Gill v. Whitford

Wisconsin's partisan gerrymandering case

Staci Duros, PhD
legislative analyst

One East Main Street, Suite 200, Madison, Wisconsin 53703
http://legis.wisconsin.gov/lrb • 608-266-3561

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Introduction

On November 21, 2016, the U.S. District Court for the Western District of Wisconsin issued an historic decision on a Wisconsin case known as *Whitford v. Gill* (formerly *Whitford v. Nichol*[1]). For the first time, a federal district court struck down a state legislative redistricting plan as an unconstitutional partisan gerrymander. In the three-judge panel's 159-page split decision (2–1), the court ruled that 2011 Wisconsin Act 43, which made new districts for the assembly, "systematically dilute[d] the voting strength of Democratic voters" and intentionally burdened their representational rights by impeding their ability to translate their votes into legislative seats in violation of the U.S. Constitution. In compliance with 28 U.S.C. §§ 2284[2] and 1253,[3] the State of Wisconsin filed an appeal on February 24, 2017, asking the Supreme Court of the United States to review the district court's decision. On June 19, 2017, the Supreme Court announced that it will hear Wisconsin's appeal during its next term. The oral arguments for the case will take place on Tuesday, October 3, 2017, with a decision to follow in 2018. This case marks the first time in more than a decade that the high court has looked into partisan gerrymandering.

In the five decades since its decision in the case of *Baker v. Carr*,[4] which held that the redistricting of state legislatures does present justiciable questions that may be resolved by federal courts, the Supreme Court has ruled on gerrymandering in the areas of minority rights and malapportionment. While the Supreme Court "f[ound] … political gerrymandering to be justiciable,"[5] it did not agree on a substantive standard to apply in assessing claims of partisan gerrymandering.[6]

In 2004, a plurality of justices in *Vieth v. Jubelirer* argued that partisan gerrymandering claims are nonjusticiable because "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged."[7] In his concurring opinion, Justice Kennedy argued, "that no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are

1. In the summer of 2016, the name of the case changed from *Whitford v. Nichol* to *Whitford v. Gill* to account not only for the change in leadership at the state's elections authority, but also because the agency itself had changed. The Government Accountability Board, which previously administered and enforced Wisconsin law pertaining to campaign finance, elections, ethics, and lobbying, was split into two separate commissions and the Wisconsin Elections Commission became responsible for election administration and enforcement. The statutory defendant changed on July 1, 2016, to the new members of the Wisconsin Elections Commission, who are Beverly Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don M. Mills, and Mark L. Thomsen.

2. A federal circuit's chief judge must designate three judges, including one federal circuit court judge, to hear redistricting cases.

3. This means that, in such cases, under federal law any appeal goes directly to the Supreme Court of the United States.

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

5. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 113.

6. *Id*. at 118–127; compare *id*. at 127–137 with *id.* at 161–162.

7. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). The Supreme Court overturned the ruling of *Davis v. Bandemer* that partisan gerrymandering claims are justiciable; *id.* at 281 (plurality opinion: Justices Scalia, Rehnquist, O'Connor, Kennedy, and Thomas). Four Justices dissented, offering various standards for adjudicating such cases: *id*. at 319–20 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting, joined by Ginsburg); *id.* at 355–56 (Breyer, J., dissenting).

involved, the impossibility of full analytical satisfaction is reason to err on the side of caution."[8] Therefore Justice Kennedy left open the possibility that judicially manageable standards could be developed in future cases and that partisan gerrymandering might still be justiciable. Two years after *Vieth*, the issue of partisan gerrymandering returned. Justice Kennedy, writing for the Court, briefly recognized the disagreement[9] on the justiciability of partisan gerrymandering claims before examining the question of whether the appellants offered a manageable, reliable measure of fairness for determining whether a partisan gerrymander is unconstitutional. The Court commented that while a "sufficiently extreme partisan gerrymandering" violated the Constitution,[10] it would be difficult to determine when extreme partisan gerrymandering was taking place without a "judicially manageable and discernable standard."[11] The Court rejected the standard and dismissed the plaintiffs' partisan gerrymandering claims for failure to state a claim on which relief may be granted.

After more than thirty years, the issue of whether or not courts should adjudicate cases of partisan gerrymandering remains largely unsettled. In addition to this, the Supreme Court has yet to provide adequate guidance on when a partisan gerrymander rises to the level of unconstitutionality or a workable standard for proving extreme partisan gerrymandering. Because the Supreme Court has never adopted a constitutional standard for partisan gerrymandering, *Whitford v. Gill* could represent a landmark case with an answer to the search for the elusive standard.[12] *Whitford* centers on the plaintiffs' proposed three-part standard that could be used as a method of identifying extreme partisan gerrymandering. This could have broad implications depending on the Court's decision because states may face new limits on the degree of permissible partisanship.

Reapportionment and redistricting

The terms "reapportionment" and "redistricting" are often used interchangeably even though technically *reapportionment* refers to (re)dividing the number of seats in the U.S. House of

8. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 311 (Kennedy, J., concurring in the judgment). He provided the fifth vote for the judgment.

9. Justice Kennedy was joined by Justices Stevens, Souter, Ginsberg, and Breyer in the opinion that partisan gerrymandering cases are justiciable; *League of Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006) at 447, 483, and 491. While concurring in judgment, Justices Roberts and Alito "took no position" on the justiciability of partisan gerrymandering claims (*id*. at 492) and Justices Scalia and Thomas reiterated their opinion expressed in *Vieth* that partisan gerrymandering claims lack "any manageable standard" and are therefore nonjusticiable (*id*. at 511).

10. *LULAC v. Perry*, 548 U.S. 399 (2006) in which the Supreme Court ruled that only District 23 of the 2003 Texas redistricting map violated Section 2 of the Voting Rights Act of 1965. Other newly created districts remained constitutional.

11. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 293 (plurality opinion) ("[A]n excessive injection of politics is unlawful.") (quoting *Baker v. Carr*, 369 U.S. 186 (1962) at 217) ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a *bona fide* controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.") Although ultimately in *Vieth*, the Supreme Court ruled that partisan gerrymandering claims present a nonjusticiable question, as there are no judicially manageable standards available to resolve questions of partisan gerrymandering.

12. In *Veith*, Justice Kennedy made clear that a standard must be based on a limited and precise rationale, and comprehensive and neutral principles, and, most importantly, it must be a standard that will limit and confine court intervention (*id*. at 306–7).

Representatives based on each state's portion of the national population, while *redistricting* refers to the actual division (or redrawing) of electoral district boundaries within a state. On the federal level, the Constitution requires that congressional seats be reapportioned among the states according to the population count from the federal census.[13] On a state level, after the congressional seats have been reapportioned, the boundaries for both the congressional and state legislative districts are determined by each state.

The purpose of redistricting is to establish electoral districts[14] of equal population that will ensure proper representation for all potential voters living within that state. Depending on these population changes over the decade, some states will gain seats, some will lose seats, while others will remain the same. Regardless, new district boundaries for both congressional and state legislative seats must be redrawn every decade after the census to avoid *malapportionment*, which refers to the fact that the number of voters per electoral district can vary widely without any relation to boundary lines. An example of malapportionment would be if an electoral district that has only 5,000 constituents has ten times more representation than a district with 50,000 constituents.

In many states, including Wisconsin, the state legislature has the power to redraw new electoral districts through the normal state legislative process: by enacting a bill, subject to gubernatorial veto, that will become a regular statute in use for the next decade until the new census data is released and the process begins anew.

Federal requirements for state redistricting

Equal population: "one person, one vote"

Like all states, during the process of redistricting, Wisconsin's congressional and legislative districts must comply with two federal requirements: equal population and minority protection.[15] Equal population is the most crucial principle involved in redistricting because it is the catalyst for the whole process. The concept of equal population[16] means that electoral districts should be approximately equal in population so that they do not violate the "one person, one vote" principle embedded in the equal protection clause of the Fourteenth Amendment.[17] If districts were drawn with different population sizes, the weight of each vote

13. U.S. Const. art. I, § 2, cl. 3.

14. An electoral district is a district from which a jurisdiction's governing body is elected. For example, the electoral districts of the state legislature are the assembly and senate districts.

15. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court held that federal courts did have jurisdiction to consider constitutional challenges to state legislative (and by extension congressional) redistricting plans and that this merited judicial evaluation. The Court split 6–2 (majority: Brennan, joined by Warren, Black, Douglas, Clark, Stewart; dissent: Frankfurter and Harlan; Whittaker recused himself for health reasons). *Baker* overturned *Colegrove v. Green*, 328 U.S. 549 (1946), now holding that malapportionment claims under the equal protection clause of the Fourteenth Amendment were not exempt from judicial review under U.S. Const. art. IV, § 2.

16. The term "equal population" refers to the general population in a given district, not the voting-eligible population.

17. The concept of "one person, one vote" arose from three Supreme Court cases: In *Gray v. Sanders*, 372 U.S. 368 (1963) at 381, Justice William O. Douglas declared, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettys-

would be different. For example, in underpopulated districts, a vote might be worth more than in an overpopulated district where a vote would be worth less. When districts are drawn with equal populations, each resident has equal access to government no matter where he or she lives.

The degree of population equality among congressional and legislative districts can be determined and evaluated through a few statistical measurements. The number for equal population is calculated using the concept of *ideal population*, or the target population for each equal population district under a redistricting plan. This figure can be calculated by dividing the total population of the unit being divided into districts by the number of districts being created.[18] For example, if a state's total population is 5 million and there are 50 legislative districts, the ideal population for each district is 100,000. The Wisconsin Department of Administration's Demographic Service Center's 2016 state total population estimate as of January 1, 2016, was 5,775,120. So hypothetically in Wisconsin if we were to redistrict today, the ideal population for a state assembly district would be 58,335, for a state senate district would be 175,004, and for a congressional district would be 721,890.[19] It should be noted that this example of Wisconsin's ideal population is for explanative purposes only using updated population information for ease of demonstration. Federal census data must always be used when redistricting.

Another statistical measurement to check how well redistricting efforts achieve population equality is by calculating the *absolute deviation*, or the difference between the population of a given district and the ideal population. This measurement assesses the degree by which a single district's population varies, either exceeding or falling short, from the ideal population district. Absolute deviation is derived by subtracting the ideal population from the population of a given district, and that number is used to determine the extent to which an actual district is larger (has a "+" deviation, *i.e.,* a positive value) or smaller (has a "–" deviation, *i.e.,* a negative value) than the ideal district size. For example, if the ideal population per district is 100,000 and the actual population of the district is 99,000, the absolute deviation would be –1,000. This number can also be expressed as a percentage, which indicates the proportion by which the population exceeds or falls short of the ideal population, by dividing a district's absolute deviation by the ideal population. The result is called *relative deviation* and in our example, the

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burg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." It was an 8–1 decision (majority: Douglas, joined by Warren, Black, Clark, Brennan, Stewart, White, Goldberg; dissent: Harlan). In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court ruled that each state is required to draw its congressional districts so that they are approximately equal in population. ("[O]ne man's vote in a congressional election is to be worth as much as another's.") (*Id.* at 7–8). The "one person, one vote" concept was then applied to state legislative redistricting in *Reynolds v. Sims*, 377 U.S. 533 (1964), in which the Court ruled that electoral districts must be roughly equal in population.

18. The above hypothetical example assumes the district in question is a single-member district. The ideal population for multi-member districts divides the total state population by the number of representatives.

19. The following hypothetical example on calculating ideal population uses the 2010 U.S. Census seat numbers for Wisconsin: 99 assembly districts; 33 senate districts; 8 congressional districts. The totals are rounded up. Assembly district ideal population: 5,775,120 ÷ 99 = 58,334.55 or 58,335. Senate district ideal population: 5,775,120 ÷ 33 = 175,003.64 or 175,004. Congressional district ideal population: 5,775,120 ÷ 8 = 721,890.

relative deviation would be –1 percent. Both absolute deviation and relative deviation are used to assess equality of population at the district level.

The *overall range*, or the difference in population between the smallest and the largest districts, can be used as a measurement that evaluates the redistricting plan at the state level (or in other words, as a whole).[20] For example, if the largest district's population is 101,000 and the smallest district's population is 98,000, the overall range is 3 percent. To get to 3 percent, one starts with the ideal population, which is 100,000; we know that the largest district is +1,000 and the smallest district is –2,000, so the overall range, ignoring "+" and "–," would be 3,000 people or 3 percent. Overall ranges that are less than 10 percent are generally regarded as complying with "one person, one vote."[21] During litigation, courts normally measure a redistricting plan using the concept of overall range, but the courts might refer to the concept and the quotient generated through its calculation by different terms.[22]

Table 1 represents a compilation of the necessary statistical terminology needed to understand the concept of equal population for redistricting. None of these statistical measures by itself presents the full picture of population equality or inequality in a given district or the plan as a whole.

Table 1. Statistical terminology for redistricting

Ideal population = total population ÷ number of districts
Absolute deviation* = total population – ideal population
Relative deviation* = absolute deviation ÷ ideal population
Overall range** = largest positive deviation + largest negative deviation
Range** = largest positive deviation and largest negative deviation
Mean deviation** = sum of all relative deviations ÷ number of districts, expressed as %

*Used in the calculation of deviation for individual districts
**Used in the calculation of deviation for entire plan; both calculations ignore "+" and "–" signs

Technically, there are different constitutional standards for establishing equal population in congressional districts and state legislative districts, but the overall concept of "one person,

20. The "overall range" calculation allows a redistricting plan to be evaluated as a whole (rather than at the district level) and is normally expressed as a percentage.

21. It is important to note that states should not assume that any legislative redistricting plan that has 10 percent or less overall range would be safe from court challenge based on a violation of the concept of "one person, one vote," see also *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Brown v. Thomson*, 462 U.S. 835 (1983); *Cox v. Larios*, 542 U.S. 947 (2004).

22. The term "overall range" can be referred to by many different terms, sometimes even within the same case: *e.g., Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), at 529: "population difference"; *White v. Weiser*, 412 U.S. 783 (1973), at 785–790: "total population difference," "total percentage deviation," "total absolute deviation"; *White v. Regester*, 412 U.S. 755 (1973), at 761–764: "total variation," "total deviation," "population differential,"; *Gaffney v. Cummings*, 412 U.S. 735 (1973), at 742, 750–751: "maximum variation"; *Brown v. Thomson*, 462 U.S. 835 (1983), at 838: "maximum percentage deviation"; *Karcher v. Daggett*, 462 U.S. 725 (1983), at 729, 766: "maximum population difference," or "maximum deviation," at 731–732, 741, 765–790; *Board of Estimate v. Morris*, 489 U.S. 688 (1989), 700: "maximum percentage deviation"; *id.* at 691, 701: "total deviation."

one vote" holds.[23] Congressional districts must be as "nearly equal in population as practicable," with the lowest possible deviation from ideal population, and no level of population inequality is deemed too small for judicial challenge.[24] This means that the population equality standard is strictly enforced at the congressional district level. State legislative districts must be drawn with substantial equality of population with an overall range of 10 percent from the ideal population.[25] Wisconsin has historically applied a much higher population standard for its districts with an overall range of less than 2 percent.[26]

Racial and ethnic minority protection from vote dilution

While the Supreme Court worked through population equality/inequality issues, Congress enacted the Voting Rights Act of 1965 in order to remedy the inequality of opportunity given to racial and ethnic minorities to participate in elections. Section 2 of the Voting Rights Act prohibited any state or political subdivision from imposing a "voting qualification or prerequisite to voting, or standard, practice or procedure to deny or abridge the right to vote on account of race or color."[27] Section 5[28] stipulates preclearance requirements that any changes to certain jurisdictions' electoral laws, practices, or procedures are precleared with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.[29] In 1982, Congress amended Section 2 to make clear that it applied to any plan that results in discrimination against a member of a racial or ethnic minority group, regardless of the intent of the plan's drafters.[30]

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23. The population standard for congressional districts was defined in the case *Wesberry v. Sanders*, 376 U.S. 1 (1964), in which the Supreme Court held that congressional districts must be redrawn so that "as nearly as is practicable one man's vote in a congressional election is … worth as much as another's." (*Id*. at 2, 7–8, 18). The standard for congressional districts remains quite strict, with equal population required "as nearly as is practicable" and applied in the following Supreme Court cases: *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Miller v. Johnson*, 515 U.S. 900 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997). The population standard for state legislative districts was defined in the case *Reynolds v. Sims*, 377 U.S. 533 (1964) in which the Supreme Court held that the boundaries of legislative districts must be redrawn on a regular basis (i.e., every decade) and that the "overriding objective must be of substantial equality of the population among various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." (*Id*. at 579).

24. The federal courts have interpreted "nearly equal in population as practicable" to require near mathematical equality. *Karcher v. Daggett*, 462 U.S. 725 (1983) held that an overall range percentage of 0.6984 was unconstitutional and reaffirmed that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of U.S. Const. art. I, § 2, without justification. Deviations, if present, must be based on "some legitimate state objective." (*Id*. at 740).

25. *Brown v. Thompson*, 462 U.S. 835 (1983) at 842–3. ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10 percent falls within this category of minor deviations.")

26. In 1982, the federal judges who drew the map for Wisconsin's districts stated, "We believe that a constitutionally acceptable plan should not deviate as high as 10 percent, and should, if possible, be kept below 2 percent." (*AFL-CIO v. Elections Bd.*, 543 F. Supp. at 634 (E.D. Wis. 1982)). The plan they drafted was 1.74 percent. In 1992, the court drew a plan with a smaller deviation of 0.91 percent. (*Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992) at 870). In 2002, the deviation was 1.59 percent (*Baumgart v. Wendelberger*, No. Ol-C-0121 (E.D. Wis. May 30, 2002) at 8), still within the 2 percent threshold established in 1982. Act 43's population deviation was 0.76 percent (Appellants' J.S. at 13).

27. In 1975, the ban on tests was made permanent (arising from the 1970 amendments instituting a five-year ban on the use of tests and devices as prerequisites to voting) and the coverage of the act was broadened to include members of language minority groups.

28. The Supreme Court's 5–4 decision on the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 2 (2013) effectively eliminated Section 5. Section 4(b), the formula that determines which jurisdictions are subject to preclearance based on their histories of voting discrimination, was ruled as unconstitutional because the coverage formula was outdated and caused an impermissible burden. The court did not strike down Section 5, but without the formula contained in Section 4(b), no jurisdiction can be subject to preclearance.

29. 42 U.S.C. § 1973(c) (2006). Section 5 applied only to certain jurisdictions covered under the act.

30. 42 U.S.C. § 1973(a) (2006). In 2006, amendments made it clear that the broad intent to discriminate was grounds for denial of preclearance under Section 5, and that Section 2 was intended to preserve minority voter's ability to elect candidates of their choice,

In practice at its most basic level, a redistricting map may be constitutionally challenged if it splits up a race or language minority group and combines its members with a majority group, effectively limiting the ability of that minority group to elect a candidate of its choice. This is known as *vote dilution*. A redistricting plan, in which the voting strength of a minority group is diluted, is most often constitutionally challenged because the plan violates either the equal protection clause of the Fourteenth Amendment or Section 2 of the Voting Rights Act of 1965 (or sometimes both).

In the 1986 case of *Thornburg v. Gingles*, the Supreme Court set preconditions that a minority group must prove in order to establish a violation of Section 2 of the Voting Rights Act of 1965.[31] The Court identified three factors, commonly referred to as the "Gingles Factors," (or less often as the "Gingles Preconditions") to determine a violation of Section 2 of the Voting Rights Act: (1) whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) whether the minority group is politically cohesive (i.e., tends to vote as a bloc);[32] and (3) whether the majority votes sufficiently as a bloc to enable it in the absence of special circumstances (usually to defeat the minority's preferred candidate). If these three factors exist, then the plan can be challenged as discriminatory. However, a state's redistricting plan is subject to "strict judicial scrutiny" only if race is the predominant motive for the final shape of the district. If compliance with Section 2 of the Voting Rights Act has demonstrated a rational basis for a district's shape, the plan will not be subject to strict judicial scrutiny. [33]

Other than the required federal principles of equal population and protection of the minority vote, many states impose additional requirements, referred to generally as *traditional districting principles*,[34] including: compactness, contiguity, preserving unity of local political subdivisions,[35] preserving communities of interest, and competitiveness. [36]

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not merely to influence elections.

31. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court invalidated multi-member legislative districts in a redistricting plan adopted by North Carolina after the 1980 census. Interpretation of Section 2 has evolved since then: *Shaw v. Reno (Shaw I)*, 509 U.S. 630, (1993); *Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001); *LULAC v. Perry*, 548 U.S. 399 (2006); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Alabama Legislative Black Caucus v. Alabama*, No. 13-895 (U.S. March 25, 2015); *Bethune Hill v. Virginia State Bd. of Elections*, No. 15-680 (U.S. March 1, 2017); *Cooper v. Harris*, No. 15-1262 (U.S. May 22, 2017).

32. The term "voting bloc" refers to a group of voters who are strongly motivated by a specific common concern (or a group of concerns) to the point that it dominates their voting patterns and they tend to vote together in elections because of that shared concern.

33. *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996) at 909 ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."); see also *Miller v. Johnson*, 515 U.S. 900 (1995) at 920; *Easley v. Cromartie*, 532 U.S. 234 (2001). Under the equal protection clause, any law that creates distinctions based on race is constitutionally suspect. The Supreme Court has traditionally subjected such laws to "strict scrutiny," which requires the government to defend the law by demonstrating that it is "narrowly tailored" to a "compelling state interest."

34. *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993) is the first case to use the term "traditional districting principles" and the Court identified them as compactness, contiguity, and respect for political subdivisions. If these traditional districting principles are not followed and if there is proof that race was the dominant factor, then the plan is subject to strict scrutiny.

35. Many states, including Wisconsin, have a history of trying to draw legislative and congressional lines along, rather than across, existing political boundaries. In Wisconsin, these principally include county and town lines, city and village limits, and ward lines within cities, towns, and villages.

36. The term *compactness* refers to the general principle of minimizing the distance between all parts of a district. There are many

Wisconsin's requirements for legislative redistricting

In addition to the two requirements stipulated by federal law—equal population and minority protection—Article IV of the Wisconsin Constitution governs the basic requirements for legislative redistricting.[37] Article IV, Section 2, directs the legislature to establish from 54 to 100 assembly districts and to draw senate districts, which do not cross assembly boundaries that comprise not more than one-third nor less than one-quarter of the number of assembly districts.[38] Article IV, Section 3, directs the legislature to redraw the boundaries of its congressional and state legislative districts each decade to reflect population changes as reported by the U.S. census.[39] Article IV, Section 4, requires legislative districts "to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable,"[40] while Article IV, Section 5, requires senate districts to be of "convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen."[41]

In addition to what is required by the constitution, the legislature follows a few traditional redistricting principles:

> When drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them: preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. When the maximum population deviation between the largest and smallest district is less than 10 percent, a state or local legislative map presumptively complies with the one-person, one-vote rule. The equal protection clause does not mandate use of the voter-eligible population. It is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.[42]

Once the legislature drafts a redistricting plan, it is treated like any other bill in that it must be passed by both houses and signed by the governor before it becomes law.[43]

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types of compactness measures including area, dispersion, and perimeter. The term *contiguity* refers to the general principle that all areas within a district should be physically adjacent or a district that is within one continuous boundary and whose parts all touch one another at more than a point. All districts in the United States must be contiguous, however some districts stretch the limits of this requirement by connecting different landmasses through water or having two districts intersect at a single point that takes up no area. The term *communities of interest* refers to the principle that it is desirable to group like-minded or similar people so that they may elect a representative that reflects their common values. The term generally encompasses a group of people with a common interest relevant to legislative representation. Respect for communities of interest is a principle often observed, but a community of interest must be viewed separately from those racial, ethnic, or linguistic groups who are protected by federal law. The term *competitiveness* refers to the principle that political parties or incumbents sometimes draw district lines for their benefit at the expense of proportionality and fair representation.

37. Wis. Const. art. IV, entitled "Legislative," deals specifically with the Wisconsin Legislature and consists of 35 sections.

38. Wis. Const. art. IV, §§ 2 and 5.

39. Wis. Const. art. IV, § 3.

40. Wis. Const. art. IV, § 4.

41. Wis. Const. art. IV, § 5.

42. *Evenwel v. Abbott*, 578 U.S _____, 136 S. Ct. 1120 (2016).

43. See "The Legislative Process in Wisconsin," State of Wisconsin Legislative Reference Bureau, Research Bulletin 14-2 (December 2014) for more information on the legislative process for Wisconsin. The bulletin states that similar to the process in Congress, the

Wisconsin redistricting cycles 1960s–2010s

History through passage of 2011 Wisconsin Act 43

In the past five decades, Wisconsin's courts largely had redrawn the redistricting maps because no single party controlled the whole of state government. Judicial intervention had been a result of the legislature and the governor failing to agree on a redistricting plan—especially contentious were state legislative plans. In the 1960 redistricting cycle, a Republican-controlled legislature and Democratic governors were unable to agree during the 1961[44] and 1963[45] legislative sessions; in 1964 the Wisconsin Supreme Court intervened and established the legislative districts for the rest of the decade.[46] In the 1970 redistricting cycle, political control was divided in the legislature between a Republican-controlled senate and a Democrat-controlled assembly and Wisconsin had a Democratic governor. After several unsuccessful attempts[47] and the threat of judicial action,[48] the legislature passed a plan that was signed into law by the governor. In the 1980 redistricting cycle, the Democrat-controlled legislature and the Republican governor were unable to agree on a plan, forcing a three-judge panel to intervene in order to have a plan in place in time for the November 1982 elections.[49] The court plan was superseded the next year by a plan that passed the legislature and was signed into law by the governor.[50] In the 1990 redistricting cycle, the composition of partisan control—this time a Democratic-controlled legislature and a Republican governor—was reminiscent of the redistricting cycle in the previous decade and the results were similar. After Governor Tommy G. Thompson used his veto authority to reject the plan,[51] the U.S. District Court for the Western

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Wisconsin legislative process was designed to provide substantial deliberation in both houses as well as public scrutiny to ensure thorough consideration of potential legislation.

44. The legislature failed to come up with redistricting maps for either the state legislature or congressional districts during the 1961 session. The next year, the legislature considered four bills for congressional redistricting, five bills for legislative reapportionment, and eight joint resolutions proposing amendments to the Wisconsin Constitution relating to reapportionment. Two congressional bills and one legislative bill passed in both houses, but Governor Gaylord Nelson vetoed them all.

45. A bill to redraw the congressional districts was passed by the 1963 legislature and signed into law as Chapter 36, Laws of 1963. However, the legislature failed to enact a legislative plan that was acceptable to Governor John Reynolds. When he vetoed the plan the first time, the legislature enacted the vetoed plan (in the form of a joint resolution known as 1963 Joint Resolution 74). However, in *Reynolds v. Zimmerman*, 22 Wis. 2d 544 (Wis. 1964), the Wisconsin Supreme Court ruled that the legislature could not "enact" a reapportionment plan by joint resolution, and that the governor must be a part of the process.

46. The court made its own "temporary" legislative redistricting plan in May 1964 (*Reynolds v. Zimmerman*, 23 Wis. 2d 606 (Wis. 1964)). The plan was used for the 1964 elections and, in the absence of a legislatively enacted plan, served for the remainder of the decade.

47. A 12-member commission, comprised of members of the public and legislators appointed by the governor, also failed to reach an agreement.

48. A federal court suit was filed requesting the court to reapportion the legislature following the 1972 legislative recess without an agreement on boundaries for state legislative districts. Attorney General Robert Warren petitioned the Wisconsin Supreme Court to carry out reapportionment. The court set a deadline for the legislature to act before it would undertake the task. However, in a special session the legislature passed a plan that was signed by the governor (Chapter 304, Laws of 1971). A plan establishing Wisconsin's nine congressional districts had passed in 1971 (Chapter 133, Laws of 1971).

49. *AFL-CIO v. Elections Board*, 543 F. Supp. 630 (E.D. Wis. 1981).

50. 1983 Wisconsin Act 29. Two years earlier, the legislature adopted a congressional redistricting plan (Chapters 154 and 155, Laws of 1981) after an earlier plan had been vetoed by Governor Lee Dreyfus.

51. The plan was known as 1991 Senate Bill 578.

District of Wisconsin established a legislative redistricting plan[52] in June 1992 that remained in effect for the rest of the decade. In the 2000 redistricting cycle, partisan control split in the two houses of the legislature and while each house passed its own plan, neither was acted upon by the other house. As a result, the federal district court was once again called upon to put in place a plan.[53] It should be noted that in each of these earlier cases (1982, 1992, and 2002), when Wisconsin's legislative districts were drawn by a three-judge panel, the *only* contested matter was the state's legislative districts.

In 2010, for the first time in four decades, Wisconsin voters elected a Republican majority in the state senate (19–14) and the assembly (59–39–1) and Republican Governor Scott Walker, who defeated the Democratic candidate Tom Barrett and replaced the Democratic Governor Jim Doyle. Thus, the 2010 redistricting cycle was under the control of one political party for the first time in many years. This meant that a legislatively enacted redistricting plan, instead of a judicially enacted one, for the two state houses would be highly probable.

2011 Wisconsin Act 43 and its major court cases

In January 2011, Senate Majority Leader Scott Fitzgerald and Speaker of the Assembly Jeff Fitzgerald hired the law firm of Michael, Best & Friedrich, LLP, to assist with the state legislative district plan after the 2010 census. The firm supervised the work of legislative aides in planning, drafting, and negotiating what would become 2011 Wisconsin Act 43 as well as providing its offices as the venue of the redistricting work.

On July 11, 2011, Senate Bill 148, a legislative redistricting plan, was introduced.[54] Eight days later the senate passed the bill,[55] and the assembly concurred on the bill the following day.[56] On August 9, 2011, the governor signed Senate Bill 148 into law, which became 2011 Wisconsin Act 43 and the state legislative redistricting plan. In addition to being notable for having abandoned the prevailing ward-based method of redistricting in favor of a block-based plan put forth before local governments had finished drawing their local lines, the plan had the lowest deviation of any in Wisconsin history—all districts within 0.4 percent of ideal—and was the ear-

52. *Prosser et. al. v. Elections Board et. al.*, 793 F. Supp. 859 (W.D. Wis. 1992). A congressional redistricting plan was enacted by the legislature in 1991 (Wisconsin Act 256).

53. *Baumgart et. al. v. Wendelberger et. al.* (Case No. 01-C-0121, E.D. Wis.); revised order issued in July 2002. Once again, a congressional plan was passed (2001 Wisconsin Act 46).

54. Because state districts must follow municipal ward lines where possible, redistricting usually occurs after ward lines are redrawn; this means that the legislature would have to postpone its drafting efforts by several months until the municipalities adopted their ward boundaries. However, Senate Bill 150 was introduced at the same time as Senate Bill 148, and SB-150 permitted the legislature to draw new districts before Wisconsin's municipalities draw their ward lines. It was signed into law by the governor on July 25, 2011 (2011 Wisconsin Act 39). 2011 Wisconsin Act 39 permitted the legislature to draw new districts before municipalities drew their ward lines, overturning more than a century of practice. A congressional district plan was introduced as Senate Bill 149 on July 11, 2011, and proceeded along with the legislative district legislation. The bill passed the Senate on July 19, 2011, and the assembly on July 20. The bill was signed by Governor Walker as Act 44 on August 9, 2011.

55. July 19, 2011.

56. July 20, 2011.

liest legislative district plan enacted since 1921.[57] It was the first time in almost three decades[58] that the legislature had enacted a state legislative district plan.

2011 Wisconsin Act 43 was challenged[59] before the U.S. District Court for the Eastern District of Wisconsin on constitutional and statutory grounds, including Section 2 of the Voting Rights Act of 1965. The court concluded that the plan did not violate the "one person, one vote" principle, nor did it violate the equal protection clause by "disenfranchise[ing]" voters who were moved to a new senate district and were unable to vote for their state senator for another two years.[60] However, the court ruled that the plaintiffs were entitled to relief on their claim that Act 43 violated Section 2 of the Voting Rights Act by diluting the voting power of Latino voters residing in Milwaukee County. The court ordered the legislature to redraw Assembly Districts 8 and 9 to ensure that Hispanics were able to elect the candidate of their choice. However, the legislature did not amend its plan for Assembly Districts 8 and 9, forcing the court to adopt a remedial plan for those two districts. Elections proceeded under Act 43 with this small modification as the rest of the plan remained intact and governed the 2012 and 2014 elections.

On July 8, 2015, the case of *Whitford v. Nichol* was filed with the U.S. District Court for the Western District of Wisconsin alleging unconstitutional partisan gerrymandering due to *partisan symmetry*[61] (in this particular court case, the lack thereof, or "partisan asymmetry").[62] The plaintiffs argue that Wisconsin's 2011 state assembly map was unconstitutional. Specifically, the plaintiffs contend that the redistricting plan enacted by the legislature following the 2010 census intentionally created partisan asymmetry through redistricting because it favored the Republican-controlled legislature, which discriminated against Democratic voters by violating the Fourteenth Amendment's guarantee of equal protection. The plaintiffs also propose a test, known as the "efficiency gap," to measure the plan's competitiveness.[63] Developed by Nicholas Stephanopoulos, an assistant professor at the University of Chicago Law School, and Eric McGhee, a research fellow at the Public Policy Institute of California, the efficiency gap is a formula designed to test partisan symmetry.

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57. Michael Keane, "Redistricting in Wisconsin," (Wisconsin Legislative Reference Bureau: April 2016), 15.

58. Since 1983 or about 28 years.

59. In an order entered on November 21, 2011, the court consolidated two actions, *Baldus v. Brennan*, No. 2:11-cv-00562 (E.D. Wis. 2011) and *Voces de la Frontera v. Brennan*, No. 2:11-cv-01011 (E.D. Wis. 2011), for decision because the two lawsuits qualified as actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body," (28 U.S.C. § 2284(a)). *Baldus v. Brennan* was a challenge in federal court to the federal and state legislative districts, based on alleged partisan and racial gerrymandering, the violation of the Voting Rights Act, and various state constitutional criteria. *Voces de la Frontera v. Brennan* was a challenge in federal court to the state legislative districts, based on alleged violations of the Voting Rights Act in the Milwaukee area.

60. *Baldus v. Members of the Wisc. Gov't Accountability Bd.*, 849 F. Supp. 2d 849–51, 852–3 (E.D. Wis. 2012).

61. The term *partisan symmetry* refers to the idea that district plans should treat the two major political parties, Republicans and Democrats, equally.

62. The Wisconsin Assembly district plan adopted in 2012 by 2011 Wisconsin Act 43 (referred to as the "Current Plan" in *Whitford v. Gill's* court documents).

63. In "Partisan Gerrymandering and the Efficiency Gap," Public Law and Legal Theory Working Paper, No. 493 (2014), authors Nicholas Stephanopoulos and Eric McGee note at the outset that, consistent with the metric introduced in the article, whenever they refer to "gerrymandering," they mean district plans whose electoral consequences are asymmetric. They do not mean plans that were devised with partisan intent because their conception of gerrymandering is strictly effects-based.

The plaintiffs in the case are twelve Democratic voters, and the lead plaintiff is Bill Whitford, a retired University of Wisconsin Law School professor.[64] The defendants are the current members of the Wisconsin Elections Commission in their official capacity.[65] Before outlining *Whitford v. Gill*, it is necessary to discuss partisan gerrymandering and two foundational cases that directly address it.

Partisan gerrymandering and its foundational case law

Brief overview of partisan gerrymandering

To *gerrymander* is to draw political districts in such a way as to ensure political gain.[66] *Partisan gerrymandering*[67] is the drawing of electoral district lines by the party in power in a manner that intentionally discriminates and disadvantages the opposing political party. The effect of partisan gerrymandering is the tendency of the state to lean in a certain political direction for the duration of the redistricting map. Partisan gerrymandering takes the form of two basic techniques that work in tandem: *packing* the opposition's supporters into a handful of districts, where they win in landslides, and *cracking* them among multiple districts, where they lose by slim margins. The goal of either technique is to dilute the voting strength of a *voting bloc*, effectively denying the opportunity of that group to elect a representative of its choice. Cracking divides voters of the same characteristic into multiple districts. This technique denies these voters a large enough voting bloc in any particular district. For example, voters in an urban area could be divided among several, surrounding suburban or rural districts.[68] Packing concentrates as many voters of the same characteristic into a single electoral district, or into as few districts as possible. Packing may sometimes be done to ensure representation for a community of common interest. For example, a *majority-minority district*[69] may be created to remedy or avoid violations of Section 2 of the Voting Rights Acts of 1965.

Partisan gerrymanders use cracking and packing techniques in tandem to maximize the gerrymandering party's electoral advantage. When voters are cracked, their community is split into multiple districts to ensure that their voting strength is diluted enough to pose no significant challenge in any one of the districts. Their voting strength is, in effect, diluted because their votes are cast without the possibility of overcoming the opposing majority. Packed voters

64. The other eleven plaintiffs are Roger Anclam, Emily Bunting, Mary Lynne Donohue, Helen Harris, Wayne Jensen, Wendy Sue Johnson, Janet Mitchell, Allison Seaton, James Seaton, Jerome Wallace, and Donald Winter.

65. Beverly R. Gill, Julie M. Glancey, Ann S. Jacobs, Steve King, Don Mills, and Mark L. Thomsen.

66. The term "gerrymander" was first used in the *Boston Gazette* on March 26, 1812, and created in reaction to a redrawing of the Massachusetts Senate election districts under the governor, Elbridge Gerry. When mapped, one of the districts was said to resemble the shape of a salamander. Gerrymander is a portmanteau of the governor's last name "Gerry" and the word "salamander."

67. Partisan gerrymandering can be used interchangeably with political gerrymandering.

68. This example assumes that the urban voters would vote differently than the suburban voters.

69. A *majority-minority district*, also known as a *minority opportunity district*, is an electoral district in which the majority of the constituents are racial or ethnic minorities. Majority-minority districts have been the subject of legal cases examining the constitutionality of such districts, including *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); and *Bush v. Vera*, 517 U.S. 952 (1996).

face the opposite problem. If there are too many districts that contain the opposing party's voters, the gerrymandering party tries to limit their potential damage by drawing them all into one district (or into as few districts as possible). Their voting strength is concentrated in the packed district and reduced in the other districts. The gerrymandering party then spreads out their own party's voters in such a way as to win multiple seats in order to have a comfortable majority in the legislature.

The ability to choose where to place boundaries for legislative districts affects which voters candidates will be responsible to on Election Day. To assess advantage for the gerrymandering party, underlying partisan strength of districts is measured and evaluated using historical electoral data. Then that data is used to forecast election results in prospective districts. Therefore, the district boundaries become the most important factor in determining representation, meaning who will win and by how many votes, because a political party can manipulate those lines for its own partisan advantage.

Most partisan gerrymanders are constitutionally challenged as a violation of the equal protection clause of the Fourteenth Amendment and the "one person, one vote" principle because partisan gerrymandering unfairly dilutes the opposing party's voters' ability to elect representatives who support their interests.[70] The typical partisan gerrymander argument states that no matter how much effort the opposing party puts into getting itself elected, the maps are so skewed in favor of the gerrymandering party that even if the opposing party gets more votes, the gerrymandering party retains its majority power. In other words, partisan gerrymandering creates representational asymmetry between major political parties.

Courts have heard partisan gerrymandering challenges in the past; however, no judicial standard exists to determine an unconstitutional disadvantage created by a partisan gerrymander. The existence (or lack thereof) of an objective judicial standard forms the basis of the foundational case history on partisan gerrymandering. It is necessary to discuss each case because *Whitford v. Gill* builds on the precedents of the Supreme Court of the United States.

Justiciability and measuring unconstitutionality

Even if partisan gerrymandering was alleged in a given case, population equality and racial discrimination dominated constitutional challenges in redistricting cases. However, without directly speaking to the justiciability of partisan gerrymandering, "invidious discrimination" in reapportionment had been raised in the cases of *Fortson v. Dorsey*[71] and *Burns v. Richard-*

70. Two cases will be discussed in detail within the main body below, for they set the precedent of the rationale to challenge cases as unconstitutional under the Fourteenth Amendment's equal protection clause and "one person, one vote" principle as well as the First Amendment rights of freedom of speech and association, cf. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 122–3; *Vieth v. Jubelirer*, 541 U.S. 109 (2004) at 314 (Justice Kennedy, concurring in judgment) ("penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or their expression of political views") (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion)).

71. *Fortson v. Dorsey*, 379 U.S. 433 (1965). A federal district court had held unconstitutional a multimember district system in Atlanta (Fulton County) in which the seven-man delegation to the state senate was elected at large in the county on a winner-take-all basis, even though technically each legislator was assigned to a subdistrict in the county. This system would make it more difficult

son.[72] In *White v. Regester*, the Supreme Court has held that multimember districts violate the Constitution when plaintiffs have produced evidence that an election was "not equally open to participation by the group in question—that members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[73] In *Gaffney v. Cummings*,[74] the Supreme Court stated:

> [J]udicial interest should be at its lowest ebb when a state purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so ... neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[75]

Although these cases mainly focused on discriminatory apportionment that rely on voting strength dilution, they indicate that vote-dilution cases are governed by the same standards as other equal protection claims in that the plaintiffs must establish both a discriminatory intent and discriminatory effect. Absent those demonstrable two factors, the equal protection clause was not violated.

The Supreme Court has heard two major partisan gerrymandering claims that exclusively deal with partisan gerrymandering, and these two cases provide the foundation for *Whitford v. Gill*.

Davis v. Bandemer

In 1986, the Supreme Court heard the first case, *Davis v. Bandemer*, 478 U.S. 109 (1986),[76] in which a political party directly raised, and the Court squarely addressed, a claim that a legislative redistricting plan invidiously discriminated against members of an opposing political party. In *Davis v. Bandemer*, Indiana Democrats challenged the 1981 state redistricting plan passed by a Republican-controlled legislature. The plaintiffs alleged that the redistricting plan had been drawn in such a way as to disadvantage Indiana Democratic voters in electing representatives of their choosing, in violation of the equal protection clause, under the Fourteenth

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for minorities to elect representatives in proportion to their voting strength on a regular basis. While the Supreme Court reversed the district court's decision for lack of proof of inequity, Justice Brennan said, "It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or *political* elements of the voting population" (*id*. at 439) (emphasis added).

72. *Burns v. Richardson*, 384 U.S. 73 (1966) at 88–99. This case involved the reapportionment of the Hawaii Senate and is somewhat of an outlier from the other cases in this group because Hawaii's geography heavily affects the drawing of boundaries. The case also deals with the question of voter eligibility, including the large numbers of the military population, especially on the island of Oahu, as well as if fluctuating numbers of tourists in the reapportionment process can pass constitutional muster, (*id*. at 94–6).

73. *White v. Regester*, 412 U.S. 755 (1973) at 766.

74. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

75. *Id*. at 754.

76. In *Davis v. Bandemer,* 478 U.S. 109 (1986), the Supreme Court held that partisan gerrymandering was a justiciable issue, but ruled that a violation of the equal protection clause by the Republican-controlled Indiana Legislature had not been proven.

Amendment of the U.S. Constitution. A three-judge panel of the United States District Court for the Southern District of Indiana found that Indiana Democrats were a "politically salient class," whose "proportionate voting influence … [had been] adversely affected."[77] The district court also found that the State of Indiana was unable to justify that the map was "supported by adequate neutral criteria" and so they ruled that the map was an unconstitutional gerrymandering.[78] The defendants then appealed to the Supreme Court.

The Supreme Court came to a number of important conclusions even though it ultimately overruled the lower court's decision. For the first time, it explicitly stated that it "f[ound] … political gerrymandering to be justiciable."[79] Agreeing with the district court, a plurality[80] of the Supreme Court held for the first time that a plan that discriminated against an "identifiable political group," proving "both intentional discrimination … and an actual discriminatory effect on that group," could be challenged as unconstitutional under the equal protection clause of the Fourteenth Amendment.[81] According to the Court, "[u]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will *consistently degrade a voter's or group of voters' influence on the political process as a whole*."[82] The plurality also agreed with the lower court's finding of discriminatory intent, stating that "[a]s long as redistricting is done by a legislature it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[83] Discriminatory intent still had to be proven by the plaintiffs. The Court made sure to include that political influence is not limited to winning elections, stating that "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult."[84]

However, the Court did not rule in the plaintiffs' favor by striking down the maps. The Supreme Court overruled the decision made by the district court that had declared the maps unconstitutional because the plaintiffs had failed to show that the district plan was "sufficiently adverse" to constitute a constitutional violation of the equal protection clause. The plurality opinion[85] suggested that a partisan gerrymander would be unconstitutional only if it left the dis-

77. *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984) at 1492–1495. The district court relied heavily on *Karcher v. Daggett*, 462 U.S. 725 (1983), a challenge to a New Jersey congressional plan that allegedly diluted Republican voting strength in Newark, as well as *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a challenge on racial discrimination that generated a discriminatory purpose test for violations of the equal protection clause.

78. *Id*. at 1495.

79. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 113. Claims that are considered to be "justiciable" are those that are able to be adjudicated by a court. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred with the majority's decision by declaring that alleged partisan gerrymandering claims are political questions and therefore nonjusticiable. (O'Connor stated that when there is "'a lack of judicially discoverable and manageable standards for resolving it,' or where 'the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion' is apparent," then the question is political and nonjusticiable.") (*Id*. at 148 (quoting *Baker v. Carr*, 369 U.S. 186 (1962) at 217)).

80. Plurality: Justices Byron White (parts I, III, IV), joined by William J. Brennan, Thurgood Marshall, and Harry Blackmun.

81. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 127.

82. *Id*. at 132.

83. *Id*. at 129.

84. *Id*. at 132.

85. Majority: Byron White (part II), joined by William J. Brennan, Thurgood Marshall, Harry Blackmun, Lewis F. Powell, Jr., and John P. Stevens. Concurrence: Warren E. Burger and Sandra Day O'Connor, joined by Warren E. Burger and William Rehnquist.

advantaged party without any means of influence, or a fair opportunity for electoral success over many election cycles,[86] adding that "such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process."[87] The evidence for long-lasting results was missing from the *Bandemer* trial record and informed the plurality's opinion:

> Relying on a single election to prove unconstitutional discrimination is unsatisfactory. The District Court observed, and the parties do not disagree, that Indiana is a swing State. Voters sometimes prefer Democratic candidates, and sometimes Republican. The District Court did not find that because of the 1981 Act the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly. Indeed, the District Court declined to hold that the 1982 election results were the predictable consequences of the 1981 Act and expressly refused to hold that those results were a reliable prediction of future ones. The District Court did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate. The appellants argue here, without a persuasive response from the 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.[88]

Partisan gerrymandering did violate the equal protection clause. However, in order to prove it, plaintiffs must demonstrate the drafter's intent, effect, and predictably long-lasting results in its consequences. These three items have come to be known collectively as the "Bandemer Test."

Table 2. The Bandemer Test

1. **Intent**—an established purpose to create a legislative districting map that purposefully disempowers voters of one political party.
2. **Effect**—proof that an election on a contested map resulted in a distorted outcome.
3. **Predictably long-lasting results in its consequences**—evidentiary election data that proves dilution of votes, meaning noncompetitive elections, reliable projections of future results, seat losses for the minority party, etc.

Concur/Dissent: Lewis F. Powell, Jr., joined by John P. Stevens.

86. *Davis v. Bandemer*, 478 U.S. 109 (1986), at 129–36; see *Vieth v. Jubelirer*, 541 U.S. 267 (2004), at 279–81 recounting the eighteen-year history of litigation under *Bandemer* and observes that no partisan gerrymandering claim had succeeded in this period.

87. *Id.* at 132–3.

88. Justice White in his plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), at 127–43.

In the subsequent twenty years after this case, no challenged redistricting plan has been held as unconstitutional on partisan grounds. In *Vieth v. Jubelirer*, the Supreme Court revisited the issue of partisan gerrymandering for the second time in eighteen years.

Vieth v. Jubelirer

In 2004, the Supreme Court heard the case *Vieth v. Jubelirer,* 541 U.S. 267 (2004). The plaintiffs, Democratic voters in Pennsylvania, challenged the congressional redistricting plan, enacted by the Republican-controlled legislature, alleging that it benefited Republican candidates at the expense of Democrats. Specifically, the plaintiffs argued that the plan violated the "one person, one vote" principle of Article I of the Constitution, the equal protection clause of the Fourteenth Amendment, the privileges and immunities clause of Article IV of the Constitution, and the freedom of association guaranteed by the First Amendment. A three-judge panel of the U.S. District Court for the Middle District of Pennsylvania threw out the redistricting plan because it contained districts of unequal population.[89] The Pennsylvania Legislature corrected the population disparities, and the Democrats once again challenged the new district plan using the same list of violations. This time the district court, finding no violation of the "one person, one vote" principle and again dismissing the other claims (equal protection clause of the Fourteenth Amendment, the privileges and immunities clause of Article IV of the Constitution), upheld the redistricting plan. The Democrats then appealed to the Supreme Court.

The Supreme Court's plurality opinion held that partisan gerrymandering was a political question that was off-limits to the courts because there are no "judicially discernible and manageable standards" for gauging when drafters took redistricting too far.[90]

> Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.[91]

Four other justices[92] disagreed, arguing that courts could intervene in partisan gerrymandering cases and proposing various tests for determining when a partisan gerrymander had occurred. Falling somewhere in the middle of these two opinions, Justice Anthony Kennedy affirmed that partisan gerrymandering is an issue courts can decide, but said none of the proposed standards were sufficient, leaving open the question of what standards courts should use when evaluating those claims.

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89. Unequal population violates the federal "one person, one vote" principle.

90. Justices Antonin Scalia, William Rehnquist, Sandra Day O'Connor, and Clarence Thomas, with Anthony Kennedy concurring in judgment. Justice Scalia wrote the plurality opinion. It was a split decision that had no majority opinion.

91. *Vieth v. Jubelirer*, 541 U.S. 267 (204) at 281.

92. Justices John Paul Stevens, David Souter, and Stephen Breyer; each justice provided dissenting opinions.

> A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation's political life. While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.[93]

Despite the finding that no standard currently existed, the Fourteenth Amendment, and possibly the First Amendment, still provided some general standard for constitutionality that the Court could use as a basis for determining when political groups' representational rights have been unconstitutionally burdened.[94] The *Vieth* decision has caused problems for lower courts and litigants.[95]

League of Latin American Citizens (LULAC) v. Perry

Two years after *Vieth, LULAC v. Perry,* 548 U.S. 399 (2006)[96] represented the Supreme Court's third and most recent attempt to create a reliable standard for adjudicating claims of partisan gerrymandering. The plaintiffs claimed that Texas's 2003 congressional redistricting plan not only violated Section 2 of the Voting Rights Act of 1965 but also was an unconstitutional partisan gerrymander. As in *Vieth*, the Supreme Court was once again divided, producing six separate concurrences.[97]

The Court did not directly address the issue of justiciability of partisan gerrymandering claims.[98] Instead of expressing a particular partisan gerrymandering standard for the lower courts and political branches of state government, the Court examined the plaintiffs' proposed standard. The plaintiffs' standard centered on the motivation to decide to adopt a redistricting plan mid-decade, concluding that the decision had no other motive than to disadvantage the opposing political party and this was enough to prove a claim of unconstitutional partisan gerrymandering.[99]

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93. *Vieth v. Jubelirer*, 541 U.S. 267 (204) at 307–8.

94. *Id*. at 314–5.

95. *Cox v. Larios*, 542 U.S. 947 (2004); *Johnson-Lee v. City of Minneapolis*, No. 02-1139, 2004 WL 2212044 (D. Minn. Sept. 30, 2004); Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 WL 1341302, 2006 (N.D. Ga. May 16, 2006).

96. In *LULAC v. Perry*, 548 U.S. 399 (2006), the Supreme Court affirmed the district court's dismissal of the statewide political gerrymandering claims and the District 24 Voting Rights Act claim, reversed and remanded the district court's dismissal of the District 23 Voting Rights Act claim, and vacated the district court's race-based equal protection and District 23 partisan gerrymandering holdings because the Court failed to reach them.

97. Majority: Justices Kennedy (in part), joined by Stevens, Souter, Ginsburg, Breyer (Parts II-A & III); Roberts, Alito (Parts I & IV); Souter, Ginsburg (Part II-D); Concurrences: Roberts, joined by Alito; Stevens, joined by Breyer (Parts I, II); Scalia, joined by Thomas; Roberts, Alito (Part III); Souter, joined by Ginsburg; Breyer.

98. Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer in the opinion that partisan gerrymandering cases are justiciable; *LULAC v. Perry*, 548 U.S. 399 (2006) at 447, 483, and 491. Justices Roberts and Alito reserved their judgment on the justiciability (*Id*. at 492). Justices Scalia and Thomas reiterated their opinion previously expressed in *Vieth* that partisan gerrymandering claims are nonjusticiable (*id*. at 511).

99. *LULAC v. Perry*, 548 U.S. 399 (2006) at 413–17.

Writing for the majority, Justice Kennedy rejected the plaintiffs' argument concerning mid-decade redistricting, arguing that "there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own."[100] In addition, the Court added that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights."[101] The Supreme Court distinguished two separate challenges that a plaintiff must overcome for a successful partisan gerrymandering constitutional challenge: demonstrate a reliable measure of partisan dominance a plan achieves in its intent and effect as well as "a standard for deciding how much partisan dominance is too much."[102]

As of the time of publication of this article over a decade after *LULAC*, the Supreme Court still does not have a manageable standard. While the Court has recognized that partisan gerrymandering can be unconstitutional, a constitutional challenge has yet to succeed on that ground because plaintiffs have been unable to offer a workable standard to distinguish between permissible political line-drawing and unconstitutional partisan gerrymandering.

Whitford v. Gill: Wisconsin's partisan gerrymandering case

Complaint

On July 8, 2015, the *Whitford v. Nichol* plaintiffs filed a complaint in the U.S. District Court for the Western District of Wisconsin[103] challenging the 2012 redistricting plan for the Wisconsin Assembly on the ground that the plan is an example of "extreme partisan gerrymandering"[104] and requesting a three-judge panel to hear the case.[105] In filing the complaint, the plaintiffs sought a declaratory judgment,[106] alleging that 2011 Wisconsin Act 43, the state legislative redistricting map, violates the United States Constitution's "Fourteenth Amendment's guarantee of equal protection, and unreasonably burdens their First Amendment rights of association and free speech."[107] The plaintiffs also claim that Act 43 deprives them of their civil rights under cov-

100. *LULAC v. Perry*, 548 U.S. 399 (2006) at 418.

101. *Id*. at 419.

102. *Id*. at 420.

103. According to the plaintiffs, the venue is proper in this judicial district under 28 U.S.C. § 1391(b) because at least one of the defendants resides in the Western District of Wisconsin and at least six of the plaintiffs reside and vote there as well.

104. R.1 at 2.

105. 28 U.S.C. § 2284(a). In this case, Judge Diane Wood, the federal Seventh Circuit Chief Justice, designated the members of the panel. On September 29, 2015, Judge Barbara B. Crabb (appointed by Jimmy Carter), of the U.S. District Court for the Western District of Wisconsin, issued an order acknowledging a three-judge panel request and designated Circuit Judge Kenneth F. Ripple (appointed by Ronald Reagan), of the U.S. Court of Appeals for the Seventh Circuit, and Chief District Judge William C. Griesbach (appointed by George W. Bush), of the U.S. District Court for Eastern District of Wisconsin, as the two other members of the three-judge panel.

106. A *declaratory judgment* states the court's authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything.

107. R.1 at 2.

er of state law in violation of 42 U.S.C. §§ 1983 and 1988.[108] In addition, the plaintiffs sought an order "permanently enjoining the implementation of [Wisconsin Act 43] in the 2016 election."[109]

The plaintiffs proposed using the efficiency gap as the standard for measuring partisan gerrymandering. The *efficiency gap (EG)* is the difference between the two major political parties' respective wasted votes in an election, divided by the total number of votes cast. The EG is proposed as a metric of partisan symmetry based on the concept of wasted votes. Recall that wasted votes are any votes that do not contribute to the election of a candidate.

As an equation, the efficiency gap looks like this:

Efficiency gap = (total Democratic wasted votes – total Republican wasted votes) ÷ total votes

To understand how the EG works, consider a hypothetical state[110] with 500 residents that is divided into five legislative districts, each with 100 voters. In the most recent election cycle, Democrats won Districts 1 and 2 by wide margins, while Republicans won Districts 3, 4, and 5 in closer races. Overall, Democratic candidates received 55 percent of the statewide vote but won just 40 percent of the legislative seats, while Republican candidates received 45 percent and won 60 percent of the seats. Table 3.1 shows the election results for each district.

Table 3.1. Election results

District	Democratic votes	Republican votes	Election result
1	75	25	Democrat wins
2	60	40	Democrat wins
3	43	57	Republican wins
4	48	52	Republican wins
5	49	51	Republican wins
Total	**275**	**225**	

In order to calculate the EG, the first step is to determine the total number of votes each party wasted in the election. Any vote cast for the losing candidate and any vote cast for the winning candidate in excess of the number needed to win[111] would be considered a wasted vote. For example, since the Democratic candidate in District 1 received 75 votes, but needed only 51 to win, Democratic voters wasted 24 votes (75 − 51 = 24). All 25 Republican votes in District 1 are considered to be wasted votes because the candidate lost; therefore, Republicans

108. R.1. at 28.

109. *Id*. at 1.

110. This hypothetical example and its explanation generated from Table 2 come directly from the Brennan Center for Justice, "How the Efficiency Gap Works," by Eric Petry, p. 1–2. This was done for ease of explanation and clarity.

111. In our hypothetical example, the total number of votes needed to win a district is 51 since there are 100 voters in each district. Any votes above 51 would be considered wasted.

wasted 25 votes in District 1. The next step is to calculate the total number of votes wasted by each party and to determine the net wasted votes. In this scenario, Democrats wasted 173 votes (24 + 9 + 43 + 48 + 49 = 173) and Republicans wasted 72 votes (25 + 40 + 6 + 1 + 0 = 72). Thus, Democrats had a net waste of 101 votes (173 – 72 = 101), meaning they wasted 101 more votes than Republicans. What follows is the completed table 3.2:

Table 3.2. Election results with wasted votes

District	Democratic votes	Republican votes	Democratic wasted votes	Republican wasted votes	Net wasted votes
1	75	25	24	25	1 Republican
2	60	40	9	40	31 Republican
3	43	57	43	6	37 Democratic
4	48	52	48	1	47 Democratic
5	49	51	49	0	49 Democratic
Total	**275**	**225**	**173**	**72**	**101 Democratic**

The last step in calculating the EG is to divide the net wasted votes by the total number of votes cast in the election. The net number of wasted votes was 101 and there were 500 total votes, which produces an EG of 20 percent (101 ÷ 500 = .202). In other words, Republicans were better able to convert their votes into legislative seats. As a result, they won 20 percent more seats (which translates to one additional seat since 20 percent of five equals one) than they would have if both parties had wasted an equal number of votes. When two parties waste votes at an identical rate, a plan's EG should equal zero. An EG in favor of one party, expressed as a percentage that is greater than zero, means that the party wasted votes at a lower rate than the opposing party.

It is in this sense that the "EG arguably is a measure of efficiency: Because the party with a favorable EG wasted fewer votes than its opponent, it was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats."[112] In their paper, Stephanopoulos and McGhee propose EG thresholds based on historical analysis above which a district plan would be presumptively unconstitutional: for congressional plans, an EG of two or more seats indicates a constitutional problem; for state legislative plans, the threshold is an EG of 8 percent or greater.[113]

The plaintiffs' complaint incorporated the EG into a proposed three-part test for partisan gerrymandering. To successfully challenge a redistricting plan, the plaintiffs would need to address partisan intent, partisan effect, and the justification burden. In other words:

112. R.166 at 17.

113. "Partisan Gerrymandering and the Efficiency Gap," *The University of Chicago Law Review,* 831 (2015), at 884; for whole discussion of the potential test, review pages 884–99.

1. The plaintiffs would have to establish that a state had a partisan *discriminatory intent* to gerrymander for partisan advantage.[114]
2. The plaintiffs would have to establish partisan *discriminatory effect* by demonstrating that the EG for a plan exceeds a certain numerical threshold (which the plaintiffs proposed to be 7 percent at the state legislative level). If a plan exceeds that threshold, the plaintiffs asserted that it should be presumptively unconstitutional.[115]
3. The plaintiffs would have to place the *burden on the defendants to rebut the presumption (justification[116] on other legitimate legislative grounds)* by showing that the plan "is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography." If the state is unable to justify this, then the plan is unconstitutional.

The plaintiffs alleged that they had satisfied all three elements.

According to the complaint, the plaintiffs alleged that Act 43 was drafted and enacted with a specific intent to maximize the electoral advantage of Republicans and harm Democrats to the greatest possible extent.[117] Additionally, the plaintiffs argued that Act 43 had a partisan discriminatory effect, meaning that Act 43 was expected and intended to disproportionally

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114. The Supreme Court has stressed the "basic equal protection principle that the invidious quality of a law … must ultimately be traced to a discriminatory purpose," see *Washington v. Davis*, 426 U.S. 229 (1976) at 240; see also *Vill. Of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977) at 265 ("Proof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). A legislature's discriminatory intent also factors into a First Amendment analysis. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) at 358–59 (considering whether a state has imposed "reasonable, *nondiscriminatory* restrictions" on First Amendment associational rights (emphasis added)); see also *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) at 452 (same); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) at 676 ("Where the claim is invidious discrimination in contravention of the First … Amendment[], our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose."). The Court explicitly has held that equal protection challenges to redistricting plans require a showing of discriminatory purpose or intent; *cf. Rogers v. Lodge*, 458 U.S. 613 (1982) at 617 (explaining that cases involving allegations of vote-dilution on the basis of race "are … subject to the standard of proof generally applicable to Equal Protection Clause cases" including a showing of "'a racially discriminatory purpose'" (quoting *Washington v. Davis*, 426 U.S. 229 (1976) at 240). *Davis v. Bandemer*, 478 U.S. 109 (1986) at 127 (stating that plaintiffs who bring a claim of partisan gerrymandering "[a]re required to prove … intentional discrimination against an identifiable political group"). This requirement applies with equal force to cases involving political gerrymanders. A "'discriminatory purpose' … implies that the decision-maker … selected or reaffirmed a particular course of action at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979) at 279; see also *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001) at 645 (quoting same). The Court has identified "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" that legitimately may inform drafters in the drawing of district lines; *Shaw v. Reno* 509 U.S. 630 (1993) at 647. However, the Court has made clear that "traditional districting principles" are not synonymous with equal protection requirements. Instead, they "are objective factors that may serve to defeat a claim that a district has been gerrymandered," *id*. at 647 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973) at 752 n.18).

115. The use of the phrase "discriminatory effect" refers to having to "show a burden, as measured by a reliable standard, on [their] representational rights." *LULAC v. Perry*, 548 U.S. 399 (2006) at 418 (opinion of Kennedy, J.).

116. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 307 (Kennedy, J., concurring in the judgment) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that [political] classifications … were applied in … a way unrelated to any legitimate legislative objective."); *id*. at 351 (Souter, J., concurring in part and dissenting in part) (stating that, after the plaintiff has made a *prima facie* case, "I would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage"); *Davis v. Bandemer*, 478 U.S. 109 (1986) at 141 (plurality opinion) ("The equal protection argument would proceed along the following lines: If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings."). It is also consistent with the Supreme Court's approach in the state legislative malapportionment context, see *Voinovich v. Quilter*, 507 U.S. 146 (1993) at 161 ("[A]ppellees established a *prima facie* case of discrimination, and appellants were required to justify the deviation."); *Brown v. Thomsen*, 462 U.S. 835 (1983) at 842–43 (a plan with "large disparities in population … creates a *prima facie* case of discrimination and therefore must be justified by the State").

117. R.1 at 9–13; among the pieces of evidence cited, the main ideas fall into three ideas: drafting Act 43 via secret process run solely by Republicans (¶32, 37–40), using election results to measure the partisanship of the electorate to design districts (¶34–6), and using $431,000 in State taxpayer funds for their work even though they worked solely for Republican leaders of the legislature and for the benefit of Republicans (¶43).

waste Democratic votes by cracking and packing Democratic voters. Wisconsin's EG measures in 2012 and 2014 are 13 percent and 10 percent respectively.[118] In 2012, the Republican Party received 48.6 percent of the two-party statewide vote share for assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly; in 2014, the Republican Party received 52 percent of the two-party statewide vote share for assembly candidates and won 63 of the 99 seats in the Wisconsin Assembly.[119] The plaintiffs argued for evidence of discriminatory effect by cracking and packing, which is demonstrated by eight districts in which Democrats won with more than 80 percent of the vote, while there were no districts in which Republicans won by such a wide margin.

Defendants' motion to dismiss

On August 18, 2015, the defendants filed a motion to dismiss the case on the grounds that the court would not be able to grant the relief sought by the plaintiffs because the plaintiffs' claim is a nonjusticiable, political question essentially similar to the one rejected in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Firstly, citing the plurality opinion held by the Supreme Court in *Vieth*, the defendants claimed that partisan gerrymandering claims presented nonjusticiable, political questions or, more specifically, that partisan gerrymandering claims raised political questions that only other branches of government can resolve because the claims lack a "judicially manageable standard."[120] The defendants argued that the efficiency gap was directly analogous to the proportional-representation standard rejected by the Supreme Court in *Vieth*.[121] Furthermore, the defendants argued that the EG failed to account for the impact of traditional districting criteria like contiguity and compactness. Lastly, the defendants argued that the plaintiffs lacked the standing to challenge Act 43 on a statewide basis, and instead could challenge only their individual districts.[122] To further explain their position, the defendants argued that Republican advantage in recent elections is a byproduct of Wisconsin's political

118. R.1, Exhibit 3, "Assessing the Current Wisconsin Legislative Districting Plan," by Professor Simon Jackman, p. 4. Professor Jackman noted that the 2012 estimate is the largest EG estimate in Wisconsin over the 42-year period (between 1972–2014), at 4.

119. R.1, Exhibit 2, "Analysis of the Efficiency Gaps of Wisconsin's Current Legislative District Plan and Plaintiffs' Demonstration Plan, by Professor Kenneth Mayer (commonly referred to as the "Mayer Report"), at 46.

120. *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) at 1427 ("[A] controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.").

121. *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 287–8. The defendants pointed to Professor Jackman's report, which employs a "simplified method" for calculating the Efficiency Gap: EG = S − .5 − 2 (V − .5), R.34 at 18. In this equation, "S" is the party's expected seat share and "V" is the party's expected vote share. The "simplified method" implies that for 1 percent of the vote a party obtains above 50 percent, the party would be expected to earn 2 percent more of the seats (what is called a "winner's bonus"). It is this direct correlation between seat and vote share that, the defendants maintained, ran afoul of *Vieth*.

122. The plaintiffs' argument in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) ("[A]n individual Democrat has standing to assert a challenge to the statewide map": "The concern" [in bringing a partisan gerrymandering claim brought by a Democrat] "is the effect of a statewide districting map on the ability of Democrats to translate their votes into seats" and "[t]he harm is the result of the entire map, not simply the configuration of a particular district."); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Penn. 2002) at 540 ("[U]nlike a claim for race-based gerrymandering, a plaintiff in a partisan gerrymandering claim need not allege that he lives in a particular district that has been gerrymandered on the basis of political affiliation."); *cf. Common Cause v. Rucho*, No. 1:16-CV-1026, 2017 WL 876307, at 12 n.5 (M.D.N.C. March 2017) ("Defendants fail to cite any decision holding that a plaintiff has standing to challenge as an unconstitutional partisan gerrymander *only* that electoral district in which he resides, nor have we found any such decision.").

geography, stating that Democratic supporters are concentrated in specific locations such that they are naturally packed into districts drawn using ordinary districting principles.[123]

On November 4, 2015, Judges Ripple, Crabb, and Griesbach heard the defendants' motion to dismiss the case, and on December 17, 2015, the judges issued an order denying the motion to dismiss. The court concluded that the plaintiffs satisfied the federal pleading standards.[124] In the order, the court ruled that the claim was justiciable, and "[u]ntil a majority of the Supreme Court rules otherwise, lower courts must continue to search for a judicially manageable standard."[125] The court recognized the defendants' argument that the EG was analogous to a proportional-representation standard but noted that "[a] determination whether plaintiffs' proposed standard is judicially manageable relies at least in part on the validity of plaintiffs' expert opinions" and that a more developed record was necessary to resolve that question.[126] Finally, the court stated that the plaintiffs had standing: "[b]ecause plaintiffs' alleged injury in this case relates to their statewide representation, it follows that they should be permitted to bring a statewide claim."[127]

Defendants' motion for summary judgment

On January 4, 2016, the defendants filed a motion for summary judgment in which they challenged the efficiency gap as a standard for partisan discrimination rather than challenge the plaintiffs' ability to meet the standard.[128] The defendants' major objection to the use of the EG as a proposed standard was that it was not a good measure of partisan discriminatory effect because even ostensibly neutral plans (a plan drawn by neither political party) could have a large efficiency gap.[129] Recall that the EG's purpose was to capture in one number a district's partisan symmetry. In other words, the number represented the extent to which districts are packed and cracked based on the number of wasted votes. Therefore, the defendants argued

123. R.25 at 2.

124. For the plaintiffs' standing, the district court acknowledged that, for them, it was a "threshold issue" (R.43 at 11; R.166 at 30, 111–5). In an order dated November 17, 2015, the court asked the parties to submit supplemental briefs on the threshold question on "whether the plaintiffs have standing to sue under the test articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) at 560. For further discussion and consideration of standing, review R.38 at 11–15.

125. R.43 at 9, citing *Davis v. Bandemer,* 478 U.S. 109 (1986) at 123 (the Court rejected the argument that partisan gerrymandering claims are nonjusticiable political questions); *Vieth v. Jubelirer,* 541 U.S. 267 (2004) at 305 (four justices expressed the view that partisan gerrymandering is a political question, but five other justices rejected that view); *LULAC v. Perry,* 548 U.S. 399 (2006) at 420 (the Court declined to revisit the issue). Since *LULAC*, the Supreme Court has not considered the merits of a partisan gerrymandering claim, so the Court concluded that *Bandemer* still controls on the narrow question whether partisan gerrymander claims are barred under the political question doctrine; see *Shapiro v. McManus*, 577 U.S.__(2015) at 5 (acknowledging that a majority of the Court has declined to find partisan gerrymandering claims nonjusticiable).

126. R.43 at 23.

127. R.43 at 13.

128. R.45 and R.46.

129. R.94 at 13. The defendants point to Wisconsin's 2002 assembly plan in which a federal court drew it (based on plans submitted by the political parties), *Baumgart v. Wendelberger*, No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. May 30, 2002) amended, No. 01-C-0121, 2002 WL 34127473 (E.D. Wis. July 11, 2002), the efficiency gap for the plan was 7.5 percent in favor of the Republicans in 2002 and then fluctuated between 4 percent and 12 percent in favor of the Republicans for the remainder of the decade (R.74). In response, plaintiffs argued that the assembly map for 2002 was an anomaly and that the court adopted a map that was more similar to the one proposed by Republicans. Defendants also point to other states that have had pro-Republican efficiency gaps of more than 5 percent in recent years, even when the plan was drawn by a neutral body (R.46 at 38).

that the use of the EG itself might have been misleading when applied to Wisconsin's political geography (Democrats cluster in cities) and to Wisconsin's potentially competitive districts.[130]

On April 7, 2016, the three-judge panel issued an order denying the defendants' motion for summary judgment. After reviewing the defendants' objections, the court decided that there were fact issues that needed to be resolved at trial on the question of whether a large efficiency gap is a strong indicator of discriminatory intent.[131] The court added that the evidence on the "natural packing" of Democrats, who tended to live in cities, in Wisconsin was inconsistent.[132] Because the defendants did not object to the admissibility of the opinions of the plaintiffs' experts, the court "conclude[d] that there is a genuine dispute on the question whether a large efficiency gap is a strong indicator of discriminatory effect."[133]

As an alternative to their broader argument, the defendants argued that using zero as a baseline "does not isolate the portion of the efficiency gap that is attributable to partisan bias."[134] The court concluded that this argument should be explored during trial because "this is a suggestion to alter the threshold of the plaintiffs' test and, perhaps, shift the burdens of production or proof…to show as part of their prima facie case the extent to which political geography cannot explain the efficiency gap generated by Act 43."[135] The court also directed the plaintiffs to "be prepared to present the strongest evidence that they have on this issue . . . in order to meet even the most demanding intent requirement" for the upcoming trial.[136]

The court set the case for trial, which took place over the course of four days: May 24–27, 2016.

Court's order November 21, 2016

On November 21, 2016, in a 2–1 decision,[137] the three-judge federal panel declared that the state house plan adopted in 2011 by Wisconsin's Republican-controlled legislature was an unconstitutional gerrymander for providing an unfair advantage to one political party, which violated the U.S. Constitution's equal protection clause of the Fourteenth Amendment and the freedom of association of rights guaranteed by the First Amendment. The proposed test was

130. The defendants basic argument here is that had voters in close (or competitive) elections voted for the other party, and had a few candidates of the other party won those seats, then the EG might be dramatically different and a plan that included such competitive districts could be found unconstitutional.

131. R.94 at 2 ("as a matter of law would be premature because there [we]re factual disputes regarding the validity of plaintiffs' proposed measurement.").

132. R.94 at 14–17, especially at 16. According to the District Court, "[i]n their reply brief and at oral argument, the defendants seemed to concede that there is a genuine dispute on this issue, but they argued that the dispute is not material because the mere existence of large efficiency gaps in plans adopted by neutral bodies is sufficient to discredit the efficiency gap as a tool for measuring a constitutional violation . . . Defendants cite no authority for the view that discriminatory intent and discriminatory effect must be borne out by the same evidence." (R. 94 at 15–16).

133. R.94 at 15.

134. R.46 at 36. The defendants said that the baseline should incorporate whatever natural advantage a party has as a result of political geography.

135. R.94, at 16–17.

136. R.94 at 30.

137. The majority opinion was written by Judge Ripple and joined by Judge Crabb. Judge Griesbach dissented.

based on the Equal Protection Doctrine, which requires that discriminatory intent and effect must be demonstrated.[138] In setting out the basis and elements of the claim, the court held that

> the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.[139]

The court considered each part in turn, first by citing Supreme Court precedence on the subject and then by applying that foundation to the facts of the case.

Part one: impermissible partisan intent. According to the District Court, their first task "[wa]s to determine what kind of partisan intent offend[ed] the Constitution."[140] When it considered the intent portion of the three-part test, the court recognized that "state legislative apportionment is the prerogative" of the state government and that they must "recognize[] the delicacy of intruding on this most political of legislative functions."[141] At the same time, the court acknowledged that they cannot rely on the simple finding "that political classifications were applied"[142] or that "the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination."[143] Because the Wisconsin Legislature carries out the redistricting process, the court distinguished between legal partisanship considerations and invidious partisan gerrymandering based on the definitions of intent and entrenchment.[144]

The court noted that the First Amendment and the equal protection clause "protect a citizen against state discrimination as to the weight of his or her vote when that discrimination is based on the political preferences of the voter."[145] The court added that "this principle

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138. *Whitford v. Nichol* 180 F. Supp. 3d 583 (W.D. Wis. 2016) at 587.

139. R.166 at 56.

140. R.166 at 56. The Supreme Court explicitly has held that equal protection challenges to redistricting plans require a showing of discriminatory purpose or intent. See *Rogers v. Lodge*, 458 U.S. 613 (1982) at 617 (explaining that cases involving allegations of vote-dilution on the basis of race "are . . . subject to the standard of proof generally applicable to Equal Protection Clause cases" including a showing of a "'a racially discriminatory purpose'" (quoting *Washington v. Davis*, 426 U.S. 229 (1976) at 240)). This requirement applies with equal force to cases involving political gerrymanders. See *Davis v. Bandemer*, 478 U.S. 109 (1986) at 127 (stating that plaintiffs who bring a claim of partisan gerrymandering "[a]re required to prove . . . intentional discrimination against an identifiable political group").

141. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 143; see *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 306 (Kennedy, J., concurring in the judgment) (cautioning against "the correction of all election district lines drawn for partisan reasons" because that course "would commit federal and state courts to unprecedented intervention in the American political process").

142. *Vieth v. Jubelirer,* 541 U.S. 267 (2004) at 307 (Kennedy, J., concurring in the judgment).

143. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 132 (plurality opinion).

144. R.166 at 38 ("[A]n intent to entrench a political party in power signals an excessive injection of politics into the redistricting process."). The majority defined entrenchment as "making that party—and therefore the state government—impervious to the interests of citizens affiliated with other political parties." (*Id*. at 38).

145. R.166 at 55. *Reynolds v. Sims*, 377 U.S. 533 (1964) at 565 ("Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purpose of legislative apportionment."). The Court added that "this principle applies not simply to disparities in raw population, but also to other aspects of districting that operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433 (1965) at 439. Specifically, the Court referred to apportionment plans that "invidiously minimize[]" the voting strength of "political groups" "may be vulnerable" to constitutional challenges (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973) at 754) because "each political group in a State should have the same chance to elect representatives of its choice as any other political group." (citing *Davis v. Bandemer*, 478 U.S. 109 (1986) at 124).

applies not simply to disparities in raw population, but also to other aspects of districting that "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[146] Using principles from other Supreme Court cases, the District Court argued that apportionment plans that "invidiously minimize[]" the voting strength of "political groups" "may be vulnerable"[147] to constitutional challenges, because "each political group in a State should have the same chance to elect representatives of its choice as any other political group."[148] According to Supreme Court precedence, the "basic equal protection principle that the invidious quality of a law [minimizes] . . . must ultimately be traced to a discriminatory purpose."[149] Equal protection challenges to redistricting plans required "a showing of discriminatory purpose or intent"[150] and this requirement "applie[d] with equal force to cases involving political gerrymanders."[151] A legislature's discriminatory intent also provided a foundational basis for analysis of claims that allege a violation of the First Amendment.[152]

After laying out the arguments defining discriminatory intent and purpose, the court noted that

> [h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional districting criteria. A map that appears congruent and compact to the naked eye may in fact be an intentional and highly effective partisan gerrymander. When reviewing intent, therefore, we cannot simply ask whether a plan complied with traditional districting principles. Therefore, the defendants' contention—that, having adhered to traditional districting principles,[153] they have satisfied the requirements of equal protection—is without merit.[154]

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146. *Fortson v. Dorsey*, 379 U.S. 433 (1965) at 439.

147. *Gaffney v. Cummings*, 412 U.S. 735 (1973) at 754.

148. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 124.

149. R.166 at 56. The Court cites the following cases: *Washington v. Davis*, 426 U.S. 229 (1976) at 240; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) at 265 ("Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) at 358–9 (considering whether a state has imposed "reasonable," nondiscriminatory restricts on First Amendment associational rights); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) at 452 (same); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) at 676 ("Where the claim is invidious discrimination in contravention of the First . . . Amendment[], our decisions make clear that the plaintiff must plead and prove that the defendant acted with a discriminatory purpose.").

150. *Rogers v. Lodge*, 458 U.S. 613 (1982) at 617 (explaining that cases involving allegations of vote-dilution on the basis of race "are . . . subject to the standard of proof generally applicable to Equal Protection Clause cases" including a showing of "'a racially discriminatory purpose.'" (quoting *Washington v. Davis*, 426 U.S. 229 (1976) at 240)).

151. *Davis v. Bandemer*, 478 U.S. 109 (1986) at 127 (stating that plaintiffs who bring a claim of partisan gerrymandering "[a]re required to prove . . . *intentional* discrimination against an identifiable political group" (emphasis added)).

152. R.166 at 56.

153. Relying on traditional districting principles, defendants proposed that a redistricting plan that "is consistent with, and not a radical departure from, prior plans with respect to traditional districting principles" cannot, as a matter of law, evince an unconstitutional intent; R.153 at 5; see also R.156 at 1 ("[A] democratically-enacted districting plan . . . is entirely lawful when it complies with traditional districting principles.").

154. R.166 at 62. The Supreme Court has held that "traditional districting principles are not synonymous with equal protection requirements and "are objective factors that may serve to defeat a claim that a district has been gerrymandered." (*Shaw v Reno*, 509 U.S. 630 (1993) at 647 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973) at 752 n.18)).

The court then considered the question of how to discern the map-drafters' intent by tracing the sequence of events that led to the enactment of Act 43.

In January 2011, Republican leadership in the legislature retained a private law firm to assist with the reapportionment of the state legislative districts.[155] The firm supervised the planning, drafting, and negotiating of the new districting plan.[156] Professor Ronald Keith Gaddie, a professor of political science at the University of Oklahoma, also assisted.[157] A "significant part" of Professor Gaddie's work involved "building a regression model to be able to test the partisan makeup and performance of districts as they might be configured in different ways."[158]

In April 2011, the majority party began drafting the redistricted map after receiving census data from the Legislative Technology Services Bureau.[159] To draw the maps, Republican staffers used redistricting software known as autoBound, which provided demographic information for the state, such as the population of each legislative district, deviation from the ideal population, voting-age population, and different minority group populations; the software also allowed inclusion of "customized demographic data,"[160] such as a "composite partisan score."[161] Once the composite measure was developed, Professor Gaddie confirmed its usefulness by testing it against his regression model.[162] Majority party staffers then used the composite measure to "assess the partisan impact of the map[s] that [they] drew."[163] When the map-drafters had created a statewide map with which they were satisfied, they exported the district-by-district partisanship scores from autoBound into a spreadsheet for the "finalized" "statewide" plan.[164] The composite score was then used at the statewide level to evaluate maps based on the level of partisan advantage and, in many instances, the names of the maps reflected that idea.

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155. R.125 at 5.

156. R.125 at 7.

157. Professor Gaddie was retained on April 11, 2011, by a private law firm as "an independent advisor on the appropriate racial and/or political make-up of legislative and congressional districts in Wisconsin (Tr. Ex. 169)." During his deposition, Professor Gaddie described his job as "devis[ing] measures and consult[ing] . . . about measures" of partisanship, compactness, "the integrity of counties, the integrity of city boundaries, the so-called good government principles of redistricting" (Tr. Ex. 161 (Gaddie Dep.), at 45).

158. Tr. Ex. 161 at 46. As explained by one of the plaintiffs' experts, Professor Kenneth Mayer, "[r]egression is a technique where we can seek to explain a dependent variable, the variable that we're trying to account for. . . . [W]e attempt to explain the values that a dependent variable take[s] with what are called independent variables or underlying causal variables (R. 148 at 156–7)." In statistical modeling, regression analysis demonstrates the relationships between a dependent variable (the main factor you are trying to understand or predict) and one (or more) independent variable(s) (the factors that potentially impact the dependent variable).

159. R.148 at 68–9.

160. R.148 at 62–4. One of the map drafters described in detail how autoBound was used (R.148 at 72–3).

161. They developed a composite partisan score that would accurately reflect the political make-up of population units so that when they aggregated those units into new districts, they could assess the partisan makeup of the newly drawn district (Tr. Ex. 175 at 1–2). On April 19, 2011, they developed a composite of "all statewide races from [20]04 to 2010" that "seem[ed] to work well" and sent the measure to Professor Gaddie to confirm its usefulness.

162. Professor Gaddie confirmed to one of the map drafters that "the partisanship proxy you are using (all races) is an almost perfect proxy for the open seat vote, and the best proxy you'll come up with" (Tr. Ex. 175 at 1).

163. See R.147 at 61; R.148 at 16–17. The drafters' "partisanship proxy" and Professor Gaddie's "open seat vote" measure of partisanship (Tr. Ex. 175 at 1) correlated almost "identical[ly]" with the "open-seat baseline model" that Professor Mayer developed by way of a regression analysis and that he used to construct his Demonstration Plan. R.148 at 191; see R.166 at 24.

164. R.147 at 162; R.148 at 14.

For example, maps were labeled as "Assertive" or "Aggressive."[165] A staffer in the Speaker's office, testified that "aggressive" in this context meant "probably that [the map] was a more aggressive map with regard to GOP leaning."[166] The map-drafters produced a document that compared the partisan performance of the "Current Map" to two earlier draft maps known as "Joe's Basemap Basic" and Joe's Basemap Assertive."[167]

> Under the "Current Map," drafters anticipated that the Republicans would win 49 Assembly seats. This number increased to 52 under the "Joe's Basemap Basic" map and to 56 under the "Joe's Basemap Assertive" map. The number of safe and leaning Republican seats increased from 40 under the "Current Map" to 45 under the "Joe's Basemap Basic" map and 49 under the "Joe's Basemap Assertive" map; the number of swing seats decreased from 19 to 14 to 12. The number of safe and leaning Democratic seats, however, remained roughly the same under all three maps, hovering between 38 and 40.[168]

As each of the statewide map alternatives were processed, the map drafters collected partisan scores of each alternative and compared the scores against other alternatives.[169]

> The total number of safe and leaning Republican seats now ranged between 51 and 54, and the number of swing seats was decreased to between 6 and 11. The number of safe and leaning Democratic seats again remained about the same under each draft map, ranging between 37 and 39.[170]

Completed drafts were sent to Professor Gaddie, who created an "S" curve for each map that provided another means of partisan analysis.[171] The "S" curves provided a visual depiction of how each party's vote share (on the x axis), ranging from 40 to 60 percent, related to the number of assembly seats that party likely would secure (on the y axis) with Democratic seats depicted by shades of blue, and Republican seats by shades of red.[172] The "S" curves "allowed a

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165. R.148 at 30. During the drafting process, Republican staffers met with individual senators to review with them the census numbers for their district, to verify their addresses, and to ask general questions about their districts, such as "are there areas you like, are there areas you don't like, are there areas surrounding your district that you like;" *id*. at 81. Republican staffers also received a few requests from senators concerning their districts.

166. R.147 at 65.

167. Tr. Ex. 465 and Tr. Ex. 476 (sorting districts by Republican vote share). The name "Current Map" was given to the prior map drawn by the *Baumgart* court that was used in the 2000s redistricting cycle.

168. R.166 at 11 citing Tr. Exs. 465, 467. At least another six statewide map alternatives had been produced: Milwaukee_Gaddie_4_16_11_V1_B (Tr. Ex. 172, at 1); Statewide2_Milwaukee_Gaddie_4_16_V1_B (Tr. Ex. 172, at 2); Tad MayQandD (Tr. Exs. 364, 477); Joe Assertive (Tr. Exs. 366, 478); Tad Aggressive (Tr. Ex. 283); and Adam Aggressive (Tr. Ex. 283). See generally Tr. Ex. 225 (containing metadata from the drafters' computers). These maps were intended to improve upon the anticipated pro-Republican advantage generated from the initial two statewide maps (Joe's Basemap Basic and Joe's Basemap Assertive).

169. Tr. Ex. 364. Each spreadsheet included a corresponding table comparing the partisan performance of the draft plan to the prior map drawn by the *Baumgart* court in *Baumgart v. Wendelberger*, Nos. 01-C-0121 & 02-C-0366, 2002 WL 34127471 (E.D. Wis. 2002), amended by 2002 WL 34127473 (E.D. Wis. 2002); cf. Tr. Ex. 364. These performance comparisons were made on the following criteria: "Safe" Republican seats, "Lean" Republican seats, "Swing" seats, "Safe" Democratic seats, and "Lean" Democratic seats; see also R.148 at 15 (a Republican staffer testifying about these criteria).

170. Tr. Exs. 172, 364, 366.

171. An "S" curve—a "visual aide [to] demonstrate the partisan structure of Wisconsin politics" (Tr. Ex. 134; see Tr. Exs. 263–82) as well as show how each map operated within an "array of electoral outcomes" (Tr. Ex. 161 (Gaddie Dep.), at 44–45). To produce the "S" curves, Professor Gaddie first used his regression analysis to calculate the expected partisan vote shares for each new district (Tr. Ex. 161 at 44–47).

172. R.166 at 12.

non-statistician, by mere visual inspection, to assess the partisan performance of a particular map under all likely electoral scenarios."[173]

Over several days in early June 2011, the map drafters presented a selection of regional maps drawn from statewide drafts, approximately three to four per region, to the Republican leadership.[174] Following this meeting, the map drafters amalgamated the regional alternatives chosen by the leadership.[175] Under the "Team Map," also referred to as the "Final Map,"[176] the Republicans could expect to win 59 assembly seats, with 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democratic, and 33 safe Democratic seats.[177] The map drafters also produced a document with the heading "Tale of the Tape,"[178] which compared partisan performance of the "Team Map" to the "Current Map."[179] Finally the "Team Map" was sent to Professor Gaddie, who conducted the "S" curve analysis.

> The "Team Map" demonstrated that Republicans would maintain a majority under any likely voting scenario; indeed, they would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority.[180]

Once "Team Map" was finalized, each Republican member of the assembly was presented with his or her new district information.[181]

> [T]he memorandum detailed what percentage of the population in the old and new districts voted for Republican candidates in representative statewide and national elections held since 2004. This information also was provided in terms of raw votes. *The memoranda did not provide the individual legislators with any information about contiguity, compactness, or core population*.[182]

Each Republican member of the senate was also presented with similar new district information.[183] In addition to this, a staffer in the senate majority leader's office made a presentation to the Republican caucus and his notes for that meeting stated that "the maps we pass will

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173. R.166 at 13; see also Tr. Ex. 161 at 75.

174. R.166 at 13; see also R.148 at 20; Tr. Ex. 191 at 106.

175. R.166 at 13; see also R.147 at 80.

176. A Republican staffer testified that if the "Team Map" "[wa]sn't the final one that was pushed, put forward in the public domain, it was very close to it, and it was the result of that mashing process of taking the various regional alternatives and putting them all together." R.147 at 165; see also infra note 68 (discussing changes made after the regional maps were amalgamated). R.147 at 62; see also Tr. Ex. 172, at 3–4 (showing partisan performance of the "Final Map").

177. R.166 at 13. The map drafters in fact produced and evaluated several distinct versions of the Team Map, but each rendition is virtually identical. See Tr. Ex. 172, at 3–4 (Final Map); Tr. Ex. 467, at 1 (Team Map (Joe Aggressive)); *id*. at 2 (Team Map Ranking (Joe Aggressive 2)); *id*. at 3 (Team Map (6-15-11)).

178. R.148 at 33–4.

179. They highlighted specifically that under the Current Map, 49 seats are "50% or better" for Republicans, but under the Team Map, "59 assembly seats are 50% or better" (Tr. Ex. 283). The Team Map underwent even more intense partisan scrutiny in a document identified as "summary.xlsx" (Tr. Ex. 284 at 1).

180. R.166 at 14, citing Tr. Ex. 282.

181. R.1 at 12; see also Tr. Ex. 342.

182. R.166 at 15 (emphasis added).

183. R.148 at 111; see also R.147 at 185–6. No other changes were made in response to these meetings.

determine who's here 10 years from now," and "[w]e have an opportunity and an obligation to draw these maps that Republicans haven't had in decades."[184]

According to the majority of the court, the evidence at trial demonstrated that from the outset of the legislative process in making the new redistricting map, the drafters were "concern[ed] with the durable partisan complexion"[185] and, with the help of Professor Gaddie, "develop[ed] a composite partisan score that accurately reflected the political makeup of population units, which would allow them to assess the partisan make-up of the new districts," at the regional and statewide level.[186]

In his dissent,[187] Judge Griesbach agreed with his colleagues on the nature of partisan intent on the part of the staff members:

> *It is almost beyond question that the Republican staff members who drew the Act 43 maps intended to benefit Republican candidates.* They accumulated substantial historical knowledge about the political tendencies of every part of the state and consulted with Dr. Ronald Gaddie to confirm their predictions about voting patterns. Though they denied the suggestion that such information was used to project future voting tendencies, my colleagues rightly conclude that when political staffers compile historical voting information about potential districts, their claim that they did not intend to use that information to predict future voting patterns is hardly worthy of belief.[188]

He added that the Republican leadership "clearly wanted a plan that would give them a majority of seats."[189] To summarize his views on partisanship in the redistricting process, he reiterated that "legislators tasked with drawing maps will always seek to advantage their own party."[190] Judge Griesbach commented further, "[i]n other words, so long as it is deemed acceptable for politicians to draw district maps—and it is—we cannot pretend to be shocked that

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184. Tr. Ex. 241 at 1.

185. R.166 at 64.

186. R.166 at 64; Tr. Ex. 175 at 1–2. The Court cites that after a trial in prior litigation of the act, a three-judge court characterized claims by the current plan's map drafters that they had not been influenced by partisan factors as "almost laughable" and concluded that "partisan motivation . . . clearly lay behind Act 43." *Baldus v. Wisconsin Government Accountability Board*, 849 F.Supp.2d 840, 851 (E.D. Wis. 2012).

187. Judge Griesbach's dissent covers pages 119–159 of the 159-page opinion filed November 21, 2016.

188. R.166 at 121 (emphasis added). Judge Griesbach cites the following cases: "The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 285 (plurality opinion) (citing *Miller v. Johnson*, 515 U.S. 900 (1995) at 914 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition."); *Shaw v. Reno*, 509 U.S. 630 (1993) at 662 (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics."); *Gaffney v. Cummings*, 412 U.S. 735 (1973) at 753 ("The reality is that districting inevitably has and is intended to have substantial political consequences.")). As Justice Stevens put it, "Legislators are, after all, politicians." *Karcher v. Daggett*, 462 U.S. 725 (1983) at 753 (Stevens, J., concurring). "[S]ome intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent." *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 344 (Souter, J., dissenting). "That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. . . . Politics is quite a different matter." (*Id*. at 307) (Kennedy, J., concurring).

189. R.166 at 122.

190. R.166 at 125.

legislators so engaged will act like the politicians they are."[191] Judge Griesbach reiterated that this "attempt to gain political advantage" is not illegal:

> I believe it is largely true that individuals who attempt to gain political advantage through map-drawing are not engaged in foul play or dirty tricks, but are merely using the power the voters have granted them to enact the policies they favor . . . By and large, whether it is the Democrats or Republicans doing the gerrymandering, they try to create partisan majorities not to suppress opposing viewpoints but because *they honestly believe they will then be able to enact the policies that in their view are best for the state, or nation.*[192]

He added that "any test that requires heroic levels of nonpartisanship does not square with the courts' recognition of the reality that legislators tasked with drawing maps will always seek to advantage their own party" because partisan intent is "not illegal, but is simply a consequence of assigning the task of redistricting to the political branches of government."[193] He supported this argument by drawing from the acknowledgement by the Supreme Court of the United States that "partisan considerations are inevitable when partisan politicians draw."[194] He added that "if political motivation is improper, then the task of redistricting should be constitutionally assigned to some other body."[195] According to Judge Griesbach:

> After all, these individuals are not operating under even the pretense that they are nonpartisan: they are employed by Republicans in leadership and draft district maps at their direction. That they would resort to partisan considerations in drawing the maps is therefore anything but surprising.[196]

After dealing with partisanship as an inevitable part of the redistricting process, Judge Griesbach rejected the majority's decision to include "proof of intent" as part of the test for partisan gerrymandering that would satisfy the requirement for an equal protection violation.[197] He took issue with the majority's citation of *Rogers v. Lodge*[198] for the basis of discrimi-

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191. R.166 at 122.

192. R.166 at 126 (emphasis added).

193. R.166 at 125, 127.

194. R.166 at 122, citing: "The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 285 (plurality opinion) (citing *Miller v. Johnson*, 515 U.S. 900 (1995) at 914 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition."); *Shaw v. Reno*, 509 U.S. 630 (1993) at 662 (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics"); *Gaffney v. Cummings*, 412 U.S. 735 (1973) at 753 ("The reality is that districting inevitably has and is intended to have substantial political consequences.")).

195. R.166 at 120. For example in 2015, in *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 US_(2015), the Supreme Court upheld the right of Arizona voters to remove the authority to draw election districts from the Arizona State Legislature and vest it in an independent redistricting commission.

196. R.166 at 121.

197. The majority argued against this point ["intent to act for political purposes," dissent at 120], stating that they would require an intent "to make the political system systematically unresponsive to a particular segment of the voters based on their political preference" (*Id*. at 59).

198. *Rogers v. Lodge*, 458 U.S. 613 (1982) at 617 ("Equal protection challenges to redistricting plans require a showing of discriminatory purpose or intent.").

natory intent because *Rogers* concerns a challenge based on race discrimination and not political motivations. He questioned how the intent to entrench a party in power was different from the "intent to benefit the party."[199] He followed up this question by stating that "[w]e are talking about redistricting plans, after all, not a bill to name the State mascot. Redistricting plans, by their very nature, affect future elections for the life of the plan. And what does 'entrench their party in power' mean in this context?"[200]

In Judge Griesbach's view:

> Given the fact that Republicans already enjoyed significant advantages under court-drawn districting plans then in effect, it should hardly surprise anyone that, when afforded the rare opportunity to draw their own maps, they extended their electoral advantage somewhat. I am therefore unable to conclude that Act 43's passage was anything other than the kind of "politics as usual" that courts have routinely either tolerated or acquiesced in.[201]

In general, Judge Griesbach favored using traditional redistricting criteria, which aligns with his definition of gerrymandering,[202] as an essential part of any gerrymandering test. When he reviewed the record of evidence, he concluded that it supported a conclusion that the mapmakers only wanted to improve their position incrementally.[203]

Part two: partisan effect. In assessing the effect portion of the three-part test, the court reviewed the election results under Act 43 from 2012 and 2014 in conjunction with the statistical analysis offered by the expert witnesses.[204] In 2012, Republicans garnered 48.6 percent of the vote, securing 60 seats in the assembly.[205] Two years later, Republicans received 52 percent of the vote, securing 63 seats in the assembly.[206] In the "Tale of the Tape," in which the map drafters compared the partisan performance of the "Team Map" with the "Current Map," the latter had only "49 [assembly] seats" that were "50% or better" for Republicans, and the former increased that number so that "59 assembly seats" were designated as "50% or better" for Republicans.[207] Overall, the Team Map gave the Republicans the following expected assembly seat distribution: 38 safe Republican seats, 14 leaning Republican, 10 swing, 4 leaning Democrat, and 33 safe Democratic seats.

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199. R.166 at 123.

200. R.166 at 123.

201. R.166 at 127.

202. R.166 at 128. (Gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." For the term discussion, see *Davis v. Bandemer*, 478 U.S. 109 (1986) at 164 (Powell, J., concurring in part and dissenting in part) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) at 538 (Fortas, J., concurring)); see also *Vieth v. Jubelirer*, 541 U.S. 267 (2004) at 323 (Stevens, J., dissenting) (noting "outlandish district shapes" in traditional gerrymanders). Judge Griesbach determined that without evidence of any distortion of otherwise legitimate district boundaries, there is no gerrymander, at least as the term is traditionally understood.

203. R.166 at 125–6.

204. Professors Gaddie, Jackman, and Mayer.

205. R.125 at 69–70.

206. R.125 at 70.

207. Tr. Ex. 283.

According to the testimony of Professors Gaddie and Mayer, a political science professor at the University of Wisconsin-Madison and expert witness for the plaintiffs, "consistent with what actually occurred in 2012 and 2014, under any *likely* electoral scenario, the Republicans would maintain a legislative majority."[208] Each professor had conducted a separate swing analysis to demonstrate this outcome.[209] Professor Gaddie's swing analysis, contained in his "S" curves, for the Team Map showed that the Republicans had only to maintain their statewide vote share at 48 percent to conserve a comfortable majority (54 of 99 seats), while Democrats needed more than 54 percent of the statewide vote to obtain that many seats.[210] Professor Mayer studied how Act 43 in 2012 functioned under two electoral scenarios: the minimum and maximum statewide vote share for the Democrats. The first scenario represented the minimum statewide vote share in which the Democrats received 46 percent of the vote and the second scenario represented the maximum statewide vote share in which the Democrats received 54 percent of the vote.[211] Professor Mayer predicted that under the first scenario, the minimum Democratic vote share had no effect on the allocation of legislative seats. Utilizing the greatest and smallest statewide vote shares over the last twenty years, the maximum Democrats would secure would be only 45 seats despite receiving 54 percent of the vote.[212] However, when it came to entrenching Republican control, the court argued that both professors' analyses underestimated Act 43.

In 2012, when the Republican vote share dropped to 48.6 percent, Republicans secured 60 seats—10 more than what Professor Gaddie's "S" curve predicted yet in line with Professor Mayer's maximum Democratic vote share analysis prediction. The court concluded that "the actual election results suggest that Act 43 is more resilient in the face of an increase in the statewide Democratic vote share, and is more responsive to an increase in the statewide Republican vote share."[213] Comparing statewide vote shares, the court argued that

> [i]n 2012, the Democrats received 51.4% of the statewide vote, but that percentage translated into only 39 Assembly seats. A roughly equivalent vote share for Republicans (52% in 2014), however, translated into 63 seats—a 24 seat disparity. Moreover, when Democrats' vote share fell to 48% in 2014, that percentage translated into 36 Assembly seats. Again, a roughly equivalent vote share for Republicans (48.6% in 2012) translated into 60 seats— again a 24 seat dispar-

208. R.166 at 75.

209. R.166 at 75. "What a swing analysis does," Professor Mayer explained, "is ask the question . . . what might happen" under different electoral conditions (R.148 at 222). He explained further that "[i]t's a way of, generally speaking, estimating what is a plausible outcome given a change in the statewide vote, which in this case a change in the statewide vote is a proxy for a different election environment, what might happen if there's a pro-Democratic swing or a pro-Republican swing."

210. Tr. Ex. 282; R.125 at 21.

211. R.148 at 225. Professor Mayer looked at electoral outcomes dating back to 1992 and determined that the maximum statewide vote share the Democrats had received was 54 percent in 2006 and the minimum statewide vote share Democrats had received was 46 percent in 2010.

212. R.149 at 77.

213. R.166 at 78.

ity. The evidence establishes, therefore, that, even when Republicans are an electoral minority, their legislative power remains secure.[214]

According to the majority, the case of *Whitford v. Gill* differed from *Bandemer* because the results of the elections of 2012 and 2014 under Act 43 demonstrated that the numbers were "sufficiently egregious" and that the partisan gerrymander was "durable."[215] In addition to the previous evidence on the discriminatory effect of Act 43, which "certainly [made] a firm case on the question of discriminatory effect," the court felt that the plaintiffs' use of the "Efficiency Gap," "demonstrate[d] that, under the circumstances presented here, their representational rights have been burdened."[216]

The EG is a measure that evaluates whether either political party had a systematic advantage by calculating and comparing their respective wasted votes in an observed election. If Party A has a favorable EG (meaning it had fewer wasted votes), then it "was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats."[217] The court's argument on the EG as a piece of corroborating evidence relies heavily on the testimony of Professor Simon Jackman, a political science and statistics professor at Stanford University.[218] Professor Jackman's calculations estimated that the pro-Republican EG was 13 percent in 2012 and 10 percent in 2014.[219] In 2012, the Republicans garnered 48.6 percent of the statewide vote, which translated into 61 percent of the assembly seats (60 seats out of the available 99). In 2014, the Republicans increased their percentage of the statewide vote to 52 percent, which translated into 64 percent of the assembly seats (63 seats out of the available 99). By way of comparison, Professor Jackman also determined that if the EG had been 0 percent (meaning each party wasted votes at the same rate), the Republicans would have secured approximately 47 seats with 48.6 percent of the vote in 2012 and 53 seats with 52 percent of the vote in 2014. Thus, the Republican Party in 2012 won about 13 assembly seats in excess of what a party would be expected to win and in 2014 it won about 10 more assembly seats than would be expected. In other words, a favorable EG allows for a greater proportion of assembly seats than would be expected based on a party's share of the statewide vote.

Professor Jackman's additional historical analysis suggested that an EG over 7 percent in

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214. R.166 at 78. The majority argued that the factual record of the intent and effect portions of this case does not support the conclusion that the drafters only wanted to improve their position incrementally as the dissent argued (at 125–6). If this had been the case, the court concluded that the map drafters could have settled on one of the previous versions of the maps that provided a pickup of a smaller number of Republican seats.

215. R.166 at 80. The majority opinion contrasted with the dissent that noted that the seats-to-vote-ratio in 2012 under Act 43 "was similar to that under the apportionment scheme in *Bandemer*, stating that Wisconsin's case cannot be distinguished from *Bandemer*" (*id.* at 119). In terms of its durability, the court stated that "[h]ere we have two elections under Act 43, as well as swing analyses conducted by three experts, all of which support the conclusion that Act 43's partisan effects will survive all likely electoral scenarios, throughout the decennial period."

216. R.166 at 80.

217. R.166 at 81.

218. Professor Simon Jackman served as the plaintiffs' expert witness on the reliability and practicability of the EG.

219. Professor Jackman utilized the "simplified method" for EG calculation that assumed equal voter turnout at the district level.

the first election under a given plan would favor that party for the life of the plan.[220] When he compared his EG estimates for Act 43 with his historical analysis of EG estimates from other states, Professor Jackman contended that Wisconsin's plan would have an average pro-Republican efficiency gap of 9.5 percent for the entire decennial period.[221] Even adjusting the 2012 vote in each district based on a 5 percent swing increase in Democrats' vote share, Professor Jackman found that the pro-Republican EG would not drop below 7 percent.[222]

In sum, the majority concluded that the Republicans' "comparative electoral advantage" (meaning their ability to translate votes into seats with greater ease than their opponents) under Act 43 allowed for the attainment and preservation of their control of the Wisconsin Assembly. The court established that "Democratic voters will continue to find it more difficult to affect district-level outcomes, and, as a result, Republicans will continue to enjoy a substantial advantage in converting their votes into seats and in securing and maintaining control of the Assembly."[223]

In his dissent on partisan effect, part two of the three-part test, Judge Griesbach focused on a number of issues. This included a lengthy discussion of traditional redistricting principles (including compactness, contiguity, and respect for political boundaries like counties and cities). He concluded that Act 43 did not violate any "traditional redistricting principles,"[224] maintaining that a standard based on traditional redistricting principles is not only better,[225] but also "more acceptable to the Supreme Court."[226]

While Judge Griesbach agreed with his colleagues on the fact that Republicans enjoyed "some degree of natural advantage" because of Wisconsin's political geography, he concluded that "[t]he fact that [the Democrats'] inability to control the legislature is due not to Republican gerrymandering but to Republican statewide strength combined with certain natural advantages means, at a minimum, that this case is hardly the kind of outrageous partisan iniquity the Plaintiffs portray it to be."[227] Wisconsin's political geography advantage factored into his position on the use of the EG as a standard for partisan gerrymandering, especially

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220. By comparing redistricting plans across a wide variety of states (41 states over 40 years—R.149 at 238—J's trial testimony), Professor Jackman determined that 95 percent of plans with an EG of at least seven percent will never have an EG that favors the opposite party (R.149 at 224–40, cf. Tr. Ex. 93; R.149 at 215–24). Therefore seven percent represents the basis for the plaintiffs' proposed threshold for liability.

221. R.149 at 224–40, esp. at 233 (opining that he was "[v]irtually certain" of this outcome, "[v]irtually 100 percent").

222. R.149 at 243–49.

223. R.166 at 84.

224. R.166 at 128. Judge Griesbach does concede that "Act 43's districts split more counties than previous plans, but Act 43 splits fewer municipalities" (*id*. at 128), although he does not explain the merits (or lack thereof) of this particular distinction.

225. R.166 at 134 ("Unlike most witnesses who testified at trial in this action, the line drawers will not require advanced graduate training in statistics, regression analysis, or political science, but merely a respect for traditional political boundaries and an affinity for relatively straight lines. Constitutional law need not become the province of a cottage industry of Ph.D.'s and statisticians."). Essentially, he argues that all the benefits from the reliance on traditional redistricting principles derive from the fact that anyone could easily identify "unusual" districts.

226. R.166 at 130–5. ("My point is not that all Justices would require unusually shaped districts before considering a partisan gerrymander; the point is that of the Justices who would even entertain a partisan gerrymandering claim, a majority would require adherence to traditional districting principles as part of any test.") (*Id*. at 130).

227. R.166 at 137.

its proposed 7 percent threshold for liability;[228] its use on especially competitive districts;[229] and its foundational basis, which he argued, relied on proportional representation, a concept courts have already rejected.[230] He summarizes these arguments by stating:

> None of the above is to suggest that natural geographic factors explain the entirety of the efficiency gap seen under Act 43, as the majority rightly concludes. Still, when pro-Republican efficiency gaps have existed in neutral court-drawn plans going back decades, and when they exist even in the Plaintiffs' own demonstration plan, geography cannot and should not be ignored. Even if geography does not explain the entire gap, and even if it plays only a "modest" role—for example, three to six percent—it would seriously undermine the notion that the Republicans in this case engaged in a partisan gerrymander of historical proportions.[231]

Judge Griesbach's overall conclusion on the efficiency gap condemns the majority's "elevat[ion of] the efficiency gap theory from the annals of a single, non-peer-reviewed law review article to the linchpin of constitutional elections jurisprudence."[232] In addition to this, he questioned the majority's opinion on the concept of Republican entrenchment, citing that "a popularly elected Democratic governor could prevent the Republicans from enacting their agenda,"[233] and whether the plaintiffs were damaged by their inability to secure a political majority.[234] To summarize, in his view

> [t]he efficiency gap theory on which the Plaintiffs founded their case fatally relies on premises the courts have already rejected, including proportional representation, and it suffers from a number of practical problems as well. Simply put, I do not believe the Supreme Court would direct courts to meddle in a state districting plan when that plan adequately hews to traditional and legitimate districting principles; contains no "gerrymander," as traditionally understood; and when the plan only modestly extends the map-drawing party's electoral advantage beyond what would exist naturally. This is particularly true given that the gerrymandering party very likely would have won both elections conducted under the challenged plan even without gerrymandering.[235]

Part three: justification. According to the district court, "[i]n the absence of explicit guidance from the Supreme Court, we think that the most appropriate course in this context is to evaluate whether a plan's partisan effect is justifiable, *i.e.*, whether it can be explained by the

228. R.166 at 157–9.

229. R.166 at 149.

230. R. 166 at 143–4.

231. R.166 at 157.

232. R.166 at 137.

233. R.166 at 145. The majority responded that, "[a]lthough the governorship may be a check on Republican legislative efforts, it also cannot secure for Democrats the opportunity to pass an agenda consistent with their policy objectives" (R.166 at 78).

234. R.166 at 145–6. According to the Dissent, "Republican legislators who win by slimmer margins will be more receptive to the needs of their Democratic constituents." The majority concluded that although the dissent's argument "might have some intuitive appeal in other political contexts, it is not supported by the record, where there is evidence of a strong caucus system" (R.166 at 78)

235. R.166 at 158.

legitimate state prerogatives and neutral factors that are implicated in the districting process."[236] The majority's discussion of the third part of the test, justification for the entrenchment, centered around Wisconsin's political geography and whether it explained Act's 43's partisan effect.

The defendants argued that Wisconsin's political geography favored the Republicans because they had a larger geographical reach as opposed to the Democrats, who tended to cluster in and around urban areas.[237] The defendants largely relied on the report and testimony of Mr. Sean Trende, a senior elections analyst for the website RealClearPolitics. While the majority found that Mr. Trende "provide[d] some helpful background information on political trends and political geography," his level "of analytical detail" was insufficient to "conclude that political geography explain[ed] Act 43's disparate partisan effects."[238] The majority specifically took issue with Mr. Trende's analysis of Wisconsin's counties because his conclusions "were based largely on the shaded maps rather than quantitative data analysis."[239] In addition, Mr. Trende was unable to "give a precise estimate of the effect of Wisconsin's natural political geography on the efficiency gap."[240] The majority found that the evidence at trial "establishe[d] that Wisconsin has a *modestly pro-Republican* political geography."[241] Then they examined if this "modestly pro-Republican political geography" advantage explained Act 43's partisan effect.

The majority returned to the evidence before Act 43 was enacted, focusing on the actions of the map drafters. In particular, the majority discussed the staffers' spreadsheets that evaluated a plan's district-by-district partisan performance as well as the number of (Joe's Basemap Basic, Joe's Basemap Assertive, and at least another six more prior to meeting with Republican leadership in June 2011) and names ("Assertive" or "Aggressive") for the alternative statewide maps that reflected the degree of partisan advantage that could be anticipated. According to the majority, "the drafters themselves took pains to gauge their success *at the time*, taking stock of the degree to which they had improved upon the Current Map."[242] After reviewing the "substantial record of evidence," the majority found that "Wisconsin's modest, pro-Republican political geography cannot explain the burden that Act 43 imposes on Democratic voters in Wisconsin,"[243] adding:

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236. R.166 at 91. The majority argued that this approach mirrored the Supreme Court's approach in analogous areas.

237. Mr. Trende specifically examined the political geography of Wisconsin using a measure called the "partisan index" (PI) to "determine the partisan lean of political units" (R.150 at 19).

238. R.166 at 95; for the majority's whole discussion of Mr. Trende see at 27 and 92–6.

239. R.166 at 95.

240. R.166 at 95. Mr. Trende thought it was "more than 0, but as far as . . . putting it on the 1 to 100 spectrum, I haven't done that." (R.150 at 98). The majority also took issue with Mr. Trende's "nearest neighbor analysis," which he used to analyze Wisconsin's wards by assessing the median distance between heavily Democratic wards compared to the median distance between heavily Republican Wards; see R.150 at 60. Professor Goedert's ward-level analysis was also called into question because "the evidence showed that in the 2010 redistricting cycle Wisconsin's wards were, for the first time in the state's modern history, drawn after the assembly district lines were created under Act 43. Professor Goedert admitted that he was unaware of this chronology when he conducted his analysis." (R.166 at 97).

241. R.166 at 103 (emphasis added).

242. R.166 at 106. In forming this assessment, the majority reiterated the events of the "Tale of the Tape."

243. R.166 at 107. The majority added that Professor Mayer's Demonstration Plan provided additional evidence that further "dispel[led] the defendants' claim" of Wisconsin's inherent pro-Republican advantage (*id*. at 111).

> The drafters themselves disproved any argument to the contrary each time they produced a statewide draft plan that performed satisfactorily on legitimate districting criteria without attaining an expected partisan advantage as drastic as that demonstrated in the Team Map and, ultimately, in Act 43. In reaching this conclusion, we emphasize that we did not require, as the plaintiffs initially proposed, that the defendants show that Act 43's partisan effect was *necessary* or *unavoidable*. Rather, our task at trial was to determine whether the burden that Act 43 imposes is *justifiable* in light of legitimate districting considerations and neutral circumstances. The defendants offered Wisconsin's natural political geography as one such neutral circumstance. Because we find that a Republican advantage in political geography, although it exists, cannot explain the magnitude of Act 43's partisan effect, and because we find that the plan's drafters created and passed on several less burdensome plans that would have achieved their lawful objectives in equal measure, we must conclude that the burden imposed by Act 43 is not justifiable.[244]

This means that justification would not be needed because partisan intent is not illegal.

Remedy

The three-judge federal panel had deferred its ruling on the remedy in their November 21, 2016, opinion, inviting the parties to brief the issue of an appropriate remedy, which both parties submitted on January 27, 2017. The parties agreed to enter an injunction prohibiting the use of Act 43's district plan in future elections.[245] The questions of who should draft a remedial map, how should it be drafted, and when should it be implemented were disputed.[246]

The plaintiffs argued that providing an opportunity for the legislature to enact a remedial plan would be impracticable because Wisconsin's elected branches have compiled an "objectionable record of defending its unconstitutional plan."[247] The court rejected this, stating:

> The record in our case, however, contains no evidence of the malice or intransigence that would justify our abrogating such a fundamental principle. Although the state actors in this case certainly intended the partisan effect that they in fact produced, the record does not permit us to ascribe to them an unwillingness to adhere to an order of this Court or to conform the allocation of seats in the state legislature to constitutional requirements.[248]

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244. R.166 at 107.

245. R.169 at 5 for the defendants' remedy ("The proper remedy is for the Court to enter an injunction directing the legislature to draft a new map consistent with its opinion."); R.170 at 2 for the plaintiffs' remedy. ("To begin with, as soon as possible, the Court should enter an injunction barring any further use of the Current Plan.").

246. Recall that the State determines the maps for the electoral districts of the assembly and in the state of Wisconsin, the Legislature draws the maps. The Supreme Court has stated that "[w]hen a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan" (Wise v. Lipscomb, 437 U.S. 535 (1978) at 540).

247. R.170 at 7. See *Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La. 1996) (refusing to give the Louisiana legislature an opportunity to pass a third remedial plan); *Terrazas v. Slagle*, 789 F. Supp. 828, 838–39 (W.D. Tex. 1991) (noting the "unusually lethargic" pace of the state legislature's actions).

248. R.182 at 3.

If the Wisconsin Legislature is permitted to redistrict, then the plaintiffs asked that the court provide detailed instructions.[249] The court responded that "[i]t is neither necessary nor appropriate for us to embroil the court in the Wisconsin Legislature's deliberations."[250] The plaintiffs asked the court to set the deadline of April 1, 2017.[251] The defendants argued that because of "the uncertain nature of the law on partisan gerrymandering" the court should not require the legislature to act until after the Supreme Court has ruled on this case.[252]

The court rejected both parties' proposals, stating that while "[i]n a perfect world, the defendants' suggestion [that the court avoid ordering any remedy until after the Supreme Court decided this appeal] would make sense," there were "several countervailing considerations that [the court] must consider[,]" including: the two-year term length for members of the Wisconsin Assembly, the fact that the people of Wisconsin "already have endured several elections under an unconstitutional reapportionment scheme," any new map must be drawn in time for the preparatory steps leading up to the election," and that the Supreme Court of the United States "may well need a significant amount of time to finish its work on this case." [253]

These "countervailing considerations" led the court to require unanimously that the legislature enact a remedial redistricting plan by November 1, 2017.[254] The plan must comply with the court's order (issued on November 21, 2016), but acknowledges that it may be contingent upon the Supreme Court's affirmance of the said order. As the court stated:

> Here, we must balance the harm to the defendants against the harm to the plaintiffs … In setting a November 1, 2017, deadline for the enactment of at least a contingent replacement map, we considered the State's burden in enacting even a contingent remedial plan and have concluded that the State's thorough earlier work may significantly assuage the task now before them. Additionally, by choosing to enact a plan contingent on the Supreme Court's affirming our judgment, the defendants will retain easily the present map if the Supreme Court does not agree with our disposition.[255]

In its judgment, the court also stated that it "retain[ed] jurisdiction to enter such orders

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249. R.170 at 10.

250. R.182 at 4. The Court argued that "[c]onsistent with our approach to remedying other constitutional violations, our only interest in the redistricting of the State is to 'correct … the condition that offends the Constitution,'" (*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); cf. Wise, 437 U.S. at 540); "[A] state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause," (quoting *Burns v. Richardson*, 384 U.S. 73, 85 (1966); *Gorin v. Karpan*, 775 F. Supp. 1430, 1445–46 (D. Wyo. 1991); ("It is the state legislature, not the federal court, that is the best institution 'to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality") (quoting Connor v. Finch, 431 U.S. 407 (1977) at 414–5).

251. R. 170 at 10. The plaintiffs asked for a "[s]trict [d]eadline" citing other examples of courts giving the state legislature little time within which to pass a remedial plan, e.g. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) and *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D. Fla. 1996).

252. R.169 at 1.

253. J.S. App. at 321a.

254. J.S. App. at 321a. The next primary election is scheduled for August 14, 2018, and the general election for November 6, 2018. See Wis. Stat. § 5.02(5), (12s). Candidates for assembly can begin to circulate nomination papers on April 15, 2018, and the requisite paperwork is due on June 1, 2018. Wis. Stat. § 8.15(1); *id.* § 8.21(1).

255. J.S. App. at 322a–323a.

as may be necessary to enforce the court's judgment in this matter and to remedy in a timely manner the constitutional violation."[256]

Defendant's appeal to the Supreme Court of the United States

On February 24, 2017, the defendants (now referred to as appellees) filed a notice of appeal with the Supreme Court of the United States in compliance with 28 U.S.C. §§ 2248 and 1253. According to the appellants, the main issues to be considered are:

1. Whether the district court violated *Vieth v. Jubelirer* when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis;
2. Whether the district court violated *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles;
3. Whether the district court violated *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*;
4. Whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed;
5. Whether partisan gerrymandering claims are justiciable.

On May 22, 2017, the appellees filed a stay application with the Supreme Court, pending resolution of direct appeal, and to consider this request "contemporaneously" with its appeal. The appellees' stay application evidence focused on evidence of irreparable harm, the most prominent argument of which is the possibility of a waste of legislative resources.

On June 19, 2017, the Supreme Court of the United States announced that it will hear Wisconsin's partisan gerrymandering case, *Gill v. Whitford*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), in its next term. The justices will be reviewing the State of Wisconsin's appeal of the lower court's decision last fall that struck down the state's electoral redistricting map produced by the Republican-controlled legislature as a product of partisan gerrymandering. The three-judge panel hearing the case concluded that the map violated both the First and Fourteenth Amendments. On the same day as the announcement to hear the case, the Supreme Court also granted Wisconsin's application for stay (No. 16-1611), putting on hold the lower court's decision to require the Wisconsin Legislature to create a new map for its legislative districts by November 1, 2017. The order came on a 5–4 vote. Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application for stay. The case is set for oral arguments on Tuesday, October 3, 2017. ■

256. J.S. App. at 329a–330a.

Appendix 1: *Whitford v. Gill* timeline through August 2017

Major actions	Document	Date filed
U.S. District Court for the Western District of Wisconsin's decisions	Order assigning judges	September 29, 2015
	Opinion and order denying motion to dismiss	December 17, 2015
	Opinion and order denying motion for summary judgment	April 7, 2016
	Opinion and dissent	November 21, 2016
	Opinion and order on remedy	January 27, 2017
	Amended judgment	February 22, 2017
Plaintiffs' complaint	Plaintiffs' complaint	July 8, 2015
	Defendants' answer to the complaint	January 4, 2016
Defendants' motion to dismiss	Defendants' motion to dismiss	August 8, 2015
	Plaintiffs' response to motion to dismiss	September 29, 2015
	Hearing on motion to dismiss	November 4, 2015
	Opinion and order denying motion to dismiss	December 17, 2015
Defendants' motion for summary judgment	Defendants' motion for summary judgment	January 4, 2016
	Plaintiffs' opposition to summary judgment	January 25, 2016
	Defendants' expert report—Professor Nicholas Goedert	January 5, 2016
	Defendants' expert declaration—Sean Trende	January 5, 2016
	Plaintiffs' support of Daubert motion to exclude certain testimony	January 25, 2016
	Plaintiffs' rebuttal report—Professor Simon Jackman	January 25, 2016
	Plaintiffs' rebuttal report—Professor Ken Mayer	January 25, 2016
	Opinion and order denying motion for summary judgment	April 7, 2016
Pre-trial briefs	Plaintiffs' proposed findings of fact	January 25, 2016
	Defendants' proposed findings of fact	May 9, 2016
	Joint final pretrial report	May 9, 2016
Trial briefs	Defendants' trial brief	May 16, 2016
	Plaintiffs' trial brief	May 16, 2016
Whitford v. Gill trial		May 24–27, 2016
Post-trial briefs	Defendants' post-trial brief	June 10, 2016
	Plaintiffs' post-trial brief	June 10, 2016
	Defendants' post-trial reply brief	June 20, 2016
	Plaintiffs' post-trial reply brief	June 20, 2016
Remedies	Defendants' brief on remedies	December 21, 2016
	Plaintiffs' brief on remedies	December 21, 2016
	Defendants' response brief on remedies	January 5, 2017
	Plaintiffs' response brief on remedies	January 5, 2017
	League of Women Voters' amicus brief	January 5, 2017

Major actions	Document	Date filed
Appeal to the Supreme Court of the United States and amicus/intervenor filings	Appellants' notice of appeal	February 24, 2017
	Appellants' jurisdictional statement	March 24, 2017
	Order extending time to file response to statement as to jurisdiction and including May 15, 2017	April 5, 2017
	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the appellants	April 18, 2017
	Judicial Watch, Inc., and Allied Educational Foundation's amicus brief	April 24, 2017
	Republican National Committee's amicus brief	April 24, 2017
	States of Texas, et al.'s amicus brief	April 24, 2017
	Wisconsin Institute for Law and Liberty's amicus brief	April 24, 2017
	Wisconsin State Senate's amicus brief	April 24, 2017
Appellees' motion to affirm	Appellees' motion to affirm	May 8, 2017
	Appellants' opposition to motion to affirm	May 18, 2017
Appellants' application for a stay	Appellants' application (16A1149) for a stay pending appeal, submitted to Justice Kagan	May 22, 2017
	Distributed for conference of June 8, 2017	May 23, 2017
	Response to application, due Wednesday, June 7, 2017, by 11 a.m. (ET)	May 24, 2017
	Wisconsin State Senate's motion for leave to file amici brief in support of stay	May 25, 2017
Set for argument	Set for argument on Tuesday, October 3, 2017	July 19, 2017
Appellant brief	Brief of appellant	July 28, 2017
Joint appendix	Joint appendix (2 volumes) (statement of cost filed)	July 28, 2017
Record request	Record requested from the United States District Court Western District of Wisconsin; record received August 9, 2017	August 1, 2017
Amicus curiae brief	Republican National Committee's amicus brief	August 3, 2017
	Judicial Watch, Inc., and Allied Educational Foundation's amicus brief	August 3, 2017
	Tennessee State Senators' amicus brief	August 3, 2017
	Wisconsin Institute for Law & Liberty's amicus brief	August 4, 2017
	Majority leader and temporary president of the New York State Senate and members of the majority coalition's amicus brief	August 4, 2017
	States of Texas, et al.'s amicus brief	August 4, 2017
	Wisconsin State Senate and Wisconsin State Assembly's amicus brief	August 4, 2017
	Southeastern Legal Foundation's amicus brief	August 4, 2017
	Legacy Foundation's amicus brief	August 4, 2017

Major actions	Document	Date filed
	Republican State Leadership Committee's amicus brief	August 4, 2017
	National Republican Congressional Committee's amicus brief	August 4, 2017
	Wisconsin Manufacturers & Commerce's amicus brief	August 4, 2017
	Plaintiffs' in the Maryland redistricting litigation, Benisek v. Lamone (formerly *Shapiro v. McManus*) amicus brief, in support of neither party	August 4, 2017
	Eric McGhee's amicus brief, in support of neither party	August 10, 2017
	Bernard Grofman and Ronald Keith Gaddie's amicus brief, in support of neither party	August 16, 2017

Appendix 2: court cases

Abate v. Mundt, 403 U.S. 182 (1971)

Abrams v. Johnson, 521 U.S. 74 (1997)

AFL-CIO v. Elections Board, 543 F. Supp. at 634 (E.D. Wis. 1982)

Alexander v. United States, 721 F.3d 418, 422 (7th Cir. 2013)

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Baldus v. Brennan, No. 2:11-CV-00562 (E.D. Wis. 2011)

Baldus v. Members of the Wisconsin Government Accountability Board¸ 849 F. Supp. 2d (E.D. Wis. 2012)

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

Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984)

Bartlett v. Strickland, 556 U.S. 1 (2009)

Baumgart v. Wendelberger, No. 0l-CV-0121 (E.D. Wis. May 30, 2002)

Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007)

Board of Estimate v. Morris, 489 U.S. 688 (1989)

Brown v. Thomson, 462 U.S. 835 (1983)

Burns v. Richardson, 384 U.S. 73 (1966)

Bush v. Vera, 517 U.S. 952 (1996)

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

Common Cause v. Rucho, No. 1:16-CV-1026, 2017 WL 876307 (M.D.N.C. Mar. 3, 2017)

Cox v. Larios, 542 U.S. 947 (2004)

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

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

Gray v. Sanders, 372 U.S. 368 (1963)

Growe v. Emison, 507 U.S. 25 (1993)

Easley v. Cromartie, 532 U.S. 234 (2001)

Elrod v. Burns, 427 U.S. 347 (1976)

Evenwel v. Abbott, 578 U.S _____ (2016)

Fortson v. Dorsey, 379 U.S. 433 (1965)

Johnson v. DeGrandy, 512 U.S. 997 (1994)

Johnson-Lee v. City of Minneapolis, No. 02-1139, 2004 WL 2212044 (D. Minn. Sept. 30, 2004)

Luevano v. Wal–Mart Stores, Inc., 722 F.3d 1014 (7th Cir. 2013)

Karcher v. Daggett, 462 U.S. 725 (1983)

Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 WL 1341302, 2006 (N.D. Ga. May 16, 2006)

Kirkpatrick v. Preisler, 394 U.S. 526 (1969)

League of Latin American Citizens (LULAC) v. Perry, 548 U.S. 399 (2006)

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

Prosser v. Elections Board, 793 F. Supp. 859 (W.D. Wis. 1992)

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

Reynolds v. Zimmerman, 22 Wis. 2d 544 (Wis. 1964)

Reynolds v. Zimmerman, 23 Wis. 2d 606 (Wis. 1964)

Shapiro v. McManus, No. 14-990,—U. S.—2015 WL 8074453 (U.S. Dec. 8, 2015)

Shaw v. Hunt (Shaw II), 517 U.S. 899 (1996)

Shaw v. Reno (Shaw I), 509 U.S. 630 (1993)

Shelby County v. Holder, 570 U.S. 2 (2013)

Silha v. Act, Inc., No. 15-1083,—F.3d.—, 2015 WL 7281602 (7th Cir. Nov. 18, 2015)

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

Timmons v. Twin Cities Area New Party, 520 U.S. 351, (1997)

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

Vieth v. Pennsylvania, 188 F. Supp. 2d 532 (M.D. Penn. 2002)

Village of Arlington Heights v. Metro Housing Development Corporation, 429 U.S. 252 (1977)

Voces de la Frontera v. Brennan, No. 2:11-CV-01011 (E.D. Wis. 2011)

Voinovich v. Quilter, 507 U.S. 146 (1993)

Washington v. Davis, 426 U.S. 229 (1976)

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008)

Wesberry v. Sanders, 376 U.S. 1 (1964)

Whitcomb v. Chavis, 403 U.S. 124 (1971)

White v. Regester, 412 U.S. 755 (1973)

White v. Weiser, 412 U.S. 783 (1973)

Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016)

Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012)