majority in any Senate or Assembly districts. We believe that sound policy requires that any redistricting plan ensure fair representation to the black population. Our plan clearly meets this objective.

For Hispanic Wisconsins and Native Americans, the court commented that it could not draw a constitutional district comprising a majority of the group, but that its plan was conscious to reduce the "fragmentation" of these populations as optimally as possible to ensure some voting strength in "influence districts."

In addition to population equality and minority populations, the court put substantial but secondary value on traditional criteria. Some traditional redistricting criteria such as contiguity and protection of county boundaries is included in the Wisconsin constitution. Others, such as compactness and protection of city boundaries are not, but still are recognized by the court as general redistricting principles. The consistent refrain from the court in its opinion is that when drawing its plan, it used these criteria, when possible, but explicitly views them as less important than population equality, which is their primary foe.

Of contiguity, which has a definition from the state supreme court of Wisconsin, and compactness, which is generally recognized but without definition, the federal court explained that these are good but not the most important goals of redistricting. The court wrote, "districts should be reasonably, though not perfectly, compact and contiguous" and "although important, the requirement of compactness is clearly subservient to the overall objective of population equality."

The court spent more of its opinion discussing the importance of maintaining political subdivisions[466], but strikes a similar tone of acknowledging its inferiority in relation to population equality as a redistricting criterion. The LFC wrote,

[466] "The most commonly urged justification for variation from strict population equality in state legislative reapportionment plans is that the integrity of county lines should be preserved … The Wisconsin Constitution provides that county, town and ward lines should be maintained." WISCONSIN STATE AFL-CIO v. Elections Bd., 1982

> While maintaining the integrity of county lines may be a desirable objective, we believe its general incompatibility with population equality makes it only a consideration of secondary importance...Our plan … was drafted with the somewhat elusive goal of maintaining the integrity of county lines firmly in mind. We were able to succeed only to the extent of keeping 31 counties intact.

The court justifies this hierarchy of criteria further with an example of how prioritizing boundaries necessarily conflicts with population equality. Previous redistricting plans in Wisconsin required intact political boundaries - including a 1964 "intact county" state Court-made plan[467]. However, the LFC notes, this would be unconstitutional today because there were substantial population disparities between districts. This comment shows a clear inversion of criteria priorities, where in the past population equality was subordinated to political boundaries and now the LFC has inverted these priorities. Additionally, the party submitted plans for 1982 also divided many political subdivisions, showing that even the Republicans and Democrats viewed protecting subdivisions as a lesser criterion than their other reapportionment goals.

In terms of political and partisan criteria, it is striking how little is said about these criteria in the *Wisconsin State AFL-CIO v. Elections Board* opinion. Likely at the top of the "goals" hierarchy of the state legislature or governor's redistricting plans, the federal court says nothing of what is expected in terms of partisan election outcomes from this map, partisan composition of districts or even the idea that maps should be created to be competitive. The only political or partisan criteria that the court did mention at all was that of incumbency protection. The court wrote in its initial April 23 order that it would not consider incumbency in its map making. In the final opinion, the court wrote, "We have been faithful to that pledge. At no time in the drafting of this plan did we consider

[467] Just prior to Reynolds v Sims

where any incumbent legislator resides or whether our plan would inure to the political benefit of any one person or party." Although the court does note that it tried to keep in mind that only the odd numbered senate districts would be affected by the 1982 elections, and tried to have preservation of district lines when applicable in terms of the other stated criteria and its relative hierarchy[468].

The 1982 federal court-drawn map of Wisconsin's state legislative districts articulates a stated set of criteria and a hierarchy of criteria that broadly matches the findings of Chapter 5. The federal courts pay particular attention to population equality and the avoidance of racial voter violations on the first tier of criteria considerations. This is stated by the court and follows the results of LFC-made plans broadly from Chapter 5. The second tier of considerations is that of traditional criteria like compactness and splitting of boundaries. Here also the court is clear that these are subordinate, which corresponds to their presence but not preeminence among LFCs on average as shown in chapter 5. And the third tier are political or partisan criteria, which are only accounted for in this opinion by the court explaining that these criteria were not considered such as when the federal court goes out of its way to claim that it had no consideration of incumbency. It does not mention any other political criteria in its opinion. Although the

[468] "While our plan has been drafted without incumbency considerations, we were mindful of the fact that the fall elections only call for the election of Senators presently holding odd numbered Senate seats. Consequently, the residents of Wisconsin presently living in even numbered Senate districts will not be electing Senators under our plan until 1984. To minimize the number of people affected by our plan as it relates to Senate districts, we have tried, as much as possible consistent with the principle of one person, one vote, to use even numbers for the Senate districts in our plan that roughly correspond to areas assigned to even numbered districts in the 1972 act. Because all ninety-nine members of the state Assembly will be selected under this plan, we saw no reason to adhere to any numbering system for Assembly districts that related to the 1972 law." WISCONSIN STATE AFL-CIO v. Elections Bd., 1982

court does clearly state that it had some consideration for the state senate in relation to the staggered elections.

These stated goals both correspond and do not correspond to the findings of Chapter 5. On one hand, the lack of emphasis on incumbency and competitiveness fits well with the finding of no LFC effect on these criteria in redistricting maps. However, Chapter 5 did see some small effect on the partisan criteria in relation to the direction of the appointment of the judges on the panel. Here, however, the court states no consideration of such things. These two ideas can be rationalized in that partisan bias may be inadvertent, inconsistent or incidental. Above all, this opinion's statements on political and partisan criteria strengthen the idea that the LFCs care deeply about legitimacy norms and want to appear as apolitical as possible even when participating in the most political activity.

In addition to looking at the court's stated criteria in comparison to the Chapter 5 findings, we can also compare this stated criterion to the quantitative, objective results of the plan and its electoral effects. As shown in Table 6.1, the court's opinion in relation to the measured 99-district assembly map is generally accurate. Population variance is quite low. Incumbency and competitiveness do not seem to have been emphasized, although the map is less protective of incumbents and more competitive than the average LFC map. Also, the partisan gerrymandering measurements show a Republican bias, but one that is small. This runs counter to the two Democratically appointed judges on the panel and sheds light on the accuracy of the nonpolitical emphasis of the map-making process the opinion states.

	Political		Political/Partisan			Traditional				Clear Precedent	
	Competitive Seats n=378	Incumbency n=378	EG n=283	PB n=283	MM n=283	PP Mean n=311	Core n=224	County Split n=218	City Split n=218	Racial (n=359)	Population Variance
1982 LFC-Drawn WI State Assembly Plan [469]	0.485	0.606	-0.038	-0.035	-0.016	n/a	n/a				0.017
Federal Courts n=56	.293	.780	.011	-.009	.0024	.293	.764	.0303	.0070	.515	.031

15 - Table 6.1 – Case Study #1

The opinion in *Wisconsin State AFL-CIO v. Elections Board* ends with the explanation that this map will be effective for the 1982 election, but that it could be replaced by the legislature afterward. The court wrote, "The appended judicial plan of reapportionment be effective for the 1982 legislative elections and thereafter until such time as a valid constitutional redistricting plan is enacted into law."

In 1983, after the Democratic party retained its majorities in both houses of the Wisconsin legislature and won the governorship in the 1982 elections, they passed a new plan that was used until the 1990-1992 redistricting cycle. In 1992 and again in 2002, the split party control of the state government led to the federal courts redrawing Wisconsin's state legislative maps again and again.

The 2010 elections brought full Republican control to the redistricting process and they passed the redistricting plans that were eventually struck down by a three-judge LFC as unconstitutional partisan gerrymanders in *Whitford v Gill*. This case was combined with *Rucho v Common Cause* and heard by the Supreme Court, which

[469] Not much data on senate

eventually decided that partisan gerrymandering was a nonjusticiable issue for the federal courts leaving the Wisconsin maps at the center of the case in place.

6.2 Case #2 - Burton v Sheheen 793 F Supp 1329 - SOUTH CAROLINA - 1992

Burton ex rel Republican Party v Sheheen from 1992 is a great case to study together with *Wisconsin State AFL-CIO v. Elections Board*. The cases share important commonalities with the Wisconsin case for better understanding the LFC redistricting process as well as key differences that highlight the variation present among all of the individual cases in this large and institutional analysis of LFC redistricting.

Unlike in the Wisconsin case, *Burton v Sheheen*[470] deals with Congressional redistricting as well as state assembly and senate districts. Further, two factors make race a much larger part of the LFC's consideration in the South Carolina case. First, the 1982 Voting Rights Act amendments and the *Thornberg v Gingles* precedent had been established by the time *Burton v Sheheen* was heard, creating clearer standards for interpreting racial gerrymandering. Second, the demographics and history of South Carolina and Wisconsin differ. In the 1990 U.S. Census, nearly a third of South Carolina's population was Black - about 1.1 million people out of the state's 3.4 million total population. In Wisconsin in 1980, only about 182,000 of the more than 4.7 million residents were Black[471]. These demographic realities, along with the long history of racist

[470] *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992) – All block quotes in this section are drawn from this case

[471] Gibson, Campbell, and Kay Jung. *Historical census statistics on population totals by race, 1790 to 1990, and by Hispanic origin, 1790 to 1990, for the United States, regions, divisions, and states*. Washington, DC: US Census Bureau, 2002.

electoral institutions in the Southern state, leads to a different calculus related to race for the federal court drafting new plans.

While these differences in time and demographics are important for examining the redistricting plans of South Carolina in 1992 in relation to 1982's plans in Wisconsin, this case again provides an example of how the unique and specific cases fit the general trends outlined in LFC redistricting found in Chapter 4 and 5, and discussed throughout this book.

Like with Wisconsin, the federal courts have been the legislative map makers in South Carolina in multiple redistricting cycles. *Burton v Sheheen* follows the 1982 federal court intervention and drawing of a temporary remedial map for South Carolina. In *Burton ex rel Republican Party v Sheheen,* the LFC only became involved after a protracted fight and failure between the de jure redistricting institutions in the state, including inaction by legislative procrastination and gubernatorial vetoing. A three-judge court comprising South Carolina District court judges and Fourth Circuit judges heard the case.

The opinion in *Burton v Sheheen* reveals important similarities to *Wisconsin State AFL-CIO v. Elections Board* and the Chapter 4 system-wide case analysis of procedure. The federal court repeatedly expressed its reluctance to draw the redistricting plans in, but did eventually create the remedial maps when time dictated the need for legitimate maps. The courts were guided most by the clear precedents on race and population variance. The LFC statement at the end of the opinion summarizes how the judges saw their role well. The court will only act when the other institutions create substantial

obstacles to a new plan. New the conclusion of its opinion in *Burton v Sheheen,* the court wrote

> Much has changed in South Carolina since 1984 and even more since 1980. One thing that has not changed is the General Assembly's inability to redistrict without judicial intervention or at least prodding. The General Assembly knew the census was coming, correctly predicted malapportionment, and had both sophisticated software and capable operators in place to draw plans. Nevertheless, no compromise was ever reached with the Governor's office and this court was called upon to perform a task that all concede is most properly a legislative one. As set forth more fully above, the duties of a legislature and a federal court are not the same. While we certainly can consider significant state policies, we have less latitude to serve those policies than a state legislature would enjoy.
>
> Since the General Assembly and the Governor did not fulfill their obligations, and the plans proposed at trial suffered an array of infirmities, reluctant as we were, this court unabashedly fashioned its own plans. Our plans meet the *de minimis* standards of *Chapman*, the deviation standard of *Karcher*, and the retrogression standard of *Beer* as applicable to each plan.

Case Background

Burton v Sheheen started with the 1990 Census. The Census kicked off the 1990 redistricting cycle and under South Carolina law the state legislature was tasked with drawing new redistricting maps for the 124-seat state house of representatives, the 46-seat state senate and the state's six Congressional districts. The legislature-made redistricting plans must be passed by the state legislature and signed by the governor to become law. South Carolina was also subject to Voting Rights Act Section 5 preclearance at this time.

The 1990 Census showed that South Carolina had gained about 300,000 residents and saw significant in-state population shifts. Both of these factors led to impermissible

malapportionment among its existing districts, including the 1982 Congressional plan drawn by the federal courts. This necessitated new redistricting plans for all three legislative district types and, as the court notes repeatedly in its *Burton v. Sheheen* opinion, should have been predicted by the legislature.

Despite the likely unsurprising data from the 1990 census, the South Carolina legislature did not complete its task of redistricting the three legislatures. Although the state senate passed a redistricting bill for itself, legislative inaction ultimately led to no maps being passed and approved by the end of the 1990-1991 session. In its opinion, the federal court panel noted how this inaction has occurred consistently in South Carolina and forces the LFCs into a role it does not want to perform. The court wrote,

> Redistricting is primarily a matter for legislative consideration and determination and judicial relief becomes appropriate only when a legislature fails to redistrict according to federal constitutional and statutory requisites in a timely fashion after having had an opportunity to do so. *White v. Weiser*, 412 U.S. 783, 794-95, 37 L. Ed. 2d 335 , 93 S. Ct. 2348 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586, 12 L. Ed. 2d 506 , 84 S. Ct. 1362 (1964)); U.S. Const. Art. I, § 2; 2 U.S.C. § 2(c); S.C. Const. Art. III, § 3. We do not tread unreservedly into this "political thicket"; rather, we proceed in the knowledge that judicial intervention in the instant case is wholly unavoidable. In fact, judicial intervention in the South Carolina redistricting process has been frequently unavoidable.

A number of cases were brought before the federal courts to enjoin the use of the existing and now malapportioned South Carolina districting plans as well as have the courts choose a new plan. The court was also involved in this issue due to Section 5 of the VRA. All of these cases were eventually consolidated as *Burton v Sheheen.*

The various court cases spurred action by the South Carolina legislature in late 1991 and early 1992, passing new redistricting plans for the state house and senate, although not for Congress. However, the governor vetoed both bills and called for more

minority districts. Then-governor Carroll Campbell was Republican while both state legislative bodies had Democratic majorities. Due to no legislative solutions emerging, the federal court trial continued with a pretrial hearing in February 1992 and the separation of the trial into distinct phases for each type of legislative map that was needed i.e. a senate stage, a house stage, a Congressional districting stage. The court also appointed a technical advisor, Bobby Bowers, to help the court understand the various submitted and computer-generated plans[472]. The trial ended on March 6, 1992 with none of the submitted legislative plans being adopted by the court, with each insufficient to the requirements, according to the court. As a result, the "court has drawn its own plans which satisfy all relevant constitutional and statutory requisites."

The court explains in its opinion that although this case requires three maps to be drafted and although they are distinct in their size and purpose, the court was guided by shared principles for each map. In the opinion, the court describes that it emphasized the criteria of population equality, racial retrogression and proportionality and traditional criteria. In distinction from the Wisconsin case, this opinion and these criteria focus much more on race and the differences of whether certain criteria apply to Congressional versus state legislative plans.

For population equality, the three-judge court explained the relevant precedents that guided redistricting along the One Person, One Vote principles and how this differed for federal compared to state legislatures.

[472] "Confronted further with the unusual complexity and difficulty surrounding computer generated redistricting plans and faced with the prospects of drawing and generating its own plan, the court appointed Bobby M. Bowers, Director of the Division of Research of Statistical Services of the State Budget and Control Board, as technical advisor to the court pursuant to the inherent discretion of the court and under the authority of Reilly v. U.S., 863 F.2d 149 (1st Cir. 1988)."

The LFC explained that for Congressional districting, mathematical equality was expected based on the *Wesberry v Sanders* line of cases and the principles articulated in Article I, Section 2 of the U.S. Constitution. Particularly, the court regarded the recent *Karcher* and *Kirkpatrick* standards as useful guides, with *Karcher* providing a two-pronged test and no *de minimis* level of variation. For the court's own Congressional districting plan, it would try to achieve absolute equality of population among South Carolina's six districts. The eventual court plan achieved zero deviation, which was lower than every other plan submitted to the court except for the governor's plan.

For the state legislature plans, the court explained that it would be within the standard created by the *Reynolds* line of cases for One Person, One Vote and the *Chapman v Meier* standard that "both houses of the state legislature must be apportioned so that districts are 'as nearly of equal population as is practicable'". The court admitted that when state legislatures redistrict there is more latitude for variation of population in state as opposed to federal districting, and that the recognized limit of this is generally about 10%. However, the court itself does not recognize the need for this extra variation in the state districts in their own maps. The court explained that it strives for as little variation as possible, although not necessarily to the same standard as with Congressional districts. The court wrote,

> In sharp contrast, this court possesses no distinctive mandate to compromise potentially conflicting state redistricting policies in the people's name. *Id.* at 415. Rather, we are admonished to "achieve the goal of population equality with little more than *de minimis* variation." [**30] *Chapman*, 420 U.S. at 27. Given that compliance with the principles of one man, one vote is the preeminent concern of court-ordered plans, the very real possibility exists that certain state policies will be compromised in a court-ordered plan which could have been better served had judicial intervention not been necessary...We conclude, without quantifying the *de minimis* standard, that the standard lies somewhere between the 10 percent presumption of *Brown* and the mathematical preciseness required for

> Congressional redistricting under *Wesberry v. Sanders*, 376 U.S. 1, 11 L. Ed. 2d 481 , 84 S. Ct. 526 , (1964), and in the opinion of this court, it lies closer to *Wesberry* than *Brown.*

The discussion of population equality as districting criteria in *Burton v. Sheheen* is more complicated than was seen in the Wisconsin case because of the variety of districting types as well as the emergence of *Karcher v Daggett* in 1983, which developed the standard for Congressional districting. The general statement in the *Burton v Sheheen, Wisconsin State AFL-CIO,* and findings from Chapter 5 read together show that the federal courts value population equality as the preeminent criteria and, *importantly*, the federal courts themselves to a higher standard than they would hold any other redistricting institutions to. This helps explain the negative effect LFCs have on the population measurement in Chapter 5 in relation to all other redistricting institutions.

In its opinion for *Burton v Sheheen,* the court spends most of its time discussing the role of the Voting Rights Act and race. The court starts by explaining how Section 5 and Section 2 require different responsibilities from the court, explaining that these two sections must be considered differently when evaluating a map compared to designing a map. This section makes clear that the three-judge court holds not violating Section 5 or 2 as a top tier criterion of the redistricting process, alongside only population equality, but holds the creation of addition majority-minority districts with the goals of proportional representation as subordinate criteria that is not required of the court by any law.

For Section 5 of the VRA, which led to the federal court involvement in the case from the beginning, the court clearly holds that its standard for interpretation is non-retrogression[473] from *Beer* - that the new plan cannot have the purpose or effect of

[473] See Chapter 3

reducing minority voting power when compared to the old plan. This is also what the court must do when fashioning the new plan, but more proactively. The court must create a plan that does not have the purpose or effect of negatively altering minority voting power. The court makes clear however that this does not require them to promote racial proportionality of voting. It wrote,

> Consequently, the court looked first to retrogression in the total number of districts in a given plan and only then to decreases in population within a given district, where meaningful comparisons, if any, could be made … The erroneous basis for measuring retrogression, urged upon the court by certain parties to this suit, is to compare proffered plans one to another without reference to the existing plan. This proposed methodology is flawed in at least two respects. First, it has no basis in case law, the statutes, or § 5 regulations… Second, such methodology serves as a "racial ratchet," which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of all other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute.

The court's second major criteria for race in redistricting is related to Section 2 of the VRA. Specifically, the court is concerned with the developments that have occurred to Section 2 of the VRA in the terms of the 1982 Amendments and the *Thornberg v Gingles* case that established a new test for Section 2 racial vote dilution[474]. Here again the *Gingles* test is better suited for the judicial task of analyzing a plan than providing positive guidance for how to create a new plan. Therefore, the court must first create a plan that does not violate Section 2 in terms of the *Gingles* test, which means racial districting can be done but it must consider compactness, numerousness and voting blocs when creating these districts.

[474] See Chapter 3

Considering the Voting Rights Act and its associated precedents, the court in *Burton v. Sheheen* explained that it adopted three plans that did not violate Section 5, Section 2, the *Beer* nonnretrogression standard or the *Gingles* test. But its plan has less promotion of majority-minority districts than other proposed plans, showing that this as a goal was subordinate to many other criteria including some traditional criteria. The court wrote,

> Therefore, with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind, we have analyzed the proposed plans as well as the plans we adopt today based on the following factors: 1) the extent to which the plans proposed and the plans adopted are consistent with the retrogression standard set forth in *Beer* and *City of Lockhart*; 2) the extent to which reasonable compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina. The Senate factors may be applied to the extent that they aid the court in its determination of these factors. This approach allows the court to formulate a plan which is consistent not only with the provisions of § 5, but insures that the court's plan will not violate the threshold requirements for liability under § 2….While other plans create a larger number of black districts, they do so without regard to any interest but race and without the clear necessity which justifies a § 2 remedy ...The House plan proposed by the Republican Party, containing 36 majority black districts using total population, represents an attempt to achieve proportional representation on the basis of race, a result specifically not dictated by any federal or state law ... Thus, the Republican plan draws lines without regard to any factor except skin color and possibly political affiliation. As previously noted, the Republican plan shows little regard for traditional state political units such as the county. The plan also divides numerous smaller municipalities and towns into separate districts.

The court in *Burton*, did not spend substantial time discussing traditional criteria, but the court did explain the importance of state requirements. First, the importance of state requirement of legislature-made maps explains the reluctance of the LFC to create a

map when other redistricting institutions still had time to create plans. Second, the court explained that state constitutional requirements and laws were sources for these state requirements[475]. And third, the court wrote about the importance of county boundaries in the history of South Carolina legislative redistricting. This emphasis on splitting few subdivisions was likely the preeminent goal of the court-made plans in terms of traditional criteria, with several references to how the court-made plans split fewer county lines than other proposed plans. Compactness and contiguity were also considered as criteria, but barely discussed. These traditional criteria appear most often in the opinion in relation to racial criteria[476].

The court also considered incumbency in terms of race. The court said that it did consider incumbents when it drew its maps, especially when considering racial minority voting power. The court wrote,

> [B]eyond the use of voting age population, we have considered other factors, such as the presence of an incumbent in a district, in formulating our plans. With regard to the presence of an incumbent in a district, the undisputed testimony was that the lack of, or presence of, an incumbent in a district has an effect on voter turnout and this effect is more pronounced for black voters as opposed to white voters.

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[475] "In fashioning interim relief where state political actors have failed to produce redistricting plans, this court, in both legislative and Congressional redistricting, "should follow the policies and preferences **[*1341]** of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795, 37 L. Ed. 2d 335 , 93 S. Ct. 2348 (1973); *see also* *Upham v. Seamon*, 456 U.S. 37, 71 L. Ed. 2d 725 , 102 S. Ct. 1518 (1982) (per curiam). Decisions made by "the legislature in pursuit of what are deemed important state interests . . . should not be unnecessarily put aside in the course of fashioning relief. . . ." *Weiser*, 412 U.S. at 796. While "the remedial powers of an equity court must be adequate to the task . . . they are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161, 29 L. Ed. 2d 363 , 91 S. Ct. 1858 (1971).

[476] ""This functional view of compactness in light of effective representation is a sound approach to the problems of compactness, especially with the ability of modern technology [**73] to create maps which, though they have maximized percentages by pinpointing specific voters, may resemble a series of ink blot tests.

The court did not consider competitiveness or other political criteria. Nor did it discuss partisan outcomes or criteria in the opinion.

Viewing these criteria together, it shows that the courts were most concerned with achieving population equality among districts and not violating the Voting Rights Acts. All other considerations were of a lower priority. These decisions were made in light of strong Supreme Court precedents. The opinion also makes clear that racial proportionality was not a key criterion for this court and was one that was subordinated to many traditional criteria, chiefly the protection of political subdivisions.

The court made three plans in *Burton*. By focusing on one, the Congressional plan, we can see exactly how this discussion of criteria and its value was put into place and how this plan actually compares with the quantitative results and the court was clear on what it was doing.

The federal court-drawn redistricting plan for South Carolina in 1992 is described in the *Burton* opinion by its criteria and a clear hierarchy of criteria. The court explained it approach to drawing the states six Congressional districts,

> As discussed above, the court developed its plan consistent with the following factors: 1) the extent to which the plans proposed and the plans adopted are consistent with the retrogression standard set forth in *Beer* and *City of Lockhart*; 2) the extent to which reasonably compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina. *Based on these factors, two important considerations emerge. First, to what extent does the court's plan comport with the more stringent equal population requirement required for Congressional districts?*

> *Second, to what extent does the court's plan draw reasonably compact and contiguous black districts?*[477]

Although many of the criteria described here relate to race, the first criteria the court explained is population. The court used the strict *Karcher* standard for Congressional districts for districts as exact as mathematically possible. The court-made map "clearly comports with the stringent equal population requirements set forth in *Karcher"* with its deviation of zero.

The second set of criteria and considerations for the Congressional plan specifically is about the nonretrogression standards of *Beer* and Section 5 of the VRA. The court said it proceeded as outlined in its larger discussion of criteria and first ensured the plan it drew had no retrogression based on race. Further, the court ensured this being true by creating a majority-minority district. The court clearly explained that this was not required, but also fulfilled the goals of preclearance. The court wrote,

> The record before the court is devoid of any argument that a majority-minority district should not be created and our decision today is bound by the record developed at trial. Given the lack of an adversarial proceeding in this regard, we do not decide if the court was *required*, under existing legal principles, to create a majority-minority district. Nevertheless, based on the criteria set forth above, the court devised a plan which created a majority-minority district … By establishing a black majority district, the court has enhanced "the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer*, 425 U.S. at 142, and has satisfied the retrogression standard set forth in *Beer…"*

Following the fulfillment of the nonretrogression standards of *Beer* and Section 5 of the VRA, the court looked to Section 2 and the Gingles test to ensure race-conscious districting was permissible in regard to number, compactness, political cohesion and

[477] Emphasis added

voting blocs. Due to the dispersion of demographics, the court said a majority-minority community would require a district draw in the “crescent from South Carolina's southwestern border with Georgia through the midlands to the coast in Georgetown County " where there is a large, concentrated Black population. Further, this district would have to include parts of both the Charleston and Columbia metropolitan areas. By drawing a district including these areas and parts of these two cities with large minority populations allowed the court to create a district with a composition of 57.9 percent black voting age population.

The court acknowledged that this pushed the definition of compactness, but said the map would fulfill the Gingles Test for Section 2 of the VRA, including the requirements for political cohesion and racial bloc voting. It wrote,

> Though we acknowledge that the resulting districts may stretch the concept of compactness, especially in light of the intrusion into the Charleston and Columbia metropolitan areas, we cannot say that the districts do not comport with the flexible approach to compactness advocated by the court ... First, and foremost, the creation of a majority-minority district itself "aids and facilitates the political process" by assuring compliance with the retrogression standard of *Beer*. Second, the testimony at trial was sufficient to indicate that the district would be manageable from the standpoint of constituent services. Finally, there is no indication from the record that the impact on the surrounding districts would impair the effective representation of those districts. Thus, in the context of Congressional districts, we cannot say that the creation of a majority-minority district would violate the compactness requirement set forth in *Gingles*.

The court did not discuss the compactness of the districts in its Congressional plan outside of these *Gingles* test concerns. The only traditional criteria discussed in terms of this plan was the protection of political subdivisions or “South Carolina's specific state policy of maintaining the integrity of county lines.” The court admitted that there were other submitted plans with fewer county lines split, but admitted that those violated more

important criteria including population variance and racial voting power. Here, again, the court clearly subordinates traditional criteria, even this important criterion of protecting subdivisions below other criteria. The court wrote,

> Though other plans may split fewer counties, these plans do not have as low a deviation as the court's plan. The court only split county lines when it was necessary to achieve a minimum variation or to increase the percentage of black population within the majority-minority district consistent with the non-retrogression principles of *Beer* as set forth above

The court concluded the discussion of its new Congressional map with a clear statement of purpose and hierarchy of criteria. Population equality, legal racial representation and county boundaries were the criteria favored by the three-judge court for Congressional districts in this case. The court wrote, "the plan created by the court satisfies the important principles of one man, one vote and is consistent with the requirements of the Voting Rights Act. No other plan has a lower deviation and splits fewer counties than the court created plan."

Looking at Table 6.2 shows how this LFC-made 1992 Congressional plan of South Carolina compares to the overall LFC averages and to the court opinion's stated objectives. The quantitative measurements show that the court was accurate in its assessment of population variance and protection of political subdivisions. Both are quite low and not far from the LFC average.

	Political		Political/Partisan			Traditional				Clear Precedent	
	Competitive Seats n=378	Incumbency n=378	EG n=283	PB n=283	MM n=283	PP Mean n=311	Core n=224	County Split n=218	City Split n=218	Racial (n=359)	Population Variance
1992 LFC-Drawn Congressional Map of SC	0.1667	.667	n/a	n/a	n/a	0.156	0.724	.094	.0214	0.543	0
Federal Courts n=56	.293	.780	.011	-.009	.0024	.293	.764	.0303	.0070	.515	.031

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The score results for this Congressional plan however show that the court created a map that was closer to proportional representation than the court stated in its opinion. Making one majority-minority district in the small state's six-seat Congressional delegation created a statewide plan with a 1:2 proportion between seat share and population percentage for Black residents in the state. Due to the court's stated opposition to proportional racial representation, such as that shown in the Republican submitted plan, it is likely that this ratio is unintentional and more likely the result of trying to avoid violations of VRA Section 2 and 5. This is close to the LFC-wide average for this racial proportionality score.

Additionally, comparing the quantitative results and the court opinions statements, we see that the criteria not mentioned by the court are close to LFC-wide averages, with few competitive seats, many protected incumbents and average retained district cores. The South Carolina map has less compact districts than the LFC average and splits more political boundaries. However, none of these scores are particularly far from the LFC averages or outside of the general findings of Chapter 5.

Despite some deviations from the average LFC-made map, viewing all of the data together shows that the federal court that drew the six district South Carolina Congressional plan was accurate in its statements about the emphasis on population and race as the most important criteria. As the empirical results back up, this 1992 plan fits both the general trend of LFC favored criteria and the stated criteria of the court opinion, with perfect population equality among districts and race-conscious districting.

6.3 Case #3 - Balderas v Texas 2001 - TEXAS - 2002

In 2001, a lower federal court drew the Congressional districts for Texas that would be used in the 2002 midterm elections. Like Wisconsin in 1982 and South Carolina in 1992, the federal court was deferential to the state de jure redistricting institutions at first prior to taking action and drawing the new redistricting plan. The LFC considered a variety of factors when drawing the remedial plan. Also, like the two previous examples, Texas has had a number of redistricting maps created by federal courts including the post-1980 and post-2010 redistricting maps.

Despite these similarities, Texas in 2001 differs from the previous examples in a few key ways. First, Texas is a much larger and more populous state than Wisconsin or South Carolina, with a large Congressional delegation. *Balderas v Texas*[478] only focuses on Congressional redistricting. Texas also has many more cities and a more diverse population than Wisconsin or South Carolina, including large populations of Black,

[478] Balderas v. Texas, (E.D. Tex.) 2001 – Not to be confused with the similarly named case related to state house and senate districts

Hispanic and White voters. Additionally, *Balderas v Texas* was not the end but the beginning of redistricting fights in Texas in the 2000s. While this case and this federal court made the map used for the 2002 midterms, it was the subsequent legislative redistricting that occurred later in the decade, after the typical redistricting cycle that grabbed national attention. Cases like *LULAC v Perry*, for example, brought issues of partisan gerrymandering, racial gerrymandering and mid-decade redistricting to the front of the redistricting consciousness in the mid-aughts. While these cases are important, and were considered in Chapter 3's discussion of federal court decisions and precedents, this section will focus on *Balderas v Texas* because this case led to the court adopting its own map for a large, diverse and powerful state.

Balderas v Texas starts the same way as the previous two examples and hits many of the same rhythms, aligning closely with the timeline description of court-made plans in Chapter 4: First the census data is released and shows population changes, then suits are filed, then the federal court is deferential to the state, then the three-judge federal court creates a plan when it decides there is no other legal remedy ahead of the election. The only difference with *Balderas v Texas* is that the timeline is accelerated, with the challenges and cases beginning in early 2001 and the decision in late 2001. The previous examples and typical procedure occur months later in their respective redistricting cycle.

Balderas v Texas starts in December of 2000, when three lawsuits challenged Congressional redistricting in Texas[479]. That same month, on December 28th, the 2000 Census results were released and they showed that Texas had more than 20 million residents, including a population that was 11% Black and 32% Hispanic[480]. The state's

[479] "History," accessed March 26, 2022, https://redistricting.capitol.texas.gov/history.
[480]See: https://www.census.gov/prod/2002pubs/c2kprof00-tx.pdf

population grew by more than 22% from the 1990 Census, adding nearly 4 million new residents, the second largest population growth in that time period after California[481]. Texas would gain two seats in the House due to its population growth for the 2002 elections.

The late-2000 lawsuits challenging the apportionment of Texas' Congressional district included a variety of voters and office holders, and were filed in both state and federal court. The legislature had the opportunity to redistrict the Congressional districts with the new census data in early 2001, but adjourned on May 28, 2001 without any plans passed and the governor did not exercise his power to call a special session[482].

On July 23, the federal court in *Balderas v Texas* was deferential to the state, giving time for a new plan to emerge by October 1, 2001 and setting the trial date on October 15 if there was no adequate Congressional plan. At the same time, the state court was moving forward with its suits in Travis County district court. The state district court started its trial on September 17, 2001 and concluded on the 28th. The state court asked the federal court to extend its October 1 deadline, which it did and the state court adopted a new redistricting plan for Texas' Congressional districts on October 3. On October 10, the state court issued another new plan, which the federal court notes was not part of its schedule or plans. Due to this second new state court plan and at the request of the parties, the federal court delayed the start of its trial to October 22. On October 19, the Texas Supreme Court intervened and vacated the state court plans, saying that they were violative of the state constitution and inappropriate for the state court to use as a baseline,

[481]See: https://www.census.gov/prod/2001pubs/c2kbr01-2.pdf
[482] "History," accessed March 26, 2022, https://redistricting.capitol.texas.gov/history.

effectively ending the state courts' role and handling the issue to the federal courts[483]. The federal court began its trial of the consolidated cases known as *Balderas v Texas* on October 22, without the use of the state's map as a "baseline."

The facts of this case again highlight how the federal courts are deferential to the state prior to creating a remedial redistricting plan. In this example, all of the courts are first deferential to the legislature and governor, allowing for the de jure redistricting institutions to create their own plans, despite the suits being filed so much earlier. Then, the federal court was deferential to the state courts, including moving its own schedule twice to accommodate the state courts. Ultimately, the federal courts acted when the state's three branches failed to come up with an adequate redistricting map.

The three-judge court, composed of U.S. Fifth Circuit Court of Appeals Judge Patrick Higginbotham, Federal District Court Judge John Hannah and Federal District Court Judge T. John Ward, heard the case between October 22 and November 2, 2001, with the final decision on November 14, 2001.

The court heard plans from multiple parties, but decided to follow its own procedure for drawing its redistricting maps. The court considered the Voting Rights Act, traditional, political and partisan criteria when drawing the map. They also considered population equality, but did not write about it to the extent of the other opinions, spending more time on creating a "neutral" map that considered incumbency and partisan balance, issues that became the frontier of redistricting in the federal courts during the

[483] "Based on a violation of the parties' state constitutional rights and remanded the case to the state trial court. The Texas Supreme Court also concluded that 1065C, the first plan of the state trial court, was not the baseline plan for this court to use, because 1065C was never adopted as a final judgment by the state trial court. The Texas Supreme Court acknowledged that the end result of the state processes left the federal courts with no choice but to proceed without the benefit of a state plan." Balderas v Texas

2000s and 2010s. The court first explained its process in detail, explaining that courts should start with a blank state map as opposed to the previous map, which would now be unconstitutional. It then explained the criteria it would use and in what order. The court wrote,

> Federal courts have a limited role in crafting a Congressional redistricting plan where the State has failed to implement a plan. The limits are not to be found in the traces of the unconstitutional plan being replaced...Our decisional process accepted the reality that, as with so many decisional processes, the sequence of decisions is critical. Starting with a blank map of Texas, we first drew in the existing Voting-Rights-Act-protected majority-minority districts. We were persuaded that the next step had to be to locate Districts 31 and 32, the two new Congressional seats allotted to Texas following the 2000 census...the most natural and neutral locator is to place them where the population growth that produced the new additional districts has occurred… With a large part of the Texas map thus drawn, we looked to general historic locations of districts in the state, such as the districts in the Panhandle and the northeast corner of the state, the north central districts of the Red River area, through the metropolitan districts and the central plains. We then drew in the remaining districts throughout the state, emphasizing compactness, while observing the contiguity requirement. We struggled to follow local political boundaries that historically have defined communities--county and city lines...As we have explained, in our efforts to avoid splitting counties and cities, and in particular "double splits," or simultaneously moving populations in and out of a county between two districts, we also strove for compactness and contiguity.

By explaining its procedure and order of operations, the federal court explains its hierarchy of criteria in *Balderas v Texas.*

This section of the court opinion does not discuss population equality as a criterion, but it is a clear presupposition of the court. Elsewhere, the court wrote that the "mandate of population equality under the principle of one-man, one-vote" is superior to other criteria, such as the preservation of county boundaries. This illustrates that

population equality is at the top of this three-judge court's hierarchy of criteria as well. Perhaps, population equality is viewed by this three-judge court as such a clear requirement and necessary criteria so as not to discuss it in detail.

Next, the court values meeting the nonretrogression qualities of the VRA, not reducing the number of districts or voting power controlled by minority populations. The court explains that it drew majority-minority districts when required by law, but did not go beyond that mandate to create the types of districts that a state may. This LFC explained that its plan complies with Section 2 and Section 5 of the VRA, although some districts have smaller, but still large minority populations. There were competing visions by plaintiffs for influence, "opportunity" or majority-minority districts based on those advocating for Hispanic or Black districts during the trial.

Then, adding new districts in high growth areas. Then, using the traditional criteria of maintaining existing districts, here called historical, as well as compactness and contiguity for each district. The protection of political subdivisions sits below these traditional criteria in importance. Again, population equality is not mentioned, but it can be assumed that it is a prerequisite of each district for this federal court.

While the explanation of the hierarchy is illuminating for the larger project of understanding how exactly the federal courts draw the maps that they do, it is another section of the *Balderas v Texas* opinion that diverges from the 1982 and 1992 examples and the Chapter 5 findings that is fascinating. In *Balderas v Texas,* the federal court also goes to lengths to ensure that this map is nonpartisan and neutral, while also not harming incumbents. The federal court views its role as protective of the incumbents in both parties when making this map, and wants to ensure it is not a partisan gerrymander.

These concerns are nonpartisan, but not apolitical. It clearly shows that the three-judge court in *Balderas v Texas* had political concerns as map makers, the strongest of which was to appear neutral. As discussed in Chapter 2, this speaks to the importance of legitimacy in the federal courts, especially when this apolitical institution is tasked with such a political job. The court explained its political considerations, writing

> As a check against the outcome of our neutral principles, we asked if the resulting plan was avoidably detrimental to Members of Congress of either party holding unique, major leadership posts. We looked at three Democrats and three Republicans, consensus members of this limited group, each with substantial leadership positions in the Congress. It was plain that these Members were not harmed in their reelection prospects by this plan and that, indeed, no incumbent was paired with another incumbent or significantly harmed by the plan. We thus considered no change in our map in response to this inquiry. Doubtlessly some may see any such weighting as an incumbency factor since Congressional leadership so directly correlates with seniority. This view is not without force. Nonetheless, three circumstances must also be considered. First, this correlation is no longer so complete. Second, it does not here offer purchase to one political party over another. And, finally, it reflects a traditional state interest in the power of its Congressional delegation distinct from partisan affiliation. Finally, we checked our plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in Congressional races. This is a traditional last check upon the rationality of any Congressional redistricting plan, widely relied-upon by political scientists to test plans, if only in an approximating manner. We found that the plan is likely to produce a Congressional delegation roughly proportional to the party voting breakdown across the state. It must be understood that any plan necessarily begins with a Democratic bias due to the preservation of protected majority-minority districts, all of which contain a high percentage of Democratic voters.

This excerpt shows that the court is conscious of how using political criteria could be perceived, and even more conscious of perception itself. The court stresses fairness

and neutrality in its defense, saying that it is not favoring one party over another and is more generally serving the interests of the state of Texas by not changing who its most powerful members are in Congress. However, the court also gives this potential criticism some credence.

The court also explains that it considered partisan measurements to test for bias. The excerpt here explains that its map is roughly proportional for vote share and seat share and that there will be some Democratic bias due to VRA considerations. However, the fact that this is in the opinion is even more important. The court took the time to use social science metrics to prove that the map would not have substantial partisan bias. This underscores again the importance that the court itself puts on the appearance of being nonpartisan, neutral, unbiased and fair. This again speaks to the importance of legitimacy in the federal courts and how the role of redistricting puts the federal courts in the difficult position of creating maps for partisan elections while expecting complete fairness and neutrality from the courts. The court directly wrote, "Finally, to state directly what is implicit in all that we have said: political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a Congressional redistricting map."

Using the quantitative analysis from Chapter 5, we can compare the stated goals of redistricting from the court's opinion in *Balderas v Texas* with the actual metrics of the map that was created and the average LFC-made map. Looking at Table 6.3, this comparison shows that the three-judge panel had a good understanding of the criteria they were using and how it would translate into the map.

	Political		Political/Partisan			Traditional				Clear Precedent	
	Competitive Seats n=378	Incumbency n=378	EG n=283	PB n=283	MM n=283	PP Mean n=311	Core n=224	County Split n=218	City Split n=218	Racial (n=359)	Population Variance
2002 LFC-Drawn Congressional Map of TX	.25	.875	.112	.041	.062	.249	.813	.0074	.0054	.502	0
Federal Courts n=56	.293	.780	.011	-.009	.0024	.293	.764	.0303	.0070	.515	.031

17 - Table 6.3 – Case Study #3

Looking first at the political criteria, the Texas plan has a slightly lower percentage of competitive seats where someone won with fewer than 60% of the vote, and a higher rate of incumbency winners than the LFC average. This corresponds to the statements that the LFC made in *Balderas v Texas* about how it was conscious of incumbency in its districting when possible. The court created a map where 87% of seats were won by incumbents. The court stated that the purpose of considering incumbents of both parties was in the interest of the state, and defended its practice as neutral and fair, and these quantitative metrics show that is what was achieved.

The partisan symmetry measurements of the Efficiency Gap, Partisan Bias Test and Mean-Median Test all show bias toward Democrats. This is more biased than the LFC average, but corresponds to the court's own opinion in *Balderas v Texas.* The court explained that it used tests very similar to these itself to ensure partisan symmetry, however there was some inevitable Democratic bias due to the VRA compliance leading to minority opportunity or majority districts combined with the voting habits of minority voters in Texas at the time. The data bears out the court's statements.

Looking at the traditional criteria measurements, the court also followed through on its stated goals. The higher-than-average core retention measurement speaks to the stated goal of the court to follow "historical" districts after considering the two new districts and the VRA districts. Additionally, the metrics show a plan that has a low number of county and city lines that were crossed with a compactness score near the LFC average. This compactness score is not particularly high however, which shows that this was not one of the most favored criteria, while the other traditional measures appear to have been.

The racial proportionality measurement and population variance score are near the LFC average and fit the court opinion. The court created a plan with the zero-population variance preferred in Congressional districting plans, showing that although rarely mentioned in the opinion, this is clearly a presupposition for any court-made plan. It is likely that by 2001, when this case was decided, the novelty needed for explaining population equality seen in the 1982 and 1992 cases ceased, as there was no longer even the need for discussion of the difference between state and Congressional districts. Those precedents were decades old and this case dealt with only one district type. The racial proportionality score shows a 1:2 ration between the number of majority-minority districts created by the court and the total minority population in the state. Although the court said plainly that it would not necessarily maximize the number of majority minority districts in the same way that a legislature might, it's non retrogression compliance under Section 5 of the VRA clearly led to substantial descriptive representation. Additionally, this quantitative measurement of racial proportionality, does not count districts where the combined population of Hispanic and Black voters compose more than 50% of the voters,

which the court does discuss in its opinion. However, this also assumes cohesive voting patterns.

The stated criteria that were favored by the LFC align closely with the average LFC-made plan and show that the court was accurate in its assessment of itself. The biggest difference between this court-made plan and the South Carolina and Wisconsin cases was the emphasis on political and partisan concerns by the judges themselves. This opinion highlighted the court's desire for fair and neutral criteria. Not only does this support the theory of LFCs as institutions constrained by precedent and legitimacy during redistricting, but it also emphasizes the importance of political and partisan gerrymandering criteria at this point in time. As shown in Chapter 3, *Balderas v Texas* takes place after the major malapportionment and racial gerrymandering cases and during the key partisan gerrymandering cases. This example shows how the lower courts are aware of the broader themes in law occurring throughout the federal court system and which areas of law are likely headed to the Supreme Court.

6.4 Case #4 - Favors v Cuomo - NEW YORK - 2012

Whereas Wisconsin, Texas and South Carolina are good cases for examining court-made redistricting plans because they are modal and provide a variety of types of redistricting maps over time, New York has not had many federal court-made maps. Many of the early New York redistricting cases were related to apportionment and local governments, such as in the New York City Borough system. However, in 2012, the

federal court drew the Congressional redistricting map for the state of New York. The "overview" of the court-made plan summarizes the details in this case and tells a familiar story of inaction, reluctant judicial map-making and the consideration of redistricting criteria. The summary for *Favors v Cuomo*[484] reads,

> In the face of an outdated Congressional districting plan, the application of which would plainly have violated requirements of federal law, and of the New York legislature's complete abdication of its Congressional redistricting duty, the court was obliged not only to recognize a violation of law but also to create a new redistricting plan. One of the controlling principles was the "one person, one vote" principle mandated by U.S. Const. art. I, § 2. Further, the plan had to adhere to constitutional prohibition against both intentional and excessive uses of race or ethnicity in redistricting.

As the summary shows, *Favors v Cuomo* hits all of the familiar beats of federal court redistricting. The suit is brought on by state government inaction or gridlock. The old plan has now been rendered unconstitutional by population changes in the past decade that have been made official by the census. New York also lost two seats in the 2010 redistricting cycle. The court is reluctant to act, but is forced by other institutions' actions (New York legislature's "abdication") to create a legal plan. Then the court decides how to draw its map, with population equality and One Person, One Vote as the key criteria and race as a secondary but important criterion.

The biggest way that *Favors v Cuomo* diverges from the other examples used in this chapter is that the three-judge court is not who actually makes the map that is eventually adopted. Instead, the three-judge court appointed magistrate judge Roanne Mann to prepare a report for the court with a new redistricting plan. Magistrate Judge

[484] *Favors v. Cuomo*, 11-CV-5632 (DLI)(RR)(GEL) (E.D.N.Y. Aug. 10, 2012)

Mann worked with redistricting expert and law professor Nate Persily to prepare the Congressional plan, which was then adopted by the three-judge court in *Favors v Cuomo*.

The use of Persily and Mann is not uncommon with federal court map making. As explained in Chapter 4, federal courts may use magistrate judges or special masters to do the work of actually creating a redistricting plan. These people may be active or retired judges, and may work with or be redistricting experts. They can prepare the redistricting plan according to specific or general instructions from the three-judge courts. The special master or magistrate judge plan will then be presented for ultimate approval or amendment by the three-judge federal court before this remedial plan will go into full effect.

This last step is important, because it ultimately keeps the authority and responsibility for the redistricting plan with the three-judge federal court. Although the special master or magistrate may do the hard work of drawing the lines and carving out district lines, the court is the arbiter and adopter, and ultimately the map maker. Although these special master or magistrate recommendations are typically adopted, the three-judge court in *Favors v Cuomo* is clear that it will review this plan with fresh eyes and give it a fair assessment as it has with any other plans submitted to the court. The court wrote, "This court is nevertheless required to review the Recommended Plan de novo and to decide for itself what redistricting plan is necessary to ensure compliance with controlling law." The court's concern for fairness, neutrality and legitimacy in redistricting are again made clear by this statement.

The court's opinion in *Favors v Cuomo* adopts the plan prepared by Mann and Persily, but it also takes the time to explain the hierarchy of criteria that the court's use

when fashioning a redistricting plan. The three-judge court lays out three tiers of redistricting criteria that have been used in the magistrate judge report and are adopted by this court in its remedial plan. The first tier is population equality, the second tier is race and the third tier is traditional criteria. This explicit hierarchy of federal court-made plans bolsters the analysis in each other case study and the results of Chapter 5.

The court in *Favors v Cuomo* wrote that "At the first tier of redistricting analysis, the controlling principle is constitutional and mandatory: Article I, Section 2 requires that Congressional election districts conform to the principle of "one person, one vote." For this 2012 plan, Persily and Mann followed the strict Congressional standard of as mathematically exact as possible population equality and allowed only deviation of a single person from the target population of 717,707 for each of New York's 27 Congressional districts.

The second tier of redistricting, the court explains in *Favors v Cuomo*, is that of racial factors. Although numbering this tier as secondary, the court clarifies that it is of "equal importance to the first." First and foremost, this means that the new redistricting plan cannot have the purpose of discrimination based on race, following the long line of precedents going back to *Gomillion* and *Mobile v Bolden*. The Mann and Persily plan are also cognizant of the Section 2 of the 1982 amended VRA prohibiting discrimination from racial vote dilution, and the Section 5 prohibition of retrogression. Further, this "tier" of criteria requires that race also not be used as the "predominant " factor in district construction, following the *Miller* and *Shaw* standards from the 1990s.

The discussion of this second tier of racial criteria and standards by the court in Favors v Cuomo, highlights several developments in federal court map making by 2012.

First, race is both a secondary and primary factor in districting for the federal courts. This reads like oxymoronic legalese, but it holds up under data analysis and scrutiny of the maps created. Population equality is the clearest standard and the first considered by the federal courts as a prerequisite for any districting, but the consideration of race is next and equally important factor. There are an infinite number of ways to draw equal population districts. Therefore, racial factors help give the map shape, while population equality will not be violated.

Second, this brief discussion of racial factors that the federal courts value and follow in redistricting shows the complicated and complex legacy of common law jurisprudence and lawmaking over the course of more than 50 years. The Mann and Persily plan and the three-judge court considers race simultaneously by the standards of the 1960 *Gomillion v Lightfoot* precedent prohibiting discriminatory intent, the 1965 VRA Section 5 prohibition on redistricting retrogression, the 1982 VRA Amendments to Section 2 focusing on discriminatory effect via dilution, and the 1990 Shaw standard against using race as the predominant factor for creating a maximum number of majority-minority districts. This is a convoluted set of somewhat conflicting criteria grouped together as a second and primary tier of redistricting criteria for federal judges to use when making a new map. Based on the other cases in this chapter, and the data analysis in Chapter 5, it is clear that the federal courts do effectively emphasize race as criteria in the maps that they create and do so to a larger degree than other redistricting institutions.

The third tier of criteria outlined by the three-judge court in Favors v Cuomo is the traditional criteria. These are the "traditional principles that generally inform legislative redistricting" and are only considered by the court "to the extent possible"

rather than as necessary conditions for a legal plan, like population equality and race. This case dealt with six explicit traditional criteria: compactness, contiguity, protection of political subdivisions, preservation of communities of interest, maintenance of district cores and consideration of incumbents. The Mann and Persily plan gave priority to the three criteria protected in New York law - compactness, contiguity and preservation of political subdivisions - achieving contiguity of districts and a better protection of borders than other submitted plans (43 counties and 897 towns preserved).

The court explains that the three remaining traditional criteria - preservation of communities of interest, maintenance of district cores and consideration of incumbents - are less fit for judicial consideration and ripe for political disagreement. The court explained that it considered these criteria but to a lesser degree than legislatures would, with the overall goal of neutrality and an apolitical map. Further, these traditional criteria in total are only used by the court's discretion and are subordinate to the first two tiers. The court wrote,

> like the magistrate judge, this court has made every effort also to consider the range of traditional redistricting factors, but it has done so cautiously, mindful of its obvious inability to acquire the sort of comprehensive insights that allow a legislature to balance the competing political concerns implicated in preserving various communities of interest, maintaining the cores of existing districts, and protecting incumbents...even if a court were generally inclined to accord significant weight to factors such as compactness or respect for political subdivisions, it might sometimes have to subordinate those factors to satisfy the population requirement of "one person, one vote," or to avoid proscribed minority voter dilution or retrogression.

Additionally, the court was explicit that the Mann and Persily plan did not consider incumbency in drawing its new plan. Both the three-judge court and the magistrate plan gave this criterion "no weight." The court defended this feature of the plan and all of the

"weights" given to each traditional criteria with a call for aggrieved parties to lobby the state legislature to draw its own constitutional plan as a remedy.

Despite this call for redistricting from the legislature, the three-judge court in Favors v Cuomo actually did hear from a number of objectors to this plan, including the senate majority, intervenors from Brooklyn, a Dominican American group and an orthodox Jewish group. The three-judge court did end up making four changes to the Mann and Persily map, including moving some blocks in Brooklyn from one district to another for population equality.

The court's opinion concluded with another statement of the "unwelcome obligation" of federal court legislative redistricting. The court wrote,

> In prior redistricting challenges, New York has avoided such a wholesale transfer of state legislative power to the federal courts through last-minute enactments of new redistricting plans. In this case, however, New York has been willing to let even the last minute pass and to abdicate the whole of its redistricting power to a reluctant federal court. Confronted with this unwelcome failure of state government, and consistent with its obligations under federal law, the court hereby... ADOPTS the March 12, 2012 Report of Magistrate Judge Mann in its entirety and the Recommended Plan referenced in the Report with the changes indicated in note 5 of this opinion and reflected in the attached Ordered Plan.

	Political		Political/Partisan			Traditional				Clear Precedent	
	Competitive Seats n=378	Incumbency n=378	EG n=283	PB n=283	MM n=283	PP Mean n=311	Core n=224	County Split n=218	City Split n=218	Racial (n=359)	Population Variance
2012 LFC-Drawn Congressional Map of NY	.407	.814	-.005	-.013	.027	.322	.651	.0328	.0018	0.221	0
Federal Courts n=56	.293	.780	.011	-.009	.0024	.293	.764	.0303	.0070	.515	.031

18 - Table 6.4 – Case Study #4

As Table 6.4 shows, the quantitative measurements of the LFC-drawn 2012 New York Congressional plan that was created in *Favors v Cuomo* generally complies with the stated criteria in the court opinion, with the racial metric requiring extra attention.

The court opinion stated population equality as the clear first tier of federal court redistricting and complies with the score of 0 variation. This is below the overall LFC average, which does include state legislatures as well.

The second tier of criteria were the racial considerations found in precedential, constitutional and statutory law. The racial metric here shows that the 2012 New York Congressional plan has a roughly 1 to 5 ratio of majority-minority districts in the state in relation to the percentage of combined Black and Hispanic residents in the state. Two of the 27 Congressional districts, or about 7%, are either Black or Hispanic majority-minority districts compared to a combined state population of 33% of Black and Hispanic New Yorkers. This is lower than the average LFC-made map which features a 1:2 ratio, and a score of racial proportionality in districting much higher than most other

redistricting institutions. As Chapter 5 explains, this is also the criteria that LFCs have the largest substantial effect on.

The lower-than-LFC-average score in *Favors v Cuomo* does however fit within the court's statement of criteria in the opinion. That three-judge panel explained that it would avoid discriminatory intent, vote dilution and retrogression, but that it would not use race as a predominant factor in the creation of majority-minority districts. This score on the racial metric shows that the court may have done exactly what it said. Although the statewide plan features few majority-minority districts, it may still feature districts where minorities combine to form majorities for influence or opportunity districts.

The third tier of traditional criteria that the court stated it considered but not strictly largely fits the LFC averages when making redistricting plans. The court in this plan had districts that were more compact than the LFC average, with general protection of cores and a low number of split political boundaries. While the court did say that it did not consider incumbency, it did have the effect of protecting a high number of incumbents, more than 80% of whom won reelection. This is higher than the LFC average. Taking the court and magistrate court's statements at face value, the incumbency protection could be due to efforts to protect district cores or communities of interest. Or, it is possible the courts put more consideration into incumbency protection than alluded to. Further, the quantitative measurements show that the LFC created a slightly more competitive map than the LFC average, where more than 40% of districts had elections where the winner received fewer than 60% of the vote.

There was no discussion of partisan criteria in the court opinion. The quantitative measurements here show that the court-made plan has very small partisan biases, in line with the LFC averages.

6.5 Hierarchy of Criteria and Conclusions

These four cases, from four states, spanning four decades, illustrate both the variety of specific details that LFCs have to account for when crafting individual remedial plans, but also highlight the commonalities among cases over time, space and subject area that define the least political branch's involvement in the most political activity.

The cases are not selected completely at random, in fact the very presence of a LFC in a redistricting controversy means that that case is not completely random. Instead, these cases were selected to be representative of LFC-made plans between *Baker* and *Rucho.* These cases were selected to add context to the large-scale data sets and analyses in Chapters 4 and 5 - to show how and why specific courts, in specific places and years, with specific facts, drew the lines for districts the ways that they did, and how closely their reasoning matched the quantitative data for LFCs and for the maps themselves[485].

First, these four cases solidify the accuracy of the process of judicial map making shown in Chapter 4. The federal courts follow a predictable pattern from the timing of challenges after Census data arrives to the establishment of the three-judge panels, to the

[485] The results from these four cases highlight a few findings and strengthen the results of the analyses in Chapters 4 and 5.

decision by the court to adopt its own map in light of the approaching primary elections in the year ending in "2". This pattern was shown in each case, although the Texas map was adopted earlier.

Second, and related to the process, these cases highlighted how deferential the courts are to the states and de jure redistricting institutions and how reluctant the federal courts are to act, until time is pressing. Three of the cases quoted 1977's *Connor v Finch*, calling this duty of map making an "unwelcome obligation." Each court opinion repeatedly stated its reluctance to create a redistricting plan and how it was being forced into this role by other actors and institutions who failed at their duties.

Third, these cases cement a clear hierarchy of redistricting criteria that are considered by the courts (Table 6.5).

Hierarchy	**LFC-Favored Criteria**	**Details**
Tier 1A	Population Criteria	Population equality to higher standard than other institutions
Tier 1B	Racial Criteria - Not Violating the Voting Rights Act	Nonretrogression and nondiscriminatory
Tier 2	Racial Criteria - Other	Racial Proportionality, majority-minority districting
Tier 3	Traditional Criteria	Compactness, Protection of Political Subdivisions, Contiguity, etc
Tier 4	Political Criteria	Incumbency, Competitiveness
Tier 5	Partisan Criteria	Partisan Outcomes, Partisan Bias, Partisan Symmetry, etc

19 - Table 6.5 – Hierarchy of Criteria in LFC-Made Maps

Each opinion articulated its reasoning and criteria for making the map it did. The first tier of redistricting criteria for the federal courts is population equality. These criteria would be expected based on the previous analysis and Supreme Court standards, but these cases emphasized again how closely the courts want to get to perfect equality of population and how the courts hold themselves to a higher standard than they hold the other redistricting institutions. For example, in the 1992 South Carolina state legislative districts, the federal court acknowledges that there is an effective *de minimis* deviation allowed for state legislative districts by Supreme Court standards in distinction from the absolute equality of Congressional plans. However, the court still decides to hold itself to a higher standard and effect limit of 2% deviation.

The second criteria are the racial considerations in line with law and precedent. While What is interesting about viewing these case opinions is that the judges draw a distinction between racially conscious redistricting. On one hand, some race conscious districting - specifically avoiding violations of the Voting Rights Act - is held to the highest tier of criteria, alongside only population equality. On the other hand, the court opinions show other racial considerations such as the creation of racial proportionality and majority-minority districts outside of VRA compliance is a lower tier of criteria to be used by the LFCs when redistricting. The quantitative results for the plans created by the LFCs show that this stated sub-hierarchy either consciously or unconsciously leads to the high level of racial proportionality among LFC-made maps that is far above any other institutions. To a certain extent, the LFCs are clear in their opinions that they consider race substantially in crafting a remedial map, but their assessment of the federal courts' favoritism toward racial proportion representation may be a blind spot.

The third tier of this hierarchy are traditional criteria (compactness, contiguity, preservation of subdivisions, maintenance of previous district cores and protection of communities of interest), fourth are political criteria, mainly incumbency protection, and fifth would be partisan criteria. Both political and partisan criteria were treated critically and defensively by the courts, if discussed at all. The consistency of this hierarchy is all the more interesting in light of the shifting precedents related to the criteria seen through change over time. This is particularly clear in relation to race. These results fit with broadly with Chapter 5 findings and Chapter 2's hypotheses

Fourth, because each opinion explained the criteria it favored in the plan's creation, I was able to compare the quantitative metrics for the criteria of each plan used in Chapter 5 to the stated criteria in the opinions. The results based on these four cases were that the court opinions are generally accurate. Although the courts are not necessarily using the same metrics when they redistrict, their cognizance of criteria translates into the quantitative measurements of the effects of these maps for each criterion. Each of the four cases generally corresponds to the findings of chapter 5 as well.

The courts were accurate in understanding their effect and emphasis on population and compactness as criteria in particular as well as their lack of impact on political criteria such as competitiveness and incumbency advantage. However, the understanding of their effect on race and party are less clear. On one hand, the court opinions emphasized that race was a critical factor to consider in terms of avoiding Voting Rights Act violations, so judges were using race as a criteria and were aware of it. However, some opinions stated opposition to using race to achieve a racial

proportionality scheme. While LFC-made plans did not do this, the quantitative results of chapter 5 show that LFCs had a greater effect on proportionality than any other institutions. This may be due exclusively to the VRA concerns, but there is a narrow area of disagreement on race between the empirical results and the court opinions as reflected in Tier 1B and Tier 2.

Additionally, the court opinions did not express any acknowledgement of partisan bias. Although the measured bias of the three-judge panels was small and far below that seen in legislatures, it is shown as an aspect of the Chapter 5 results.

Fifth, the court opinions' emphasis on their reluctance to act, on the need for a new map, on the types and hierarchy of redistricting criteria, and the accuracy of these statements when compared to quantitative metrics show that these federal three-judge courts are completely focused on being and appearing fair, neutral, unbiased, apolitical and nonpartisan. The emphasis on these factors gives credence to the factors discussed in Chapter 2 that are due to the unique roles of the federal courts in the American political system. The focus on neutrality and fairness, and of reluctance and responsibility highlights the importance of legitimacy for LFCs. The court opinions are defenses of the decisions made by the courts first to make a redistricting plan at all. And then of its decisions on where to draw the lines.

7.0 CONCLUSIONS ON REPRESENTATION

In the 57 years between the Supreme Court's decision in *Baker v Carr* and its decision in 2019's *Rucho v Common Cause*, the federal courts regularly drew the legislative district lines used in American elections. *Baker* did not just thrust the Court into the political thicket in 1962, but it put the entirety of the "least dangerous branch" at the forefront of the most political process decade after decade. The emergency, de facto novelty power of court-made redistricting plans has become a consistent feature of the decennial redistricting cycle.

Although the consequences of the *Baker* decision and the involvement of the Supreme Court in redistricting, reapportionment and gerrymandering have received substantial scholarly attention in political science scholarship and law journals since the 1960s, there has been no systematic examination of what these decisions meant for the lower federal courts, the maps that they have had to create and the people who live under these new court-drawn plans. These are the questions that this project has sought to address - to fill a substantial void in the scholarship by comprehensively answering some of the most important questions at the intersection of politics and law: *How, when and why do the federal courts make a redistricting plan? What are the criteria that lower federal courts favor when making a redistricting map? How do these criteria compare to the criteria favored by other redistricting institutions, such as commissions and legislatures? And, how do the biases of federal court drawn maps affect representation in a state for citizens and constituents?*

This project has taken a multiple methodological approach seeking a comprehensive analysis of federal court involvement in redistricting between 1962 and 2019, paying special attention to the role of the lower federal courts as map makers. Chapter 2 introduced a wholly new model for studying the lower federal courts, emphasizing institutional constraints that affect court behavior. This theory is built on scholarship of the federal courts as well as judicial behavior. It is a contribution that can assist in the general study of the lower federal courts as well as useful for developing comprehensive hypotheses for this project.

Chapter 3 presented an original analysis of the Supreme Court cases related to redistricting using an American Political Development approach. This analysis highlighted the development of judicial manageable standards at the high court for three subject areas of redistricting: malapportionment, racial gerrymandering and partisan gerrymandering. The results of this chapter allow for an understanding of the standards and precedent that most constrain and shape lower federal court decision making for redistricting, both when to draw a map and how to draw the district lines. This analysis also contributes tools for historical analysis of LFC map making by illustrating the multiple orders of judicially manageable standards that affect LFC decision making on redistricting in a given year - 1982 and 1984 racial gerrymandering cases would be decided differently.

Chapter 4 presented a large, original dataset of LFC cases related to redistricting between 1962 and 2019 with statistical and content analyses. This chapter not only presents previously unknown findings about the federal courts, redistricting and LFC action on redistricting, but it also presents a new approach for studying the federal courts.

Chapter 4 uses the massive dataset to highlight several important insights about LFC action on redistricting. First, it shows the typical procedure for redistricting cases at the federal level, where the courts are deferential to state institutions until forced to act. Second, it lays out several interesting trends in caseload over time, including the growth in racial gerrymandering cases in the 1980s and substantial number of local cases decided over time that are often ignored with scholarship focused on the Supreme Court. Third, the analyses show a two-way responsive relationship between LFC caseload and Supreme Court decisions for a given subject area, such as malapportionment. And fourth, the analyses reveal not only a typical flow of decision making at the LFCs but also a typical timeline for federal court action in redistricting cycles, with court-made maps most likely in the Spring of a year ending in "2" before the primary elections.

Chapter 5 is the heart of the dissertation project and focuses specifically on federal court-made redistricting plans. This chapter uses extensive quantitative analysis to answer the questions - *What are the criteria that lower federal courts favor when making a redistricting map? How do these criteria compare to the criteria favored by other redistricting institutions, such as commissions and legislatures?* Harnessing an additional large and original dataset of more than 600 redistricting plans made over five redistricting cycles (1972-2012), Chapter 5 shows how the federal courts favor different criteria when they make redistricting plans compared to other institutions, like legislatures and commissions. Specifically, LFCs make maps that have more population equality, more racial proportionality of districts to population, more compact districts and slight partisan bias toward the majority party of the judges on the three-judge panel. LFCs do not have a

substantial effect on making districts that are competitive and do not have partisan biases approaching those of legislatures.

Chapter 6 presents a short case study of four states over four decades, looking at how the LFC court opinions reflect the findings of chapter 4 and 5. This content analysis shows that judges are generally accurate in their assessment of the criteria they favor, and the empirical results of Chapter 5 match closely with the stated criteria of the court opinions. The case studies also reveal a hierarchy of criteria in how the LFCs draw maps and how it changes over time as judges are acutely aware of the controversial conversations in redistricting at the time. Further, these cases reveal how LFCs make maps with different favored criteria than other institutions, but that individual cases include variations that reflect the realities and specifics of the individual cases - these are the consistent variables that LFCs will always deal with. In sum, this analysis shows that LFCs hold themselves to a different standard on population and race than they hold other institutions, and judges are consciously constrained by stare decisis and legitimacy norms.

These five sections work together to explain federal court action on redistricting between *Baker* and *Rucho.* The multi-method analyses of Chapters 4, 5 and 6 explain when LFCs draw maps, what criteria they favor and how that differs from other institutions - the *what,* the *how,* the *where* and the *when.* The theory and analysis of Chapters 2 and 3 work with these chapters to help explain *why* the federal courts work this way, emphasizing the importance of legitimacy and Supreme Court precedents.

What remains is to see how these choices and biases could impact democratic representation in the US and what that could ultimately mean for the role of the courts

and the average voter in the US System. *How do the biases of federal court drawn maps affect representation in a state for citizens and constituents?*

This conclusion explores these remaining questions, reflecting on the practical implications for everything covered in this project, and presenting a path forward for future research on this important area of law and politics.

Competing Criteria and Representation

One reason that the involvement of the federal courts in legislative redistricting raises immediate questions is that it presents a clear tension between the institution, its purpose, its powers and the task that it is being asked to undertake. Redistricting of state or federal legislative districts places the least democratic branch at the heart of the most political activity because it is dividing up voters and constituents, impacting candidates, representatives and representation.

The federal courts are institutions designed for dispute resolution using the highest level of the triadic structure - a highly formal contestation with an array of legal norms and laws from statute, precedent and constitutional law[486]. As public law scholars have discussed in detail[487], there was a shift that took place in the federal courts during the mid-20th century. In public law litigation, the federal courts transitioned from the traditional role of retrospective dispute resolution of established facts with a clear ending of the case when the remedy is imposed to a more participatory and active role for the courts with on-going litigation. In his well-known examination of the "morphology of

[486] Shapiro, *Courts*
[487] Horowitz, *The Courts and Social Policy,* and Chayes, Abram. "The role of the judge in public law litigation."

public law litigation", Abram Chayes explains that this shift is characterized by 8 qualities[488], including the shift from exogenously determined case scope to court and party-shaped scope; "sprawling and amorphous" instead of bilateral party structure; and, importantly, the the courts are not passive governors of the proceedings, but active in "organizing and shaping the litigation to ensure a just and viable outcome." The intervention of the federal courts in redistricting and reapportionment in the 1960s is an excellent example of this change in public law litigation, in both timing and fact.

These previous scholars focused not only on what defined this shift in public law litigation but also how it fits the skills, roles, responsibilities, powers and constraints of the courts and judges. However, these similar questions can be taken one step further with the specific subject area of redistricting and reapportionment. Instead of asking if the federal courts are well- or ill-suited to the new, active role of extensive fact-finding, case-shaping and on-going public remedy management, the question for this project is about these changes have impacted the representation of people living in the districts the court created through these new powers. Much in the same way that the important second-order question in the 1970s court-ordered bussing was not about how well the judges crafted the bussing order in Boston or Charlotte, but ultimately about how those orders impacted

[488] Chayes, Abram. "The role of the judge in public law litigation "(I) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties. (2) The party structure is not rigidly bilateral but sprawling and amorphous. (3) The fact inquiry is not historical and adjudicative but predictive and legislative. (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees. (5) The remedy is not imposed but negotiated. (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court. (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and
viable outcome. (8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

the students and their educations. The question here is *how has the criteria used by the federal courts when they instituted plans impacted the democratic representation of the people living under their plans for the last 57 years?*

We know what kind of redistricting maps federal courts draw and what criteria they favor in the abstract and in relation to other institutions. We know why they favor these specific criteria and why they ignore others. We know how they redistrict. We know when they redistrict. What remains to be done is to connect these findings to concepts of representation to understand why it all matters to the individual voter, the individual homeowner, the constituents and the candidates.

As discussed in the introduction, this project builds on political scientist Bruce Cain's work on redistricting in *The Reapportionment Puzzle*. The book examined the procedures of redistricting, especially the importance of the choices made about redistricting criteria. Cain argued that when criteria are chosen, they necessarily conflict with other potential criteria that could have been chosen. He explained how favoring certain criteria when creating a redistricting plan, such as population equality, would require subordinating other criteria, like maintaining county lines, in a way that could render that goal achievable. Not all criteria cancel out all other criteria. Some can be harmonious. But all compete for preeminence in some way. These are the unavoidable conflicts in redistricting that make it political activity. Cain's insights about competing criteria drive the analysis in Chapter 5 of LFCs' chosen criteria and how it is distinct from other redistricting institutions.

Cain's theoretical framework on competitive criteria as well as his specific insights as to how each criterion interacts with each other redistricting criterion is useful

when applied to the findings of this project. Cain's analysis helps explain how the favored criteria of the federal courts over 57 years conflicts with other potential criteria and therefore shaped representation into its own separate form than that created by other redistricting institutions.

Cain's theoretical framework explains that equal population - the LFCs Tier 1A criteria - subordinates criteria for preserving communities of interest and political subdivisions and can potentially conflict with competitive seat criteria depending on how much control the redistricting institution has to move large parts of the population - courts do, but they often have not. Cain also explains that the emphasis of equal district population can impact minority political power as well depending on the size of the population. If the minority population is numerous enough, they can have power within a district and there is no conflict in criteria. However, if the minority is not compact and numerous, then the equal population requirement for every district could result in effective dilution of minority political power[489].

Cain's examination of competing criteria has shed light on how minority political power - similar to the LFC's Tier 1B or 2 criteria - can easily conflict with other criteria, such as the protection of political subdivisions and competitive seats, as quoted before. But, while minority political power as a criterion may conflict with the protection of political subdivisions or preserving communities of interest, this is not necessarily the case if the minority population is numerous and compact - this could allow for these competing criteria to coexist. This is particularly interesting for LFC map-making, because the federal courts are guided by precedents from the *Shaw* line of cases that

[489] Cain, *Reapportionment Puzzle,* 70

minority-majority districting should only occur when populations are both compact and numerousness enough i.e. the federal courts should not allow all positive racial gerrymandering.

The *Reapportionment Puzzle* excludes compactness from its list of competing criteria in this discussion as an "aesthetic" criterion, but Cain builds on this framework with David Butler in 1992's *Congressional Redistricting*[490]. Although this book explicitly deals with Congressional redistricting, the framework is similarly applicable to state redistricting.

In *Congressional Redistricting*, Cain and Butler show compactness to not have as many conflicts as other criteria. For example, they explain how equal population and compactness generally do not conflict, although they may result in more jagged edges than one may have without the other[491]. This is particularly useful in the consideration of LFCs as mapmakers because as the analyses of Chapter 5 and 6 show, the courts favor compactness, when possible, subordinated only to equal population and race, where Cain and Butler also do not see a necessary conflict[492]. Therefore, even in the framework of conflicting criteria outlined by Cain in the two publications, the top three criteria that define LFC-made redistricting plan can co-exist together, even if not fully complementary. This harmony of criteria is a logical extension of Cain's discussions of competing and conflicting criteria.

In addition to compactness, Cain and Butler include a consideration of partisan fairness. The authors conclude that partisan fairness can conflict with the criteria of equal

[490] Cain and Butler, *Congressional Redistricting*
[491] Cain and Butler 83-85
[492] Cain and Butler 83

population by excluding certain options for party vote weighting and can compete with racial criteria[493] by possibly countering the effect, as has been discussed regarding majority-minority districts and the inherent partisan packing of one minority group that votes reliably for the same party.

Cain's discussions of the competing and conflicting criteria involved in redistricting, and how this makes the process political is useful for this project's understanding of the role of the federal courts as redistricters. By choosing criteria, they are making political choices, about what to favor and what to subordinate. The inherent conflicts among certain criteria make the decisions all the more impactful.

Cain's insights about the competing criteria in redistricting is helpful for thinking about how the criteria LFCs have favored come together to form a unique type of map, separate and apart from other institutions. However, these conflicting or harmonious criteria do not themselves express a concept of representation. Instead, we can build on these insights to see how the criteria favored and disfavored by LFCs ultimately impacts the type of representation experienced by those in the new redistricting plans.

Hanna Pitkin's influential 1967 book *The Concept of Representation* opens with a nod to *Baker v Carr*[494]. She writes that the 1962 landmark case shows the contemporary popularity and importance of representation and the differences between competing views of representation and their legitimacy.[495] Her book's project is to define the

[493] Here "ethnic fairness"
[494] Rush, Mark E. Voting Rights and Redistricting in the United States. Westport, Conn: Greenwood Press, 1998.; Mark Rush notes that every discussion of representation and redistricting starts with a discussion of Pitkin
[495]Pitkin, Hanna Fenichel. The Concept of Representation. Berkeley: University of California Press, 1967, 2.

modern and often-amorphous concept of "representation," which she stated has had "surprisingly little discussion or analysis of its meaning."[496]

Pitkin also does not create a clear or simple definition of representation, but instead defines the concept in a comprehensive typology of four parts of representation: formalistic, descriptive, symbolic and substantive. She explained that representation itself is "a rather complicated, convoluted, three–dimensional structure in the middle of a dark enclosure" and that most philosophers and thinkers write of only "flash-bulb photographs of the structure taken from different angles."[497] The foundational and linguistic basis of representation is the repetition of a presentation i.e. to make present again[498]. Each of the four types continue this idea in various forms to create the "structure."

Often when representation is discussed in relation to redistricting the ultimate emphasis is on the representative and concepts related to functional representation such as responsiveness and accountability.[499] Discussions over *gerrymandering* and representation is often focused on the question of who is being represented, how is representation being limited in terms of race or party and who should be a legitimate majority in a space[500]. The emphasis is on how well the representative represents the views of the constituency on policy matters, whether constituents can respond to their representatives with re-election or defeat, voice or exit[501]. However, this project is not concerned directly with these questions of how well the eventual winner of the legislative seat with representative the policy ideal points of the constituents themselves, but rather

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[496] Pitkin *The Concept of Representation,* 3-4 "Perhaps it is one of those fundamental ideas so much taken for granted that they themselves escape close scrutiny; or perhaps its complexity has discouraged analysis."
[497] Pitkin, 10
[498] Pitkin, 8
[499] Brunell, *Redistricting and Representation,* 18-19
[500] Rush, *Voting Rights,* 13
[501] Brunell, *Redistricting and Representation,* 28

how the districts that the federal courts have created, and which criteria they favored in the map making process, will impact the types of representation that the constituents and voters will be able to experience in this new map. This, should in turn, have an impact on the actual principal-agent relationship between voter and representative, on accountability and responsiveness.

Pitkin describes four types or facets of representation: formalistic, symbolic, descriptive and substantive. Formalistic representation includes the composite parts of authorization and accountability and is chiefly concerned with the institutional arrangements that create representation[502]. Redistricting is a part of the formalistic representation model insofar as it is part of the broader institutions that allow for representative democracy in the U.S., providing districts for voters to elect resident representatives. However, this formation of representation is not directly applicable to the discussion over the types of representation that LFCs create when they draw a map. The other three formations are.

Symbolic representation, as Pitkin describes, refers to when a representative stands in for something that the constituents want represented and is successful when accepted as a symbol of the constituents.

Descriptive representation, as is commonly used now, describes a representative who resembles the constituency in some important way. This type of representation has been used extensively in political science for discussing representatives elected from districts where they share a racial, ethnic, religious or sexual orientation background with

[502] Pitkin *The Concept of Representation*

the constituents. This type of representation fits firmly within the broader discussions at the intersection of identity politics and representation.

Finally, Pitkin describes substantive representation. With substantive representation, the representative acts in the interests of the constituency, achieving or pursuing the policy preferences of the voters even if he or she does not resemble or symbolize the constituents in a different way.

Pitkin's discussion has been enormously influential for both the understanding of representation in politics as well as representation in redistricting. The contemporary scholarship on representation has gone beyond Pitkin's work and has questioned aspects of the principal-agent relationship, representation by non-governmental bodies and the historical lack of representation among American minorities[503]. However, the simple and foundational nature of Pitkin's work makes it useful for this project and its initial attempt to understand representation in LFC-made maps.[504]

7.1 What Does this All Mean for Representation in American Democracy

To better understand the type of representation created by LFC-made redistricting plans, and how residents under these plans would be affected, I combine the concepts of Cain with those from Pitkin. Together these ideas help us decode the findings from Chapters 5 and 6 and consider them in terms of *representation* rather than *criteria*.

[503] See Chapter 5 for a larger discussion

[504] As noted earlier, however, this discussion does not hinge on the same normative questions often asked about the intersection of redistricting and representation such as Who should be represented? How are these representatives responsive to the voters and constituents? Who is deprived of representation? What is fair representation?

Because the federal courts do draw redistricting plans that are used in elections at least once a decade, these decisions that they have made about which criteria to favor in a given plan really matter for the representation of the people in the state. The decision of where to draw lines decides who will vote where, with whom and for whom. Each of these criteria is linked to an underlying notion of representation. The criteria that the federal courts and the other redistricting institutions use and favor in their redistricting plans, determines the notions of representation that they are favoring as well, and therefore the type of representation that the residents of the plan will experience.

As shown in the data analysis, and largely explained in the institutional theory and hypotheses, the LFC-drawn maps favor four categories of criteria, while disfavoring two others. LFC-drawn maps favor (1) strict population equality of districts, (2) proportional minority representation through minority-majority districts, (3) general compactness of districts and (4) some partisan bias toward the majority party of the three-judge panel. LFC-drawn maps do not favor the criteria of competitive elections, incumbency protection and the other traditional redistricting criteria, above the average of all redistricting institutions.

These four criteria categories that LFCs favor correspond to different understandings of representation. Each individual criteria within categories measures a different understanding of representation itself.

	LFC-made Plans	Butler and Cain Criteria Conflicts	Pitkin Representation Type
Equal population (T1)	Favored as Tier 1a Criteria; Substantive effect	- Complicates and subordinates all other criteria	Symbolic Representation of Equality
Race-Based Majority Minority Proportionality (T2)	Favored as Tier 1b and 2 Criteria; Substantive effect	- Complicates and subordinates party and political criteria; Tension with Traditional criteria i.e compactness	Descriptive Representation of Race
Compactness (T3&4)	Favored as Tier 3 Criteria; Substantive effect	- Compatible with equal population; tension with race; Can, but not necessary, to conflict with protection of subdivisions, party and political criteria	Symbolic representation of place by closeness
Protection of Political Subdivisions (T5&6)	Average	- Conflicts with and is subordinated by equal population and compactness; often compatible with race; tension with party and political criteria	Symbolic and substantive representation of place by town, city, county, community
Competitiveness (T9&10)	Not favored by LFCS	- Conflicts with minority voting power and partisan bias	
Partisan Fairness (T11, 12&13)	Slight bias when accounting for partisan appointment of 3-Judge panel	- Conflicts directly with competitiveness and race; tension with compactness and equal population	Descriptive Representation of Party; Substantive representation

20 - Table 7.1 – Redistricting Criteria and Representation

The favoritism toward equal population districts achieves an understanding of representation based on absolute equality of representation irrespective of place, partisanship or property. As is well-established in legal opinions and law opinions, this is the aim of the One Person, One Vote principle and has been more successfully and

consistently implemented by the federal courts than any other redistricting institution. If this were the only criteria favored by LFC map makers, it may come closest to the elusive neutral criteria constantly sought by judges and legal advocates. It treats all residents of a redistricting plan with simple equality of representation without regard to any characteristic or quality. It may, but does not necessarily, achieve equal voting power. Districts are based on equality of population, not citizens, registered voters or voting age population. This criterion favors an absolute and simple representation of inhabitation, but noting voting power.

Second, the favoritism of the creation of majority-minority districts in proportion to the state's racial population leads to a representation of proportional descriptive representation based on racial group. By favoring this criterion and maximizing the number of majority-minority districts, LFCs favor an idea of racial representation in Congress or the state legislature over representations of place, interest or party. Favoring majority-minority districts plays into the debate over the efficacy of these districts as a form of representation as discussed previously[505]. In some ways, it is logical and in-line with the hypothesis that LFCs would follow a descriptive, maximalist understanding of racial proportionality in majority-minority districts, because to favor substantive, influence districts would also mean de facto partisan favoritism and risk legitimacy. Favoring descriptive and racially proportional representation via majority-minority districts reflects the development of federal law and jurisprudence since the 1960s, most clearly outlined in the 1982 Amendments to the Voting Rights Act.

[505] See: Chapter 5

Third, by favoring compactness of districts, LFCs favor a representation of place defined by closeness. Whether the use of compactness as favored criteria comes from a simplicity of cartography or a fear of the appearance of gerrymandering districts, the result is that people are grouped by their most geographically adjacent neighbors in terms of representation and voting. This is a different understanding of representation of place than is seen in the preference for city or county government representation in the protection of political subdivisions or the continuity of a district over time seen in the preservation of district cores, both not substantially favored by the LFCs. Compactness requires a simple understanding of representation outside of local governments and geography that makes logical sense for travel. Compactness is not facially partisan or political, but it does group people by neighborhood and region in ways that likely have these effects.

The partisan criteria include different understandings of representation themselves. The Partisan Bias test measures the idea of electoral equality under the plan, presupposing a notion of representation of partisan fairness at the polls, where a voter's input for either party will yield an equal outcome for either party across the state. The Efficiency Gap measures a wholly different idea of representation. The Efficiency Gap measures a hyper-proportional partisan representation, of roughly 2:1, where one's votes yields proportional seats for one's party. The Mean-Median test measures the electoral skew in a plan and presupposes an understanding of consistency in partisan electoral fairness among all of the districts.

All three of these measurements include two other characteristics. First, the simple but important idea that people are represented first and foremost by party. And

second, that representation should be considered at the state or plan level versus the individual district level. These ideas are quite divergent from traditional criteria, which considers individuals without characteristics and at the district level.

By favoring all three of these partisan criteria for the majority party of the LFC judge panel, LFCs create maps that have at least some conception of representation based on party, electoral partisan fairness, vote-seat proportionality and consistency of partisan elections.

Baker v Carr thrust the federal courts into the realm of politics and previously exclusive state matters by declaring that reapportionment challenges were now justiciable. But the more important step was the one that received less attention. It was not that this case made malapportionment something that could be brought before the courts, it was that this led to the federal courts themselves becoming redistricting institutions. Once the Supreme Court decided to take on these cases, eventually the hands of the lower federal courts would be forced to act when no other party would, to fashion their own remedy without clear instructions or motivations.

As we have seen throughout this analysis, the federal courts have created the maps for dozens of states over five decades of redistricting cycles, fashioning districts and plans that do not violate federal law. The federal courts do not create maps that promote competition or partisan symmetry to the same extent as reformers want or some commissions achieve. They do not protect incumbents or have the partisan biases of legislature-made maps. They achieve population equality first and foremost. They achieve a specific understanding of racial proportional representation steeped in the

complicated precedents of the Supreme Court. They care about compactness and contiguity. They also try to limit creating weird shapes, splitting political subdivision lines and changing old districts. They want to act only when necessary. They are concerned with neutrality, fairness, bias and legitimacy. But the decisions they make are undeniably political.

Taking all four of these favored criteria categories together, we see LFC-made redistricting plans create a distinct understanding of representation by favoring some criteria and ignoring others. LFCs create a notion of representation that favors certain racial and partisan identities while tempered by representation of absolute residential equality and compact representation of place. People in LFC-made plans are represented equally as residents, they are identified by race and by party, vote with and for their neighbors. People are not represented by town or county. They are not represented by equality of voters or citizens or voting age people. They are not represented by religion or ethnicity or age or sex or other demographics or identities. They are not as represented by party as in legislature-made maps or as represented by competitive elections as commissions or state courts. People are not represented by property, wealth or material interest. People are not represented by ideology or community of interest.

Federal courts create a different form of representation than other redistricting institutions. They represent population equally, race descriptively, space proximity, and party slightly and silently. They determine who votes, where, with whom and for whom. People living under federal court-drawn maps can guarantee that they have an equal weight as a constituent in their district as any other person in any other district in the state. Minority voters are likely to have majority voting power about half the time if they

are numerous and compact enough of a population. Voters can count on voting with the people who live near them regardless of town or county boundaries. If you're a voter who shares a party identification with the majority of the three-judge panel your party may have a slight advantage in the next election. This is the representation and representative democracy that the LFCs promote.

7.2 What Does This All Mean for Federal Courts in U.S. Society

In Article III of the Constitution, the role of the lower federal courts is vaguely defined and destined to be determined by Congress later. "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," the Constitution reads.

But looking at this project as a whole and reading these findings together, with representation in mind, it is clear that the federal courts by taking on redistricting as a justiciable issue which in turn led to lower federal court-made maps as equitable remedies have shaped representation for dozens of states over the decades, creating maps that favor criteria different than those made by other institutions and therefore creating representation distinct from other institutions.

This is substantially different from what was expected by the federal courts at the beginning of the U.S. and raises normative questions about the role of the U.S. courts as redistricting institutions.

On one hand, these analyses show that the LFCs do a better job of promoting equality of representation and descriptive racial representation than any other institutions.

They are least likely of all institutions to create egregious racial or partisan gerrymanders. They may favor more conservative changes to existing plans and do not seek overly competitive or partisan symmetrical maps called for by reformers, but they also do not seek to promote substantial levels of incumbency protection or partisan advantage. The procedural tools that the courts use of state deference, action only when necessary and outside help such as special masters to help with the data-heavy and map-specific tasks that courts are not institutionally well suited to, may only further show that the courts have done an admirable job with this unique role over the years.

On the other hand, as Cain explains, and as the qualitative analysis of court opinions shows, this is a political task, filled with political decisions, that determines how Americans are represented in Congress and at the state level. It is definitionally a political project and should not be done by an apolitical body like the courts. At best, LFC-made maps remove the democratic powers from the political institutions of legislatures and constitutions that voters have determined to be the de jure redistricters. At worst, this duty plunges the federal courts so deep into the "political thicket" that it harms the concept of legitimacy that empowers the weakest branch to function in the eyes of public opinion.

In a separated powers system like the U.S., the judicial power should be held separate from the legislative power except where there are checks and balances. This is an example of a check and balance in the U.S. system that is not outlined in the Constitution and not referenced in Federalist 51. The judicial branch is not only exercising a non-judicial power by drawing the redistricting maps at the state and federal

levels, but it is shaping the legislature itself by drawing the district lines and determining who votes, for whom and where.

Considering these two ideas together, it seems that the threats that redistricting by LFCs present to the voters and constituents are less than those presented to the courts themselves. Equality, promotion of minority voting power, compact districts are popular ideas even if specific mechanisms like majority-minority districts are not necessarily. Instead, the biggest threat is that to the federal courts, with the potential for a loss of legitimacy and power, the fear of a partisan judiciary. However, as was shown in the qualitative analyses of court cases in Chapter 4 and court opinions in Chapter 6, the LFCs are well aware of this threat. The consistent deference and hesitance to act seems to be an important quality in maintaining the legitimacy of LFC redistricting and the threat of overstepping the bounds of the system. Further, the desire for dispute resolution as a key structural feature for the court may also limit the potential threat for "legislating from the bench" as their goal is to get a map into place for the election rather than to create ideal representational structure.

In short, the LFCs appear able to do anything they want to in terms of redistricting. They are bound by the legitimacy norms for the public on one end and the threat of being overruled on the other. Perhaps neither threat is enough to stave off the worst concerns of redistricting. But, in practice, both - or an abundance of caution - appear to do more than enough to result in a redistricting institution that creates consistent maps and representation based on equal population, racial proportionality and compactness, without any realized fear of a politicized, partisan judiciary.

It may be useful to think of the federal judiciary's role in redistricting as part of the larger entrance of the federal government into the affairs of U.S. states during the 20th Century, especially regarding voting rights. By taking on a prominent role in redistricting since *Baker,* LFCs represent the equalizing middle ground of federal government involvement between the positives of state discretion and flexibility in an idealized dual federalism and the extreme discrimination and inequality of the Jim Crow South. This the tripart arrangement is analogous to the rule of law. A regime built on the rule of law system is better than that of a tyrant, because it avoids the worst abuses of self-interest and corruption, applies equal protections to individuals, and establishes consistency. But rule of law systems can be worse than that of a hypothetical philosopher king who is just, flexible, and promotes the common good. LFCs represent the rule of law system. It does not provide the flexibility that a state legislature may desire in drawing district lines to account for every parochial interest or concern, but it also is effective in preventing the worst excesses of malapportionment and racial discrimination.

7.3 Going Forward

This dissertation project is about how the federal courts *have* affected redistricting and representation since they entered the arena in 1962 with *Baker v Carr*. The project ends in 2019 when the Supreme Court shut the door of justiciability slightly, declaring partisan gerrymandering claims nonjusticiable. Malapportionment claims and racial gerrymandering claims are still justiciable concerns for the federal courts in redistricting. However, the 2013 *Shelby County v Holder,* which occurred after the 2010 redistricting

cycle here examined, effectively eliminated the preclearance provision of Section 5 by voiding the preclearance formula. Section 5 of the Voting Rights Act was a critical avenue for many of these cases to come before the court, both when the courts had the initial institution draw a new plan, when the courts adopted a plan submitted by an outside party or when the court stepped in and drew it themselves. Congress has not created a new formula for Section 5 and it is effectively dead as an avenue for challenging redistricting maps under the VRA.

Section 2 remains as an avenue for pursuing race-based redistricting claims in the federal courts. However, it remains to be seen what the effect of the 2021 decision of *Brnovich v. Democratic National Committee* will have on the courts. As discussed in Chapter 3, the federal courts chose to not strike down a redistricting map in the early 1980s in *Bolden v City of Mobile* because there was no evidence of an intent for racial vote dilution despite the effect. The Congress responded with the 1982 VRA amendments that then led to the line of cases that allowed challenges to redistricting plans based on vote dilution effects under Section 2. The 2021 *Brnovich v. Democratic National Committee* has the potential to return jurisprudence to the *Bolden* standard of requiring intent to prove Section 2 violations. Additionally, viewing these potential changes together with the nonjusticiability of partisan claims could create substantial hurdles to bring challenges to gerrymanders that have an effect of diluting minority voting as well as Democratic voting power.

In addition to these changes to partisan gerrymandering and race-based federal claims, the ideological composition and partisan appointment of judges to the courts is constantly changing. This project's quantitative analysis showed that the number of

appointment partisanship of the majority of the three-judge panel matters for the partisan bias of the map created, although at a low level and to a lesser extent than with legislatures. However, as appointments to the federal judiciary have become more partisan, and if judges are more polarized in their ideology, it is possible that these effects may be amplified. This is a good area for additional research.

Irrespective of any additional research, these results show that the appointment of judges matters to the maps that are created. Therefore, the number and ideology of judges that a president appoints matters to the maps that are created and therefore American representative government. In his one term as president, Donald Trump appointed 28% of all federal court judges, including 174 district court judges and 54 appeals court judges. In his eight years as president, Barack Obama appointed 38% of the active federal judges, including 268 district level judges and 55 appeals court judges. These numbers help add context to who is on the bench now and who is likely to be drawing the maps in 2022. The large number and percentage of Trump appointees in the past few years may have a sizable partisan impact on the biases of LFC-made maps.[506]

All of these changes come together for the 2020 redistricting cycle, where every state will redraw their district lines, reapportion seats, and many will face federal lawsuits. If the 2020 redistricting cycle is like every other decade since 1970, there will be three-judge panels drawing the plans for dozens of state's legislative districts ahead of the 2022 elections. This project provides helpful information on what people can expect from the 2022 LFC-made maps.

[506]See: https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/

Future work can look at these 2022 maps and see how they compare to the findings in this project. Do they differ due to one of these changes for partisan gerrymandering, the VRA or judicial ideology? Is there a current threat to judicial legitimacy that affects when and how federal judges create maps?

Further research could continue in a number of directions, using this project's approaches, datasets and methods. Or it could build upon and further the results, developing a more comprehensive connection between criteria and representation for example. There is ample room for more incisive research looking at LFC map making in depth for specific states, federal court circuits or years. There are many local districting schemes not fully explored in this analysis that were shaped and developed by the federal courts in the 1970s and 1980s that require greater research. Minority representation of Native American populations was a frequent issue in redistricting in the West, which brought federal court intervention and needs more scholarly insight. The role of other types of districting, including single-purpose government boundaries or state judicial districts, has ample room for greater exploration.

What is clear is that once *Baker* opened the door to justiciability, it opened the door to federal court redistricting and it looks unlikely to ever be able to be closed. As long as the apolitical federal courts are actively making the maps and the political decisions on districting criteria that determine democratic representation across the U.S., it will be important to continue to research how, when, why and what the federal courts are drawing. And it looks unlikely that the federal courts will stop any time soon.