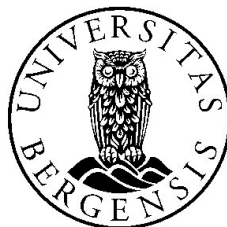


# Gerrymandering v. The Constitution: The case of Gill v. Whitford

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## Abstract

In this case study I analyze partisan gerrymandering in the United States with the research question: *Does partisan gerrymandering violate the Constitution of the United States of America?* With this as a starting point I use the Supreme Court case of *Gill v. Whitford* about redistricting in Wisconsin as this studies case.

I start off with an introduction to some views on representation that informs the conflict in the case. Whether one has a dyadic or collective view of representation could be a huge influence on ones opinion of gerrymandering's legality. Then I go in detail on how the redistricting process works in the United States, some of the mechanisms in place to ensure a fair redistricting process and explain what gerrymandering is. I also present the parts of the American Constitution that partisan gerrymandering might be in violation of. To get background information on how gerrymandering is treated in the court system, I found it important to do a breakdown of the most important Supreme Cases on the field.

Then I looked at the case at the center of my paper. The data I used in discussing and concluding on the issue is mainly collected through document analysis of the amicus briefs filed in *Gill v. Whitford*. I sorted the arguments in what I found to be the most important categories. The two main things the oral arguments and the amicus briefs seemed to focus on were the First Amendment and how a manageable standard would look like.

I conclude the thesis as following: With *Gill v. Whitford* as the case of study, I find that partisan gerrymandering is a violation of the Constitution of the United States of America. It is probably not a violation of the Equal Protection Clause of the Fourteenth Amendment, where my opinion is colored by how the Supreme Court has ruled in previous gerrymandering cases. However, I do believe that partisan gerrymandering violates the First Amendment and its freedom of association. I find that voting is a free speech activity and that when the state dilutes the vote of voters with a certain political leaning, it becomes a form of viewpoint discrimination. The First Amendment guarantees free expression and association, but partisan gerrymandering violates that when it is used to punish individuals for their viewpoint by diminishing their vote.

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## 1. Introduction

“Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”

Alexis De Tocqueville – Democracy in America (1835), p. 110.

Most democratic states today have a representative democracy, where professional legislators work fulltime with politics and make political decisions on the public’s behalf. The politicians who will serve as representatives are decided through elections by the public and the election process varies from country to country. One feature of electoral systems with single member districts is that in the process of drawing new electoral districts, parties or individuals might try to create a political advantage for themselves. This process is referred to as redistricting, but when it leads to an extreme partisan advantage for someone, it is called gerrymandering. The name comes from the United States and has been a feature of their political system for a long time. Gerrymandering is a very interesting phenomenon to me, as it is unlike anything in the Norwegian political system.

The last 60 years have seen a number of Supreme Court cases in the United States where electoral districts, both congressional and state legislative, their representativeness and their constitutionality have been the central elements. The focus on my master thesis will be on partisan gerrymandering in the United States and whether it is in violation of the American Constitution. So far, it has been an area where the Supreme Court has not been willing to enter the political thicket and has left it to the states. With the case of *Gill v. Whitford*, dealing with a state legislature redistricting plan from Wisconsin, it seems like the Supreme Court is ready to take a stance. The plaintiffs claim that partisan gerrymandering is a violation of both their First Amendment right to association and the Equal Protection Clause of the Fourteenth Amendment. My research question for the thesis will be:

*Does partisan gerrymandering violate the Constitution of the United States of America?*

There are conflicting views on how gerrymandered districts affect representation and whether those districts should be legal or if they violate the constitution. Congressional elections are

not competitions for statewide or nationwide seats; they are separate elections between separate candidates in separate districts. The same goes for elections to the state legislatures. However, one could also argue that the parties do not just compete for specific seats, but also for control of Congress and of state legislatures through having a majority of the representatives. Whether Congress as a whole represents the American people as a whole or whether each member of Congress only represents his or her particular district is at the center of the conflict of gerrymandering. Is it unconstitutional to give one party a partisan advantage by making the other party's voters less effective in converting their votes into representatives on a statewide basis, as long as the district specific voting is equal? And if it is, how do you decide when the decisions made in a redistricting process are too partisan and it constitutes an unconstitutional gerrymander?

Partisan gerrymandering has been a part of American politics for centuries, but it has become more controversial as other representative challenges like malapportionment and racial gerrymandering has been struck down by the judicial system. The partisan divide in the United States is increasing and gerrymandering is getting more sophisticated and effective with modern district drawing programs on computers. This has depleted the number of competitive congressional districts. It has also led to parties winning a clear majority of seats in Congress and state legislatures with a minority of votes. But can those institutions then be said to be representative? This question has become very relevant by an ongoing Supreme Court case on partisan gerrymandering.

When the Supreme Court has dealt with previous cases of partisan gerrymandering, they have tended to say that it is necessary to produce a district-specific claim that violates the Equal Protection clause. What plaintiffs have argued is that the results of Congressional and state assembly elections as a whole can be used as evidence. The question of how to consider representation is made current in the ongoing case of *Gill v. Whitford*, where the hearings in the Supreme Court started at October 3, 2017.

I plan to go through the history of partisan gerrymandering in the United States Supreme Court and end up with a close examination of *Gill v. Whitford* as the case I will study in detail. Following the introduction, chapter two will discuss representation, the Constitution, redistricting and gerrymandering. It will go in detail on two different views on representation, why a lack of representation is harmful and how the Supreme Court's view of representation

could affect their ruling on partisan gerrymandering. Then it presents the parts of the Constitution that partisan gerrymandering could be violating and why. Next, I present the American redistricting process in detail and explain what gerrymandering is. In chapter three the research method of the paper and the reasoning behind it is presented. Chapter four goes through the history of gerrymandering in the Supreme Court and how the rulings have affected later redistricting. Then chapter five analyzes the case of *Gill v. Whitford*. First by going through the case process in the court system and then by looking at the amicus briefs filed in the case and group the arguments presented in seven main categories. In chapter six I discuss the findings from the case, bearing in mind the research question of “*Does partisan gerrymandering violate the Constitution of the United States of America?*” It is a discussion that looks at the First Amendment and Fourteenth Amendment to find out if partisan gerrymandering is a violation of those. It also becomes a discussion of other important questions the Supreme Court will have to decide on in *Gill v. Whitford*. Is partisan gerrymandering justiciable and could plaintiffs have a statewide claim? Then I consider how a manageable standard might look like. At the end, chapter seven concludes the findings in the paper.



## 2. Representation, redistricting and gerrymandering

### 2.1 Representation

Following the decisions in *Wesberry v. Sanders* and *Reynolds v. Sims*, it was assumed that mandated equal population districts would lead to equal representation. The term “equal population districts” is an objective term that can be easily measured, but “equal representation” is a much more subjective term that has a wished-for result. Whether they reach that result or not could be dependent on a lot of factors. Some of them are objective, like equal population districts, other are more subjective, like gerrymandering (Dixon, 1968: 269).

Representation provides you with a certain impersonalization, as one person, the legislator, stands in place of another, the voter. With representation, you also get a higher degree of inexactness, since a single legislator is incapable of subsuming in his being all of the conflicting aspirations of the electorate he stands in front of. The voters might have a large variance of opinions on any given issue, but their elected representative is only able to respond with a single voice – or abstain (Dixon, 1968: 24). As the legislator is such a crucial link between parties on the one hand and legislative action on the other, the legislative election process can play a very vital and determinative role. The whole range of apportionment, districting alternatives and practices are a part of it. With that perspective, the need of fair and effective representation entail a disposition to critically analyze the traditional ways legislative elections and districting has been performed, to evaluate how they fulfill the goals and to consider if there are possible modifications or alternative devices that has any merit (Dixon, 1968: 56).

#### 2.1.2 Different types of representation

There are many ways to view representation, depending on the features one wishes to highlight. Pitkin defined political representation as, “a way to make the represented present again” (Pitkin, 1967: 10). In her seminal work on representation, she identified four main ways of looking at political representation in political literature: A formalistic view of representation that identifies representation with the formal procedures, like elections, used to

select a representative. A descriptive view that sees representatives as representing the people they resemble, which can refer to gender, race or class etc. In a symbolic view, the representatives “stand for” the people they represent as long as those people believe in them or accept them as a representative. The last view is a substantive view, where the representatives act in the interests of the people they represent (Pitkin, 1967: 11-12).

A classic dilemma in representational theory has been whether a man who represents a particular constituency in the legislature has in his duty to pursue the constituency’s interests or the interest of the nation as a whole. It is important that local interests are not just overruled and sacrificed in favor of national interests. But at the same time, the representatives as a group has to look after national interests and make sure partial interests do not outweigh the needs for the whole nation (Pitkin, 1967: 215-216). The same goes for politics at the state level. Whether gerrymandering is viewed as something acceptable or viewed as breaking with fair representation could also depend what your view of representation is. As long as they follow traditional redistricting criteria like contiguity and compactness, most gerrymandered districts look acceptable. It is when you view it in combination with other districts in the state that the most advanced cases of gerrymandering really stand out. The norm in previous Supreme Court cases dealing with gerrymandering has been to consider the individual districts of the plaintiffs. One of the questions the Court will have to answer in *Gill v. Whitford* is whether voters from just 11 state legislative districts have the standing to challenge the entire Wisconsin Assembly map. The state argues that any harm the plaintiffs have suffered has only been in the district that they live or vote. The plaintiffs claim that the voter dilution is statewide and not district-specific, which makes their gerrymandering claim statewide. I will now go more in detail on these two ways to look at representation.

### **2.1.3 Dyadic representation**

If representation is observed in an electoral context, then citizens can be said to be represented by an elected official that they could have voted in favor of or against. In this sense, an American voter is only represented by, for instance, one member of the House of Representatives and one member of the State Assembly, but none of the Supreme Court justices. The maximum degree of representation, according to the dyadic model of representation, would occur if legislators followed the wishes and preferences of their constituents. Candidates who run for office in individual constituencies have a clear motivation to provide dyadic representation for their district and prove that they in particular

look out for their constituency. This can be done through representing the policy issues that the district care about, but also by providing money to the district through pork barrel or help individual constituents to obtain government services (Weissberg, 1978: 536-538).

#### **2.1.4 Collective representation**

The representation of an interest or opinion though, is theoretically independent of an electoral connection between the person with a preference and the legislator representing the preference. An individual's interests could be represented in Congress by any of the 435 members of the House and it is likely that the one who best represents an individual would change over time and depend on policy area. One example of how representation can be independent of the legislator one could have voted for was when northern black and liberal white Congress members were the ones who represented the preferences of disenfranchised black voters in the South during the 1950s and 60s. The idea of collective representation is that the legislators as a group of individuals collectively represent the people as a whole. Misrepresentation would occur if some of the interests and opinions of the political community is excluded or not accurately reflected in the legislature (Weissberg, 1978: 536-538). Whether the state legislature as a whole represents the people of Wisconsin or whether each member of the legislature represents his or her particular district will be a central question for the Supreme Court when it comes to deciding if the plaintiffs have standing in *Gill v. Whitford*.

#### **2.1.5 Why a lack of representation can be problematic**

What you want from a legislator is ideally someone who can represent all of the diverse interests and groups within his constituency. However, with the increase in safe districts that has been the trend over several decades, many legislators are able to win elections by only paying attention to certain parts of the electorate. A problem with this is that when no return can be expected from voting, which is the reality for minorities in many safe districts, it becomes irrational to make the effort to vote. The result is a truncation of formal representation (Dixon, 1968: 31).

All systems of representation aim to both be responsive to the popular feeling and provide power to govern efficiently. The latter is an important reason for why the majority rules, rather than legislative assemblies making decisions by total consensus. But even though

majorities rule, minority opinions should be heard and have the right to participate in the legislative deliberation process, where the majority on different issues may ebb and flow from case to case. Having a set of legislative districts, whether or not they are equal in population, where a political party consistently gets close to 40 percent of the vote, but rarely get more than 20 percent of the seats in the legislative assembly, denies effective political representation in terms of bargaining power to the mentioned minority. Another important element is that by denying a minority even its proper minority share of legislative influence, which might lessen their chance of ever getting to majority states and turn a state from a nominal two-party system to what in reality is a one-party system (Dixon, 1968: 437-438).

### **2.1.6 Group Rights versus Individual Rights**

A dimension of redistricting cases that is relevant when considering representation is the group rights versus individual rights dimension. It follows political lines to some extent, with liberals being in favor of group rights, while conservatives oppose it. The two conceptions differ on whether they see redistricting controversy as affecting an individual's vote or as diluting the voting power of a particular group. Still, the two views can come to the same result in redistricting cases, as some of the cases will go against both conceptions. An example of this is *Reynolds v. Sims* from 1964, where the Supreme Court both emphasized that the "weight of a citizens vote cannot be made to depend on where he lives", but also that "in a society ostensibly grounded on representative government, it should seem reasonable that a majority of the people of a State could elect a majority of that State's legislators" (Persily, 2005: 73-74).

## **2.2 Constitutional challenges to gerrymandering**

### **2.2.1 First Amendment**

The First Amendment is one of ten amendments to the Constitution that makes up the Bill of Rights, which was adapted in to law in 1791. It says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (United States Bill of Rights, 1789). The plaintiffs in

*Gill v. Whitford* have held up the First Amendment and specifically the freedom of association and it will be the first partisan gerrymandering case where the Supreme Court has to consider the question. It is also the main focus of *Benisek v. Lamone*, the second partisan gerrymandering case that the Supreme Court will decide in 2018. Both cases involve claims that the state government have violated their First Amendment rights by punishing them for expressing their political views at the ballot box, through a gerrymandered legislative map that makes their votes less worth than those of the other party.

### 2.2.2 Fourteenth Amendment

The Equal Protection Clause is found in the Fourteenth Amendment to the United States Constitution, which took effect in 1868. The motivation behind the Fourteenth Amendment was to put more constitutional restrictions against the states in the aftermath of the American Civil War and validate the equality provisions provided by the Civil Rights Act of 1866. Section 1 of the amendment says the following: “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 law*” (Fourteenth Amendment, 1868). The emphasis in italics is added by me and highlights the Equal Protection Clause. The first application of it to voting law came with the case of *Baker v. Carr*, and it has since been used to equal voting rights further in other Supreme Court cases. It is one of the claims the plaintiffs have raised in *Gill v. Whitford* and will be an essential question for the Supreme Court to decide on. I will review those cases and their use of the amendment later in the paper.

When the Supreme Court makes a ruling on the constitutionality of partisan gerrymandering, it will be the First Amendment and the Fourteenth Amendment that they will have to consider. The District Court found Wisconsin’s Act 43 to be in violation of both. In the 1986 redistricting case of *Davis v. Bandemer*, which will be discussed later, it was ruled that partisan gerrymandering could violate the Equal Protection Clause of the Fourteenth Amendment if it intentionally and effectively discriminated against an identifiable political group, for instance members of a political party. In that instance though, they did not find a violation and the Supreme Court has not been able to find a clear standard for deciding if the

equal protections of the law has been broken. Many gerrymandering cases has been litigated under the Fourteenth Amendment, but in the 2004 gerrymandering case of *Vieth v. Jubelirer*, which is also discussed later, Justice Anthony Kennedy suggested that a suitable standard could rather be found in the First Amendment. Violations of the amendment could take place when an apportionment has the purpose and effect of burdening a group of voters' representational rights. *Gill v. Whitford* will now give the Supreme Court a chance to consider if partisan gerrymandering violates the First Amendment freedom of association.

## **2.3 Redistricting and gerrymandering**

### **2.3.1 What does the constitution prescribe?**

Article 1, section 2, of the United States Constitution tells us that the people of the several states shall choose the members of the House of Representatives every second year. After much debate on how to distribute the representatives, it was decided that “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons]. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct” (Constitution of the United States of America, 1787).

### **2.3.2 Redistricting**

The United States conducts a census every 10 years. After counting every resident, the number of congressional seats every state will have is decided and this is called apportionment. The total number of representatives in the House is 435 and every state gets at least one representative, while the 385 others are apportioned after the state's share of the population. Seven states are only represented by one member of Congress, due to their low population. Following the census, states that have gained population can be entitled to additional representation and will get new congressional districts. However, since the number of congressional representatives is restricted to 435, this means that the states that have lost people or had less growth will lose congressional districts. The creation of new seats, or the loss of an old one, affects all districts in the state. Even states that do not add or lose

congressional districts need to redraw their districts, to adjust for population shifts within their borders (Draper, 2012).

The same modifications must be performed on districts for state legislatures and local jurisdictions as well. How the districts are drawn will be an essential part of the political “rules of the game” for the rest of the decade, which makes the process of drawing up the districts meta-political (Cain, 1984: 5-6). Richard L. Morrill (1987: 242) states that the goal of districting is “to make possible the meaningful and effective participation of voters in electing individuals who meet these three senses of representation – party, place, and, if appropriate, race.” The essential part is that voters feel like their vote matters. Poorly executed redistricting can lead to disenfranchisement and a feeling of not being represented. Over time, this could lead to lower voter participation, reduced trust in government and a lower quality of representation and of governance.

The United States is in many ways an outlier in the democratic world in the way politicians play a major role in shaping the rules that affect their electoral future. Nonpartisan actors and professional bureaucrats play less of a part, while electoral rules, administration and campaign financing is handled by highly partisan actors. The electoral rules are a part of the same power struggle as the elections and the policy. The system is designed with the acknowledgement that many politicians will act in their own interests. It tries to channel that behavior in a way that may serve the public's wishes and goals through its institutions and pluralistic interest group environment, rather than deny that the self-interest is there (Mann, 2005: 93-94).

### **2.3.3 The purpose of the House of Representatives**

The current method of redistricting creates a large number of uncompetitive congressional districts, where only one of the political parties has a chance of winning. Even though the Congress has a very low approval rating, the incumbents keep being reelected at very high rates. Though it should be noted that most voters like their own congressional representative a lot more than Congress as a whole, even a wave election like 2010 did only result in 63 seats that changed from one party to the other! This makes it harder for voters to demonstrate their displeasure with a political party and if the electoral system is not an effective way to express one's opinion of a political party, then there might be a flaw in the democratic process (Kamarck and Buchler, 2017: 232).

The Congress of the United States was created with two houses, the Senate and the House of Representatives, each with particular purpose. State legislators chose the Senate for a period of six years, so it had some distance to the “common people” and provided stability. The people elected the House of Representatives for shorter periods of two years. This gave it the purpose of reflecting changes in the will of the people and serve as a direct way to influence (Kamarck and Buchler, 2017: 232).

In the vast majority of elections since 1950, more than 90 percent of House incumbents held on to their seats. While there is usually a strong advantage in being an incumbent with regards to name recognition and money, the number of safe seats has increased. The average percentage of House incumbents who won with at least 60 percent of the major-party vote was at 64 in the 1960s, but has increased to 80 in the 2000s (Kamarck and Buchler, 2017: 235). The development with an increase in safe seats, both due to the increased importance of incumbency and because districts drawn to keep a representative safe, makes the House of Representatives less responsive to changes in the popular will. This goes against what the founding fathers saw as its purpose.

#### **2.3.4 What is gerrymandering?**

The term gerrymander has its origin in Massachusetts in 1812. The redistricting of the state led to weirdly shaped districts, separated towns and split many counties. The outer district of Essex county had the oddest shape of them all. As the new map was discussed at a dinner party in Boston, someone remarked that the Essex district only needed wings to resemble a prehistoric monster. They named it as salamander and combined the name with Governor Gerry’s name, since he had let the bill become a law. The artist Elkanah Tisdal illustrated the districts resemblance and it was printed in the Boston Gazette on March 26 1812. The term was quickly picked up by the Federalist press and used for campaign purposes (Griffith, 1907: 16-19).





Figure 2.1: Original cartoon of "The Gerry-Mander". Originally published in the Boston Centinel (Tisdale, 1812).

Following the census performed every 10 years, all 50 state legislatures have to redraw the borders of their congressional and state legislative districts to they account for population movement and make sure the districts have as equal population as possible, in accord with the Supreme Court's "one person, one vote" rule. As most state legislatures perform the redistricting themselves, it gives an opportunity for political parties to make changes that are to their own advantage. This phenomenon of manipulating the redistricting process to make sure your own party wins a lot more districts than the popular vote of the state suggests, is called gerrymandering. When this tinkering is done to benefit one party, it is often referred to as partisan gerrymandering, but there are also instances where the major parties cooperate to create a district map that can benefit both, for instance by protecting incumbents. Those instances are called bipartisan gerrymanders (Wofford, 2014).

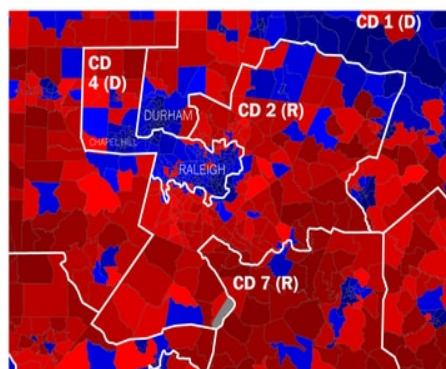
To maximize the number of seats their party can win, partisan map drawers will employ gerrymandering tactics that "wastes" votes from the opposition party. One of them is called

“packing” and is performed by concentrating the other party’s voters in a small number of districts to limit the number of seats they could influence. The amount of representatives won in single-member districts are the same regardless of margin of victory, so it is preferable that the opponent wins big in some districts and become less competitive in others. Another tactic is to break up a strong area for the other party and divide it across several districts so that they become a minority in each of them. This is called “cracking”. These tactics are often used together with great effectiveness. The optimal scenario is to make sure your preferred party has a safe majority, but not too big of a majority, of voters in as many districts as possible (Wofford, 2014).

A good example of how this might look is the current congressional map in North Carolina as shown in Figure 2.2. The Republicans won 53 percent of the statewide popular vote in the 2016 election, but came out of it with 10 out of 13 seats, or 77 percent. This was made possible after the 2010 election, when they were in charge of the redistricting process, as they controlled both chambers of the state assembly. This resulted in a map that used both packing and cracking. For example, the redistricted map included the entire city of Raleigh in the already heavily Democratic 4<sup>th</sup> District, while snaking the 2<sup>nd</sup> District around it to ensure a Republican majority there. It also exemplified cracking by splitting the mostly democratic city of Greensboro in half, which made it difficult for Democrats to compete in either the 13<sup>th</sup> or 6<sup>th</sup> District (Ingraham, 2018).

**CD 2 snakes around Raleigh**

2016 presidential vote results versus congressional district boundaries in NC

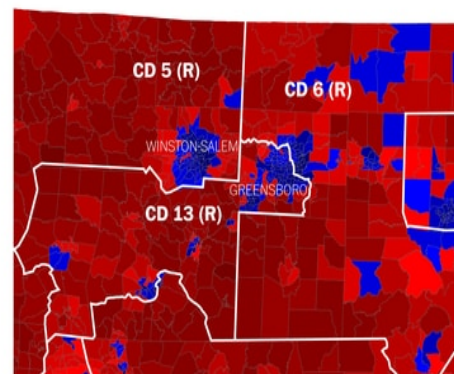


WAPO.ST/WONKBLOG

Sources: Ryne Rohla, US Census Bureau

**Splitting up Democrats in Greensboro**

2016 presidential vote results versus congressional district boundaries in NC



WAPO.ST/WONKBLOG

Sources: Ryne Rohla, US Census Bureau

Figure 2.2: Congressional Districts in North Carolina illustrating how packing and cracking can look like. Source: (Ingraham, 2018)

Even if partisan map drawers would like to get creative, all 50 states include at least some traditional districting principles in their state constitution to put some limits on what kind of districts the state legislature can create. The phrase “traditional districting principles” was first used in *Shaw v. Reno* in 1993, a Supreme Court case dealing with racial gerrymandering in redistricting, but the actual principles are as old as the political system of the country and may have been called by a different name or taken for granted. Contiguity means that all parts of a district is physically connected, so that it is possible to travel to all parts of it without crossing the districts border. It is not always mentioned in state constitutions, but seen as a de facto requirement for districts. Another basic principle for districting is compactness, which limits how creative map drawers can be with their districts. A circle is considered to a perfectly compact shape, but many states already have irregularly shaped boundaries and municipalities. This makes it a complicated process to determine if a district breaks with the principle or not. Other things that need to be considered are the preservation of local political subdivisions and communities of interest. Most state constitutions do their best to minimize the division of towns, counties and other municipal boundaries. Some also include language about protecting incumbents and the cores of prior districts. While it has less priority than most of the other principles, it is viewed as disruptive to the political process when incumbents are made to run against each other, though sometimes it is unavoidable, like when a state loses a congressional district following a census (National Conference of State Legislatures, 2010: 105-106). I will now expand on the discussion of some of the traditional redistricting principles.

### 2.3.5 Contiguity

A very simple idea in theory, contiguity means that all parts of the district are connected. In reality, this can be more problematic, as the addition of a thin connecting line could make a noncontiguous district into a contiguous one without changing the electoral make-up of the district. When the contiguity is stretched as far as possible, it can result in some rather odd shapes and lead to problems with compactness. Nevertheless, it can also be used as a tool to increase representation, as adding a thin connection between two minority-dominated areas could create a majority-minority district. Majority-minority refers to districts where one or more racial and/or ethnic minorities make up a majority of the population. Another problem is that a breach in contiguity is sometimes unavoidable due to geography, like islands of the

coast. This can cause a lack of contiguity even if there is no political manipulation behind it (Altman, 1998: 164).

### 2.3.6 Compactness

People have always had a problem with oddly shaped districts. Going all the way back to when the term gerrymandering was created, opponents of Governor Elbridge Gerry of Massachusetts criticized him for drawing a district that looked like a salamander, which they ridiculed by calling it a Gerry-mander. Oddly shaped districts are often seen as evidence of gerrymandering, and it can certainly be a visual indicator that something is suspicious, but compactness can sometimes be at odds with other goals like ethnic or political balance (Butler and Cain, 1985: 199). Justice Stevens mentioned this in his concurrence with the majority in *Karcher v. Daggett*, where he argued that geographic compactness was a guard against all types of gerrymandering and that “drastic departures from compactness are a signal that something may be amiss” (National Conference of State Legislatures, 2010: 109).

While there are no formal standards for compactness, the shape of districts and how it affects the perception of fairness has been an important factor in court rulings. Justice Sandra Day O’Connor argued in a Supreme Court ruling from 1993 that “Reapportionment is one area in which appearances do matter”, which played a big factor in striking down several majority-minority districts in the 90s (Monmonier, 2001: 44). Deval Patrick, assistant attorney general for civil rights under president Bill Clinton and attorney general Janet Reno and later the governor of Massachusetts, said about oddly shaped majority-minority districts that: “I will admit that some of these look pretty strange to me as well, until you look around. A lot of majority-white districts are bizarre and these districts have not been affected by the Voting Rights Act.” “There’s no such thing as a “normal” or regularly shaped district”. The weirdness of many districts are most of all a reflection of the legislature’s eagerness to protect its own (Monmonier, 2001: 85).

Others have argued that we should probably focus less on the shape and compactness of districts. While odd-looking districts have been derived and the media love to make fun of the “snakes”, “earmuffs” and “Goofy kicking Donald Ducks”, we should be careful to assume that a checkerboard square is the ideal. That may cast attention in the wrong direction, towards superficialities like size and shape, rather than the political realities the districts form will produce. Form should not be confused with function. There are many factors to consider

in a redistricting process, like natural boundaries, minority representation, political balance and subdivisions, which could make an asymmetrical design the better option (Dixon, 1968: 459).

Therefore, definitions of gerrymandering that focuses on shape are a bit misleading. The concept should include all apportionment and districting arrangements that transform one party's actual voting strength into the maximum number of legislative seats and transform the other party's actual voting strength into the minimum number of legislative seats. Dixon (Dixon, 1968: 460-461) would include all discriminatory districting in this category, even if it were simply a result of non-action, when the result is racial or political malrepresentation. The reality is that weird shaped districts could be part of facilitating an unfair advantage for a party over the other, but it could also be a way, short of proportional representation, to avoid wasted votes by recognizing some safe areas for the weaker party.

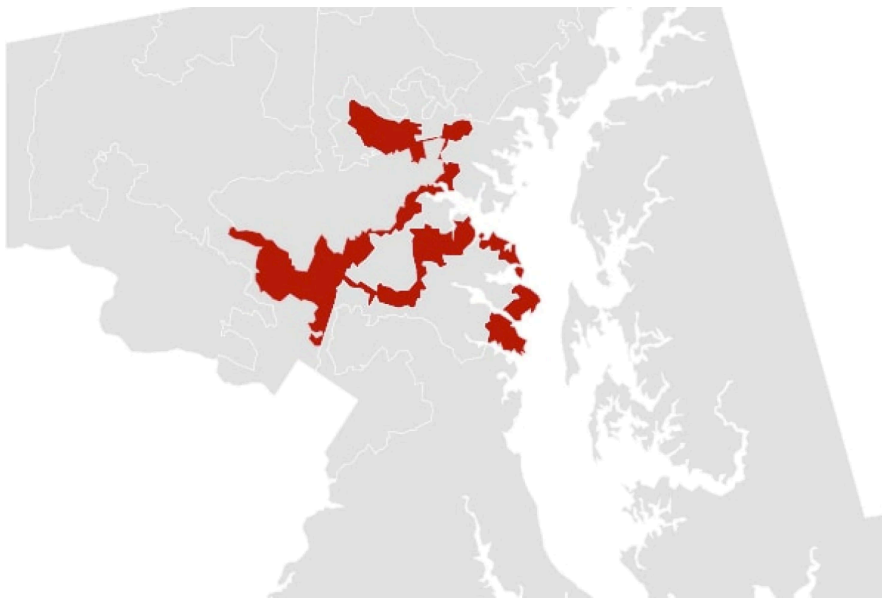


Figure 2.3: Maryland's 3<sup>rd</sup> Congressional District is one of the most gerrymandered and least compact districts in the United States. Source: (Ingraham, 2014)

### 2.3.7 Communities of interest

Another factor that goes into the redistricting process is communities of interest, which can be an ambiguous concept. It is generally viewed as traditional neighborhoods or communities with common interests, but some states like Colorado are more specific in their description:

“ethnic, cultural, economic, trade area, geographic, and demographic factors”. Only three states specifically mentions communities of interest in their constitution, but around half of them require consideration of communities of interest in congressional or state legislative redistricting (Cain, Donald and McDonald, 2005: 19).

### **2.3.8 Gerrymandering as a “political question”**

Many of those who are opposed to a Supreme Court ruling in favor of restricting gerrymandering will argue it is a political question that should be resolved by state legislatures and not the judicial system. The concept of the “political question” is a tantalizing constitution law principle, and hard to define, as it cannot really be said to be a principle at all. It is in many ways a rule of expediency rather than a rule of reason, as it is designed to cover areas where the judicial wisdom might fail for a lack of guiding standards or the judicial power might lack a way to shape or enforce a solution. Evil tongues may say that it is a self-imposed limitation, which justifies disengagement from a case or an issue by the judicial branch (Dixon, 1968: 101).

### **2.3.9 Polarization**

Partisan gerrymandering is considered by some to be a contributing factor to the polarization we see in American politics today. A safe district usually means that the hardest fight could come in the primary election. The primary voters are just a small percentage, in the single digits, of the voting-age population and are made up by the hardcore ideologues of each party. Focusing an inordinate amount of attention on these voters and not the constituency as a whole, could certainly widen the gap between the political parties and explain why a lot of Americans feel like politicians ignore the issues that matters to them (Kamarck and Buchler, 2017: 235).

However, the same polarization also seem to take place where partisan gerrymandering is not possible, like statewide elections for senate and in states with only one congressional representative. This indicates that other factors also contribute to the trend of more safe seats. One of these is that Americans seem to segregate themselves voluntarily into communities with others who are similar to them economically, culturally and politically. This reduces the amount of competitive seats that can be drawn (Kamarck and Buchler, 2017: 236).

Partisan control over the process of redistricting has been shown to have considerable and lasting implications for the electoral fortunes in state legislative elections. The extent of the effect partisan gerrymandering has on elections to the U.S. House of Representatives is more disputed (Seabrook, 2010: 1).

Some argue that partisan redistricting creates rigid conservative and liberal districts, where the general election becomes less important and the primary contests are where things are decided. As primaries become the main battleground, it becomes a race to the extremes. This will lead to less cooperation across the aisle and a politically crippled Washington, because the congressmen know that compromising can lead to them getting challenged in their primary elections (Draper, 2012).

Congress has clearly become more polarized in recent decades. A comparison between the 83<sup>rd</sup> congress from 1953-54 and the 113<sup>th</sup> congress from 2013-14 shows a lot fewer congressional representatives who are close to the center ideologically in the 113<sup>th</sup>. However, if moderate politicians are a result of competitive districts and the lack of competitive districts are a result of gerrymandering, then we should still expect the representatives from competitive districts in the 113<sup>th</sup> congress to be as moderate as the representatives from competitive districts in the 83<sup>rd</sup> congress. It does however seem to be the case that members from marginal districts have become more polarized as well, so it is hard to blame polarization on a lower number of competitive districts. The same polarizing trend is also there in the Senate and the senators are elected by whole states and not subjected to drawn districts (Kamarck and Buchler, 2017: 244-245).

### **2.3.10 Independent commissions**

Due to the partisan competition and the lack of competitiveness in many districts, some states have chosen to take the redistricting process away from the legislators and turn it over to a nonpartisan body. Hawaii, Iowa, Washington and Montana were the first states to establish independent redistricting commissions in the 1980s, and were later followed by Idaho, Arizona, New Jersey and California. Alaska, Pennsylvania, Colorado, Arkansas, Ohio and Missouri have established bipartisan or nonpartisan commissions as well, but only for their state legislature districts. The Supreme Court ruled this kind of independent redistricting

commission constitutional in the case of *Arizona State Legislature v. Arizona Independent Redistricting Commission* in 2015 (Kamarck and Buchler, 2017: 236).

### 2.3.11 Bipartisanship

While partisan gerrymandering can be bad for voters, some would argue that bipartisan gerrymandering is more effective in serving the voter's interests than competitive districts (Kamarck and Buchler, 2017: 243). Competitive districts need to be politically diverse, but districts that are a result of bipartisan gerrymandering are usually more homogenous. This makes the gap between the primary and the general electorate smaller, so that the elected representative is likely to be closer ideologically to his constituents. You could also argue that a politically diverse district ensures that no matter who wins, a large part of the constituency will disagree with their views (Kamarck and Buchler, 2017: 247).

As in many other aspects of American politics, race has been a factor in many gerrymandered district plans. Both major parties have at times done their best to suppress the voting power of minorities, especially in the south where blacks and hispanics make up a larger percentage of the population. A lot of it is due to racism, plain and simple, but there is also a partisan element to it.

Following the civil war, blacks overwhelmingly supported the Republican Party, but voter suppression after the Reconstruction ended made the south solidly Democratic. As the decades went by, the Democratic Party started to align themselves more with the civil rights movement and started to receive a large majority of black votes, while the Republican Party became more popular with southern whites. This led to some bipartisan cases like *Georgia v. Ashcroft* from 2003, where a Republican-controlled Department of Justice argued that the new state senate district plan did not concentrate black voting strength enough. Concentrating more black voters in a district would increase the chances of a minority candidate, but would also weaken the Democratic voting power overall in the state (Issacharoff, 2015: 1399).

This is an example of several cases where a bipartisan coalition of minority Democrats has cooperated with Republicans in redistricting efforts that benefit both. At other times, gerrymandering to get a partisan advantage has diminished minority-voting power. These cases blur the line between racial gerrymandering and partisan gerrymandering and have



caused the Supreme Court some headache. *Hunt v. Cromartie* saw the Supreme Court approve a racially focused gerrymandering of a congressional district, due to the argument that it was done as legal partisan gerrymandering rather than illegal racial gerrymandering (Monmonier, 2001: 45).

## 3. A Case Study

### 3.1 Case study

A case study can be, and has been, defined in many different ways, depending on what the researcher have in mind and wants to emphasize. Gerring (2006: 20) defines a case study as “A case study may be understood as the intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larges class of cases [a population].” What makes a case study different from an experiment is that the former investigates a phenomenon, as it exists in its context, while the latter tries to isolate the phenomenon from the context it exists in. Yin (2003: 18) gives a definition that addresses that separating the two can be challenging: “A case study is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident”. Both of these definitions emphasizes that case studies investigates a phenomenon thoroughly and in great depth. The term “case study” also implies that the case or unit being investigated might not be perfectly representative of the population. Social science rarely deals with phenomena that are completely identical, as the contexts around them are rarely identical. This is fine, but makes it important to have some skepticism about the bias the may be contained in a small sample of units (Gerring, 2006: 20). One of the most important parts of designing research is to select a research object or case and find a research problem that you would like to investigate. It is of great importance to have a well-reasoned statement of the problem, to identify gaps in the current knowledge, acknowledge contradictory theories and remark on any lack of evidence for existing theories (George and Bennett, 2005: 208).

Case study as a method has some clear strengths that makes it valuable. As Gerring phrases it: “the subjectivity of case study research allows for the generation of a great number of hypotheses, insights that might not be apparent to the cross-case researcher who works with a thinner set of empirical data across a large number of cases and with a more determinate definition of cases, variables and outcomes” (Gerring, 2006: 41). The internal validity tend to be strong in case study research, as it is easier to establish the veracity of causal relationship when you focus on a single or a small number of cases, rather than a larger set of cases. When you try to analyze how something got from X to Y, it can be easier to identify the causal

mechanisms when you have a detailed study of one case instead of a cross-case study, though the disadvantage is that such a method makes it difficult to accurately estimate the causal effects (Gerring, 2006: 43-44).

There are certainly some weaknesses as well with case study as a scientific method. While it can be a great method for generating hypotheses, it is less suitable for hypothesis testing. Because of the low number of units, the base for generalization is limited and there can possibly be problems with the representativeness. This can be a challenge in regards to external validity, since it can be hard to apply the findings to a broader population when the study has only included a small number of cases (Gerring, 2006: 43). Though with case studies, the goal is not always to find the most representative example. Every case can be seen as something unique and scientifically interesting by itself (Grønmo, 2004: 90).

### 3.2 Case selection

According to Yin (2003: 39-42) there are five main justifications for choosing a single-case study. The first reason is when it is a critical case in testing aspects of a well-established theory. In this study, the case can contribute to confirming, expanding on or disprove a theory. Another reason would be that the case represents an extreme or unique case. As those cases are rare, there is often a lack of theories and existing literature on the field, which means that new information about it is needed. A third reason for the selection of a case is that it is a representative or typical case. The goal is to gain knowledge about a common situation, how it unfolds and the conditions surrounding it. The fourth reason to choose a single-case study is that it allows the researcher to use a case as an exploratory device into a field or a phenomenon that is unexplored by social science. The fifth reason for it is that the case can be a pilot case that eventually becomes the first in a multi-case study.

I find it hard to fit the case of *Gill v. Whitford* from Wisconsin very accurately into one of the categories. While partisan gerrymandering certainly has a large literature, this is a fresh case with some new features and is so current that not a lot has been written about it yet. It is a representative case in certain ways, as many of the complaints and issues are well known from previous Supreme Court cases. However, it is unique in terms of its new suggested standard, which utilizes new social science, and the Supreme Court has previously not ruled upon the claim that gerrymandering violates the First Amendment of the American

constitution. I think it is a very interesting case that highlights the issues of gerrymandering and why it has not been solved yet, with the possibility to have a big electoral influence in the United States. Advances in technology and scientific method has led to an increased use of partisan gerrymandering and it has become very relevant with the ongoing Supreme Court cases of *Gill v. Whitford* and the later added *Benisek v. Lamone*. It can be a critical case that leads to big and lasting political change in the USA and change how many people view representation.

The case study is a method that can be very useful for an in depth study of a single unit or a small number of unites, where the goal is to gain greater knowledge about a larger population of unites. By looking at the case of *Gill v. Whitford*, I can analyze the arguments and goals being presented in this one case, and get a better understanding of partisan gerrymandering as a whole in the United States and its effect on representation. Why do some view it as a problem, how is its legal status debated and what solutions are being proposed? As this is not the first case involving gerrymandering that United States Supreme Court, I will look at older cases dealing with representation and gerrymandering, to establish a context and find out how they have affected the arguments and strategies used in this case. These are variables that could have been hard to investigate in a quantitative study, so the case study seemed like a suitable method based on what I want to do.

### 3.3 Document analysis

Document analysis is a form of qualitative research in which the analyst to assess a theme reviews documents and attempts to extract relevant data. There are three primary types of documents: Public records like annual reports and policy manuals, personal documents like journals and scrapbooks, and physical evidence or artifacts like flyers and posters (Bowen, 2009: 28). The documents that I will analyze in this thesis are public records from the *Gill v. Whitford* case. I will go through the amicus curiae briefs filed in support of both parties and try to find the major points of contention and how they argue for and against. My reason for choosing to use amicus briefs as sources was to get an overview over the arguments used on both sides of the gerrymandering question. Using sources from a case shows the real life consequences and makes it less of a theoretical question.

As the amicus briefs are public documents used in the court system and available to everyone in the public, their authenticity is easily verified. It is important in a document analysis to evaluate the original purpose of the document, the agenda of the author and any bias they might have (Bowen, 2009: 32-33). That is less of an issue in this case, as the agendas of the parties filing briefs are quite clearly laid out in the arguments and they write down whom the brief is written in support of. Where the bias needs to be considered is with some of the sources used on redistricting theory and the constitutional history of gerrymandering, Bernard Grofman and Eric McGhee, who have also written amicus briefs to the Supreme Court in *Gill v. Whitford*. Both of them filed in support of neither party, but McGhee is one of the researchers behind the efficiency gap measure used in the case and Grofman was one of the researchers who suggested a test based on the partisan symmetry standard in a previous redistricting case called *LULAC v. Perry* from 2006. Another potential source of bias is the researcher himself. I was not very familiar with topic before I started writing this paper and do not feel very strongly either way. However, there could be negligence that results in misreading or wrong interpretation of former cases or amicus briefs.

A case study goes in depth on a phenomenon and is likely to have a strong internal validity due to this narrow focus, while it can be more challenging to apply the findings on a broader population. This is a fresh case which utilizes new social science and is different from previous gerrymandering cases in its framing. It could potentially be a game changer in the field of redistricting and change how representation is viewed in the courts. The main analytical part of the paper is a document analysis of the amicus briefs filed in the Supreme Court case. However, as a case study is not isolated from the context it exists in, but is investigated as it is, it is necessary to investigate the context *Gill v. Whitford* exists in. I will go through the constitutional history of gerrymandering and look at the previous Supreme Court cases that have affected gerrymandering and representation. The starting point for these cases is *Baker v. Carr* in 1962. The reason is that this case established redistricting as an issue the courts could be involved in, starting what is sometimes referred to as the reapportionment revolution and helped establish the idea of a “one man, one vote” precept that would later be confirmed in *Wesberry v. Sanders* and *Reynolds v. Sims*.

# 4. A Constitutional History of Gerrymandering

## 4.1 Long history

The practice of gerrymandering is almost as old as popular elections are in America and there are examples of it even from the colonial period. The first known appearance of it was in the drawing of assembly districts in Pennsylvania in 1705. This first instance of gerrymandering probably intended to equalize representation. By separating the city of Philadelphia from its county and give the rural districts their own representation, the hope was to give the rural counties equal influence, but the result was that Philadelphia’s political influence was excessively restricted. It did, however, not take long before politicians purposefully used gerrymandering for partisan purposes (Griffith, 1907: 26).

New rounds of redistricting starts every 10 years following the census and the party in position in the state is likely to attempt to maximize their influence, following the existing rules and previous court decisions. A common pattern is that when new redistricting plans are implemented and their effect is felt, there will be some that complain and feel that their influence is marginalized by the new districting. Some of them will take their issue to the courts and the trend is that a few each decade will end up in the Supreme Court. How the courts rule in these cases will then affect the next round of redistricting.

Table 4.1 below shows the most important Supreme Court cases since the reapportionment revolution started in the 1960s and how they affected districting and representation. In this chapter I will analyze the previous cases, because they established a framework and context that *Gill v. Whitford* exists in. The outcomes of these cases have influenced the strategies used later. The quote from de Tocqueville at the start of the thesis is exemplified in the table, where subjects that were previously considered political questions, like malapportionment and racial gerrymandering, have become things that the Supreme Court is willing to make rulings on. Partisan gerrymandering could be next.

Table 4.1. Most important Supreme Court cases:

<b>Year:</b>	<b>Case:</b>	<b>Question:</b>	<b>Result:</b>
1962	Baker v. Carr	Is redistricting a political question, or can it be resolved by federal courts?	The first recognition that redistricting could be settled in court. It had previously been seen as a purely political issue, but the Supreme Court saw it as their responsibility to improve the quality of representation.
1964	Wesberry v. Sanders + Reynolds v. Sims	Do population discrepancies between congressional districts violate the Fourteenth Amendment and deprive citizens of the full benefit of their right to vote? Do discrepancies between state legislature districts?	Established the concept of "one man, one vote", voting districts should be as equal as practicably possible in population. Asserted that the aim of reapportionment is to achieve a fair and effective representation for all citizens.
1973	Mahan v. Howell	A new state legislature plan was challenged as being unconstitutional because it's population deviations were too large to satisfy the principle of "one person, one vote". Was Virginia's reapportionment plan invalid under the Equal Protection Clause of the Fourteenth Amendment?	Upheld a redistricting with significant population variance between districts, because the variance was a result of another redistricting criteria. In this case maintaining the integrity of political subdivision like cities and country lines.
1983	Karcher v. Daggett	Voters claimed the new congressional redistricting aimed to maximize Democratic power in the state. Did the gerrymandering in New Jersey's reapportionment plan violate Article 1, Section 2 of the Constitution, regarding equal representation?	First time the Supreme Court writes explicitly about partisan gerrymandering. Important with fair, as well as equal representation.
1986	Davis v. Bandemer	A group of Democrats claimed political gerrymandering diluted their votes in important districts. Did Indiana's 1981 state apportionment violate the Equal Protection Clause of the Fourteenth Amendment?	While the redistricting may have had a discriminatory effect on the Democrats, the effect was not sufficiently adverse to violate the Equal Protection Clause. But claims of partisan gerrymandering are probably justiciable and the courts can intervene to amend unconstitutional redistricting plans.
1993	Shaw v. Reno	Did the claim from North Carolina citizens, that the State had created a racially gerrymandered district, raise a valid constitutional issue under the Fourteenth Amendment's Equal Protection Clause?	Though the plan seemed neutral on its face, the districts shape was bizarre enough to indicate an effort to separate voters based on race. It was emphasized that strange district shapes are an indicator of districts drawn to include individuals with little in common other than one special feature.

1994	Vera v. Richards	District Court case after Texas created three additional congressional districts, where some voters challenged the plans as racial gerrymandering. Did the plans violate the Equal Protection Clause of the Fourteenth Amendment?	The federal District Court found the plans unconstitutional as a racial gerrymander. They expressed a concern that partisan redistricting would lead to elections where the representatives have selected its voters, and not one where the voters select their representatives.
2004	Vieth v. Jubelirer	Can voters stop a redistricting plan by claiming it was manipulated for political reasons? Does a state violate the Equal Protection Clause when it disregards neutral redistricting principles to achieve an advantage for one political party? Does a state exceed its power under Article 1 of the Constitution when it draws congressional districts to ensure that a minority party will consistently win a supermajority of the state's congressional seats?	Decided not to intervene as no appropriate judicial solution could be found. Could not find a manageable standard for partisan gerrymandering claim, but gave indications that such a standard could be found and brought before the Court in the future. The Court ruled narrowly so the case did not overturn Davis v. Bandemer
2006	League of United Latin American Citizens v. Perry	Did the Texas legislature violate the Constitution and the Voting Rights Act when it used 2000 census data to redistrict in 2003 for partisan advantage, resulting in districts that did not conform to the one person, one vote standard?	Supreme Court held that the plan did not violate the Constitution, but part of the plan violated the Voting Rights Act by redrawing a district in a way that denied Latino voters as a group the opportunity to elect a candidate of their choosing. The case made partisan symmetry an important part of the partisan gerrymandering discussion. Upheld that partisan gerrymandering is within the Supreme Court's domain.
2017	Gill v. Whitford	Does the Court have the authority to hear a statewide claim to Wisconsin's redistricting plan, rather than to specific districts? Is the redistricting plan an unconstitutional gerrymander, by violating voters' right to freedom of association under the First and equal protection under the Fourteenth Amendments? Did the District Court use an incorrect test for a gerrymander? Are partisan gerrymandering claims justiciable?	



2017	Benisek v. Lamone	Did the Maryland legislature violate voters First Amendment through partisan gerrymandering, by retaliating against them for past support of a party's candidate?	
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#### 4.2 Baker v. Carr 1962

One of the first steps in improving the quality of representation was the court's recognition in *Baker v. Carr* in 1962 that malapportionment was an issue that could be settled in court.

Malapportionment refers to electoral districts with divergent ratios of voters to representatives. Few rules had been established at the time and the disparity in representation and population of districts was big. It was even more lopsided in districts for the state legislature than in congressional districts, with ratios ranging from 2.2 for Hawaii to 1081.3 for New Hampshire, where there had been no redistricting since 1900 (Monmonier, 2001: 23-24). This meant that some electoral representatives were representing about a thousand times the number of voters as some other was. Or from a voter perspective, that voters in districts with less people per representative had a larger influence, per person, on the governing body. Rural districts tended to be overrepresented, while urban districts had a lot more people per representative. This was also the case in Tennessee and the background for why plaintiff Charles Baker brought his lawsuit to the courts. It was claimed that the apportionment of Tennessee's state legislature failed to account for significant population changes, as it had not had a redistricting since 1901, and that this was a violation of the Equal Protection Clause of the Fourteenth Amendment. An important reason for the Supreme Court's decision in *Baker v. Carr* was the conviction that deferring to legislators in matters of reapportionment could have bad consequences, since those who possess disproportionate power in a legislature have no incentives to surrender it (Grofman, 2007: 14).

Redistricting had previously been seen as a purely political problem, but the decision in *Baker v. Carr* was a reaction to representational issues that the political institutions seemed incapable of self-correcting. The decision made it clear that it was no longer just political, but was an issue where the courts could intervene. They could not have known how powerful the Equal Protection Clause would become in political reform. Looking at the court documents from the case, it appears that Chief Justice Warren was more focused on the principle of

fairness and all votes to count equally, than he worried about political consequences of judicial intervention (Cain, Donald and McDonald, 2005: 8). *Baker v. Carr* was at the end of a long line of judicial refusals to enter the political thicket of reapportionment. The Supreme Court ruling that courts could take up challenges to unrepresentative legislatures under the Equal Protection Clause of the Fourteenth Amendment served to inaugurate a new era of constitutionalism and American Politics. This greatly affected legislative institutions, judicial review and political theories of representative government (Dixon, 1968: 99).

#### 4.3 *Wesberry v. Sanders* 1964

The concept of “one man, one vote” was established as a rule for congressional districts in the case of *Wesberry v. Sanders* and for state legislature districts with *Reynolds v. Sims* in 1964, which led to a new wave of redistricting. These cases made it clear that population discrepancies between congressional districts and between state legislature districts could violate the Fourteenth Amendment and deprive citizens of the full benefit of their right to vote. Congressional districts today are very equal in population, as further cases have brought them to well below a 1 percent deviation, though local legislature districts are allowed to have a larger deviation if a good justification can be presented (Morill, 1987: 245).

#### 4.4 *Reynolds v. Sims* 1964

Chief Justice Warren asserted in the Supreme Court opinion of *Reynolds v. Sims* that “the achieving of fair and effective representation for all citizens is concededly the basic aim of reapportionment” (Grofman, 2007: 11). The opinion suggests that fair and effective representation contains at least three components: political equality, majority rule rather than oligarchy and representative institutions that will reflect significant shifts in public opinion. Representative equality was seen as an important aspect of voting rights. This was a new interpretation, as the Supreme Court in the 1946 case of *Colegrove v. Green* had viewed legislative apportionment as a political problem of governmental structure, where the court should not interfere with the states decisions regarding their own institutions. Following *Reynolds v. Sims*, representative equality would be seen as a right that needed the same judicial protection as other guarantees of equality (Grofman, 2007: 12).

*Reynolds v. Sims* was based on a case in Alabama, but had companion cases from several other states, including Colorado, once it reached the Supreme Court. From the Colorado case,

it was said by Justice Potter Stewart that the Equal Protection Clause in the constitution restricted state legislative apportionment in two ways: They had to be rational when looking at each state's own needs and characteristics; and they must not be so constructed as "systematically to prevent ultimate effective majority rule". It was expected that representative institutions would be responsive to shifts in public opinion; otherwise they would not be responsive to the popular will (Grofman, 2007: 13).

#### **4.5 Mahan v. Howell 1973**

In the *Mahan v. Howell* decision, the Supreme Court overruled a federal courts decision that a redistricting of state legislature districts in Virginia strayed too far from the principle of equal population. Even though the population variance between districts were 16.4%, the Supreme Court found it to be within constitutional limits, with the reasoning that the population variance was a result of a state policy of maintaining the integrity of political subdivisions like cities and county lines (Grofman, 2007: 17).

In other state delegation cases the same year, with a smaller overall percentage variance in population, the Supreme Court held up the lower court's decision that the reapportionment was insufficient. These cases differed from the Virginia case by not preserving local boundaries, which was the rationale for the population variance there (Grofman, 2007: 17).

#### **4.6 Karcher v. Daggett 1983**

New redistricting plans following the 1980 census brought several new charges of political gerrymandering. In the case of *Karcher v. Daggett*, the new map for New Jersey's 1982 congressional districts were invalidated on the grounds of population inequality, even if the variance ranged less than 0.70% at the most. Speaking for the majority opinion, Justice Brennan wrote, "the population deviations among districts, although small, were not the result of a good-faith effort to achieve population equality". Any population inequality had to be proven justifiably by the state through other policies like district compactness or respecting municipal boundaries (Grofman, 2007: 120).

Significant for later cases was the fact that the Supreme Court wrote explicitly about partisan gerrymandering for the first time and seemed more concerned with gerrymandering than having a completely equal population in the districts (McGhee & Stephanopoulos and

McGhee, 2015: 839). A theme in the opinions were the importance of fair representation in addition to an equal one, and that political gerrymandering could be a form of vote dilution. By manipulating district lines in favor of one party to an extreme degree, it treats voters unequally and could break with the right to fair representation of voters from the other party, which is protected by the Equal Protection Clause. Justice Stevens wrote in his opinion that “political gerrymandering is one form of ‘vote dilution’ that is proscribed by the Equal Protection Clause,” and added “The major shortcoming of the numerical standard is its failure to take account of other relevant – indeed, more important – criteria relating to the fairness of group participation in the political process” (Grofman, 2007: 20).

Therefore, as Stevens explicitly mentioned partisan gerrymandering as a democratic problem, he also identified the problem of finding a numerical standard that considers all factors. What he proposed as a way to identify unlawful gerrymandering was to examine if the plan had a significant adverse impact on an identifiable political group, whether there was an objective indicator of this irregularity and if the State could provide convincing evidence that the plan still served the neutral, legitimate interests of the community, despite the irregularity (Stephanopoulos and McGhee, 2015: 840).

#### **4.7 Davis v. Bandemer 1986**

A federal District Court held in 1984 that the new redistrict plan for both chambers of the state legislature in Indiana was unconstitutional, by violating the Equal Protection Clause of the Fourteenth Amendment. They ruled that intentional partisan gerrymandering violated the Fourteenth Amendment right of the minority party in the state legislature. The case was appealed to the Supreme Court in 1986 and became one of the most important redistricting cases the Court has seen. While it did reverse the lower court’s decision that the redistricting map of Indiana was unconstitutional gerrymandering, it also confirmed that partisan gerrymandering was justiciable. This was decided when six of the justices agreed that gerrymandering was not a “political question”, but a “justiciable controversy” that the courts could intervene in to amend the situation (Stephanopoulos and McGhee, 2015: 840). Partisan gerrymandering had previously seemed immune to judicial scrutiny, but *Davis v. Bandemer* started the debate on what a test of unconstitutional political gerrymandering would look like (Grofman, 2007: 3).

Political scientists are split in how they interpret the ruling of *Davis v. Bandemer*. Some, like Lowenstein, argues that it preserves the status quo ante by keeping the door open for the possibility of court intervention in the very extreme cases, but rules out intervention when a major political party brings the litigation forward. Grofman on the other hand would argue that *Davis v. Bandemer* set the path for a three-pronged test for partisan gerrymandering. It must be proved to be intentional, severe and have predictably long-lasting consequences (Grofman, 2007: 5).

The Democrats in Indiana, who were the minority party, did not show that the redistricting would have long-lasting consequences. The courts have taken the position that one cannot use the results of a single election to prove unconstitutional discrimination, it is necessary to prove that the plan consistently degrades voters' influence. As Justice White said in the plurality opinion in *Davis v. Bandemer*:

“The appellants argue here, without a persuasive response from appellees, that had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses. Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980s or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census. Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause” (Grofman, 2007: 6).

*Davis v. Bandemer* set a standard that meant it was not enough to show an electoral disadvantage, you also had to prove that the disadvantage is durable and not a fluke in a single election. This would be something that parties in future redistricting cases would take note of.

#### **4.8 Shaw v. Reno 1993**

The 1990 redistricting increased the number of minority representatives in Congress by a lot. A stronger enforcement by the courts on population equality and against minority vote dilution, combined with new computer technology that made it easy to alternative districting plans, created a larger number of majority black or hispanic districts. New technology made it easier to draw creative maps with enough minorities inside the borders, but it also led to

complains about irregular shapes. The new districts had less emphasis on preserving city and county boundaries as well (Grofman, 1995: 27).

Especially some of the oddly shaped black districts in the South led to a public, scholarly and legal backlash against the most creatively drawn minority districts. Some of the criticism came from the belief that it erodes a geographical based notion of representation. But for many others it is the use of any racial criteria for the drawing of districts, as that could lead away from a colorblind society to one where every group tries to grab their piece of the pie (Grofman, 1995: 27).

In the case of *Shaw v. Reno*, a group of residents from North Carolina sued after the state had presented a redrawn district map with two majority-minority districts. The lawsuit was dismissed by a federal court, but was appealed to the Supreme Court who reversed the decision. The majority opinion written by Justice O' Connor emphasized that strange shapes are an indicator of districts drawn to include individuals with little in common other than one special feature, in this case the color of their skin. The majority opinion held that redistricting based on race must be held to strict scrutiny, which means that it must satisfy three tests to pass. It must be necessary due to a compelling governmental interest, be narrowly tailored to achieve that interest and also be least restrictive way to effectively achieve that interest (Grofman, 1995: 29).

#### **4.9 Vera v. Richards 1994**

The District Court judges in *Vera v. Richards* from 1994 expressed concern over the voters' ability to control their own democracy and made a strong argument for why they view it as important that gerrymandering remains justiciable. The fear is that partisan redistricting will lead to elections where the representatives have selected the people, and not one where the people select their representatives. This is a bigger concern in the American political system than in most other, since control of redistricting is mostly a partisan and political matter and not controlled by an administrative bureaucracy. Both the District Court and later the Supreme Court in 1996 rejected the district map as racial gerrymandering (Winburn, 2008: 3).

#### 4.10 *Vieth v. Jubelirer* 2004

Pennsylvania lost two congressional seats following the census in 2000. With Republican control in both houses of the state legislature and the governorship, they had the chance to create a new district plan that elected as many Republicans as possible. Three registered Democrats challenged the plan on several alleged violations of the constitution, including a claim of partisan gerrymandering. It was up to the Supreme Court to decide if the Equal Protection Clause is violated if neutral redistricting principles are disregarded to achieve an advantage for one party. They also had to consider whether congressional districts drawn to ensure that a minority party will consistently win a super-majority of the state's congressional seats were in violation of a state's power under Article 1 of the Constitution (Driver, 2005: 1170).

In what was the last large case on partisan gerrymandering before *Gill v. Whitford*, the Supreme Court found that districting plans could not be overturned just because they gave one party an advantage over another. The reason given by the five justices in the majority was that there was no standard found in the constitution and that all the suggested standards from the appellants and the dissenting justices was viewed as unmanageable (McGann, 2012). But the fifth justice in the majority, Justice Kennedy, was unwilling to close the door on the possibility that such a standard could be found and wrote in his concurring opinion "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future" (Driver, 2005: 1173-1174). This indicated that Kennedy would be willing to adopt such a standard if it were to be brought before the Supreme Court.

Kennedy also suggested that a justiciable standard might be found in the First Amendment, rather than in the Equal Protection Clause in the Fourteenth Amendment, under which most gerrymandering cases have been litigated. Justice Kennedy noted that "... First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights" and he argued that the First Amendment could prevent a state from punishing voters on the basis of their political party, in the same way a state cannot fire employees on the basis of their political affiliation (Persily, 2005: 79).

#### 4.11 League of United Latin American Citizens v. Perry 2006

The Republican Party in Texas won total control of the state legislature after the 2002 election and sought to replace the redistricting plan that a federal court had drawn after the United States Census in 2000, with a plan that would increase the number of Republican representatives in Congress. A mid-decade redistricting is rare and not necessary as a result of the census, which means that it can come of as a more obvious political power grab and lead to bad publicity. In the *League of United Latin American Citizens v. Perry* case, also referred to as LULAC, a group of voters alleged that a mid-decade redistricting was illegal, that the plan was an example of unconstitutional partisan gerrymandering, that it did not conform to the “one person, one vote” standard and that it violated §2 of the Voting Rights act, which prohibits any voting practice that has a discriminatory effect, regardless of whether there is a discriminatory intent. They claimed that the new map diluted the voting power of minorities in multiple districts, including District 23 that was redrawn to include more Republican Anglo voters and exclude Democratic Latino voters (Harvard Law Review, 2006: 243-244).

When the case came before the Supreme Court in 2006, it ended up with a set of fractured opinions where the plurality affirmed the District Court’s decision to reject that the whole plan was an unconstitutional partisan gerrymander and that a mid-decade redistricting was illegal. But it did find that District 23 violated the Voting Rights Act (Harvard Law Review, 2006: 243-244). Perhaps the most important influence on future cases was from the discussion on partisan symmetry.

*Vieth v. Jubelirer* did cause some skepticism about whether any reasonable standard could be found, but a majority of the justices in *LULAC v. Perry* expressed interest in the concept of partisan symmetry. Symmetry in an electoral system indicates that parties in similar positions are treated equally, meaning that a party receives the same number of seats in the legislature as the other party would if they had the same percentage of votes. If the Democratic Party gets 55 percent of the vote and that gives them 70 percent of the seats, you would expect the same result for the Republicans if they got the same. If it gave them less than 70 percent, it would mean that the district plan is asymmetric in favor of the Democrats, while more than 70 percent would indicate that the plan is in favor of the Republicans. Many social scientists view partisan symmetry as the best way to define partisan fairness in a plurality-based system like the United States has (Grofman and King, 2007: 6).



One of the most prominent advocates for partisan symmetry was Justice Stevens, who defined it as a “requirement that the electoral system treat similarly-situated parties equally”. He applied partisan bias, a measure of partisan symmetry, which refers to the difference in the share of seats the two parties would receive given the same share of the statewide vote. Applying it on the Texas congressional map, it revealed that the Republicans would probably win thirty-two seats, 62.5 percent, if they got 50 percent of the voters, which would give the Democrats twelve seats, or 37.5 percent. This would give the Texas congressional map a 12.5 percent pro-Republican bias (Stephanopoulos and McGhee, 2015: 843).

Justice Kennedy did not approve of the partisan bias standard proposed, that would have compared how both parties would have fared electorally, when they were each given a certain percentage of the vote. It failed to satisfy his wishes for a standard, as he felt that it required counterfactual speculation and he disliked the assumptions one had to make about where the voters that would switch party resided. Another reason for Kennedy’s skepticism was that he wanted to see if the feared inequality would actually occur in an election and vary of invalidating a plan on hypothetical results. Lastly, none of the parties or amicus briefs had provided the empirical data on the level of partisan symmetry of other plans. Without that, the justice did not see how they could set a hard line for how much partisan dominance would be too much. Nevertheless, he did express some possibility to the use of partisan symmetry as a tool for a partisan gerrymandering standard. He did not discount that it could be used for both planning and litigation of redistricting, but that it would need other factors as well. Something that accounted for the other reasons, besides partisanship, that asymmetry could occur, like geography and compliance with traditional redistricting criteria (Stephanopoulos and McGhee, 2015: 844-845).

The majority in the *LULAC v. Perry* decision did once again hold that partisan gerrymandering is a matter that is theoretically within the domain of the Supreme Court. But one has to ask if their unwillingness to look at partisan gerrymandering leads to more focus on race within districting. It seems unlikely that the reason Latino voters were divided between District 23 and 25 was because of an intention to hurt them because of their ethnicity, but rather because their ethnicity was seen as a proxy for their political affiliation.

#### 4.12 Benisek v. Lamone 2018



Figure 4.1: Maryland's 6<sup>th</sup> District. Source: (Cooper, 2017)

The Supreme Court will also hear another gerrymandering case in 2018. In what was an unexpected turn of events, the Court announced on December 8, 2017 that it would take a case from Maryland, called *Benisek v. Lamone*. It has received less attention than *Gill v. Whitford*, but some predict it could prove to be the more important of the two (Greenhouse, 2018). This case is brought by seven Republicans, who formerly voted in Maryland's Sixth District. The Sixth District elected a Republican to Congress in every election from 1992 to 2010, until the Democratic controlled legislature conducted a large population transfer in the redistricting process that followed the 2010 census. Following the population transfer, that saw a swing of more than 90 000 voters, the 20-year Republican incumbent Roscoe Bartlett lost the congressional election of 2012 to the Democratic candidate John Delaney (Greenhouse, 2018). The announcement that the Supreme Court would hear a second partisan gerrymandering case led to much speculation about what it meant for the challengers in the case of *Gill v. Whitford*.

The Republican voters challenging the 2011 redistricting as an unconstitutional gerrymander do not bring the Equal Protection Clause of the Fourteenth Amendment or any form of statistical based test into the case, they base their claim purely on a violation of the First Amendment. They claim that unlike the equal-protection approach to partisan gerrymandering, the First Amendment retaliation framework does not depend on a unifying

definition of “fairness” or require courts to determine when a map has gone “too far”. Instead, it challenges whether the State has imposed a real or practical burden in retaliation for past political support of the other party. Rather than looking at statistical measures of imbalance, it addresses the practical effects of a gerrymander (Epps, 2018).

One reason for why the Supreme Court chose to hear the case from Maryland might be the bipartisan symmetry of having one case brought forward by Republicans and another by Democrats. Chief Justice Roberts had worried, during the argument in *Gill v. Whitford*, that the Supreme Court's status and integrity could take a big hit if people perceived the court as intervening on gerrymandering in order to favor one party over another. Hearing the Maryland case as well could hinder that perception (Greenhouse, 2018).

Judge Paul V. Niemeyer, who was part of the three-judge panel of the United States District Court that handled the case in Maryland, wrote a devastating observation of gerrymandering's place in American politics: “The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self-interest when given the opportunity” (Liptak, 2018)

Another reason why the Supreme Court chose to process *Benisek v. Lamone* could be because the two cases are framed differently. In Wisconsin, the Democrats challenged the whole redistricting and claimed that it violated their 14th Amendment right to equal protection. Previous Supreme Court precedence has been unfavorable to statewide challenges. The Maryland case challenges only the Sixth congressional district, and was litigated as a question of the Republican voter's rights to free speech and association under the First Amendment. The theory is that the Democrats dismantled the old district in retaliation for the support its voters gave the sitting Republican representative. (Greenhouse, 2018)

To focus on the First Amendment could give the case an increased chance of passing. As justice Kennedy, cited in Greenhouse (2018), wrote in his *Vieth v. Jubelirer* opinion the last time the Supreme Court had a gerrymandering case: “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'. This is important, as Kennedy is likely to be the deciding judge. The appellants in *Benisek v. Lamone* could also have another advantage over those in *Gill v. Whitford*, as a ruling in their favor would not change the map of an entire state, but have the less sweeping consequence of just changing one district. Perhaps even more important, their test based on practical burdens would remove the efficiency gap and other statistical tools from the court cases and replace it with the justices' gut feeling (Epps, 2018). A ruling that strikes down a voting district as an unconstitutional partisan gerrymander could revolutionize American politics, but perhaps the biggest challenge would be to find a practical remedy against the extreme examples of gerrymandering without getting judges involved in dozens and dozens of important political decisions (Liptak, 2018).

The Supreme Court heard the oral arguments in the case on March 28, 2018. There was a sense that the conversation was moving in circles, as some justices worried that the courts would get involved in every redistricting dispute, some thought that gerrymandering was a political decision they should not get involved in and even those would like to take on gerrymandering was unsure if they could find a manageable standard to apply. This was in many ways a repetition of what happened in the oral arguments of *Gill v. Whitford*. Justice Kennedy, who is likely to be the deciding justice in the gerrymandering cases, repeated his earlier thoughts that while a test seems elusive, extreme partisan gerrymandering could possibly be seen constitutionally as retaliation for a voter's previous votes. If so, it would be a violation of the First Amendment, which is the claim that the plaintiffs have brought in this case (Barnes, 2018).

Partisan gerrymandering has long been a forest that the Supreme Court has been reluctant to step into. With new technology and a growth in party-line voting, those who wish to redraw party lines to fit their political objectives have an enhanced capacity to do so. These tools are also available to those who are against gerrymandering, and there has been an influx of metrics from social scientists that tries to find a good standard to measure it by. The Supreme Court's almost exclusive focus on equal population and racial gerrymandering has liberated as much as constrained the self-interested behavior of politicians and parties, yet a judicial plunge into the political thicket of partisan and bipartisan gerrymandering could also be problematic and is something the justices fear would result in a wave of redistricting cases all over the country (Mann, 2005: 93). The Supreme Court's decision to hear the merits of both *Benisek v. Lamone* and *Gill v. Whitford* in the 2017-2018 term could be an indication that it is

ready to make a final ruling on partisan gerrymandering. Together the two cases make redistricting and gerrymandering very current themes. How the cases are framed in terms of representation and their claims of First and Fourteenth Amendment violations makes them a good fit for the questions I want to explore in this thesis. The next chapter will go in detail on the events that led to the Supreme Court case, take a look at the oral arguments that was presented at the hearing and analyze the amicus briefs filed in *Gill v. Whitford*.

## 5. Gill v. Whitford

### 5.1 Introduction to the case

The Supreme Court case that can settle the question of whether partisan gerrymandering is unconstitutional or not, is called *Gill v. Whitford* and arose following the 2011 redistricting plan in Wisconsin. After taking control of Wisconsin's state legislature and governorship in the 2010 election, the Republicans started the process of drawing a map that would cement their majority in future elections. The new redistricting map was approved by the state legislature as Act 43 in 2011 (Wines, 2017).

The Republican legislative leaders and their staff used redistricting software that provided them with data on population demographics and current political boundaries to help them draft district maps. They made sure to try to follow state and federal requirements on traditional redistricting criteria and drew several maps that secured different levels of partisan advantage. The drafters were also assisted by a political science professor that provided them with visuals of the maps under different electoral scenarios (Harvard Law Review, 2017).

The Republicans seem to have been successful in drawing a district map that gives them a solid partisan advantage. In the three elections since Act 43 came into effect, Democrats have never won more than 39 of the 99 seats in the state assembly, even when they won a majority of the votes. The 2012 elections saw Republicans win 48.6 percent of the votes, but they were able to capture 60 out of the 99 seats in the Assembly. In 2014 they won 52 percent of the vote, which enabled them to win 63 seats (Liptak, 2017a). Following these elections, some Democratic voters alleged that the 2011 redistricting plan had purposefully and discriminatorily diluted the vote of Democrats statewide.

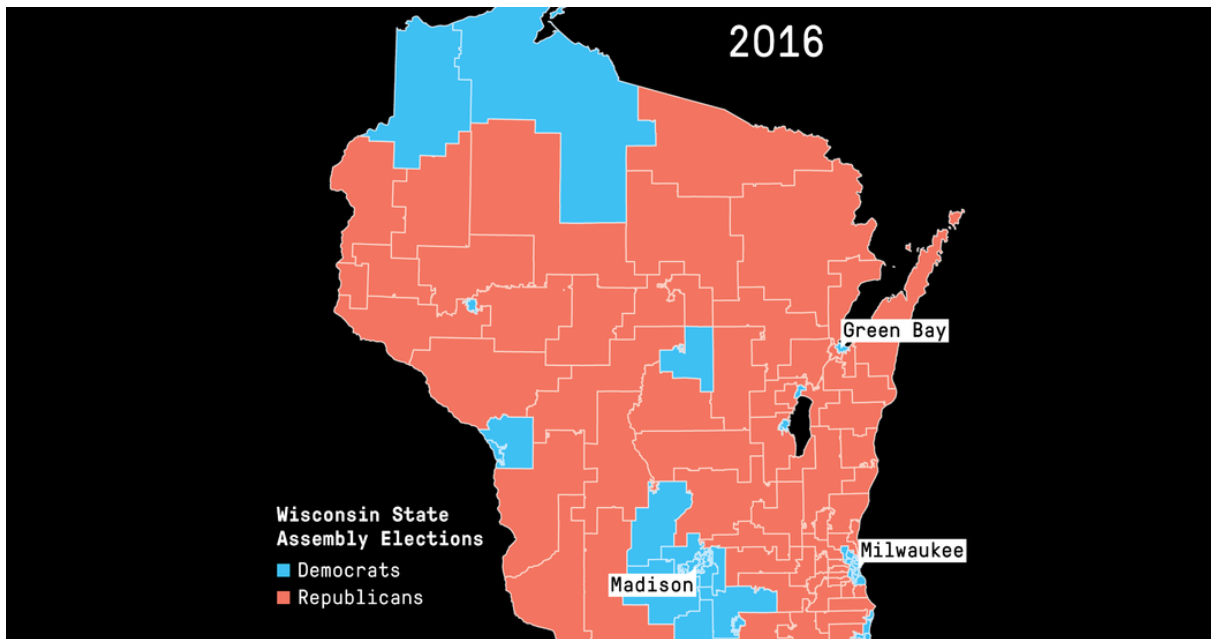


Figure 5.1: Map of Wisconsin’s State Assembly districts. Source: (Bazelon, 2017).

They accused the Republican state legislature of employing gerrymandering tactics that “wasted” Democratic votes by both concentrating voters in a small number of districts to limit the number of seats they could influence and in other places by spreading them out across several districts so they could not achieve a majority. These tactics are called packing and cracking, and can be very effective when used together. The objective would be to make sure you have a majority, but not too big of a majority, of voters in as many districts as possible (Wofford, 2014).

The case was filed with the United States District Court for the Western District of Wisconsin on July 8<sup>th</sup> 2015. It was filed by the Campaign Legal Center on behalf of twelve plaintiffs that are registered Democrats, including lead plaintiff Professor William Whitford, who claimed that the 2011 state assembly map was an unconstitutional partisan gerrymandering that favored the Republicans and discriminated against Democratic voters (Wines, 2016).

On November 21<sup>st</sup> 2016, a 2-1 decision declared that the map was unconstitutional. The three-judge panel of the U.S. District Court for the Western District of Wisconsin outlined a standard for evaluating claims of partisan gerrymandering, struck down the redistricting map from Wisconsin as unconstitutionally partisan and ordered the defendants to enact a new districting plan. Though many justices has viewed partisan gerrymandering as problematic and unconstitutional, the problem in previous cases has been that they lack a discernible and

manageable standard to apply when assessing the claims. This is what the District Court now believed that they had found by “narrowly defining the degree and duration of partisan advantage that would rise to the level of invidiousness and employing an innovative measure of voting power”. (Harvard Law Review, 2017)

To get there, the District Court adopted the three-pronged standard that the plaintiffs had presented. The standard found that a districting plan violated the Constitution if it:

1. Was created with a discriminatory intent. Was the motive to favor one party over the other?
2. Has a large and durable discriminatory effect. Is one party’s vote being wasted to a larger degree than the other party’s?
3. Cannot be justified on other, legitimate legislative grounds. Can other things than partisan gerrymandering explain the discriminatory effect?

(Harvard Law Review, 2017).

### **5.1.1 What were the arguments and/or evidence that there was intent?**

To start off, the justices had to consider whether there was discriminatory intent or not. There is a precedent for allowing some political considerations in redistricting and the political reality is that partisan considerations and incumbency will play some role, so it was necessary to find a dividing line between those legal partisan considerations and unjust partisan gerrymandering. The focus was on entrenchment, because that is something that can make the party in control, and by proxy the state government, impervious to the interests of citizens who voted for or are affiliated with other political parties. The justices found evidence of the Republican politicians intent on entrenching their power by looking at the maps they had generated and the analysis that they had done (Harvard Law Review, 2017).

### **5.1.2 What is the evidence that shows the effect?**

When they assessed if the redistricted map had its intended effect, the justices looked at the election results from 2012 and 2014, as well as statistical analysis from expert witnesses that helped them conclude that the map had achieved the intended goal. To confirm their findings, they employed a new measure called the “efficiency gap”.

The efficiency gap is a new way to measure partisan symmetry. The formula is quite simple:



$$\text{Efficiency Gap} = \text{Seat Margin} - [2 \times \text{Vote Margin}].$$

Where:

“Seat Margin” is the share of seats held by the party, minus 50 percent, and

“Vote Margin” is the share of votes the party receives, minus 50 percent.

If the efficiency gap is positive, then the party has an electoral advantage, while it is at a disadvantage if the score is negative (Stephanopoulos and McGhee, 2015: 853).

It measures in a single number the difference between the amount of votes each party receives that are “wasted”, divided by the total number of votes cast in the election. By wasted, the authors refer to votes that does not contribute to the election of a candidate. This means that both votes for a losing candidate and surplus votes for a winning candidate are counted as wasted. To categorize these votes as wasted is controversial, but they can be good indicators that cracking and packing strategies have been used to gerrymander districts (Stephanopoulos and McGhee, 2015: 835-836).

The political scientists behind the efficiency gap, Nicholas Stephanopoulos and Eric McGhee, view it as a superior measure to partisan bias, the measurement the Supreme Court considered in *LULAC v. Perry*. This looks at the seat share that each party would win given the same share of the statewide vote. The problem that Stephanopoulos and McGhee sees with the partisan bias is that uses hypothetical election results rather than real election outcomes. It assumes that the share of swing voters would be equally distributed across the state, which is usually not the case considering the different residential patterns of the two parties’ voters. And a lot of times it can be useless to look at an equal vote share for the two parties, as some states will lean solidly towards one of the parties in most elections (Stephanopoulos and McGhee, 2015: 836-837). The efficiency gap on the other hand, can still be applicable in uncompetitive systems. Studies indicate that almost half of recent state legislature elections have been so uncompetitive that partisan bias cannot be calculated reliably for them. The efficiency gap can still be used, which is important since many cases of gerrymandering happens in states that one party comfortably controls (Stephanopoulos and McGhee, 2015: 861).

### 5.1.3 Limitations of the efficiency gap

While the efficiency gap has some important advantages over partisan bias and other measures of gerrymandering, it still has some possible limitations. One of them is how it struggles when one party has a very dominant advantage. Take for instance a situation where one party receives 75 percent of the vote, then a plan with a gap of zero would give that party all of the seats. Any additional votes would be seen as wasted, since the party already holds all the seats, and suggest a growing gap in favor of the opposing party. While that might be technically true, it does not really comply with the idea of fairness, as the majority party can hardly be said to have a disadvantage in that situation. This is not much of a problem though, as such one-sided results are very rare. They can also easily be identified and flagged before an analysis (Stephanopoulos and McGhee, 2015: 863-864).

Many have suggested that there needs to be standard that curbs partisan gerrymandering, but McGann et al. do not need think that we need to go looking for a new standard. We already know what partisan bias is and there has been developed, peer-reviewed and implemented methods of measuring it, such as the partisan symmetry standard. What is needed is a correct definition and a measure of partisan bias in legal terms. It is not enough to show that a district maps treat parties differently, a legal standard needs to show that this is a violation of the constitutional rights of the individual voters. They argue that the problem with the efficiency gap is that as a standard it is not clear how it is linked to any constitutionally protected right. The argument the standard highlights is one of general fairness. Also mentioned is that it is not a given that each party having an equal number of wasted votes would be uniquely fair. It could just as well be argued that the parties should waste the same number of votes for each seat they receive, or that parties should waste the same share of their vote, so if they get twice the number of votes then they should waste twice as many as well. These different standards would all give very different results and an argument based on the efficiency gap standard as presented by Stephanopoulos and McGhee could be countered by saying that there are many equally plausible standards (McGann, Smith, Latner and Keena, 2015: 295-296).

A potentially more important flaw of the efficiency gap is the instability of the gap from one election to the next. Research has shown that the gap in one election is a relatively weak predictor of the next election's gap, when put in a model that includes a variety of other variables. This means that many partisan gerrymanders can be overcome in swing elections. However, the instability is also a key feature of elections themselves, as each party's vote

share can vary a lot within the time span of a plan. That does not mean that all partisan gerrymanders can be overcome. Some are drawn with such large and durable efficiency gaps that they will keep benefitting one party over multiple elections. This is where the strongest case can be made for the need for judicial intervention, as it shows the lasting effect of a gerrymandered redistricting plan (Stephanopoulos and McGhee, 2015: 864-865).

A problem for any measure of gerrymandering is uncontested seats. Without a choice for the voters, it is impossible to know their preferences, which again makes it impossible to determine the degree of gerrymandering in a district. The only thing you can say with almost certainty is that the share of the vote for the winner would have been lower. Scientists usually try to assign a vote share to reflect how voters might have cast their ballot if they had the chance to, rather than go with the uncontested result. In their analysis using the efficiency gap, Stephanopoulos and McGhee used presidential voting data on district level for congressional races, while for the state legislature districts they had to use voter information from other districts in the same state and election year together with information from the same district in other elections (Stephanopoulos and McGhee, 2015: 865-867).

#### **5.1.4 How to implement the efficiency gap in a standard?**

The Supreme Court has been looking for a manageable standard for redistricting for a long time. One of the big questions for the Supreme Court in the case of *Vieth v. Jubelirer* was how to distinguish between some and too much partisan unfairness. They need a threshold for which districts are considered unconstitutional or too gerrymandered. It is hard to tell these apart if you just use qualitative standards. But if you take a quantitative approach, you can set a calculable standard where every case that exceeds the standard must show a legitimate justification that makes the inequality necessary. Any efficiency gaps below the standards threshold would be assumed valid. This would be similar to how cases involving unequal district populations are solved (Stephanopoulos and McGhee, 2015: 885-886).

So what should the threshold be for a quantitative gerrymandering standard? While opponents of gerrymandering would like the efficiency gap as close to zero as possible, that is not a practical or desired threshold. One reason for this is the expressed statement in earlier cases like *Vieth v. Jubelirer* that some partisanship is tolerable. But an important methodological reason is that a plan's efficiency gap will vary between elections, so even if the gap is zero in

one election, it is unlikely to stay at exactly the same level in the next election. Unless the vote share stays exactly the same, there will be a shift in the gap and the bar needs to be high enough to allow for that. The threshold suggested by Stephanopoulos and McGhee is at two seats for congressional plans and eight percent for state legislature plans. Their reasoning for using different measurements is that each state's congressional representatives combine to form the House of Representatives and a big gap in large state is not equivalent to the same gap in a smaller state. It is the opposite for state legislatures, as each of them is a self-contained entity, where a state like New Hampshire has ten times the number of state legislators that Alaska has, even though the population of the former is less than double that of the latter. When they examined the plans from the last five redistricting cycles, which covers the entire period since the reapportionment revolution in the 1960's, they found that the thresholds were breached in 14 percent of congressional plans and 12 percent of state legislature plans. This indicates that it is not normal to have a plan that averages such a large gap and that those district plans that do are a result of an unusually extensive gerrymandering process (Stephanopoulos and McGhee, 2015: 887-888).

*Gill v. Whitford* shows how effective modern partisan gerrymandering has become increasingly more effective, by using political and behavioral data and computers. Measured by the efficiency gap, four of the five most gerrymandered state legislature maps in the last 45 years were drawn after 2010, according to Stephanopoulos, while eight of the ten most partisan maps for congressional districts were also created after 2010. This included Wisconsin's congressional map (Wines, 2017). The efficiency gap also rated Wisconsin's state assembly map the fifth most partisan among over 700 state redistricting plans from 1972 to 2014 (Wines, 2017).

### **5.1.5 Can it be justified?**

Back in the District Court in Wisconsin, the judges had found the two first prongs of the standard to be fulfilled, as the evidence suggested that the redistricting plan was created with a discriminatory effect and had a large and durable effect. Then it had to consider the third prong of the standard, was there any legitimate justifications for the entrenchment that Act 43 had caused. The reason that certainly needed to be considered was the tendency for Democrats to live more concentrated in urban areas, which creates a natural advantage for Republicans. Nevertheless, it was not enough to justify the magnitude of entrenchment that

Act 43 produced. The creators of the map had tested and passed on several maps with less partisan effect that was equally or more successful in achieving the lawful objectives of a redistricting (Harvard Law Review, 2017).

Their conclusion was not unanimous though, as judge Griesbach dissented. He had a problem with the majority's inclusion of intent in the partisan gerrymandering test and wrote that the Constitution should address political intent by delegating the responsibility of redistricting to another body, an action outside of the court's authority. He also preferred a standard based on deviation from traditional redistricting criteria, rather than entrenchment, as he thought that have a greater chance of success in the Supreme Court. Judge Griesbach disagreed theoretically with how the efficiency gap seemed to view proportional representation as a right, as well as how votes for the losing side are characterized as wasted. Finally, he took issue with the use of the efficiency gap, being skeptic to elevating a theory from a non-peer-reviewed article and making it the measurement of constitutional elections jurisprudence. He highlighted the volatile nature of the measurement and that controlling for political geography can significantly reduce it (Harvard Law Review, 2017).

The majority in the District Court decision on *Gill v. Whitford* addressed the questions of justiciability that was raised in *Vieth v. Jubelirer*, the previous Supreme Court that dealt with partisan gerrymandering. The plurality in *Vieth v. Jubelirer* acknowledged that some level of partisan consideration has to be considered unconstitutional, but left the challenge of establishing when that line was crossed to the lower courts.

One of the biggest challenges in developing a standard is to determine where you should draw the line, as you do not want it to be indeterminate, but at the same time it can be difficult to find the perfect number. Instead of establishing an exact numerical threshold for when the gerrymandering became unconstitutional, the majority in the District Court drew the line at the point where the partisan advantage will persist even with reasonable swings in the vote share each party receives.

## 5.2 Supreme Court appeal

### 5.2.1 Oral arguments

Following the District Court's ruling in the case, the State of Wisconsin wished to appeal to the Supreme Court. The Supreme Court was required to take the case, due to special procedures required by 28 United States Code §§1253 and 2284[a] when a case involves reapportionment, though it was the Court's decision whether they wanted to hear the case in full or just rule to affirm or reverse the decision (Gerken, 2016). In July 2017, the Supreme Court agreed to hear the State's challenge to the decision and granted the request to put the remapping action on hold until a Supreme Court decision was made. This is the first time that the Supreme Court will make a decision on partisan gerrymandering based on the freedom of association clause in the First Amendment in addition to the Equal Protection Clause.

Oral arguments were given by Paul Smith from the Campaign Legal Center, who represented the original plaintiffs. The arguments in defense of Act 43 were given by Misha Tseytlin, the Wisconsin Solicitor General, and by Erin E. Murphy, who participated as an amicus on behalf of Wisconsin's State Senate. They were heard on October 3<sup>rd</sup> 2017. While the Supreme Court seemed to agree on the distastefulness of gerrymandering, they appeared pretty divided after the oral session about whether the Court could find a standard for determining when the practice was unconstitutional. The four most liberal justices see it as a huge democratic issue and want the Supreme Court to step in. The four most conservative of the justices indicated that they felt the Court should not intervene. Chief Justice Roberts expressed his worry that it could hurt the legitimacy of the Supreme Court to strike down voting districts in favor of one political party: "That is going to cause some very serious harm to the status and integrity of the decisions of this court in the eyes of the country" (Liptak and Shear, 2017).

A lot of the argument was centered on various statistical tests for identifying extreme cases of partisan gerrymandering and what role social science should have in redistricting. Mr. Tseytlin argued that the plaintiffs were relying on hypothetical and flimsy social science evidence, that they were willing launch a new redistricting revolution based upon. Using partisan symmetry as districting criteria would not be a neutral method of drawing districts, in his opinion (Gill v. Whitford Oral Arguments, 2017: 26-28). Chief Justice Roberts seemed skeptical as well when he referred to it as "sociological gobbledygook" (Gill v. Whitford Oral Arguments, 2017: 40), but Justice Kagan did not agree and said, "What I'm suggesting is that this is not kind of hypothetical, airy-fairy, we guess, and then we guess again. I mean, this is pretty scientific by this point" (Gill v. Whitford Oral Arguments, 2017: 15).

Justice Alito wondered how, with judges, scholars, legal experts and political scientists looking for a manageable standard since *Bandemer v. Davis* 30 years ago and even before then, they were now sure that they had the right standard and that this was the right time. Mr. Smith answered that the Supreme Court had laid down a challenge in *Vieth v. Jubelirer* and given two things that was needed to find a workable standard. They had asked for a substantive definition of fairness and a way to measure it so that judicial intervention can be limited to the very serious cases. Now the social scientists had three different ways to measure asymmetry: the median-mean measure, the partisan bias measure and the efficiency gap. In the case of Wisconsin's Act 43, Smith said, "they all come to the exact same conclusion that this is one of the most extreme gerrymanders ever drawn in – in living memory of the United States, one of the five worst out of the 230 maps that Professor Jackman studied" (Gill v. Whitford Oral Arguments, 2017: 42-46). In his rebuttal argument, Mr. Tseytlin argued that nothing new had been presented to the Supreme Court. That the partisan asymmetry concept that professor King had presented in his amicus brief from the *LULAC v. Perry* case, had just been recycled and used again in this case (Gill v. Whitford Oral Arguments, 2017: 64).

When the question of a manageable standard was debated, Justice Breyer presented his own suggestion to how gerrymandering cases could be considered. This standard had a lot in common with the one suggested in the District Court. Step one would be to consider if one party was in full control of the redistricting process. There would not be a reason to look at the case if the redistricting was done by, for instance, a bipartisan commission. Step two would be to examine if the map treat political parties different, by looking at partisan asymmetry through tools like the efficiency gap. Step three is to consider if the asymmetry would persist over a range of votes. Next would be to see if it is an extreme outlier. You look at thousands of maps and evaluate how bad it is compared to others. And then, if it fails all the other steps, you consider if there is any other justification for it than partisan electoral gains. Breyer suspected that this could be manageable, but he was not absolutely certain. But, as he said: "I throw it out there as my effort to take the technicalities and turn them into possibly manageable questions" (Gill v. Whitford Oral Arguments, 2017: 11-13).

Justice Kennedy, who is expected to be the deciding vote in the Supreme Court's decision, asked no questions of the lawyer representing the Democratic voters who are challenging the district map. However, he had several skeptical questions that he asked the lawyers defending

Wisconsin's Act 43. Kennedy pressed hard on whether it would be lawful for a state to make a law or constitutional amendment that said all legitimate factors must be used in a way that favors party X or party Y. After some equivocal answers, Ms. Murphy said that it would probably be unconstitutional if it was on the face of it and "I think that that would be better thought of probably as an equal protection violation, but you could think of it just as well, I think, as a First Amendment violation in the sense that it is viewpoint discrimination against the individuals who the legislation is saying that you have to specifically draw the maps in a way to injure" (Gill v. Whitford Oral Arguments, 2017: 26-28).

Overall, Kennedy asked five questions and made five statements during the state of Wisconsin's arguments. He did not speak during the time that the Wisconsin Democrats presented their arguments. Some took this as a signal that he is leaning towards the side that claims partisan gerrymandering is unconstitutional. Justices do not just ask questions to get answers from the lawyers that argue the case. It can be a signal to their fellow judges of their position and potentially an attempt to lure them over to his or her side. Empirical research confirms that questions from the justices can be bad news for the receiving party. Data gathered from the transcripts of all the oral arguments in cases Justice Kennedy has participated in from 1988 to 2014 indicates that it is bad news to receive questions from him. When he votes for the respondent, which in this case would be the Wisconsin Democrats, he directs 93.3 words to them. When he votes against the respondent, with the state of Wisconsin in this case, he directs 102.0 words to them. And when he directs zero words to a respondent, Kennedy ended up voting for the party in 272 cases, while he would vote against in 177 of the cases (Roeder and Druke, 2017). While the numbers paint a positive image for the respondents, they also indicate that it is far from a certainty that their case will get Justice Kennedy's vote. A decision in the case is expected by June 2018.

### **5.3 Amicus Briefs**

I will now go through all the amicus briefs filed in this case and find the main arguments each author presents and group them in categories. The briefs give an overview over the arguments used on both sides of the gerrymandering question and how they argue over its legality. The amicus briefs are public documents used in the court system, which gives easy access and makes them verifiably authentic..



An amicus curia brief, which will be referred to as “amicus brief” in this text, is a document that is meant to bring a relevant matter to the attention of the Court. The amicus brief should concern a matter not already brought before the court and indicate which party it is written in support of. As cases that go through the legal system in the United States can affect more people than the directly involved parties, amicus briefs can provide judges with data and perspectives that can help them decide complex court cases (Cornell Law School, 2018).

The Supreme Court will in many cases ask the Solicitor General to file an amicus brief, and the opinions expressed in them is often referred to by the Court. But public interest groups like the NAACP Legal Defense & Education Fund and the American Civil Liberties Union are also frequently filing amicus briefs in cases related to their goals. As the Court receives a lot of briefs, it is important to stand out if you want to make an impact. Some judges view amicus briefs as a nuisance that increases the workload without much benefit. They feel that most files duplicate the arguments and positions that one of the parties has brought forward. To be noticed, one must bring something new and interesting to the table. This could be new research, technical and background information, an explanation of the connection between the case and other pending cases, or a demonstration of the impact the ruling in the case might have (Kearney and Merrill, 2000: 745-746).

The increasing importance of amicus briefs might be the biggest change in Supreme Court practice in the last several decades. The first recorded appearance of a brief was in 1821 in the case of *Green v. Biddle* and in the first decades of the 20<sup>th</sup> century, amicus briefs were only filed in about 10% of the cases. Nowadays, that pattern is completely reversed and there are very few cases where the Supreme Court does not receive one or more amicus briefs (Kearney and Merrill, 2000: 744).

As the number of submitted amicus briefs has increased, so have the amount of citations and quotations of briefs found in the opinions written by justices. But how much do they actually influence the outcome of Supreme Court cases? Research seem to indicate that having a small advantage in amicus brief support will slightly increase your chance of success, while a large discrepancy shows little sign of increasing it and might even be counterproductive. The Solicitor General is uniquely successful as an amicus filer, but other institutions like ACLU and the states also have a higher than average rate of success. These kinds of institutions file many briefs and know how to make them impactful. Amicus briefs do seem to matter “insofar

as they provide legally relevant information not supplied by the parties to the case – information that assists the Court in reaching the correct decision as defined by the complex norms of our legal culture” (Kearney and Merrill, 2000: 829-830). It is hard to say if any of the parties have an advantage based on that. The plaintiffs, referred to as the appellees in the amicus briefs, has a large advantage in the number of briefs filed in their support. Among that large number of briefs are several from well-known institutions with a lot of experience when it comes to writing briefs. The defendants, referred to as the appellants in the amicus briefs, have fewer of those organizations writing in their support, but they do have states writing on their behalf. The fact that both parties have experienced actors in this field writing in support of them might even out any large advantage, but it will come down to what elements they highlight and if they can provide clarity to questions that the justices might have. I will now go through the list of amicus briefs and look at the most important questions that they discuss.

Table 5.1. Amicus Briefs filed in the case of Gill v. Whitford:

	Author(s) of Brief.	In favor of.	Arguments.
1	Republican Nation Committee	Appellants [Gill]	The appellees have no standing to bring a statewide claim. The efficiency gap is in conflict with jurisprudence and the appellees approach would effectively require proportional representation. The District Court's conception of political gerrymandering is too wide and would give federal government more authority in regulating local elections.'
2	Judicial Watch, Inc and Allied Educational Foundation	Appellants	The efficiency gap is a poor tool for identifying partisan gerrymandering and the theory is based on unsettled science.
3	Tennessee State Senators	Appellants	Gerrymandering has been a part of American politics since its founding. The courts have struggled to find a manageable standard, because no standard exist. The efficiency gap is just a disguise for proportional representation and the Court should hold that traditional redistricting standards are sufficient curbs to gerrymandering.
4	Wisconsin Institute for Law and Liberty	Appellants	Partisan gerrymandering claims are not justiciable. Act 43 is lawful since it complies with traditional redistricting principles.
5	Majority Leader and Temporary President of the New York State Senate and members of the Majority Coalition	Appellants	The efficiency gap is not a good measurement of partisanship in a political system with coalitions and minor parties. Redistricting will end up with endless micro managing by federal courts.
6	States of Texas et al.	Appellants	Partisan purpose is inherent in the nature of legislative reapportionment. Appellees failed to offer a limited and precise standard. The efficiency gap-standard is not judicially manageable and relies on group rights rather than individual rights, which leads to a proportional representation standard already rejected by the Court.
7	Wisconsin State Senate and Wisconsin State Assembly	Appellants	Too broad cause of action for political gerrymandering would give the federal government more authority to regulate local elections, which would change balance of power between states and the federal government. Statewide partisan gerrymandering claims rest on a distorted view of electoral politics and representative democracy. The constitution does not guarantee proportional representation, the voters elect candidates and not statewide delegations, party identification can change and voters who support a losing candidate are not losing representation or access to the political process. The efficiency gap is biased in favor of Democrats.
8	Southeastern Legal Foundation	Appellants	The appellees have no standing to bring a statewide claim.
9	Legacy Foundation	Appellants	The appellees approach would effectively require proportional representation and take away state legislatures ability to redistrict. The efficiency gap's concept of "Wasted Voters" should be rejected by the Supreme Court.

10	Republican State Leadership Committee	Appellants	No familiar and well-developed constitutional standard has been breached. A departure from familiar standards is not warranted, because the alleged harms of gerrymandering are not substantiated.
11	National Republican Congressional Committee	Appellants	The efficiency gap is a flawed method and should not be part of a standard. It is biased in favor of Democrats. Voter preferences change over time. Wisconsin's Act 43 is lawful, since it complies with traditional redistricting principles.
12	Wisconsin Manufacturers & Commerce	Appellants	Appellees theory disregard the roles of individual choice, therefore the case fails both conceptually and legally.
13	American Civil Rights Union	Appellants	Too broad cause of action for political gerrymandering would give the federal government more authority to regulate local elections, which would change balance of power between states and the federal government.
14	Plaintiffs in Benisek v. Lamone	Neither party	The Court should only look at the merits of the claims before them, and not make a decision on the justiciability of gerrymandering as a whole.
15	Erik McGhee	Neither party	The efficiency gap is a simple and historically grounded metric of partisan advantage. It does not depend on hypotheticals and is not easily manipulated. It is responsive to concerns the Supreme Court has raised in previous cases. The objections to the efficiency gap are easily met.
16	Bernard Grofman and Ronald Keith Gaddie	Neither party	Courts must provide a check on egregious partisan gerrymandering. A justiciable partisan gerrymandering claim needs proof of partisan asymmetry, lack of responsiveness and causation. The Supreme Court has never confronted evidence of those three elements.
17	Heather K. Gerken, et al.	Appellees [Whitford]	It is a long-standing practice that the Supreme Court finds a workable principle/test, while allowing lower courts to refine it over time. Partisan symmetry is a workable standard with history and support from social science. Wisconsin's Act 43 would fail under any partisan symmetry test and is an extreme outlier.
18	Eric S. Lander	Appellees	A judicially manageable standard for recognizing excessive partisan gerrymandering requires some quantitative foundation. Technology is a threat that will grow if courts refuse to entertain claims of partisan symmetry, but could also provide objective measures and tools to recognize when a redistricting plan is excessively partisan. Act 43 is an extreme outlier among redistricting plans.

19	American Jewish Committee, et al.	Appellees	Entrenchment through severe partisan gerrymandering violates fundamental American democratic principles of representativeness and accountability in government. Denying voters a fair opportunity to participate in genuinely contestable legislative elections violate the First amendment. The Court must set limits on severe partisan gerrymandering to safeguard our democracy.
20	American Civil Liberties Union, et al.	Appellees	The state has an obligation to function as a neutral referee in the electoral process. A legislature that through partisan gerrymandering debases the citizenry's right to cast a meaningful ballot would violate that principle. Wisconsin failed to demonstrate that it's plan was necessary to the advancement of a legitimate state interest.
21	NAACP Legal Defense & Educational Fund, Inc., et al	Appellees	Partisan gerrymandering claims are justiciable and require proof of invidious discrimination against voters based on their political party affiliation. A properly structured claim for partisan gerrymandering is consistent with the Voting Rights Act, would help protect against the manipulation of minority votes and help avoid detrimental spillover to cases brought under doctrines involving race.
22	44 Election Law, Scientific Evidence, and Empirical Legal Scholars	Appellees	The Supreme Court should affirm the panel's decision that the partisan effects of the applications of political classifications in the drafting of Act 43 are not justifiable and had the likely effect of entrenching a Republican partisan advantage throughout the life of the plan.
23	Colleagues of Professor Norman Dorsen	Appellees	Denying voters a fair opportunity to participate in genuinely contestable legislative elections violates the first amendment.
24	Political Science Professors	Appellees	Voter behavior is predictable because of highly stable partisan identity, which makes the partisan bias very durable. Because of advances in data analytics, partisan gerrymanders will only become more extreme in the absence of judicial intervention. Social science provides objective measures and tools that courts could use to evaluate the partisan bias of maps.
25	Professor D. Theodore Rave	Appellees	The Court should be skeptical of districts drawn by incumbents and subject them to searching review. Recognizing the justiciability of political gerrymandering claims and affirming here will not require courts to review all redistricting decision.
26	Political Geography Scholars	Appellees	The effects of political geography can be measured and it does not explain the partisan asymmetry in Wisconsin's legislative map.
27	Brennan Center for Justice at N.Y.U. School of Law	Appellees	Extreme partisan gerrymandering undermines legislatures' accountability to the people and creates legislatures that are not representative of the electorate. They violate the First Amendment rights to political expression and association that are vital to representative democracy.

28	Law Professors	Appellees	The absence of a judicially enforced constraint on partisan gerrymandering has not prevented federal courts from facing redistricting litigations, but has led to distortions of other constraints on redistricting. Recognizing a judicially enforceable claim against partisan gerrymandering will not unjustifiably constrain states' redistricting choices.
29	Senators John McCain and Sheldon Whitehouse	Appellees	Partisan gerrymandering has become a tool for powerful interests to distort the democratic process and leads to unrepresentative districts that have a corrosive effect on our democracy.
30	Historians	Appellees	The American vision of representative democracy has been based on a legislature that reflects the broader electorate and is responsive to its demands. It requires a close correspondence between the voting public and its legislative assemblies. Partisan gerrymandering has been denounced throughout American history as an unconstitutional abuse of power. In the extreme form it takes today, partisan gerrymandering poses a severe threat to American ideas of representation and associational rights.
31	Republican Statewide Officials Senators Bill Brock, et al.	Appellees	Partisan gerrymanders violate the First and Fourteenth Amendments. The Supreme Court has a long tradition of deciding cases that remedy legislative malapportionment.
32	States of Oregon, et al.	Appellees	Extreme partisan gerrymandering harms the States and their citizens, and technology has made it easier. A purpose-and-effect test is manageable and will adequately account for the States' legitimate interests.
33	League of Conservative Voters, et al.	Appellees	Political science research shows that a reapportionment plan with a larger efficiency gap will result in adoption of more partisan and extreme politics. The experience from Wisconsin since 2011 demonstrates that the legislature has done just that, while disregarding bipartisan consensus on many key issues.
34	Center for Media and Democracy	Appellees	Past party preferences reliably predict the future statewide behavior of Wisconsin's voters and guided Act 43's redistricting plan. Voters have representational interests and rights that extend far beyond constituent services.
35	Georgia State Conference of the NAACP, et al.	Appellees	Partisan gerrymandering claims are justiciable. Invidious intent to minimize the voting power of a political element is a judicially-manageable standard that allows for necessary flexibility and evolution of subsidiary standards.
36	California Citizens Redistricting Commission, et al.	Appellees	Neutral decision-makers can implement non-partisan standards for drawing electoral districts. Upon finding that a redistricting plan violates voters' rights through partisan gerrymandering, neutral redistricting standards are a permissible remedy.

37	Represent. Us, et al.	Appellees	Both major parties engage in partisan gerrymandering, which hurts voters from both parties. Partisan gerrymandering is a form of corruption, an issue the framers of the constitution were concerned with preventing.
38	Constitutional Law Professors	Appellees	Treating judicial manageability as a freestanding justification for deeming an issue a nonjusticiable political question would depart from our constitutional history and tradition, plus it would have harmful practical consequences.
39	Current Members of Congress, et al.	Appellees	The constitution established a system of government in which the people choose their elected representatives, not the other way around. Subsequent amendments to the constitution protect the right of individuals to associate for political ends and guarantee that all American enjoy equal protection of the laws, regardless of political affiliation. Partisan gerrymandering that has the purpose and effect of subordinating adherents of a political party and severely limiting the effectiveness of their votes violates the First and Fourteenth Amendments.
40	Bipartisan Group of 65 Current and Former State Legislators	Appellees	Partisan gerrymandering is a powerful tool for shutting out the opposing party. It has caused breakdowns in the political process, through breeding polarization, discouraging cooperation among legislators and leads to legislators that do not represent their constituents.
41	Common Cause	Appellees	Partisan gerrymandering claims are justiciable and the First Amendment provides an ideal framework for partisan gerrymandering claims.
42	League of Women Voters	Appellees	Appellants proposed safe harbor for legislatures that follow traditional redistricting principles is legally unsupported and would have dangerous consequences. Even "normal"-looking district plans can violate representative and participatory rights protected by the First and Fourteenth Amendment.
43	Fairvote and One Nation One Vote	Appellees	Singling out voters on the basis of partisan affiliation is unconstitutional. States will retain ample flexibility in a districting process that excludes partisan gerrymandering, which could include other voting methods and multi-winner districts.
44	Election Law and Constitutional Law Scholars	Appellees	The right of association protects an individual's ability to enhance her political influence by association with other and forbids districting that discriminatorily burdens political association based on party affiliation. Wisconsin's Act 43 violates plaintiff's associational rights.
45	International Municipal Lawyers Association, et al.	Appellees	Intentional partisan gerrymandering makes state legislatures unrepresentative and it loses legitimacy.

46	Bipartisan Group of Current and Former Members of Congress	Appellees	Extreme partisan gerrymandering subverts traditional districting criteria, which harms both members and constituents, while it devalues pragmatic problem-solving and constituent-first representation in the House. It is also inconsistent with the nature of representation in our form of government and in conflict with the framer's vision.
47	David Boyle	Appellees	The US constitutional amendments on election offer the court more power to find partisan gerrymandering justiciable and reformable. One the one hand, some amendments may seem to favor allowing legislatures wide control over election districting, even gerrymandering, but a greater number of amendments may favor allowing individual voters dignity and immunity from gerrymandering.
48	Robin Best, et al.	Appellees	Advances in computer science and its application to political science has created analytical tools that were not previously available. The tools detected gerrymandering with "full analytical satisfaction". It is up to the Court to decide whether this kind of gerrymandering is good politics or bad politics.

### 5.3.1 The Amicus Briefs in *Gill v. Whitford*

When analyzing the amicus briefs in *Gill v. Whitford*, it quickly becomes clear that one party has received a lot more briefs in support of it. The number of amicus briefs in support of the appellants [Gill] is 13, while the briefs in support of the appellees [Whitford] count as many as 32. Three amicus briefs were filed in support of neither party. One of the three was filed by plaintiffs in another gerrymandering case, called *Benisek v. Lamone*, and they argued that whatever the decision the Supreme Court made in this case, it should not make a decision on the justiciability of gerrymandering as a whole. Rather, they should only look at the justiciability or merits of the claims before them. The two other neutral amicus briefs were from social scientists, which were writing about analytical tools. *Grofman and Gaddie* writes in their brief about what a justiciable partisan gerrymandering claim needs to prove and



argues that the necessary factors were not considered in previous gerrymandering cases. They also write about how the analytical tools have improved a lot since earlier cases like *Davis v. Bandemer* and *Vieth v. Jubelirer*. *Eric McGhee*, one of the developers of the efficiency gap, writes about how the efficiency gap works, what it analyzes and argues against some of the objections people have raised against the measuring tool.

The briefs filed by politicians follow partisan lines for the most part. The *Republican National Committee*, the *Republican State Leadership Committee* and several Republican-controlled states have filed amici curiae in favor of the appellants, while several Democratic-controlled states have written in support of the appellees. The appellees are the Democratic voters who were the original plaintiffs in the case, while the appellants refer to the State of Wisconsin who appealed the District Court decision. It is interesting to note that the *Democratic Nation Committee* has not filed a brief in this case. However, there is also some Republican support for the appellees. Most of them no longer hold office, like former California Governor *Arnold Schwarzenegger* and former presidential candidate and Senator *Bob Dole*, but there is one current member of congress in Arizona Senator *John McCain*.

A large number of amicus briefs making the case for the appellees are made up of professionals within relevant research fields such as historians, law professors, political geography scholars and political scientists. There is also a sizable group of civic and civil rights organizations, like the *League of Women Voters*, the *American Civil Liberties Union* and the *NAACP Legal Defense & Educational Fund*. Though the number is fewer, there are some of those organizations filing in favor of the appellants as well. This includes the *Southeastern Legal Foundation*, *Judicial Watch Inc.* and the *American Civil Rights Union*.

As I read the amicus briefs, I categorized the arguments that the authors of the briefs used in favor of the party they supported. Many of the authors highlight similar factors as reason for or against the ruling from the District Court. I have gathered the most compelling arguments in seven categories that I feel are the most important questions that the Supreme Court will have to consider when they make their ruling in *Gill v. Whitford*. One of them regards the question of standing and whether a voter can bring a case that does not just affect his or her district, but the whole state. This question will depend a lot on how the Court views representation. The difference between a dyadic and a collective view is clear in how the two sides of this case argue for their wanted outcome in the ruling of standard. The second

category is about judicial interference in the reapportionment process and whether too much interference will change the power balance between the states and the federal government. Partisan gerrymandering has been a political thicket that the Supreme Court has been reluctant to step into. A major reason for that is the fear that it will lead to a boatload of new cases and make map drawing a time consuming part the courts' responsibilities. Another of the categories is the discussion around the need for a limited and precise standard for partisan gerrymandering and whether the efficiency gap should be a part of that standard. Related to that is a category on traditional redistricting standards, where it is argued that there is no need for a new standard and that district maps that follow the traditional criteria should be considered acceptable. These categories could be where the case gets decided, as it will be impossible to regulate gerrymandering without a satisfying standard. If it is deemed to be unconstitutional, there must be a way to decide when a redistricting becomes a gerrymander. Then there is a category on the topic of voter behavior and how predictable it is. Can partisan identity be used to predict voter decision-making or does that fail the concept of a voter's individual choice? This is important for the question of constitutionality, since the assumption of voter behavior is central to a claim that Democratic voters have been discriminated against. It is also central to any defense of Act 43 that claims political geography is the reason for the partisan advantage of the district plan. Another category is about how partisan gerrymandering can lead to unrepresentative governments and a loss of legitimacy for the representatives. This is of course very central to the question of representation, which is central to the thesis. The last category discusses the question of justiciability, where briefs filed in favor of both parties argue that this case gives the Supreme Court a good opportunity to clarify the question, but have arguments for different outcomes. Does partisan gerrymandering violate the First and/or the Fourteenth Amendment? This category is important, as it is so related to the research question of the thesis. Act 43 can only be found to be unconstitutional if the Supreme Court finds partisan gerrymandering cases to be justiciable under the First Amendment or the Equal Protection Clause of the Fourteenth Amendment.

### **5.3.2 Standing to bring a statewide claim**

The first question the Supreme Court will have to consider is whether Whitford and the other plaintiffs in the case has the standing to bring a statewide claim. The amicus briefs from the *Republican National Committee* and *Southeastern Legal Foundation* argues that the District Court did a mistake when it held that the appellees had a standing to challenge Wisconsin's

statewide legislative map. The Supreme Court has previously rejected attempts to challenge alleged gerrymandering of districts that they do not reside in. Showing examples from racial gerrymandering, the *Republican National Committee*'s brief points to how a voter in a racially gerrymandered district can be denied equal treatment, but that the voter cannot suffer harm or be discriminated against based on the composition of districts where he does not live (Republican National Committee, 2017: 9).

The District Court held that the basis for racial gerrymandering claims is different from that of a political gerrymandering claim. The concern in a political gerrymandering case is the effect a statewide districting map can have on a party's ability to convert votes into seats. This led the court to say that the harm in *Gill v. Whitford* is the result of the statewide redistricting map, not just how a particular district is designed. From that, it followed that that an individual Democrat had the standing to challenge the statewide map. The *Southeastern Legal Foundation* wrote in their brief about how only a few of the plaintiffs actually live in a district that is affected by the redistricting, but they purport to represent all Democrats in Wisconsin. Most of the plaintiffs do not even live in one of the districts they claim to have lost in the gerrymandered redistricting. This is interpreted as just an attempt to get more Democrats elected statewide. The *Southeastern Legal Foundation*'s brief adds that what they seek is a generalized benefit, which should mean that the appellees do not have the standing to make a claim (Southeastern Legal Foundation, 2017: 8-12).

The appellees argue that racial gerrymandering cases are something separate, as this case is one where the alleged harm is vote dilution and viewpoint discrimination. The standard set in those cases are not contrary either, as the asserted claims in the racial gerrymandering cases have been specific to one or more specific electoral districts. In their brief to the Supreme Court the appellees write that the claim asserted the case, an intentional and durable dilution of Democratic votes throughout Wisconsin, is unquestionably statewide. All partisan gerrymandering challenges brought to the Supreme Court has been statewide challenges and the Court has never said that it lacked jurisdiction due to a plaintiffs' lack of standing. As such, the appellees are certain that they have the standing to pursue it if the partisan gerrymandering claim is justiciable (Whitford and al., 2017: 24).

### 5.3.3 A transfer of authority to the federal government

Several of the amicus briefs filed in favor of the appellants discuss the power balance between the states and the federal government. Redistricting of state legislatures is primarily the duty and obligation of states, but some of the amicus brief writers worry that a verdict in favor of the appellees would take power away from local government and lead to micro management by the federal courts. While the responsibility of redistricting is with the states, they are subject to certain constitutional standards, like the protection of racial minorities against discrimination and population equality between districts.

The District Court's invalidation of Act 43, the *American Civil Rights Union and the Public Interest Legal Foundation* claim, was not based on a well-established constitutional principle. Federal review and veto of state enactments should only happen under extraordinary circumstances or problems, which they exemplify with racial discrimination in voting. Considering that partisanship in redistricting has been seen as a lawful and common practice by the plurality in previous Supreme Court cases like *Vieth v. Jubelirer*, they argue that partisan gerrymandering cannot be seen as such an extraordinary problem. If it were to be seen as such, it would be a departure from the federalism principles recent cases have reaffirmed (*American Civil Rights Union and Public Interest Legal Foundation*, 2017: 5-8).

A standard like the one proposed by the District Court could potentially lead to “epic amounts of litigation in federal courts over state legislative lines”, according to the *Majority Leader and Temporary President of the New York State Senate and members of the Majority Coalition* (2017: 20). They fear that it would be the case even if the plans meet all other traditional redistricting principles like respecting communities of interests, population equality and compactness. Instead of a redistricting process that ends with an act from the state legislature, the losers of the process will take the case to the federal courts and by the time a redistricting plan has finally been sanctioned, it will soon be time for a new census with a subsequent redistricting. In their eyes, this would be damaging to representative democracy in the states. The *Majority Leader* and his fellow members feel that both state legislatures and state voters are entitled to a degree of certainty and freedom from intervention from the federal court, which they fear that a judgment that upholds the District Court's ruling would lead to (*Majority Leader, Temporary President of the New York State Senate and Members of the Majority Coalition*, 2017: 19-23).

If the Supreme Court decides to recognize a cause of action for partisan gerrymandering, then the *Republican National Committee* writes that it should be cautious when it defines the scope of it. As Congress has the authority to enforce any such right under §5 of the Fourteenth Amendment, a too broad cause of action for partisan gerrymandering could really change the balance of power between states and the federal government. They fear that it could lead to congressional efforts to oversee, dictate or even manipulate the partisan outcomes of election. In the most extreme cases, a state violation of the right to vote can lead to the state losing its representation in the House of Representatives and with that the Electoral College, which is why the *Republican National Committee* argues that any standard the Supreme Court may decide to adopt, needs to have a high threshold for what constitutes a violation of the Fourteenth Amendment (Republican National Committee, 2017: 33-38).

#### **5.3.4 About the efficiency gap and the need for a limited and precise standard**

The aspect of the Supreme Court case that received the most attention in the amicus briefs was probably the efficiency gap, the suggested standard for deciding if a gerrymander is unlawful. Both sides argued whether the standard offered is limited and precise, whether it is flawed or biased in favor of certain groups, and if there is a need for this kind of standard.

The *National Republican Congressional Committee* argues in their brief that the efficiency gap is a flawed standard with several limitations. The math in how the efficiency gap is calculated can lead to results where packed districts cancel each other out, while a party that wins several close victories in competitive districts will result in a large gap. They claim that that the efficiency gap is just a more sophisticated way of saying that a party won a large number of close elections. The fact that there is a gap is not telling us anything about gerrymandering (National Republican Congressional Committee, 2017: 4-6).

A central argument for opponents of the efficiency gap has been the claim that it does not account for the natural packing effect of political geography. Political groups that tend to cluster, like Democratic voters in cities, are systemically affected by natural packing, while Republicans live more spread out in exurbs and rural areas. Looking at the United States, as a whole there is a tendency that traditional districting criteria combined with Democratic voters clustering in cities results in additional Republican seats. This effect is even stronger in the state of Wisconsin. The *National Republican Congressional Committee* (2017: 6-8)

exemplifies this by showing how Donald Trump received over 80% or more of the votes in 43 wards, while Hillary Clinton received over 80% in 260 wards in a state that Trump won by a margin of 0.7%. This shows how the Democrats rack up a large number of votes in districts that they win, while the Republicans typically have a smaller margin of victory but can win in a larger number of districts.

It is also argued that the efficiency gap breaks with the First Amendment jurisprudence of the Supreme Court. The model of voting behavior and the concept of wasted votes assumes that most voters would continue to vote for candidates from a particular party in election after election, regardless of the candidates running in the election, what district they are in, the parties' platform for the election, as well as major issues and circumstances surrounding the election. The *Republican National Committee* claims that this view is contrary to what previous cases debating the First Amendment in the Supreme Court has ruled. They point to political communication cases, where the Court repeatedly gave robust protection to political speech and debate based on the premise that it plays a critical role in forming the outcome of elections. The same goes for cases about a party's right to elect a candidate who best represent its political platform. The reason the Court is so protective of political parties' associational rights, they argue, is that the Court recognize the importance of a party's candidate and platform when it comes to electoral outcomes. Finally, the *Republican National Committee* points to how the Supreme Court has imposed strict scrutiny on measures that burden minor party rights. The case law on this issue is inconsistent with the efficiency gap's concept of wasted votes (Republican National Committee, 2017: 28-33).

Another claim against the efficiency gap is that it systematically favors the Democratic Party. Because the political landscape of Wisconsin, and many other states, consist of Democratic voters relatively concentrated in urban areas and Republican voters more dispersed, any attempt by a Republican-controlled legislature to take advantage of that political landscape would look suspicious under that theory. The *Wisconsin State Senate & Wisconsin State Assembly* writes that any standard must equally constrain Democratic-controlled and Republican-controlled legislators, if the Court wants to be perceived as a neutral arbiter. They claim that is no coincidence that the proposed theory would allow statewide, rather than district-specific partisan gerrymandering claims. The two outcomes that results in the largest efficiency gaps are precisely the ones the political geography makes it more likely that will happen, namely landslide victories in Democratic-leaning districts while Republican leaning

districts end up as close call victories. An example of this is how Hillary Clinton won the popular vote in the 2016 election, but only received the most votes in 487 out of approximately 3100 counties. This, they claim, makes it almost impossible to draw districting maps in Wisconsin that comply with both traditional districting principles and the one-person, one-vote principle, but does not result in a large number of “wasted” votes (Wisconsin State Senate and Wisconsin State Assembly, 2017: 31-35).

Political scientist *Eric McGhee*, who is one of the developers of the efficiency gap, filed an amicus brief in favor of neither party. He wants to make it very clear that he is not arguing against or in favor of the lower court’s decision. He is only writing the brief to explain the efficiency gap and make sure that the Supreme Court’s decision is not based on a misunderstanding of how the efficiency gap works and how it may be used in analyzes of legislative district maps. The all-votes-may-have-influence argument criticizes the concept of wasted voters, but *McGhee* argues that it overlooks how winning more seats without winning over more voters is the main point of a partisan gerrymander. The reason that it raises concerns when one party’s votes are less effectively turned into legislative seats due to partisan gerrymandering is exactly because votes from all legitimate voters are so valued in a democracy. He is also referring to scholarly work that shows that the margin of victory in an election has little effect on how a legislator votes on bills. By contrast, the effect of changing a legislator with one from another party has a huge effect. There is also the technology available that enables legislators to screen constituents and reject the inquiries of persons the data set deems it unlikely to vote for the incumbent. This goes against the argument that a legislator represents all constituents in his or her district, and exacerbates the lack of representation for citizens who have been gerrymandered (McGhee, 2017: 18-20).

*McGhee* also argues that the efficiency gap is not biased towards Democrats. The 1970s and 1980s saw maps that generally had a gap in favor of the Democrats, while newer maps tend to be in favor of the Republicans. That is not surprising considering how the Republican Party controls a large number of the state legislatures. Their research also found that redistricting under unified Democratic control shifts the gap in a favor of the Democrats by about as much as redistricting under unified Republican control shifts it in the Republicans’ favor. He thinks that many of those who oppose the theory of the efficiency gap do not really have a problem with the gap per se, but is against the concept of partisan symmetry as a measure of fairness. They are more likely to believe that traditional districting principles like respect for

jurisdictional boundaries, contiguity and compactness are a better indicator of fairness than giving left-of-median and-right-of-median voters equal opportunities to achieve a legislative majority. He also refutes appellants claim that the efficiency gap requires proportional representation. Nothing about the efficiency gap or any other of the suggested symmetry metrics demands proportional representation in any way. Quite contrary, a gap of zero implies not that but a 2:1 “winner’s bonus”, where the seat margins are about twice as large as the vote margins (McGhee, 2017: 25-29).

The mathematician *Dr Eric S. Lander* is an expert in the scientific analysis of large datasets and has filed an amicus brief where he argues for the need of a judicially manageable standard for recognizing excessive partisan gerrymandering to have a quantitative foundation. All the nine justices in *Vieth v. Jubelirer* agreed that excessively partisan gerrymandering is harmful to the democratic form of government of the United States, but the Supreme Court struggled to agree upon a manageable standard that recognizes when a district plan unconstitutionally interferes with fair and effective representation for all citizens (Lander, 2017: 7-10).

*Dr Lander* claims that a major reason for this struggle has been that the court has tried to use qualitative criteria to define excessiveness. He believes that excessiveness is a quantitative concept and that recent advantages in technology have made it possible to measure the degree of partisan bias in a plan and whether it is extreme or not. The Supreme Court needs to find a manageable standard for partisan gerrymandering, as the technological advancements is bringing new threats from those who wish to create even more extreme and resilient gerrymanders. Objective guidance using quantitative measures can provide the foundation of such a manageable judicial standard. (Lander, 2017: 7-10). *Dr Lander* wants the excessiveness of a districting plan to be measured by comparing it to the distribution of outcomes of all possible plans that fulfill the declared redistricting goals of the state. The distribution of outcomes shows the results in electoral seats won with different voting levels under the plan. However, he is also open to other measures of partisan outcome, such as the efficiency gap (Lander, 2017: 15-19).



### 5.3.5 On traditional redistricting standards

Not everyone who filed an amicus brief seem to think that there needs to be established a new partisan gerrymandering standard. Some, like the *Tennessee State Senators*, feel like the traditional redistricting standards are all that is needed and that further standards will engage the courts in making political determinations. Gerrymandering has been a part of American politics for centuries and was a well-known phenomenon at the time when the Constitution was written. But the Constitution does not say anything one how legislative and congressional districts should be drawn, and does not forbid political considerations when districts are drawn (Tennessee State Senators, 2017: 3).

The *Tennessee State Senators* argue that new standards like the efficiency gap try to bring on a proportional system that changes the nature of representation from a district-based one to an ideological- and party-based system. A system where the elected officials are only responsive to their interest group, rather than to all voters within their district (Tennessee State Senators, 2017: 39). As the *Legacy Foundation* adds, several previous Supreme Court cases have already rejected any constitutional claim to a proportional representation system. Nor does the Wisconsin Constitution guarantee any right to proportional representation (Legacy Foundation, 2017: 12-13).

The Congress has the power to regulate election districting and has done so several times, such as establishing that “Representatives must be elected from single-member districts composed of contiguous territory”. These traditional redistricting standards are enough to prevent the worst malpractice (Legacy Foundation, 2017: 12-13). The *National Republican Congressional Committee* agrees with this and points to the fact that compactness, contiguity, incumbent protection and respect for jurisdictional boundaries have all been identified as traditional redistricting criteria by the Supreme Court and are used to determine if specific districts are too gerrymandered. But “Act 43 meets all of the typical traditional districting criteria that are used as evidence to determine if specific districts are impermissible gerrymanders” (National Republican Congressional Committee, 2017: 19-20).

### 5.3.6 Individual choice or predictable voter behavior

One of the points being debated in the amicus briefs is the predictability of voter behavior. Their viewpoints differ on how much one can read from data on previous elections and the

role district-specific factors plays into an individual voter's decision-making. The appellees claim in this case is that the Act 43 redistricting is an unconstitutional partisan gerrymander that uses tactics like cracking and packing on Democratic voters. To evaluate a claim like that, one needs to know how many Democrats live in each district. The *Wisconsin Manufacturers & Commerce* claims that by using previous election results and statistical analysis based on this to prove it, the appellees have lost sight of the basic truths when it comes to a voter's decision making. They feel that the theory the plaintiffs, Whitford et al., has presented and the evidence they have brought forward completely disregards the role that individual choice and change over time plays. Due to this, the theory of the case fails both conceptually and legally (*Wisconsin Manufacturers & Commerce*, 2017: 14-15).

An amicus brief sent in by *Political Science Professors* goes against this and points out that predictable and stable voter behavior is an important reason for why mapmakers are able to create redistricting maps with a durable partisan bias. While partisan identity is not the only factor that matters, partisan identity is one of the strongest predictors of voter preferences and can be used to predict voter behavior with a high degree of confidence. They provide data that shows how party preference has both become more stable and increased in intensity. When you combine this with the wealth of data available to mapmakers about voters and the new and advanced statistical and map-making applications that can be used to create maps, one has the potential for extreme gerrymanders like Act 43 in Wisconsin (*Political Science Professors*, 2017: 4-6).

While the Wisconsin legislature and their supporters tries to argue that election results are decided by factors like incumbency and individual candidate differences, those were not the factors they relied upon when they drafted Act 43. Instead, it used statistical analyses of historical voting data to project the durability of a Republican legislative majority against various shifts in party strength. The Republican majority in Wisconsin spent close to half a million dollars on advanced computer analysis by outside consultants. Why would they do that if, as it is argued, past results were not really relevant for future voting results? The *Center for Media & Democracy* argues that the appellants used modern technology to create as many safe districts as possible and reduced the number of meaningfully competitive districts in half in the process. The analytical projections for safe districts did not factor in any district-specific factors, like candidate strength or incumbency, but was calculated from data

on party preference in existing and proposed districts (Center for Media and Democracy, 2017: 15-16).

A brief filed by *44 Election Law, Scientific Evidence, and Empirical Legal Scholars* also highlight that through their pursuit of partisan advantage in generating alternative maps and searching for feasibility constraints when checking for compliance with traditional maps, the drafters of Act 43 made it clear that they did not have any legitimate legislative objective. Their goal was to create a partisan advantage, which has been observed in the 2012 and 2014 election results and is likely to persist through the lifespan of Act 43 (*44 Election Law*, 2017: 1-3).

### **5.3.7 On unrepresentative governments and the loss of legitimacy**

Many of the amicus briefs filed in support of the appellees talk about how extreme partisan gerrymandering locks in a delegation of legislative representatives that does not come close to reflecting the partisan diversity of the state's populace. This undermines the legislative representativeness and makes it less certain that the legislature will be accountable to all of the people it is supposed to represent. The necessity of actually representative government, the *Brennan Center at N.Y.U. School of Law* writes, was clear to the founding fathers. One example of this is how Article 1, §2 of the Constitution requires reallocation of House seats every ten years. This increases their legislative representativeness by taking population shifts and growth into account (Brennan Center for Justice at N.Y.U. School of Law, 2017: 27-30)

The unrepresentative and uncompetitive districts that partisan gerrymandering produce has a corrosive effect on our democracy, according to the *Senators John McCain and Sheldon Whitehouse*. They quote Alexander Hamilton writing, "The true principle of a republic is that the people should choose whom they please to govern them". That principle is undermined with the use of partisan gerrymandering. This practice turns it around, now you have the representatives choosing their constituents every ten years. They believe that when partisan gerrymandering is used to create safe seats, the elected politicians will be more reluctant to reach across the aisle and work on bipartisan legislation, as their main threat in elections will come during the primaries. Instead, you will get more partisanship and polarization. Another legitimacy problem is the lack of transparency in how redistricting is funded. Dark money increases the risk that elected officials have the interest of powerful and wealthy groups in

their mind, rather than the electorate they are supposed to represent. The senators show how all of this contributes to Americans checking out of the democratic process entirely, and reference that the voter turnout in 2014 was the lowest in any election since 1942 (McCain and Whitehouse, 2017: 16-19).

The bipartisan group of *65 Current and Former State Legislators* is in agreement with the senators on the problems partisan gerrymandering causes to bipartisanship. When the district is considered safe, the candidates find it necessary to first and foremost appeal to the primary voters of their party, who are usually farther from the ideological center than the average voter. Candidates in safe districts do not really have to temper their views in the general election either, since party identification is so high that they rarely have to reach outside the party base to win. The lack of competitive districts lead to legislators that do not reflect the ideological preference of the people they represent. The legislator is only responsive to the 30% percent of voters he needs to win the primary, which gives little incentive to work with legislators from the other party or work on moderate policies (*65 Current and Former State Legislators*, 2017: 15-17).

### **5.3.8 The question of justiciability**

A couple of the filed amicus briefs would also argue that this case provides the Supreme Court with the opportunity to once and for all clarify the justiciability of partisan gerrymandering. The *Wisconsin Institute for Law & Liberty* shows that previous court cases have given conflicting precedents and while a majority in *Davis v. Bandemer* found that partisan gerrymandering was a justiciable question, neither that Court nor any later Supreme Court has been able to find a limited and precise standard for gerrymandering cases. A fractured result, like in *Davis v. Bandemer* and *Vieth v. Jubelirer* would keep district courts in a sort of litigation limbo, where it is not clear what the rule of law should be. Recognition from the Supreme Court that these questions are unjusticiable, they feel, would both acknowledge the reality of redistricting and relieve the courts of the uncertainty (*Wisconsin Institute for Law & Liberty*, 2017: 4-17)

The brief filed by *Common Cause* argues for the opposite. The Supreme Court has previously said that partisan gerrymanders are incompatible with democratic principles and held in several cases that claims of partisan gerrymandering are justiciable. Using the framework

Justice Kennedy laid out in *Vieth v. Jubelirer*, based on the First Amendment, the Supreme Court should be able to clear out a path for gerrymandering cases. *Common Cause* argues “when a State targets individuals for unfavorable treatment because of their politics, that action is unconstitutional unless the State demonstrates narrow tailoring and a compelling interest” (Common Cause, 2017: 10-12)

## 6. The constitutionality of gerrymandering and a manageable standard

This chapter will discuss the findings from the case. The research question was “*Does partisan gerrymandering violate the Constitution of the United States of America?*” The parts of the Constitution partisan gerrymandering is claimed to be a violation of is the First Amendment and Fourteenth Amendment. I will therefore go in detail on those two. It also becomes a discussion of other important questions the Supreme Court will have to decide on in *Gill v. Whitford*. Is partisan gerrymandering justiciable and could plaintiffs have a statewide claim? At the end, I will discuss how a manageable standard might look like, based on previous Supreme Court decisions, the District Court’s ruling and suggestions from plaintiffs.

### 6.1 Unrepresentative government and legitimacy

Partisan gerrymandering has been a part of American politics for almost as long as politics has existed in the United States. While advancements in computer technology have helped partisan gerrymandering become more effective the last decades, another important factor is that people to a larger degree than before choose to self-segregate and live in areas with likeminded individuals. While partisan gerrymandering has been criticized by many, both parties have been willing to use it when they had the opportunity to get a legislative advantage and the courts have preferred to stay out of it. One of the biggest issues with gerrymandering is that it could hurt the legitimacy of elected representatives and result in delegations of legislative representatives that does not come close to reflect the partisan diversity of the voters in the state. As the *Brennan Center at N.Y.U School of Law* writes in its amicus brief, Article 1, §2 of the Constitution that requires reallocation of House seats every ten years is an example of the founding fathers intention of a representative government. By taking population shifts and growth into account, they aimed to increase the legislative representativeness of voters, but partisan gerrymandering does the exact opposite. The *Senators McCain and Whitehouse* believes that this is contributing to Americans diminishing interest in elections and reference that the voter turnout in 2014 was the lowest in any election since 1942.

Polling suggests that very few Americans, on either side of the aisle, approve of partisan gerrymandering, but the Supreme Court has been reluctant to do much about it (Frankovic, 2017). They have viewed it as a “political thicket” that should be solved by politicians and that entering into it would bring on a flood wave of cases for the court system. When looking at the remarks from justices in previous cases and from the oral arguments, they all seem to agree that partisan gerrymandering is a distasteful practice that would like to see disappear, but there is a big disagreement about whether courts could or should get involved controlling such practice.

## 6.2 Standing

An important point of contention for the parties was whether the plaintiffs have the standing to bring a statewide claim. The amicus briefs in support of the state of Wisconsin thought that the District Court has made a mistake when it held that the plaintiffs had a statewide standing to challenge the district map, as the Supreme Court had previously rejected attempts to challenge gerrymandered districts the plaintiff does not live in. Most of the Democratic voters who are plaintiffs in this case live in Democratic districts, not in the districts they claim to have lost due to gerrymandering. The *Republican Nation Committee* showed examples from racial gerrymandering cases, where a voter in a racially gerrymandered district could be denied equal treatment, but that the voter could not be discriminated against based on the racial distribution of districts he does not live in. The District Court held that the basis for partisan gerrymandering is different from that of a racial gerrymandering claim. They are not contrary either, as the claims in racial gerrymandering cases are limited to the effect the gerrymander has on one or a few districts, while partisan gerrymandering claims are based on the statewide effect it has. *Whitford* and the other plaintiffs allege that all partisan gerrymandering claims previously brought to the Supreme Court has been statewide and are certain that they have the standing to pursue if the Court finds partisan gerrymandering to be justiciable.

The decision on standing could come down to the justices’ view of representation. Mr. Tseytlin, who represented the state of Wisconsin at the oral arguments, pushed the argument that in a country with a single district election system, people only vote in their own district. He argued that while one might have a vague interest in the party you associate with to have

more members in Congress, for instance, but that no one would argue that a Wisconsin Republican could challenge Texas law if he thought Texas Republicans to be underrepresented. This would be similar to a statewide claim in his opinion. To only look at the district someone can vote in is a very dyadic view of representation. Justice Kennedy asked if it would change the calculus if the claim was based on the First Amendment instead of the Fourteenth (*Gill v. Whitford* Oral Arguments: 4-5). While Tseytlin disagreed with this as well, it might have been a suggestion from Kennedy that plaintiffs could have a First Amendment interest in having their preferred political party be strong. Even though the overall results of elections seem to matter a lot, there is not necessarily a constitutional basis for considering the House of Representatives or a state assembly in that way. The Supreme Court has previously denied that the result of congressional elections as a whole can be used as evidence of unconstitutional partisan gerrymandering. The Court seems split on the standing issue now, with Chief Justice Roberts and the three other conservative justices reacting negatively to Kennedy's suggestion. If Kennedy were to side with them, it would allow the Supreme Court to avoid ruling on the merits of the case. However, if he sides with the four liberal justices, like his comments might indicate, the Court will face some tough questions: is partisan gerrymandering unconstitutional, is partisan gerrymandering cases something the courts should get involved with, and if so, what standard should they use to review such claims?

### 6.3 Is it justiciable?

The issue of making partisan gerrymandering justiciable has been a long process. The first time it was implemented in a district court was in *Bandemer v. Davis* in 1984, where the Republican legislature's redistricting plan was ruled to be unconstitutional. The reasoning for the ruling was the systematic dilution of Democratic voting strength in Indiana. When the appeal reached the Supreme Court in 1986, its ruling agreed that partisan gerrymandering was a justiciable issue. They did not, however, find that Indiana Democrats had proved that they were permanently harmed and there was a lack of a clear consensus on what would make a plan unacceptable (Morill, 1987: 246).

While partisan gerrymandering is viewed as justiciable for now, there are still questions about its constitutionality and how to measure it. The Supreme Court has been much clearer on racial gerrymandering and has struck down several cases of it, both where minorities have



been underrepresented and where lawmakers have been to creative when creating majority-minority districts. But some people view different forms of gerrymandering as two sides of the same coin. As Robert G. Dixon, former assistant attorney general of the United States and professor of law, pointed out in 1971: “In a functional sense the gerrymandering issue is the same whether the districts are single-member or multi-member – and whether or not a racial factor is present, because racial gerrymandering is simply a particular kind of political gerrymandering” (Grofman, 2007: 19).

#### **6.4 Is partisan gerrymandering a violation of the Fourteenth Amendment?**

“When you’re talking about the opportunity to turn your vote into a policy or change, the Fourteenth Amendment says you should have an equal chance, whether you’re a Democrat or a Republican,” said Ruth Greenwood, who is the deputy director for redistricting at Campaign Legal Center, which represents the original plaintiffs in *Gill v. Whitford*. She adds: “But if you’re a Republican in Wisconsin, you get an outsized say with your vote. And if you’re a Democrat in Rhode Island, you get an outsized say” (Wines, 2017)

Those who argue that partisan gerrymandering violates the Equal Protection Clause of the Fourteenth Amendment claims that by diluting the vote of people with a certain political belief, they deny a political party the share of seats in the legislature that they otherwise would be entitled to based on the share of votes it received in the election. The Equal Protection Clause has been the framework for many cases dealing with representation, including vote dilution since *Reynolds v. Sims*. This was the case where the Supreme Court articulated the “one person, one vote” rule for legislative apportionment and held that each voter was not only entitled to cast a ballot, but had a constitutional right to an equally weighted vote as any other voter (Briffault, 2005: 402).

The protection of an individual voter’s rights has also been extended to racial minority groups. The Supreme Court has agreed that attempts to make it harder for minority voters to elect their preferred candidates, in other words dilute their vote, falls under the Equal Protection Clause. Extending it to partisan gerrymandering grows naturally from the case law that brought “one man, one vote”. A redistricting map that gives one party a larger share of seats in the legislative assembly than its share of the popular vote, while giving the other party

a lesser share of the seats than its votes can sound like it denies the latter party's voters fair representation. (Briffault, 2005: 405)

There are arguments against this viewpoint though. The vote dilution model of gerrymandering assumes that voters fall into identifiable partisan groups, so a party's share of the voters can be compared to its share of seats in the legislature. But that is not always the case, as voters can change the party they vote for without changing party registration, many are unregistered and voters can split their ticket and vote for candidates from different parties for different positions in the same election. The actual votes in an election can be affected by other factors like voters staying home because of one-party domination, specific candidate qualities or scandals. Though these are more practical worries, there are also objections to the theory. The claim is that the theory of vote dilution, or something similar like the efficiency gap, is basically a wish for proportional representation. Proportional representation is not mentioned in the Constitution and would also be hard to achieve as the law for congressional elections requires single-member districts and virtually every state legislature has it as well. You could have a party that ends up with 51% of the popular vote and 100% of the legislature seats, even if the two dominant parties were evenly spread out in a state (Briffault, 2005: 405-407).

Justice Scalia challenged the arguments for political gerrymandering's unconstitutionality in the plurality opinion on *Vieth v. Jubelirer*. He asserted that only individual voters, and not political groups, had the right to equal treatment provided under the Equal Protection Clause of the 14<sup>th</sup> Amendment. The plaintiff's proposed standard in *Vieth v. Jubelirer* was based on majority rule, that a majority of voters should be able to elect a majority of voters. But recent work in mathematical voting theory published after the case in 2004 addresses the challenge posed by Scalia and argues that a majority rule standard can be derived from the equal treatment of individual voters, with no argument about group rights. The claim that partisan gerrymandering is unconstitutional under the Equal Protection Clause is an extension of the claims that was made in *Wesberry v. Sanders* and *Reynolds v. Sims*. Those cases found that the right to vote was protected by the Constitution, which included protection from the dilution of people's vote by unequally sized districts and that nearly as is practicable one man's vote should be worth as much as another's. If diluting a person's vote by creating unequally sized districts violates their right to vote, then it is not a huge leap to assume that

manipulation of district shapes that has the same effect would also be in violation (McGann, Smith, Latner and Keena, 2015: 296-297)

An equal treatment of all individuals would indicate that the majority of voters should be able to elect a majority of representatives. In a two-party system, the largest party must therefore receive a majority of the popular vote and receive more seats than the other party. But that assumes that the legislature is considered as a whole, and that we do not view it by individual districts. I have previously talked about two of the primary ways to view representation. One way is to consider the House [or the state legislature in Wisconsin] as a whole as a single legislative body who represents the people. If the overall composition of the House is stacked against you, then you have been wronged. The other way is a more district based or dyadic way to view representation. This view assumes that if the process that your representative was chosen by is fair, then you would have received equal protection. Each election is viewed separately, each representative is treated as an individual as opposed to a member of a representative body and you cannot argue that the overall process that elected the Congress was discriminatory towards you. As you only get to vote for the member from your district, it is assumed that the only one who represents you is that member, not the House as a whole.

The laws and action performed by a legislature depend on the legislature as a whole and not just on its individual members. Since legislatures organize themselves on partisan lines, the partisan balance becomes an important part of the election result. The newspaper headlines after an election are likely to focus on who won the House or who kept control of the State Assembly, rather than that there were separate elections between separate candidates in separate districts. When Article 1, §2 of the Constitution prescribes the election of representatives to the House in collective terms: “The House of Representatives shall be composed of members chosen every second Year by the People of the several States”. There is nothing in that sentence to indicate that a voter is only representative and thus do not have a stake in how the rest of Congress look like. But to consider the overall composition of a legislative body only makes sense if we view it in partisan terms. While the partisan nature of politics is often taken for granted, might not be as straightforward in legal terms. The Constitution does not mention political parties and Justice Scalia argued in *Vieth v. Jubelirer* that parties have no special status. In his mind they were comparable to social groups like farmers or Christian fundamentalists. However, political parties are different from those categories by the fact that the legislatures actually organize themselves on partisan lines, for

instance when it comes to choosing the Speaker of the House and congressional committees. This means that political parties have become an institutionalized part of Congress. This makes a case for why the results perhaps should be viewed as a whole and considered in partisan terms (McGann, Smith, Latner and Keena: 298-301)

The Democrats in Wisconsin do not only base their case on the Equal Protection Clause of the Fourteenth Amendment, but are also saying that their First Amendment rights are being violated. By drawing a partisan legislative map, the state renders Democratic votes less worth than Republican ones, which amounts to government-ordered punishment of Democratic voters for expressing their political preference at the ballot box. Based on previous Supreme Court cases, the arguments in the amicus briefs and the oral arguments from *Gill v. Whitford* and *Benisek v. Lamone*, it seems like the basis for a decision will be found in the First Amendment. The Equal Protection Clause protects the voter from having their representation rights burdened, but to view gerrymandering as that would indicate a collective view of representation. Otherwise the Court might just view it as political classifications playing a role in the districting. That has traditionally been accepted as a permissible classification and would need a standard that shows when it is used for an impermissible purpose. Whether you believe that partisan gerrymandering is a violation of the Fourteenth Amendment is in most cases a reflection of your view on representation. Based on previous cases, I am inclined to believe that it is not a breach of the Equal Protection Clause. The *Gill v. Whitford* case could go either way on this, but the signals indicate that most of the focus will be on the First Amendment, where I believe they have a better case. As Justice Kennedy wrote in his *Vieth v. Jubelirer* opinion, “First Amendment analysis does not dwell on whether a generally permissible classification has been used for an impermissible purpose, but concentrates on whether the legislation burdens the representation rights of the complaining party’s voters for reasons of ideology, beliefs, or political association” (*Vieth v. Jubelirer*, 2004).

### **6.5 Is partisan gerrymandering a violation of the First Amendment?**

Justice Kennedy has previously suggested that partisan gerrymandering could be unconstitutional because of the First Amendment, and not because it violates the Equal Protection Clause, which has been the primary argument in previous Supreme Court cases. The thing that makes the First Amendment a possibility is that it focuses on whether the

government punishes or favors a particular viewpoint. The Equal Protection Clause is focused on hindering discrimination on the basis of protected characteristics like race, religion and gender, but it does not care as much about if a law discriminates based on political views.

When the government wants to create an effective gerrymander, it classifies individuals by their political affiliation and draws districts that are designed to dilute their votes cast in favor of the minority party. While the voters are still able to cast their ballots, their ability to elect their preferred candidates are diminished. Voting is a fundamental free speech activity and opponents of partisan gerrymandering would argue that when the state diminishes the vote of voters with a certain political leaning, it is a form of viewpoint discrimination as the government punishes individuals who support a disfavored party (Stern, 2017). The First Amendment guarantees free expression and association, but they are not really free if the state can punish you for your viewpoint by diluting the value of your vote.

Knowing that the key to get a favorable Supreme Court ruling is probably to get the vote of Justice Anthony Kennedy, who has been a strong voice against infringement on the freedom of speech, the Democratic plaintiffs in *Gill v. Whitford* has made the First Amendment central to their case. Gerrymandering has traditionally been seen as an issue that may infringe on the equal protection of the law and therefore fall under the Fourteenth Amendment. But the idea that partisan gerrymandering could be in violation of the First Amendment was one that Kennedy himself had suggested in *Vieth v. Jubelirer* in 2004. During the oral arguments in the ongoing case, Paul Smith, the lawyer that represents the Democratic challengers in *Gill v. Whitford*, read out loud the argument Kennedy had previously laid out. “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” (Toobin, 2017)

Though a partisan gerrymander could make a party’s voters less effective less effective in converting their votes into legislative representatives, the argument against it being a violation of the First Amendment rests on the fact that they still have the same right to vote, nominate their preferred candidate and participate in campaign. They way gerrymandering harms a party is by making it harder to win their “fair share” of representatives in the legislature. And

that is something that is not present in the Constitution and sounds similar to proportional representation (Briffault, 2005: 409).

From looking at the arguments made in the case, I do believe that partisan gerrymandering is a form of viewpoint discrimination. While voters have individual choice and could change their partisan preference from one election to the next, partisan gerrymandering assumes voter behavior, attempts to dilute their voting strength and penalizes individuals who vote for the disfavored party. Free expression and association, as the First Amendment guarantees, are not really free if the government can punish you for your viewpoint by ensuring your vote doesn't matter. My opinion is strengthened by the fact that the Supreme Court has chosen to take another partisan gerrymandering, *Benisek v. Lamone* from Maryland, which is framed exclusively as a First Amendment challenge. Based on the arguments, it appears that a violation of the Fourteenth Amendment would require more substantial proof of harm over time, while a state that moves voters based on their political affiliations for the purpose of partisan advantage could be in violation of the First Amendment just from the purpose itself. It would need to have a legitimate justification for doing so, regardless of the actual voting results. This would give partisan gerrymandering a judicial status more in line with racial gerrymandering.

#### **6.6 How will a manageable standard look like?**

If the Supreme Court rules that partisan gerrymandering is justiciable and in violation of the Constitution, it will still need to decide on a standard that redistricting cases can be judged by. There needs to be simple way of knowing when a redistricting crosses the line and becomes an unconstitutional gerrymander. The standard cannot seek to enforce proportional representation, that is something the Supreme Court, and Justice Kennedy specifically, has made clear. A workable standard needs to stop those instances where a redistricting process results in grossly disproportionate electoral outcomes compared to the partisan composition of the voters, while not being so squishy that the courts will be flooded with weak partisan-based redistricting challenges. The entrenchment part of Judge Ripple's ruling separates it from the focus on whether one party won their fair share of seats, which was more in focus in *Vieth v. Jubelirer*. The opinion from the District Court makes entrenchment a central part of a judicially manageable standard when evaluating a partisan gerrymander. It focuses on whether a legislature has used the redistricting process to not only favor one political party,

but also entrench it in power for several elections going forward (Whitford v. Gill District Court Opinion, 2016: 59). The harm here is not just to the other political party, but is also a detriment to democracy itself as it prevents voters from holding elected officials accountable at the ballot box. This is also a representational issue, as a representative entrenched in a safe district have little reason to be responsive to the political minorities in their district. It is hard to view someone as representing the whole district if they can dismiss a large part of the electorate.

As the history of partisan gerrymandering in the courts have shown, it is hard to find a manageable standard that eliminates the most blatant partisanship, but allows some leeway for state governments to operate. One example of how the Supreme Court could distinguish between excessive and permissible attention to a districting factor, like partisanship, is the doctrine that came from *Shaw v. Reno* on racial gerrymandering. The doctrine that came was that excessive attention to race, where it became the predominant factor in the drawing of district lines, is not allowed, while some attention to race in districting is permitted. The potential issue with a similar doctrine is the vague standard it sets and partisanship is present in a larger number of districts than racial divisions exist in. But *Shaw v. Reno*'s restriction on attention to race seem to have been absorbed in the political process and have become part of redistricting practice. Even states where race is a real factor in politics have seen little racial gerrymandering once the doctrine became internalized (Briffault, 2005: 419-420).

A standard for partisan gerrymandering needs to be both scientifically and legally valid. To be scientifically valid, it must be a correct measure of the thing we are trying to capture. Whether the measure is accurate or not does not matter if we are measuring the wrong thing. The standard also need be legally valid, in that it needs to have its basis in a constitutionally protected right and it needs to give clear guidance for judicial decision-making. Other qualities the standards should have is reliability and predictability in results and have similar cases give similar results (McGann, Smith, Latner and Keena, 2015: 309) The District Court's opinion was based on a legal test that considered discriminatory intent, the partisan effects of the district map and whether the effects were justified by some other reasons. The plaintiffs suggested the efficiency gap as a tool to measure the partisan effect and argued that gaps over 7 percent violated the constitution. The 7 percent standard is meant to capture maps that will have gaps that endure the whole 10-year election cycle until the next redistricting, but critics have argued that it is an arbitrary number. It was not used by the District Court, but Judge

Ripple did say that the efficiency gap corroborated the conclusion the majority had come to (Liptak, 2017b).

### 6.7 Previous cases will shape its form

From the way the plaintiffs in *Gill v. Whitford* has laid out their case, it looks like they have taken Justice Kennedy's objections from previous gerrymandering cases like *Vieth v. Jubelirer* and *LULAC v. Perry* to heart. Some of their complaints and solutions seems tailored to appeal to him and Kennedy's own words were used several times by the plaintiffs during the hearing further their case (Toobin, 2017). Justice Kennedy presented his concerns with partisan symmetry in the plurality opinion from *LULAC v. Perry*. He observed that to determine how symmetric a district plan is, one must estimate the results of a hypothetical election where certain voters switch their vote to the other party and that this estimation requires conjecture about where those possible vote-switchers reside. These assumptions can be controversial and often incorrect. He was also skeptical of invalidating district plans based on hypothetical unfair results from future elections. Kennedy preferred that a challenge was litigated only if the feared inequality had taken place in elections (Stephanopoulos and McGhee, 2015: 845).

These two objections apply primarily to the partisan bias as a measure, but might not be applicable to the efficiency gap. The assumption of switching the parties' vote share by the same amount in every district is problematic, as the partisan swing is likely to vary from district to district. The parties' wasted votes are calculated from actual election results when the efficiency gap is used. Both the analysis of current plans and any historical analysis are therefore based on real outcomes and not hypotheticals. Uniform swing can be used in sensitivity training, but that is an option, whereas it is a prerequisite for partisan bias. Justice Kennedy's concern with striking down a district plan before the unfair results had occurred does not apply to the efficiency gap either. This is again because the efficiency gap is calculated from past elections and any unfair results would come from historical experience. Since election outcomes can be forecast with reasonable accuracy, it would be unwise for partisan actors to create a district map that is certain to break the threshold of the efficiency gap. Even though the first election could be held under the new map, it would be very likely to be invalidated after the partisan unfair results became clear. The party in power could risk that the courts draw a more competitive map with less protection of their incumbents than a



district map with some partisan advantage that falls below the threshold would have given them (Stephanopoulos and McGhee, 2015: 896-897).

The third concern raised by Justice Kennedy was how one would select the asymmetry threshold that decided when a plan that scored lower would be upheld and a plan that scored higher would be presumed illegal. Neither the parties nor the amicus briefs of political scientists provided the empirical evidence of asymmetry in current or historical district plans, which Kennedy thought made it hard for the Supreme Court to find “a standard for deciding how much partisan dominance is too much” (Stephanopoulos and McGhee, 2015: 846). Deciding on a standard that distinguishes between some partisan unfairness and too much partisan unfairness was the main issue in *Vieth v. Jubelirer* as well. The *Vieth* Court indicated that valid plans could not be told apart from invalid ones based on qualitative standards, as it would be hard to judge unfairness or entrenchment with sufficient consistency. A quantitative approach is not new to the Supreme Court, as it is already used in cases involving population equality in districts. Population deviations above 10 percent in state legislative districts must be justified by legitimate policies that make the inequality necessary, while deviations below 10 percent are assumed to be valid unless it comes from attempts to disadvantage a racial or political group (Stephanopoulos and McGhee, 2015: 886).

The suggested use of the efficiency gap as part of a standard could enable a similar doctrine in partisan gerrymandering cases as the one using population deviation in reapportionment cases. By deciding on a specific efficiency gap level, the Supreme Court would inform both politicians and lower courts on exactly how much partisan influence is too much.

### **6.8 Where do you set the threshold?**

The question then is where do you set the efficiency gap threshold. Ideally district plans should probably be close to a gap of zero. That would invalidate any plan that treats parties unequal in terms of wasted votes, unless the state can prove that it was necessary due to other legitimate state policy, like contiguity or keeping communities of interest intact, or because it was unavoidable given the geographic distribution of the parties’ voters. But a threshold of zero is not likely and the Supreme Court has made it clear that some partisan considerations are allowed. It would also have made almost every current district plan illegal and have a very disruptive effect. Another factor that goes into setting the threshold is that a district plan’s

electoral gap varies from election to election. This means that even if a plan has a gap of zero in one election, it would be likely to have another efficiency gap in the next election even under the same map. Some margin should therefore be allowed for.

Stephanopoulos and McGhee (2015: 887-888) recommends setting the limit at two seats for congressional plans and 8 percent for state legislature plans, with the additional condition that sensitivity testing show the efficiency gap is unlikely to hit zero in the lifetime of the district plan. When Stephanopoulos and McGhee looked at the redistricting in the entire period since the reapportionment revolution in the 1960's, they found that their suggested threshold would have been breached in 14 percent of the congressional plans and 12 percent of the state legislature plans.

A last hope for the plaintiffs could be that the justices end up voting against Act 43 and ruling partisan gerrymandering to be unconstitutional, even if they view the standards suggested as, in Chief Justice Roberts' words, "sociological gobbledygook" (Gill v. Whitford Oral Arguments, 2017: 40). That would leave it up to a bunch of future cases that would come in the aftermath to set a standard, where maybe one day in the future a specific line would be set. This would give it a status that resembles that of racial gerrymandering. The process around reapportionment was also similar, in that there was not a specific ruling on the details. The Supreme Court ruling on apportionment required equal population between districts, but did not make a statement on what "equal" would actually mean. The rough threshold of around 10 percent deviation in population has been established through decades of litigations. A similar efficiency gap threshold could emerge organically over a series of cases.

Justice Kennedy has previously shown that he worries less about the long-term implications of a ruling than about getting the correct results in the case before him. In cases that test the boundaries of established legal principles, you might have to make a decision to correct a perceived wrong although there is no administrable standard. Should he find the gerrymandering problem to be a big enough democratic problem, then there is a chance Kennedy could put his foot down and trust in judges to make the right calls in the gerrymandering cases that would be sure to follow (Toobin, 2017).

Kennedy's fourth objection was that he thought unconstitutional gerrymandering could not be judged on partisan asymmetry alone, as it could be a product of other factors than

partisanship. Compactness, contiguity, and keeping communities of interests intact are some of the other things that map drawers have to consider (Stephanopoulos and McGhee, 2015: 846). The kind of standard that has been proposed, both by the District Court and by Stephanopoulos and McGhee, would only use asymmetry in the one part of the standard. If a plan were deemed to be above the threshold for asymmetry, one would get to the second stage where you look at other factors like compactness, minority representation and communities of interest. Do these factors necessitate that the plan has a gap that is higher than the threshold? At this point the court would need to balance partisan fairness against competing considerations, which could serve as legitimate justification for plans with an efficiency gap over the limit. If a state claims that their district plan needed to breach the threshold in order to achieve the other traditional redistricting standards, then they would be presumably be able to prove it through cartographic evidence. The plaintiffs should also have the chance to prove that the state's goals could be achieved equally well with a more symmetric district plan.

## **6.9 Political geography**

The other thing that could excuse a large efficiency gap is the political geography of the state. The distribution of each party's supporters might not make it feasible to create a plan below the threshold. Democrats tend to cluster in the city areas, while Republican are more spread out in the rural areas and suburban areas can be more mixed. A bias in favor of Republicans could therefore be present even without intentional gerrymandering. This is most likely to occur in states where Democratic voters are more geographically concentrated than Republican voters (Chen and Rodden, 2013: 265). Cartographic evidence would play a key part here as well. The state would have to prove that a smaller gap could not have been produced and the plaintiff would aim to draw a sample map that illustrates how a smaller efficiency gap could have been possible, despite the political geography of the state.

While the political geography of Wisconsin does play a part in explaining of how Republicans get more representatives than the amount of voters would normally indicate, it cannot explain the large disparate effect seen under Act 43. As Judge Ripple said in the District Court's opinion: "the defendants' own witnesses produced the most crucial evidence against justifying the plan on the basis of political geography" (Whitford v. Gill District Court Opinion, 2016: 91). Their testimony established that the drafters of Act 43 produced several alternative maps that all would achieved the valid redistricting goals of the legislature, with a

substantially smaller partisan advantage. When none of these were used and the legislature instead went with a map that secures a Republican electoral majority going forward, it is hard to justify the partisan effect by the legitimate state concerns and neutral factors that affect the districting process.

## 7. Conclusion

This paper has looked into partisan gerrymandering, a theme I find very fascinating. It is an aspect of American politics that has been talked about frequently in American media since the Supreme Court agreed to hear the case of *Gill v. Whitford* in the summer of 2017. I have used *Gill v. Whitford* as a case study of partisan gerrymandering, with the research question of “Does partisan gerrymandering violate the Constitution of the United States of America?” Gerrymandering has a great impact on American politics and it would affect many congressional districts and state legislatures if it would be ruled unconstitutional. The claims are that it violates the First and the Fourteenth Amendment, so that is the focus of the paper. For the Supreme Court to rule against partisan gerrymandering, it would also need to consider it a justiciable matter and make a decision on the plaintiffs’ standing in the case. I have therefore made those aspects a part of the discussion as well. All indications are that the courts would need a manageable standard to judge the merit of future partisan gerrymandering cases, should the Supreme Court rule it unconstitutional. I have looked into how that standard might look, as it could be of great importance.

It looks like this case will be decided on the merit of the constitutionality. I think it is seen as such a pressing issue and an issue that the Supreme Court does not believe elected partisan representatives is capable of fixing. Based on the amicus briefs, those in support of the state of Wisconsin would like the Court to drop the case based on standing or justiciability, but the oral arguments indicate that Justice Kennedy want to have a discussion on partisan gerrymandering as a First Amendment issue.

I am very uncertain if partisan gerrymandering is a violation of the Equal Protection Clause of the Fourteenth Amendment. It depends on whether you believe it should provide equal chance for the legislature as a whole or just equal chance in the election of your representative. Where you fall down on that question depends on whether you have a dyadic or collective view of representation. The Equal Rights Clause has previously been used to improve representation in malapportionment cases and racial discrimination, but seeing the Supreme Court rulings from previous makes me believe that they do not believe representation should be viewed collectively. Due to this, I believe that partisan gerrymandering is not a violation of the Fourteenth Amendment and that it is more likely to succeed as a First Amendment issue.

I do find that voting is a free speech activity and that when the state dilutes the vote of voters with a certain political leaning, it becomes a form of viewpoint discrimination. Even if you are allowed to cast a vote, your ability to elect your preferred candidate is diminished as a result of punishment from the state for previous voting activity. From the amicus briefs and the oral arguments it seems like this will be the plaintiffs' main argument as well, which is an argument specifically directed towards Justice Kennedy, who has previously suggested that partisan gerrymandering could be a violation of the First Amendment's freedom of association. The fact that the Supreme Court will hear another gerrymandering case, *Benisek v. Lamone*, based around the First Amendment is another indication that it could be vital. The First Amendment guarantees free expression and association, but I believe partisan gerrymandering violates that when it is used to punish individuals for their viewpoint by diminishing their vote.

With regards to how a manageable standard could be designed, I believe the three-pronged test that the District Court adopted could work well. A district plan would be found to violate the Constitution if it had a discriminatory intent. If it was created with the motive of favoring one party over the other, it would fail the first prong. The second prong would be to look at the effect. Does the plan waste one party's voters to a larger degree than the other party's and is the effect durable? The efficiency gap comes across as the best measurement of the effect. The maximum gap allowed should be set around 8, to allow for some partisan maneuvering, other redistricting goals and variation from one election to the next. The third prong would be to investigate if any other legitimate factors could justify the discriminatory effect. One would have to consider political geography, compactness and keeping communities intact, and whether those goals could only be achieved by breaching the standard.

The fear of some is that a ruling against partisan gerrymandering would shift the responsibility of districting from elected public officials to unelected judges, who would decide the fate of maps based upon the battle of experts. The court may right a current wrong, but down the road it could be more deeply embedded in legislative processes than the Constitution intended. This shift in balance between institutions is something many fear, as the federal government and the courts will be more involved in what was previously the prerogative of local government. I do not believe that would be the long-term effect from it. It seems more likely to me that after a couple of cases it will be the courts that establish how a new

standard works, it would become just another part of the redistricting framework, like the standard on population equality.

What is at stake in *Gill v. Whitford* is politicians' ability to use the redistricting process to their advantage. While Democrats have willingly taken advantage the redistricting process in the past, and continue to do so in some of the few states they control both chambers of the state legislature and the governorship, a Supreme Court decision that rules partisan gerrymandering to be unconstitutional would hurt the Republican Party the most. They control the state government trifecta in 25 states, while Democrats hold similar control in only 6 states and are in most cases forced into a bipartisan redistricting process. The Associated Press analyzed the outcomes of all 435 U.S. House races and about 4700 state House and Assembly seats that were up for election in 2016 by using the efficiency gap and found that four times as many states had Republican-skewed state House or Assembly districts than Democratic ones. Among the two dozen most populated states, nearly three times as many had Republican-tilted districts to the House of Representatives (Associated Press, 2017). Most court cases are judged by previous jurisprudence and conventional legal interpretation, but being the decision makers in partisan political cases could lead to more partisanship from judges as well and could affect their standing in the eye of the public as neutral arbiters. But one can also question if they actually are viewed as neutral, considering how they are chosen by politicians and are usually reliably liberal or conservative. The fact that a Supreme Court ruling against partisan gerrymandering would most likely hurt Republicans could have influenced why the court surprisingly added *Benisek v. Lamone* to their docket. The justices may fear that making a ruling that indicates that they take sides with one of the parties could damage the Supreme Court's legitimacy.

If the Supreme Court votes to allow continued partisan gerrymandering, then it will continue to be a feature of American politics, as it has been for centuries. Research indicates that it has become more extreme in recent redistricting cycles, as more advanced technology is available, voters have become more partisan and people are self-segregating with others of similar political views. This trend seems likely to continue and the district maps following the 2020 election could be the most gerrymandered so far. What the ruling says about justiciability could decide if other partisan gerrymandering cases will come before the Supreme Court in the future or whether *Gill v. Whitford* is the one that settles the question.

This paper has highlighted some of the most important aspects of the discussion around partisan gerrymandering. As for further research on this subject, that would depend on the outcome of *Gill v. Whitford*. It would be very interesting to research the effect it has on the next redistricting cycle following the elections of 2020, should the Supreme Court rule against partisan gerrymandering. The ruling will probably come too late to change the district maps in gerrymandered states before the 2018 elections, but that could happen in the two years before the next election and would definitely affect the process that follows the next census. If the Court continues to allow it partisan gerrymandering, I think an angle that could provide insight is to review if and how the First Amendment claims changed the justices' opinions and whether that is a route to follow in future cases.



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