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Gerrymandering Revisited—Searching for a Standard

Theodore R. Boehm*

I. DISTRICTING IN A NUTSHELL

History is replete with examples of legislative districts created to assure the election or defeat of specific candidates or to preserve the domination of a majority party. By the time John Kennedy sought the Presidency in 1960, perpetuation of incumbent interests had taken the form of inaction as well as affirmative jiggering of district lines. Many states had not redistricted for decades despite massive shifts in concentrations of population, generally from small towns and rural areas to cities and their suburbs. In the most egregious example of malapportionment, Dallas' Congressional district cast five times the votes of smallest Texas district.¹ The 1960 election in Indiana was conducted using maps that had been created in 1921. Only half as many people voted in the largely rural Ninth District as did in Marion County, which included the pre-UniGov city of Indianapolis and was a single congressional district.²

Until the 1960s, the federal courts had heeded Justice Frankfurter's caution against venturing into the "political thicket" and declared these practices, however objectionable, beyond judicial scrutiny.³ But in 1962 the Supreme Court opened the courthouse door to constitutional challenges to congressional districts.⁴ A nationwide frenzy of districting litigation ensued. Within two years, *Wesberry v. Sanders*⁵ imposed rough equivalence of district population in congressional races, and *Reynolds v. Sims*⁶ did the same for elections of both houses of state legislatures.

Equal population requirements proved to impose no restraint on the ability of legislators to keep a heavy thumb on the scale in their own elections. Manipulation of legislative districts for the benefit of a favored party or individual candidate is nothing new. But modern technology has substantially facilitated a temporary majority's ability to perpetuate its dominance of a legislative body. This art has now advanced to the point that the legislators in dozens of states can join the North Carolina state senator who famously observed in 1998: "We are in the business of rigging elections."⁷

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1 Benjamin J. Gunthrie, CLERK OF THE HOUSE OF REPRESENTATIVE, *Statistics of the Presidential and Congressional Election of November 8, 1960* 44 (1961), http://clerk.house.gov/member_info/electioninfo/1960election.pdf.

2 *Id.*

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

4 *Baker v. Carr*, 369 U.S. 186, 237 (1962).

5 376 U.S. 1, 7–8 (1964).

6 377 U.S. 533, 568 (1964).

7 *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) (quoting a North Carolina state senator).

Chief Justice Earl Warren considered the redistricting cases the most important of his time leading the Supreme Court because the effects of reshaped federal and state legislatures reverberated across every aspect of American life.⁸ We are potentially on the cusp of an equally significant ruling that gerrymanders violate the Federal Constitution.

II. GERRYMANDERS: A PROBLEM WITH MANY DIMENSIONS

There are many reasons to adjust district lines to achieve some electoral result. For purposes of this discussion, a gerrymander is an attempt to assure a political party's domination of a legislative chamber by creating as many districts as possible that are likely or certainly safe for the party. This means creating a majority of districts at least fifty-five percent favorable to the party and concentrating or "packing" the opposition's voters into a minority of districts.⁹

Voter confusion. Complaints about gerrymandering, including those from some courts, take a variety of forms. Early attacks, including the *Boston Globe's*, which coined the term "Gerry-mander" in 1812, focus on "traditional" districting principles that essentially turn on the appearance of the district on the map.¹⁰ Even today, Justice John Paul Stevens advocates a federal constitutional amendment to constrain mapmakers by requiring districts to be compact and contiguous and to justify any deviation by adherence to existing political boundaries, such as county and municipal borders.¹¹ There is merit in requiring district lines to follow boundaries that define units of municipal government. Districts that follow no pattern and have irregular shapes conforming to no widely understood demarcations are confusing and make it difficult for voters to identify their representative. But with today's very sophisticated software and the ability to manipulate precinct level voting data, the constraints of compactness, contiguity, and adherence to other boundaries are not sufficient to prevent an effective gerrymander. And voter confusion is only one of the many reasons why gerrymanders are undesirable.

Conflict of interest. A more fundamental problem with a gerrymander is that it is a law passed by vote of the majority party and opposed by the minority members. Virtually all of the approving legislators have a blatant conflict of interest. Of course, many laws are voted upon by legislators with some self-interest at stake, and legislators are generally free to vote for legislation that may benefit them individually—for example, by favoring an industry in which they have an interest. Particularly in states with part-time legislatures, this practice is considered the necessary cost of a democratic form of government. In the case of most legislation, the judgment of disinterested legislators is considered a sufficient restraint on abuse of

8 Ed Cray, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 437 (1997).

9 See *infra* note 35.

10 See Christopher Klein, 'A New Species of Monster', BOS. GLOBE (Sept. 10, 2011), <https://www.bostonglobe.com/ideas/2011/09/10/new-species-monster/TRpFHqNSEeLV2OGIU1HyI/story.html>.

11 See JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION HARDCOVER (2014).

principle. But a gerrymander is qualitatively different from most other legislation. The majority-party legislators who support a gerrymander are precisely the favored few the law benefits. By perpetuating their majority party domination, it assures many of the majority a shot at a committee chair, and gives most of them a friendly district for reelection. In that respect, those few citizens, and only they, are the direct beneficiaries of the law they are imposing on all others.

Unrepresentative legislative bodies. A third obvious issue raised by a gerrymander is it unfairly skews election results as between the parties. The Supreme Court has repeatedly found no constitutional right to proportional representation—that is, elected representatives need not be in proportion to the votes cast for their respective candidates across the state.¹² But a map that purposely packs voters of one party into a minority of districts is as pernicious in effect as patently unlawful practices such as intimidation of minority party voters at the polls or creating districts of substantially unequal population. In that sense a gerrymander is unfair to the minority party. But apart from any unfairness to a political group, a gerrymander produces a legislature that is not representative of the general voter population. Successful candidates in primary elections are predominantly those who appeal to their party's most enthusiastic supporters who tend to positions many regard as extreme. The general election in most districts of a gerrymandered map merely ratifies the election of the winners of the majority party primary, resulting in a legislature that underrepresents the views of moderates and centrists.

Polarized legislative bodies. Fourth, a gerrymander produces a legislature composed of mostly safe districts for one party or the other. In those districts the primary election becomes the only significant event, and the successful candidate is one who runs to the center of his party's voters. The result is a legislature with few centrists and with few who need to appeal to a broad range of constituents. Many argue that this in turn contributes to polarization and gridlock.¹³ Regardless of the validity of that charge, at a minimum the legislature does not reflect the attitudes of the electorate as a whole by, in effect, underrepresenting the vast political center.

Disenfranchised Independents and minority party adherents. Fifth, gerrymanders in many states, including Indiana, effectively disenfranchise Independents and third party candidates in most districts. By creating large numbers of districts as nearly impregnable fortresses of one of the two major parties, a gerrymander reduces the general election to a pro forma ratification of the primary. The result is that Independents and third party adherents in those safe districts have no meaningful role in the selection of the legislature. The extent of that consequence may depend on state laws and to some extent the voting practices of the state. Some

12 See e.g. *Vieth*, 541 U.S. at 267; see also ANTHONY J. MCGANN ET. AL., *GERRYMANDERING IN AMERICA* (2004).

13 For a discussion of this debate, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011); But see Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009).

states have “open” primaries and experience significant crossover voting in the primary elections. Others, including Indiana, have some deterrent to adherents of a different party, or even genuinely undecided voters, participating in a party’s primary election.¹⁴ Even if there is no consequence to voting other than as permitted by statute, a voter’s choice of party in the primary is a matter of public record, and that alone undoubtedly deters many who do not want to appear to affiliate with a party that is not of their choice. The constitutional right of free association includes the right not to associate, and those who do not wish to identify themselves as Republican or Democrat have a right to do that.

Voter alienation. Sixth, gerrymanders discourage all voters from participation in the election. The extent to which gerrymanders contribute to voter apathy and distrust of government is for others to analyze. But the contribution of gerrymanders to the health of the body politic can’t be positive. Because the result in the general election is preordained by each district’s majority party primary, supporters of the district’s minority party have less incentive to bother to vote, and less interest in the strengths and weaknesses of the candidates. Gerrymanders produce a number of uncontested legislative races across the state. Reduced voter turnout is less felt in presidential years but nonetheless significant. To compound this problem, the spectacle of legislators choosing their voters rather than voters choosing their representatives only fosters cynical disrespect for the process.

In sum, a gerrymander produces a number of destructive and anti-democratic consequences, but it serves only the private interests of the dominant political party and, more specifically, its legislators.

III. GERRYMANDERS IN THE SUPREME COURT

In a few states voters have taken these problems in their own hands and wrested the process from the legislature’s grasp, enacting a bipartisan approach to districting by direct voter initiative. But in the many states without voter initiatives and in those whose state constitution expressly vests districting power in the legislature, there is little evidence that the state legislatures will adopt any meaningful reform of state legislative districts. And because the state legislatures draw the Congressional maps, without reform of the state process, we can expect minimal progress in Congressional districting.¹⁵ When control of the General Assembly was divided, the two parties confirmed skepticism of legislative relief as to Indiana’s state maps. The majority in each house drew a map to its liking for itself

14 In Indiana, any voter in the precinct may challenge an attempt to vote in a party’s primary. IND. CODE ANN. § 3-10-1-6 (LexisNexis 2011) provides that a voter is “eligible” to vote in the primary if the voter voted in the last general for a majority of the party’s candidates, or did not vote in the last general, but intends to vote for a majority of that party’s candidates in the upcoming general election. How this works in practice is not clear, and may vary across the state. In fact it seems clear that in some recent elections there was some crossover voting without any consequence to the voters who crossed party lines.

15 Indiana has a form of bipartisan districting for congressional elections if the legislature fails to agree on congressional districts. This was put in place in 1988 when the two major parties each controlled one house of the state legislature and a deadlock in passage of a congressional map was foreseeable. It has never been used. IND. CODE ANN. § 3-3-2-2 (LexisNexis 2011).

and approved the other house's self-drawn plan. The result was a decade-long bipartisan gerrymander favoring Democrats in the House and Republicans in the Senate.

As explained in Part II, federal constitutional precedent offers some hope of judicial cabinining of gerrymanders. And state legislatures create both their own and congressional maps, but they more directly labor under a conflict of interest in drawing their own districts. The odds seem good that reform of state legislatures will lead to fair congressional districting. All of the foregoing leads to the conclusion that a federal constitutional challenge to gerrymandering of state legislatures offers the most likely prospect of assuring that we have functioning state and federal legislative branches that are broadly representative of the electorate and not only the zealous adherents of the two major parties.

Redistricting cases are heard by three-judge courts and appeals go directly to the Supreme Court. Beginning in the 1980s and recurring sporadically since, challenges to the constitutionality of gerrymandering have been raised, but as of this writing none have been ultimately successful.¹⁶ Few would dispute the importance of the questions whether a court can strike down a legislative map that meets the population equality test and does not violate the Voting Rights Act, as well as what a successful plaintiff must show to achieve that result. Some likely critical issues, notably partisan intent to disadvantage a voting group, are essentially factual, so a successful trial court ruling will be a leg up; but the courts have yet to establish an attainable legal standard a plaintiff must meet. Nonetheless, it seems obvious that any attempt to analyze the prospects of a successful challenge must start and end with the Supreme Court of the United States.

*Davis v. Bandemer (1986)*¹⁷ The first pure gerrymandering case to reach the Supreme Court came from Indiana. In *Davis v. Bandemer*, the three-judge trial court, by 2-1 decision, had agreed with the plaintiffs that the redistricting plan enacted after the 1980 census violated the Equal Protection Clause of the Fourteenth Amendment.

The plaintiffs were Democratic voters from several parts of the state who claimed that the map was a law that was intended to, and did, disadvantage an identifiable group, in this case Democrats, and was justified by no legitimate governmental interest. Plaintiffs presented this claim as grounded in established Equal Protection doctrine, including principles that “the state must govern impartially”¹⁸ and legislative classifications must be “rational” (that is, must “serve important governmental purposes”).¹⁹ They bolstered their claim with language from several Supreme Court cases affirming that laws having “a real and appreciable impact on the exercise of the franchise” must “serve important governmental objectives.”²⁰ Plaintiffs also argued that the law was intentionally designed to injure

16 Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 839–49 (2015).

17 478 U.S. 109 (1986).

18 N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979).

19 *Id.*

20 Craig v. Boren, 429 U.S. 190, 197 (1976).

supporters of a political party, which is a group of citizens entitled to be free from discriminatory legislation.²¹

The defendants responded that the issue was not justiciable because there were no judicially manageable standards, redistricting was inherently a political issue, and the Equal Protection Clause conferred no group right on political parties or their supporters. Because at that time the nationwide effect of curtailing gerrymandering would have benefited Republicans more than Democrats, an unusual array of amici curiae appeared. Briefs supporting the plaintiffs were filed by the ACLU, Common Cause, and The Republican National Committee. The California State Assembly, the Mexican American Legal Defense and Educational Fund, and the California Democratic Congressional Delegation supported the defendants.

The Supreme Court reversed by a seven-two vote with no majority opinion. A four-justice plurality (White, joined by Brennan, Marshall and Blackmun) held the plaintiff's claims justiciable. The plurality quoted at length from *Baker v. Carr*, which opened the door to challenges to unequal populations and limited nonjusticiable "political questions" to six areas described collectively as those "essentially a function of separation of powers."²² Among these are matters lacking "judicially discoverable and manageable standards."²³ The plurality agreed that there was no "arithmetic presumption" to identify a constitutional violation, but rejected the claim that this established a lack of judicially manageable standards.²⁴ The plurality noted that when *Baker* held challenges to unequal population justiciable, the "one-person-one-vote"²⁵ rule had not yet been devised.

Turning to the merits of the plaintiff's claim, the plurality noted that in multimember districting cases the Court had "repeatedly stated that districting that would 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population' would raise a constitutional question."²⁶ The plurality agreed with the district court that plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. The plurality readily accepted the district court's finding of intentional discrimination. The maps had been designed in secret with the aid of computer consultants and were moved through the legislative process through

21 *E.g.*, *Elrod v. Burns*, 427 U.S. 327, 363 (1976).

22 *Davis*, 478 U.S. at 121 ("It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.") (quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

23 *Id.* at 217.

24 *Id.* at 110.

25 *Id.* at 150.

26 *Id.* at 119 (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)) (emphasis removed).

“vehicle” bills which had no content. The maps were first revealed to the minority members or the public in the last days of the legislative session. The final approval was by unanimous Republican majorities in both houses of the Indiana General Assembly over the dissenting votes of all Democratic members.

Despite the partisan motivation, the plurality found the proof of lasting effect insufficient.²⁷ The plurality would require proof “that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions.”²⁸ The trial of the case was held in 1984 before the election of that year.²⁹ The only evidence of the effect of the maps was the 1982 election, in which Democratic candidates received 51.9% of the votes cast for the Indiana House but elected only 43 of 100 Representatives.³⁰ The plurality held that one election was not sufficient to establish a lasting injury.

Justice O’Connor, joined by Chief Justice Burger and future Chief Justice Rehnquist, would reverse for lack of justiciability.³¹ Justice O’Connor also found no right of a political group to assert a constitutional claim.³² In her view, the racial discrimination cases were not applicable precedent because court intervention to address racial discrimination was justified by the Fourteenth Amendment.³³

Justice O’Connor supported her conclusions with two factual assertions that time has proved questionable. First, gerrymandering has not proven to be “self-limiting,” as she suggested based on an academic study published in 1984.³⁴ To the contrary, it has metastasized. To use the Indiana example again, the 1981 map challenged in *Bandemer* created fifty-six House districts that were considered by its sponsoring legislators to be “safe” for Republicans, and the election results bore out their confidence.³⁵ The 2011 Indiana gerrymander produced at most five competitive Senate districts and perhaps ten competitive House districts in the Indiana state maps. Thirty-seven Indiana House races were uncontested in the 2014 general election. Congressional districts across the nation show the same trend. Few studies conclude that more than 35 of the 435 districts today are competitive.

Second, Justice O’Connor found no proof “that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.”³⁶ As already noted, in a few states, including Justice O’Connor’s Arizona, a voter initiative has been invoked by “the people” to address gerrymandering. But in a large majority

27 *Id.*

28 *Id.* at 134.

29 *Id.* at 163.

30 *Id.* at 181–182.

31 *Id.* at 144.

32 *Id.* at 144–61.

33 *Id.*

34 *Id.* at 152.

35 The district court found a district “competitive” if neither major party had more than 55% of the votes for the two major party candidates. This standard of measuring “safe” and “competitive” districts was accepted by the district court and endorsed by experts for both sides. As will be elaborated below, it has stood the test of time. If one party has 55% of the vote, the other party must increase its 45% by 10% of the two-party total, or 11.1% of its votes. History has shown this occurs rarely, hence a district with one party whose candidate received 55% or greater in the district is considered “safe” for that party. *Id.*

36 *Id.* at 152.

of states a voter initiative is not available, and, as described in Part I, temporary legislative majorities across the nation have typically sought to solidify a stranglehold on the maps.

Justice Powell, joined by Justice Stevens, dissented.³⁷ They would accept Justice Fortas' definition of gerrymandering as "deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes" and would affirm the district court's judgment.³⁸ They pointed out that some district lines may be distorted to achieve a partisan advantage, but the effect is statewide. The dissent would look to several factors in evaluating whether there was deliberate manipulation of districts without legitimate justification. These factors include whether the legislative process itself exhibited partisan motivation (which the plurality also found), disregard of traditional political boundaries, irregular shaped districts, and the absence of any considerations beyond partisan advantage.

Vieth v. Jubelirer (2004) Following the redistricting to adjust for the 2000 census, plaintiffs tried again, this time in Pennsylvania. *Vieth v. Jubelirer*³⁹ was appealed to the Supreme Court after the three-judge court dismissed plaintiffs' political gerrymandering claim. Again, the Supreme Court produced no majority opinion.

Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, argued that the *Bandemer* holding of justiciability should be revisited and overruled. The plurality first noted that Article 1, §4 of the Constitution allows Congress to "make or alter" Congressional districts as drawn by states; and in 1842, Congress had acted to require single member districts of "contiguous territory"⁴⁰; and in 1872, Congress had imposed a requirement of equal population.⁴¹ Since 1911, only the single member district requirement survives.

The plurality then turned to the language from *Baker v. Carr* to describe nonjusticiable "political questions" and quoted verbatim in *Bandemer*. The plurality labeled them "six independent tests" of nonjusticiability and focused on the second: "a lack of judicially discoverable and manageable standards," which imposes the requirement that, unlike legislatures, courts are to impose law only if "principled, rational, and based upon reasoned distinctions."⁴² The plurality noted that although lower courts had entertained claims of unconstitutional gerrymandering, none had granted relief, and no plaintiff had satisfied the *Bandemer* plurality's standard.⁴³ The *Vieth* plurality described the *Bandemer* standard in various ways, both as to individual districts and as to the state as a whole. But the plurality did not describe it, as it might fairly be summarized, as a requirement of a showing of a lasting impairment of voting strength. Rather, the plurality attacks the *Bandemer* approach

37 *Id.* at 161.

38 *Id.* at 164.

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

40 5 Stat. 491 (1842).

41 12 Stat 572 (1872).

42 *Vieth*, 541 U.S. at 277–78.

43 *Id.* at 279–80.

as confused because the plurality saw no clear way to identify the predominant purpose as between the likely ever-present partisan considerations and other considerations such as compactness, adherence to political boundaries, etc.⁴⁴ But this is a fact question, as later cases will hold, and the evidence in virtually every gerrymandering case demonstrates to any objective observer that the predominant motivation for the maps as a whole was preservation of the dominant party's majority status. Indeed, all six Justices of the *Bandemer* court who addressed the question found it obvious.

The *Vieth* plaintiffs argued for a standard that would require proof of (1) systematic "cracking and packing" the minority and (2) inability of the minority to attain a majority of the seats even if it obtained a majority of the votes.⁴⁵ The plurality viewed this as a claim that groups have a right to proportional representation, a right that several precedents have rejected.⁴⁶ The plurality understood the plaintiffs' measure of the minority party's vote to be based on statewide races and responded that this measure was unworkable because candidates of both major parties had won statewide races. The plurality also accepted the view that "there is no statewide vote" for districted legislative offices, citing two relatively dated academic sources.⁴⁷ Finally, the plurality noted that "natural" packing occurs from the fact that some groups, notably Democrats in cities, are more densely clustered, and therefore a neutrally drawn map would be biased against them.

Justice Stevens agreed that statewide claims are nonjusticiable, but individual district claims were cognizable by analogy to racial gerrymanders, which had been held unconstitutional.⁴⁸

Justice Souter, joined by Justice Ginsburg, found the *Bandemer* standard too demanding and would later find some gerrymanders unconstitutional, but he would limit the plaintiffs to district-specific claims. Souter would allow a claim based on a burden-shifting process patterned on those used in employment and housing discrimination cases. If a plaintiff's district were manipulated to the disadvantage of the plaintiff's group, the defendants would be required to justify the district by objectives other than naked partisan advantage.

Justice Breyer dissented, viewing the partisan gerrymandering as "unjustified entrenchment," and he set out several scenarios that he considered sufficient to support a claim. As might be expected, all of this came down to Justice Kennedy, whose views on this matter will likely be dispositive, absent a change in the Court. Justice Kennedy agreed with the plurality that the plaintiffs had not set out a "manageable and workable standard" to evaluate political gerrymanders, but he was not willing to conclude that none could be found. He therefore formed a majority to

44 *Id.* at 284.

45 *Id.*

46 *Id.* at 268.

47 *Id.* at 289 (quoting Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 59–60 (1985); see also PETER SCHUCK, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in POLITICAL GERRYMANDERING AND THE COURTS 240, 241 (Bernard Grofman ed., 1990).

48 See *Miller v. Johnson*, 515 U. S. 900 (1995); *Shaw v. Reno*, 509 U. S. 630 (1993).

affirm dismissal of the *Vieth* complaint, but left for future resolution whether a majority of the Court could find a manageable standard. Interestingly, Justice Kennedy introduced the concept that the First Amendment, whose right of association protects the formation of political parties, also protects “representational rights.” And he suggested that if 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.”⁴⁹ In his view, the ultimate constitutional issue is whether political considerations “burden representational rights,”⁵⁰ and a manageable standard requires a means to “measure the effect of the apportionment . . . to conclude that the State did impose a burden.”⁵¹

League of United Latin American Citizens v. Perry (2006)⁵² dealt with the Texas legislature’s redrawing of Congressional districts in mid-decade to override a plan devised by a court after the initial apportionment was found to violate the population requirement. The plaintiffs alleged both Voting Rights Act violations and unconstitutional political gerrymandering. Justice Kennedy wrote for a five-justice majority, putting to rest the tenuous claim advanced by a few courts⁵³ that *Vieth* had held gerrymandering claims nonjusticiable. Describing his own deciding vote, Justice Kennedy stated: “The *Vieth* plurality would have held such challenges nonjusticiable political questions, but a majority declined to do so.”⁵⁴ In a portion of his opinion, writing for himself, Justice Kennedy succinctly described a successful partisan gerrymandering claim as one that imposes “a burden, as measured by a reliable standard, on the complainants’ representational rights.”⁵⁵

A majority found the new legislative plan violated the Voting Rights Act by splitting a Latino majority district. Chief Justice Roberts and Justice Alito, both addressing redistricting cases for the first time, affirmed dismissal of the gerrymandering claim for failure to offer a reliable standard but expressed no opinion on justiciability. Justices Scalia and Thomas adhered to their view that the gerrymandering claim was nonjusticiable.

Some observers took LULAC as indicating the Court’s receptivity to revisiting *Vieth* and *Bandemer*,⁵⁶ but until recently, few plaintiffs have taken up the challenge.⁵⁷

49 *Vieth*, 541 U.S. at 315.

50 *Id.* at 269.

51 *Id.* at 315.

52 See *League of United Am. Citizens v. Perry*, 548 U.S. 399 (2006).

53 *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 121 P.3d 843, 855 (Ct. App. 2005); see *Benisek v. Mack*, 11 F.Supp.3d 516, 524–25 (D. Md. 2014).

54 *Perry*, 548 U.S. at 400.

55 *Id.* at 404.

56 Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2 (2007).

57 Stephanopoulos & McGhee, *supra* note 16 at 832.

IV. TEA LEAVES IN SUBSEQUENT SUPREME COURT OPINIONS

The Supreme Court has not entertained a direct constitutional challenge to a gerrymander since *LULAC*. But the Court has addressed several cases on the periphery of that issue that may offer insight into the Justices' current thinking.

By the time *Arizona Legislature v. Arizona Independent Redistricting Commission*⁵⁸ reached the Court in 2015, Justices Kagan and Sotomayor had replaced Justices Souter and Stevens. All indications are that this had no effect on the 4-4 division that gave Justice Kennedy the deciding vote in *Veith* and *LULAC*.

Arizona, like California and some other western states, allows voters to enact laws by popular vote, and Arizona voters had used that process to transfer the districting function from the state legislature to a bipartisan commission. The Arizona Legislature sued to preserve its districting prerogative, claiming that the Elections Clause of the Federal Constitution required that districts be drawn by the state legislature. Justice Ginsburg, joined by Justices Kennedy, Breyer, Sotomayor and Kagan, held that if a state chooses to vest legislative power in the people as a whole, it does not violate the Elections Clause.⁵⁹ Ginsburg's opinion for this five-justice majority quoted from Justice Kennedy's concurrence in *Veith*: "Partisan gerrymanders,' this Court has recognized 'are incompatible with democratic principles.'"⁶⁰ She summarized the state of play on partisan gerrymandering: "The plurality [in *Veith*] held the matter nonjusticiable. Justice Kennedy found no standard workable in that case, but "left open the possibility that a suitable standard might be identified in later litigation."⁶¹ Like *LULAC*, this language, not necessary to resolve the Elections Clause issue, can be read as an open invitation to reopen the search for a suitable standard.

Finally, shortly after the death of Justice Scalia, Justice Breyer writing for a unanimous Court, decided *Harris v. Arizona Independent Redistricting Commission*.⁶² In that case, Arizona legislators and their allies renewed their attempt to regain the keys to the legislative fortress, this time contending that the bipartisan commission had drawn its map to favor Democrats, and therefore the population variations in the state legislative maps, though within tolerances acceptable if justified by legitimate redistricting principles, were based on illegitimate considerations and were unconstitutional.

The Court unanimously rejected the factual premise that the commission had been motivated by partisan considerations, accepting the district court's factual finding that compliance with the Voting Rights Act was the reason for the commission's accepting population deviations within the ten percent tolerance allowed by precedent. The unanimous opinion concluded by "assuming, without

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

59 *Id.*

60 *Id.* at 2658 (citing *Veith*, 541 U.S. at 316).

61 *Id.* (citing *Veith*, 541 U.S. at 281, 317).

62 993 F.Supp.2d 1042 (D.Ariz. 2014).

deciding, that partisanship is an illegitimate redistricting factor,” plaintiffs failed to show it.

V. SEARCHING FOR STANDARDS

Gerrymanderers typically do their work as soon as a new census is available and create hypothetical models based on past elections. Essentially the same techniques adopted by the Indiana Republican majority and its highly paid consultants in 1981 are in use today, though refined and improved by vastly greater computing power and the ease with which graphic displays of districts can be easily manipulated to test a tweak here or there to a given district. Repeated use and refinement of this technique at considerable expense demonstrates it is believed reliable and effective. The results in most states are maps with all the attendant problems identified in Part I. The need for judicial intervention cannot be overstated. Voter initiatives are not available in most states, and the legislative branch, inherently locked in a conflict of interest of monumental proportions, has shown itself incapable of reform in almost every state.

A majority of the current Court is now on board with Justice Kennedy’s summary of the situation: gerrymandering claims are justiciable, but no manageable standard to measure the burden on representative rights has yet been shown. Gerrymandering is thus now in the same place districts of unequal populations were after *Baker* and before *Wesberry* and *Reynolds*. Plaintiffs are now launching a new round of constitutional challenges attempting to establish such a standard, and some may reach the Supreme Court in the next term.

The Efficiency Gap as a Measureable Standard. *Whitford v. Nichol*⁶³ was tried in May 2016, and is before the three-judge court for decision as of this writing. The court had previously denied defendants’ motions to dismiss the complaint and for summary judgment, carefully reserving for trial whether the plaintiffs’ proof would be sufficient to establish a claim. The *Whitford* plaintiffs alleged an unconstitutional gerrymander of the Wisconsin state House and Senate.⁶⁴ They proceeded on the assumption that such a claim required proof of partisan motivation and a measurable, material, and lasting effect on the voting power of the minority party.

Partisan motivation relied in part on evidence developed in a prior case which had attacked the same maps based on population deviations of less than one percent.⁶⁵ The plaintiffs there contended that even these usually permissible deviations were unconstitutional because the map was drawn with partisan intent. The three-judge court in that prior case described the denials of partisan intent from the legislative staffers involved, some of whom also testified in *Whitford*, as “almost laughable,”⁶⁶ but dismissed the complaint because the population deviations were de minimis.

63 No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 47048 (W.D. Wis. Apr. 7, 2016).

64 *Id.* at 918.

65 *Baldus v. Members of the Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012).

66 *Id.* at 851.

The *Whitford* plaintiffs presented evidence of the legislative process similar to that found sufficient by six justices in *Bandemer*—secrecy in developing the maps, rushed legislative process driven by party-line voting, outside consultants testing various maps for partisan bias based on prior election returns, and statements of the drafters or their consultants.⁶⁷ They offered the “efficiency gap” proposed by Stephanopoulos and McGee⁶⁸ as a measure of partisan effect to meet a manageable legal standard. The efficiency gap measures the difference in the number of “wasted votes” for candidates of the two major parties. Wasted votes are votes cast for a losing candidate, plus all votes for a winner above the number required to win the district. The efficiency gap is the difference between the statewide totals of wasted votes for the two parties expressed as a percentage (positive or negative) of the total votes for the two parties’ candidates for the legislative body. Here is a simple example of the efficiency gap in a hypothetical election of a nine-district legislative body with 900 voters, 450 of each party. Its map looks like this, with the most recent party votes in each district:

55-45 Red	55-45 Red	55-45 Red
60-40 Blue	60-40 Blue	60-40 Blue
55-45 Red	55-45 Red	55-45 Red

In this example six districts would be considered “safe” for Red and three “safe” for Blue. The efficiency gap is 16.7%, calculated as follows (for simplicity ignoring the one vote more than 50%, which is immaterial in the real world where districts contain thousands of voters):⁶⁹

3	40	60	<u>120</u>	<u>180</u>	120	9	3x40=120	3x10=30
	Total votes:		450	450	Total wasted votes:		150	300
Efficiency Gap= (300-150)/900=150/900=			+16.67%	in favor of Red				
			-16.67%	disadvantage to Blue				

⁶⁷ *Whitford*, 151 F.Supp.3d at 918; *Davis*, 478 U.S. at 109.

⁶⁸ Stephanopoulos & McGhee, *supra* note 16 (The article was widely circulated among academics and advocates concerned with redistricting issues for some time before its publication).

⁶⁹ *See id.* at 18 (In the real world, districts are not exactly equal in number of votes cast, so adding the wasted votes by district is tedious. A simpler and quicker method of calculating the efficiency gap in a two party race is $\frac{1}{2}$ of a party’s seat advantage minus 2 times its vote advantage, with both advantages expressed as percentages. In this hypothetical Red captured 6/9 or 66.7% of the seats, which is 33.3% more than Blue’s 33.3%. The two parties each received 450 votes, so Red’s vote advantage is 0%. The efficiency gap is $\frac{1}{2}$ of 33.3% or 16.7%).

In simple terms, the efficiency gap is an index of the relative legislative muscle the two parties get from each vote and how much the districting dilutes the vote of one party. It measures the presence in a map of the goal that a gerrymanderer sets out to accomplish: “pack” as many of the opposing party’s voters as possible into districts that the opponents will win anyway, and “crack” the opponent’s votes in competitive districts down to levels that assure success for the gerrymanderer.

The efficiency gap thus supplies the “measurable” component of a manageable standard of unconstitutional gerrymandering, analogous to the equal population requirements of *Wesberry* and *Reynolds*. It also is relevant, but not sufficient, to establish partisan motivation.

Proof of a material and lasting burden. The challenge raised by the *Bandemer* plurality and by the Court’s later demands for a manageable standard is to establish that the maps will create a lasting and material impairment of the minority party’s representational rights. These requirements boil down to showing how much of an efficiency gap revealed by the first actual election under a new map (or by a hypothetical election using the new districts measured by the voting history from past election) is sufficient to demonstrate a probable, lasting material impairment of representational rights.

To establish reliability and durability, the *Whitford* plaintiffs did not rely solely on common sense or the fact that the defendants spent over \$200,000 to generate their maps.⁷⁰ Plaintiffs offered two basic means of testing the durability of an efficiency gap of a given magnitude. One expert testified that he had analyzed a large number of elections and found that a map exhibiting an efficiency gap of seven percent or more in the most recent election would continue the dominant party as the majority in the legislative chamber throughout a decade in 95% of the cases. The plaintiffs argue that this finding and other statistical showings establish to a high degree of probability that the degree of Republican bias in the Wisconsin map will enable it to retain majority control throughout the decade, thus establishing a material and lasting impairment of the minority party voters’ representational rights.

Mopping up. There are a number of subsidiary issues that are often debated and cloud the issue. It is true that in some areas, notably cities with large minority populations, Democrats tend to be clustered more densely than Republicans.⁷¹ The degree to which that is truer of Democrats (in cities) than Republicans (in suburbs) is hotly debated. Very likely, however, any “natural” bias rarely exceeds low single digits, and never approaches the thirteen percent efficiency gap that the *Whitford* plaintiffs allege. Similarly, there is some skirmishing over how to account for the efficiency gap in uncontested districts, which are numerous in some heavily gerrymandered states. Some hypothetical vote for the nonexistent opponent of an

70 *Whitford*, 151 F.Supp.3d at 918.

71 Jowei Chen and Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239–69 (2013).

unopposed winner needs to be constructed.⁷² It is up to the political scientists to work this out with reasonably reliable statistical analyses. There will be multiple reasonable means of resolving these nuances, but the differences among them are unlikely to affect the ultimate conclusion that representational rights are indeed impaired by large efficiency gaps.

VI. INDEPENDENTS AND MINORITY PARTIES

Finally, plaintiffs have typically asserted claims asserting denial of rights to political parties or their supporters, and alleged that the effect of a gerrymander is statewide. Viewed as a denial of the ability to reach majority of a chamber in the state legislature, it seems correct that all supporters of the excluded party are wrongly denied representation of their views, and the effect is statewide.

A qualitatively different complaint is available to Independents and third-party supporters. In a competitive district, they can choose between the two major party candidates, and often affect the outcome. In a gerrymandered map, however, up to ninety percent of the districts are virtually certain to elect the prevailing candidate in the party dominating that district.⁷³ As a result, at least in states with closed primaries, Independents are effectively disenfranchised, having no say in whom the parties nominate, and being handed the winner of the district majority. As a result, in some districts Republicans and Independents are shut out, and in others Democrats and Independents are excluded from a meaningful vote. Some of this phenomenon occurs in any districting plan, but it is not unconstitutional because it is not the product of “illegitimate” districting considerations. The Supreme Court has assumed, without deciding, that partisan districting is “illegitimate” for purposes justifying population deviations. If so, it seems equally illegitimate in drawing district lines. Such an approach would create different, district-specific claims by different groups of people in different parts of the state.

In this connection, the recent decision of the Seventh Circuit in *Common Cause Indiana v. Individual Members of the Indiana Election Commission*⁷⁴ is interesting. The court unanimously affirmed the Chief Judge of the Southern District in holding unconstitutional Marion County Indiana’s system for electing its thirty-six Superior

72 It would seem that a hypothetical vote for the minority party that did not field a candidate could be reasonably constructed by first determining the ratio of the total votes for the minority’s least well known statewide candidate (examples are auditor, treasurer, secretary of state) in all legislative districts which were contested between the two parties to the total votes for that party’s legislative candidates in those districts, then attributing that percentage of the statewide candidate’s vote in the legislative district to create a hypothetical anonymous minority candidate vote. This would require precinct level data on the statewide candidate’s race to construct his/her hypothetical district vote. If that is not available, it may be necessary to use presidential races adjusted for relative volume between them and state legislative races. I understand statisticians may favor more sophisticated techniques, and leave that issue for the courts to resolve.

73 In 2014, thirty-seven of the one hundred Indiana House seats were unopposed. The prevailing candidate in ninety-four of hundred districts received more than fifty-five percent of the votes cast for a major party candidate. Election Results, INDIANA ELECTION DIVISION, <http://www.in.gov/apps/sos/election/general/general2014?page=office&countyID=-1&officeID=10&districtID=-1&candidate=> (last updated March 11, 2015, 10:01 AM).

74 800 F.3d 913 (7th Cir. 2015).

Court judges.⁷⁵ The system was instituted in 1975 to assure partisan balance of the trial bench in Indianapolis and only slightly tweaked since.⁷⁶ Its most recent incarnation called for each of the two major parties to nominate only half of the number of judges whose seats were up for election in any year. Absent a write-in or third party candidate, all primary winners were assured election in the general election. In the forty years of this plan, only an occasional write-in or third party candidate popped up, and none came anywhere near success.

The Seventh Circuit grounded its decision expressly in a violation of First Amendment representational rights, holding that restricting the parties to nominating only half the seats burdened the voting rights of the party adherents, and also finding troublesome the disparity between the voting rights conferred on primary voters and others.⁷⁷ The scheme invalidated in *Common Cause* was a de jure denial of voting rights to some, while a gerrymander can accomplish the same thing de facto. It remains to be seen whether this approach will supplement or even displace the conventional attack on gerrymanders as deprivations of minority party rights.

75 *Id.* at 928.

76 *Id.*

77 *Id.*