The Law of Gerrymandering

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The challenges of apportionment and redistricting are as old as representative government itself, and certainly predate the founding of America. When the U.S. Supreme Court established its "one person one vote" doctrine and required congressional districts to have equal population, the majority pointed to the "rotten boroughs" of pre-colonial Britain "under which one man could send two members of Parliament to represent the borough of Old Sarum while London's million people sent but four," *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964). The Founders grappled with these same concerns during the constitutional convention in 1787. For example, George Washington proposed that each member of Congress represent no more than 30,000 people. Thankfully his idea was not ratified or our House of Representatives would currently comprise more than 10,200 members!

Much of this book is devoted to the study of shapes and symmetry, the parceling of people and places, and the capacity of computers for mapping the universe of possible outcomes. In this chapter, we outline the basic framework for how judges think about the challenges of gerrymandering. Our goal is to provide a foundational framework for geometers, mathematicians, computer scientists, political scientists, sociologists, and others who lend their expertise to help resolve the problem of gerrymandering. Many readers will find the jurisprudence of gerrymandering to be misguided or inadequate to the task, and they may be heartened to learn that efforts to reform the law are underway. However, because judges often have the final say on whether a gerrymander violates constitutional principles, and if so, what kind of remedies are available to those who are wronged, it is imperative for all concerned parties to have a productive understanding of the legal underpinnings of gerrymandering cases that have come before the courts.

Why are courts involved at all?

At the root of all redistricting cases is a simple, but important question: why are federal courts involved in the redistricting process at all? Federal courts have limited jurisdiction to hear cases about federal law, but the U.S. Constitution does not explicitly address the problem of gerrymandering. In fact, the Constitution places immense responsibility on the states when it comes to the design and composition of the electoral structures of representative democracy. Furthermore, when it comes to partisan gerrymandering, courts not only recognize that they are on uncertain constitutional footing, but they also recognize that redistricting is primarily a political task that involves a pull and haul between different theories of democracy and political representation. All of these factors raise the question whether gerrymandering ought to be justiciable in the first place, that is whether this is an issue that the federal courts ought to resolve or whether this is an issue that belongs solely in the political process.

Before 1962, the Supreme Court consistently avoided disputes about electoral design, apportionment, and the drawing of districts. In a landmark 1962 case, *Baker v. Carr*, the Court changed course and held that questions about how lines are drawn implicate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.[i] While courts had relatively little difficulty formulating a standard for individual equality—"one person one vote"—a standard for evaluating group harms proved more difficult to articulate. But to many Justices, political gerrymandering claims were different than the malapportionment claims that it addressed in *Baker v. Carr*. So, even after the Court decided that it had a constitutional role to play in resolving disputes about the design of districts, there was a lot of uncertainty about whether the Court would also resolve political gerrymandering disputes.

In 1973, in *Gaffney v. Cummings*, the Supreme Court seemed willing to apply the Constitution to partisan gerrymandering claims. *Gaffney* was a bipartisan gerrymandering case where both parties agreed to protect their incumbents. The Court upheld the gerrymandering plan in that case and said it would not attempt "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," *Gaffney v. Cummings*, 412 U.S. 735, 754.

Gaffney was the last time the Court would agree that partisan gerrymandering claims are justiciable. In the two major cases after *Gaffney*, *Davis v. Bandemer* and *Vieth v. Jubilerer*, the Court badly split on two main issues. First, the Justices disagreed on justiciability, whether they have the power to hear these cases at all. Second, they fought about the harm, specifically, when do we know that partisan gerrymandering violates the Constitution.

Thirteen years later, in the 1986 case of *Davis v. Bandemer*, the Court dealt with another gerrymandering case, this time a partisan gerrymander. The Democrats in Indiana filed suits against the Republicans and said that the Republicans violated their constitutional rights by gerrymandering the electoral districts to minimize the political power of the Democrats. *Bandemer* showed that the Court was very divided when it came to the issue of partisan gerrymandering.

Three Justices said that the judicial enterprise of regulating partisan gerrymandering was "flawed from its inception," 478 U.S. at 147. These Justices would have dismissed the case altogether as nonjusticiable.[ii] From their perspective, the federal courts have no business resolving partisan gerrymandering claims. Six Justices, however, reiterated the importance of judicial intervention, but were split on how the courts should proceed. Four Justices criticized the trial court's reliance on election outcomes from a single election, writing that "the power to influence the political process is not limited to winning elections" (132) and that "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory" (135). These Justices failed, however, to offer an evaluative standard for the lower court to apply on remand. Instead, they merely reversed the decision. Finally, two Justices articulated what they believed to be a judicially manageable standard by importing a set of factors to guide the lower courts:

> "The most important of these factors are the shapes of voting districts and adherence to established political subdivisions. Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals. To make out a case of unconstitutional partisan gerrymandering, the plaintiff should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution. No one factor should be dispositive," 478 U.S. at 173.

Overall, a majority of the Court concluded that partisan gerrymandering claims are justiciable. The Court reversed the decision of the lower court, which had invalidated Indiana's redistricting of its state legislature. The Court concluded that the lower court had erred in its reliance on the principle that "any apportionment scheme that purposely prevents proportional representation is unconstitutional," 478 U.S. 109, 129-130. The upshot of the Court's 4-3-2 decision was that the partisan gerrymander in Indiana remained in place for the rest of the decade.

The Supreme Court did not hear another partisan gerrymandering case until 2004, when it split badly again in *Vieth v. Jubelirer.* The question in *Vieth* was "whether [the Court's] decision in *Bandemer* was in error, and, if not, what the standard [for adjudicating partisan gerrymanders] should be," 541 U.S. 267, 272. In the eighteen years between *Bandemer* and *Vieth*, the lower courts had struggled to coalesce around a workable standard. In his *Vieth* concurrence, Justice Scalia lamented that the *Bandemer* decision "has almost invariably produced the same result (except for incurring of attorney's fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused," (541 U.S. at 279). Scalia was joined by three other Justices in holding that there are no judicially manageable standards to distinguish benign partisan gerrymanders from gerrymanders that go too far. Five Justices disagreed. Pointing to the forty-year history of judicial involvement in highly political cases since *Baker v. Carr*[iii] and the Court's duty to protect the fundamental right to vote,[iv] these Justices emphasized the importance of allowing courts to intervene in gerrymandering cases. However, like the Justices in *Bandemer*, they could not agree on a standard for identifying an invidious gerrymander. Two of the Justices argued that gerrymanders are permissible unless partisanship was the sole motivation in their design (Stevens) or if partisanship was used in an unjustified way (Breyer). Justices Ginsburg and Souter argued that if a plaintiff could show (1) that she belonged to a cohesive political group, (2) that her group was intentionally cracked or packed into a district with borders that violated traditional districting principles (e.g. contiguity, compactness, and respect for existing political and geographic boundaries), and (3) if she could produce a hypothetical district that increased the political power of her political group with

fewer deviations from these traditional principles, then the burden of proof would shift to the state legislature to rebut the plaintiff's evidence.

Justice Kennedy cast a split vote. While he agreed that partisan gerrymandering is a justiciable issue, he rejected the standards proposed by Justices Stevens, Breyer, Souter, and Ginsburg and added that he could not think of a single judicially manageable standard but hoped the Court would discover one in the future. The resulting 4-1-4 plurality opinion either perfectly illustrates why the Court should not be involved in these cases in the first place or reflects just how close the Court is to reining in an abuse of power (just one vote!). Whether or not the metrics described in other chapters of this volume are motivated by Justice Kennedy's search for the unknown, each one of them will enhance our understanding of the tradeoffs inherent in redistricting and the stakes involved. To the extent that these algorithms and empirical measures *will* influence the Supreme Court's thinking, that influence will be driven as much by legal considerations as by the ingenuity and accessibility of the metrics themselves. To predict what these legal considerations might be, we provide a brief overview below of the various standards that have already been considered and rejected. We begin by distinguishing the legally thorny and open question of partisan gerrymandering from the equally thorny but more settled caselaw dealing with racial gerrymandering.

Partisan vs. Racial Gerrymandering

One argument that opponents of partisan gerrymandering sometimes make is that partisan gerrymandering is just like racial gerrymandering. This is because, in general, judges have been quite receptive to legal challenges targeting racial gerrymanders—redistricting plans that dilute the voting power of racial minorities. The reason is that racial minorities are a protected class under the Constitution. The original purpose of the 14th Amendment's equal protection clause was to provide legal protection from political oppression against former slaves and African Americans more generally. As an original matter, the equal protection clause was not intended to protect the legal rights of other groups such as women, gays and lesbians, and certainly not Democrats and Republicans, though the Court has interpreted the equal protection clause to protect groups other than African Americans. In addition to this constitutional protection,

Congress created additional statutory protections in the Voting Rights Act (VRA) of 1965. The VRA explicitly prohibits any election practice or procedure that abridges the right of racial minorities to vote and to elect candidates of their choice. As a result, courts have been open and responsive to legal challenges of racial gerrymanders. Over the course of several cases, the Supreme Court has articulated a set of judicially manageable standards to enforce both the equal protection clause of the 14th Amendment and the Voting Rights Act. In the context of the 14th Amendment, courts require plaintiffs to provide evidence that race was the "predominant factor" in deciding where to draw district lines, *Miller v. Johnson*, 515 U.S. 900 (1995). Courts sometimes point to "bizarrely" or "irregularly" shaped districts as evidence that race was central to their design, but the shape of a district is insufficient by itself to overturn a racial gerrymander. For cases alleging vote dilution under the VRA, courts do not explicitly require plaintiffs to provide evidence of intentional discrimination (though that evidence is always very powerful) but they require plaintiffs to show how, in the "totality of circumstances," racially drawn districts "interact with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[v]

Both the "predominant factor" standard and the "totality of circumstances" test have proven to be judicially manageable, and on their face these standards could easily be imported to cases dealing with partisan gerrymandering. Indeed, one vital skill for lawyers is the ability to draw analogies to relevant, settled precedent and racial gerrymanders present an ideal analogy. It is not surprising, then, that the standards suggested by Justices Stevens and Breyer in *Vieth* to address partisan gerrymandering parallel the "predominant factor" test from the racial gerrymander in *Miller v. Johnson*. Furthermore, the various factors proposed by the dissenting Justices in *Bandemer* as well as the multi-pronged test proposed by Justices Souter and Ginsburg in *Vieth* are easily analogized to the "totality of circumstances" test in VRA cases.

On the other hand, racial gerrymandering differs from partisan gerrymandering in important ways that may limit the power of these analogies. In his plurality opinion in *Vieth*, Justice Scalia argued that "the Constitution clearly contemplates districting by political entities" whereas "the purpose of segregating voters on the basis of race is not a lawful one." Thus, "to the extent that our racial gerrymandering cases represent a model of discernible and

manageable standards, they provide no comfort here [in the partisan context]," 541 U.S. at 286. Justice Kennedy was silent in *Vieth* on the question of importing the judicial standards from racial gerrymandering cases. Although he presumably agreed with Justice Scalia that racial gerrymandering cases start on stronger constitutional footing given America's long history of race discrimination, Kennedy's particular concern in *Vieth* was not about constitutional footing; he argued that courts *should* hear partisan gerrymandering challenges. The open question to Kennedy was whether there were judicially discoverable and manageable standards to evaluate a gerrymander. The racial gerrymandering cases proved that there were, yet Kennedy chose not to adopt them, with very little commentary about his thinking. Whatever the case, future attempts to articulate a new standard that will garner five votes on the current Supreme Court will likely need to distinguish themselves from, not analogize themselves to, the standards used by courts in racial gerrymandering cases.

Constitutional provisions regulating partisanship

Our quest for a judicially discoverable and manageable standard begs two questions: (1) what is a legal standard? and (2) what does it mean for a standard to be "judicially discoverable and manageable?" First, a legal standard is simply a guideline for judges. A standard typically identifies factors for judges to consider and provides direction for evaluating the relative weight of each factor. Legal standards are less strict than legal rules, which provide bright line definitions and thresholds, or that otherwise compel a particular outcome. Standards provide judges with more discretion than rules, and often require judges to balance various interests. In the context of redistricting, for example, judges may be asked balance the rights of individuals to be treated equally against the rights of elected officials to draw new districts after each Census. Or a judge may be asked to balance the interest of government responsiveness (which might suggest more competitive districts) with government representativeness (which might suggest more homogeneous districts). Legal standards provide flexibility to individual judges, which means there is no guarantee of fairness *ex ante*. However, legal standards allow judges to tailor their considerations to each individual case. This flexibility helps protect against any

unintended consequences of applying a strict legal rule and thus is more likely to ensure a fair outcome *ex post*.

The phrase "judicially discoverable and manageable" is a term of art that was first articulated in *Baker v. Carr* when the Supreme Court decided to enter the political thicket of apportionment and redistricting. In *Baker* the Court distinguished between cases that posed political questions (and thus not justiciable) and cases where judicial intervention is appropriate. According to the Court, if a case turns on a question or standard that is not "judicially discoverable or manageable" then courts should avoid the case altogether. What the Court was asking, fundamentally, is whether the federal courts have the competency to adjudicate a particular category of cases. This competency is measured in two ways. First, the courts as an institution must be properly situated to adequately address the central conflict of a case. Second, courts must be able to look to the U.S. Constitution for a theory of harm and provide a remedy that flows from a constitutional framework, past practice, and precedent. In other words, a judicially discoverable and manageable standard means that courts are focused on legal questions as opposed to questions about political theory, public policy, and/or empirical data. While this focus does not rule out empiricism, it means that are not necessarily searching for new and improved empirical data. Instead the Court is looking for a clear articulation of who has been harmed, what the harm is, and how the harm was inflicted. Empirical data will play an important role in helping judges address these questions, but the usefulness of this data will turn on the Court's opinion about which constitutional rights are implicated and how they have been deprived.

Guarantee Clause

One of the earliest proposed legal standards for evaluating partisan gerrymanders was based on the argument that these gerrymanders deprive individuals from a republican form of government. Article IV of the U.S. Constitution reads, "The United States shall guarantee to every State in this Union a Republican Form of Government." According to a legal standard based on this Guarantee Clause, a partisan gerrymander would violate the constitution when districts skewed electoral outcomes so much that members of the state legislature do not

properly represent a state's population. Relevant data for this inquiry might include a comparison of policy outcomes to the preferences of the electorate,[vi] or more simply a comparison of electoral outcomes to the distribution of registered voters as evidence that elected officials and their constituents are not ideologically aligned.[vii] The Supreme Court has repeatedly rejected the Guarantee Clause as an appropriate basis for any legal challenge, let alone partisan gerrymandering cases. In 1849 the Supreme Court declared that legal challenges based on the Guarantee Clause are nonjusticiable. In *Luther v. Borden* the Court held that "no one, we believe, has ever doubted [that] the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure," 48 U.S. 34. Later challenges to the ballot initiative process and other direct democracy procedures that allegedly violate the Guarantee Clause were dismissed by the Court, see, e.g. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912). In 1946, the Court summarily dismissed a challenge that Illinois's congressional districts violated the Guarantee Clause by writing a "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts," *Colegrove v. Green* 328 U.S. 549, 556. As we outlined above, the Supreme Court changed its position about the justiciability of partisan gerrymandering in 1946, but its decision was not rooted in a new understanding of the Guarantee Clause, but instead by holding that apportionment and districting procedures implicate rights protected under the equal protection clause of the 14th Amendment. Thus, future challenges to partisan gerrymandering based on the Guarantee Clause are nonstarters.

Equal Protection Clause

The Supreme Court's holding in *Baker v. Carr* that an apportionment scheme might deprive voters of equal protection of the laws not only introduced judicial review into the districting process, but also helped to clarify what harm(s) the Court was worried about. As a result, nearly every challenge to partisan gerrymandering since 1962 has relied on the Equal Protection Clause. The 14th Amendment to the U.S. Constitution states, in part, that "No State shall…deny to any person within its jurisdiction the equal protection of the laws." A legal standard based on equal protection requires a court to examine whether a partisan gerrymander

is rationally related to a legitimate state interest. This inquiry has two factors: (1) are partisan considerations illegitimate? and (2) is the gerrymander itself so invidious that it lacks any rational justification? With respect to the first factor, the Supreme Court has acknowledged that "as long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences were intended." Thus, a holding that any gerrymander created with partisan intent violates the equal protection clause will open the floodgate of litigation since every single district in the United States is infected with some level of partisanship. To avoid this floodgate, the Court could evaluate partisan consideration along a continuum and articulate a threshold beyond which partisan motives become illegitimate.[viii] As a reminder, two Justices in the 2004 case *Vieth v. Jubelirer* adopted this approach and argued that partisan motivation becomes illegitimate when "the minority's hold on power is purely the result of partisan manipulation and not other factors," 541 U.S. at 360 or "when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage," 541 U.S. at 318. Notably, this approach did not garner a majority of votes on the Supreme Court and one of the Justices that espoused this view has since retired.

The remaining factor for assessing whether a gerrymander violates the Equal Protection Clause asks courts to evaluate whether the redistricting plan is so extreme that it lacks any rational relationship to representative government. This inquiry has split the Supreme Court as well, with several Justices presenting their own view about when a gerrymander becomes too extreme. Some Justices have focused on the districting process—were both parties involved in the plan's design? did the legislature hold public hearings or meetings? were traditional districting criteria considered and/or followed?—while others have focused on the real and predicted effects of the redistricting plan. This latter assessment of a plan's effects has garnered the most attention by the news media, academics, and others. Much like the judicial inquiry into the *motivations* behind a gerrymander, the analysis of a districting plan's *outcomes* looks at a continuum of partisan differences and tries to identify a threshold beyond which the unequal political opportunities of the minority party goes too far. Courts have measured this unequal opportunity in various ways, using many of the metrics featured in other chapters of this volume. One unifying theme among the courts appears to be partisan symmetry, which the

Supreme Court has described as "a helpful (though not talismanic) tool."[ix] The principle of partisan symmetry states that the number of seats awarded to each party should correlate with the number of votes earned, no matter which party earned those votes. If Democrats win 48% of the vote but earn 55% of the seats, partisan symmetry demands that in future elections, if Republicans win 48% of the vote they should earn 55% of the seats. The logic of partisan symmetry has guided the courts in their evaluations of various gerrymanders, though the courts have not coalesced around any particular measure, and in a 2006 challenge to a partisan gerrymander in Texas Justice Kennedy wrote that "asymmetry alone is not a reliable measure of unconstitutional partisanship," *LULAC v. Perry*, 548 U.S. 399, 420 (2006). Metrics inspired by the logic of partisan symmetry include numerical differences in district-based voter distributions (e.g. efficiency gap, mean-median difference), durational asymmetry (e.g., predicted loses over multiple election cycles), and simulated conditions that identify outliers (e.g., comparing an actual plan to thousands of simulated alternative maps). Despite these various reasonable approaches, there is still no consensus about which measures are relevant, let alone what the threshold is for distinguishing a benign gerrymander from one that is excessive. Complicating matters further is a warning by Justice Kennedy in *Vieth* that "excessiveness is not easily determined." Justice Kennedy explains that subtle partisan effects can be equally or more problematic than just the most extreme plans. He illustrates this point by comparing the aggregate effects of a subtle gerrymander across three states that provides more additional seats for party X than an egregious gerrymander in one state where party Y wins all of the seats. Justice Kennedy's example is problematic because the redistricting process is limited to individual states so any judicial remedy will be limited to individual states, regardless of any interstate coordination.

At the time of this writing, new approaches, untested in the courts, continue to emerge for addressing the equal protection problem in redistricting. Two examples illustrate the creativity and breadth of proposals in this area. With respect to the redistricting *process*, consider the proposal by three Carnegie Mellon computer scientists who adopt the idea of "I cut you choose" fairness. The basic idea is that one party generates a districting plan and gives it to the other party, who freezes one district in place, redraws a new map around that district, and

passes it back to the first party and so on until a final map is produced.[x] Second, with respect to determinations about a redistricting plan's extreme *effect*, Sam Wang has proposed the selection of "fantasy delegations," which are groups of districts across the country that match the statewide partisan totals of a challenged plan. According to Wang, judges would compare election outcomes of a challenged plan to the outcomes in these fantasy delegations to identify when a gerrymander is a true outlier.[xi]

In short, judges have a plethora of metrics available to them for deciding when, how, and why a redistricting plan potentially violates the Equal Protection Clause. This surplus of options has proven to be a double-edged sword as individual judges have gravitated towards different measures in different cases, and the Supreme Court has failed to unite around a single standard to guide lower court judges in their analyses.

First Amendment

More recently, the Court has suggested that the Equal Protection Clause may not even be the proper constitutional hook to begin with. In this term's *Gill v. Whitford* decision, Justice Kagan hinted that the plaintiffs "may have wanted to do more than present a vote dilution theory." In her words, "partisan gerrymandering no doubt burdens individual votes" but she argued that it "also causes other harms," specifically associational harms under the First Amendment. Whereas the Equal Protection Clause protects individuals from being treated differently in general, the First Amendment protects individuals from viewpoint discrimination by the government and has been used to protect the associational rights of political organizations. The First Amendment states that "Congress shall make no law…abridging the freedom of speech." This Free Speech Clause prevents the government from treating people differently *based on their political beliefs.* Justice Kennedy highlighted this possible constitutional hook in his *Vieth* opinion when he wrote:

> "The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."

Pointing to various First Amendment cases, Kennedy concluded that "In the context of partisan gerrymandering, First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." Justice Kagan picked up on this idea in her concurring opinion in *Gill v. Whitford*, citing to Kennedy six times and providing the following example:

> "Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all the other involved members of that party," 585 U.S. at p. 9 (2018).

Plaintiffs in *Gill v. Whitford* raised a First Amendment claim, but as Justice Kagan noted, their argument lacked "sufficient clarity or concreteness to make it a real part of the case." The plaintiffs might be excused since, unlike the Fourteenth Amendment which has generated many metrics measuring deviations from equality, there is no developed caselaw or clearly-articulated standard for courts to consider in the face of a First Amendment challenge to partisan gerrymandering. Another case this term illustrates one possible approach. Maryland's 6th congressional district was represented by a Democrat for twenty-two years between 1971-1993, and then by a Republican for twenty years from 1993-2013. During the 2011 redistricting cycle, the 6th district was redrawn to heavily favor Democrats who controlled both legislative chambers and the governor's mansion. The result was immediate and drastic. The Republican incumbent who was reelected in 2010 by 28 points, lost his bid in 2012 by more than 20 points. A group of Republican voters filed suit alleging that the 6th district was reconfigured in 2011 as retaliation for supporting Republican candidates, or in other words retaliation based on how they voted, in violation of the First Amendment. At trial, the lower court held that to prevail the plaintiffs must provide evidence that (1) the district was intentionally drawn to burden voters based on how they voted, (2) that the burden resulted in a "tangible and concrete adverse effect," and finally that (2) was caused by (1). Upon a showing of all three, the burden would shift to the state to prove there was some lawful alternative to explain the district's design.

Notice that the trial court's inquiry is not very different from the framework of the Equal Protection Clause. In both cases, courts look for evidence of partisan intent and partisan effects.

The difference is that under the First Amendment the effects are framed in terms of their burden on voters instead of their relationship to voters in a different party.

In terms of Maryland's 6th district, the lower court held that the evidence of intentional retaliation was unequivocal. However, because the Republican challenger in 2014 mounted a very competitive campaign (losing by just 1.5%), the court held that plaintiffs had not suffered a tangibly adverse effect, and the Supreme Court affirmed the ruling in *Benisek v. Lamone*. In short, the gerrymander was not effective enough in the court's eyes to justify the burden shifting framework, let alone the requested injunction. Despite the disposition of this case, the language of Kennedy's plurality opinion in *Vieth* and Justice Kagan's concurrence in *Whitford*, there is a reasonable likelihood that the Court will be receptive to First Amendment challenges going forward. To date relatively scant attention has been paid to the First Amendment in the gerrymandering context, and there is room for important contributions by mathematicians, social scientists, computer scientists and others for defining the scope of "adverse impacts" on voters, measuring this "burden," and conceptualizing the operation of "but-for causation" as part of the inquiry.

Elections Clause

Legal scholars have also pointed to the Elections Clause of the Constitution as a way to walk the fine line of maintaining a republican form of government while limiting the judicial role as much as possible.[xii] The Elections Clause is found in Article 1 § 4 of the Constitution, which reads, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations." Richard Pildes notes that under the Elections Clause, partisan gerrymandering is a limited, enumerated power. Pildes further argues that the Supreme Court has "seen the enforcement of limits on enumerated grants of power as central to [its] role" and thus the Elections Clause provides a structural constraint on the states's power to gerrymander, giving support to the claim that partisan gerrymandering is a justiciable issue.[xiii] In a different line of attack, Ned Foley has argued that because the Elections Clause grants ultimate authority over the "places and manner" of elections to Congress,

Congress could immediately supersede any federal court ruling it disagreed with. This power sharing arrangement should clip the wings of those who worry the Court is overstepping its properly prescribed judicial role, such as Justice Kennedy and Chief Justice Roberts. According to Foley, when a court nullifies a state's congressional map under the Elections Clause, it acknowledges that Congress is free, even welcome, to intervene.

Note that there are two important limitations of an Elections Clause argument. First, the Elections Clause is more relevant to the threshold inquiry about justiciability than about any particular standard or measure. The Elections Clause serves as a relief valve to alleviate the pressure that courts feel when stepping into the political realm. Second, the Elections Clause only applies to federal gerrymanders, so challenges to state legislative districts cannot benefit from this relief valve. These limitations do not undermine the potential for the Elections Clause to transform the law of gerrymandering, but it is too early to tell how the argument will fare in the courts. Plaintiffs raised an Election Clause argument in a federal court case challenging North Carolina's 2016 remedial congressional map as well as in a state court case challenging Pennsylvania's 2011 congressional map. The Pennsylvania state supreme court rejected the Elections Clause claim (although it struck down the map for other reasons), and the federal court in North Carolina was silent on this particular claim.

State constitutions

Finally, state courts provide an alternative forum to challenge partisan gerrymanders. Most state constitutions explicitly protect the right to vote and provide for free and fair elections. For example, Article 1 § 5 of the Pennsylvania state constitution states that, "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Eighteen plaintiffs, one from each congressional district in Pennsylvania, recently challenged the 2011 congressional maps that were drawn by the Republican-majority legislature. The plaintiffs, all Democrats, alleged that the maps were unconstitutional under the state constitution. In February 2018 the state supreme court sided with the plaintiffs and struck down the plan as an unconstitutional gerrymander under Article 1 § 5 of the state constitution. The court wrote that, "while federal courts have, to date, been

unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter…We conclude that in this matter [the state constitution] provides a constitutional standard, and remedy, even if the federal charter does not." The standard adopted by the court looked similar to the approach taken in federal courts with respect to the Equal Protection Clause. The court noted that traditional redistricting criteria were subordinated to partisan motivations. Experts at trial also provided evidence that the congressional map was an outlier compared to 1,000 computer-generated alternative plans with respect to measures of compactness and partisanship. The efficiency gap was also used to show that Republicans experienced significant partisan advantage under the challenged plan. Based on this evidence, the court held that because the 2011 congressional maps "aimed at achieving unfair partisan gain," it "undermines voters' ability to exercise their right to vote in free and "equal" elections if the term is to be interpreted in any credible way." When the legislature could not generate a satisfactory new map, the court hired a consultant to draw a new map that will be used in the 2018 midterm election.

The experience in Pennsylvania is not without controversy. The Republican-majority legislature was upset by the court's ruling and the president of the state senate filed ethics complaints against the judges. A dozen state lawmakers have since threatened to impeach the judges who voted to strike down the map, an act that threatens the separation of powers and independent judiciary in Pennsylvania, but also plays into the fears of Chief Justice Roberts who worries that when the Supreme Court inserts itself into political matters, the entire judiciary risks being perceived as partisan and biased. Nevertheless, the Pennsylvania state supreme court illustrates that state constitutions and state courts are relevant and important to the inquiry into partisan gerrymanders. In other words, there are fifty legal frontiers waiting to be explored.

Alternative approaches

While nearly every challenge to partisan gerrymandering relies on constitutional language, there are two alternative approaches are worth noting.

Race As Party

First, because the distinction between partisan and racial gerrymanders is not always very clear, one possible strategy is to focus on the racial effects of a partisan gerrymander. In other words, instead of analogizing to the legal standards used in racial cases, the idea is to coopt the racial gerrymandering framework altogether. Race and party correlated quite well in most states, meaning a partisan gerrymander is likely to look like a racial gerrymander.[xiv] To the extent that courts are receptive to challenges based on race, not party, plaintiffs are more likely to succeed in striking down a partisan map if they focus on the racial effects. In 2016, the 4th Circuit invalidated a partisan-motivated election reform bill in North Carolina (that did not include a redistricting plan) in part because the state legislature used race as a proxy for partisanship. See *North Carolina State Conference of NAACP v. McCrory* (2016). In the gerrymandering context, however, the correlation between race and party has not yet doomed any partisan gerrymanders on racial grounds. On the contrary, states have defended racial gerrymanders by arguing that the true motivation was partisanship, and in one case (see below) a racial gerrymander was replaced with an openly partisan one.

In Texas, a three-judge panel struck down the state's 2011 congressional redistricting plan because it was an impermissible racial gerrymander. The state had argued that there was no proof their plan was "enacted for the purpose of diluting minority voting strength rather than protecting incumbents and preserving Republican political strength won in the 2010 elections." Nevertheless, the state updated its redistricting plan in 2013. This new plan met a similar fate at the lower court, which found that Texas had used "race as a tool for partisan goals" with goal of "intentionally destroy[ing] an existing district with significant minority population that consistently elected a Democrat." However, in *Abbott v. Perez* (2018) the U.S. Supreme Court reversed the lower court and upheld the 2013 districting plan.

North Carolina's 2011 congressional redistricting plan was also struck down by a three-judge panel because the court held that two districts were unconstitutional racial gerrymanders. The Supreme Court upheld this ruling in *Cooper v. Harris* (2017) while applauding the "formidable task" of lower courts who must make a "sensitive inquiry into all the circumstantial and direct evidence of intent to assess whether the plaintiffs have managed to

disentangle race from politics and prove that the former drove a district's lines." Recognizing legal implications of racial vs. partisan gerrymandering, the North Carolina state legislature responded by enacting a bold and extreme partisan gerrymander. Representative David Lewis, who co-chaired the legislature's Joint Select Committee on Redistricting, openly acknowledged his desire to maximize Republican seats. At one hearing he argued that the goal was to "draw the maps to give a partisan advantage to ten Republicans and three Democrats because I do not believe it's possible to draw a map with 11 Republicans and two Democrats." When confronted that this was the very definition of a partisan gerrymander, Lewis responded that "a political gerrymander is not against the law." Representative Lewis was right, at least for the time being. Despite his brazen statements, the Supreme Court in *Rucho v. Common Cause* (2018) declined to prevent the districts from being used during the 2018 election, though the Court will have the opportunity to evaluate the districts again during the 2018-2019 term.

State and Federal Statutes

Finally, legal standards and remedies are available through political channels. Much like the Voting Rights Act has proven especially powerful in cases challenging racial gerrymanders, Congress and state legislatures can enact statutes to complement (or substitute for) constitutional protections. Remember that the Supreme Court has explicitly rejected numerous times the argument that the Constitution guarantees a right to proportional representation. For example, when the lower court in *Bandemer* invalidated Indiana's 1981 partisan gerrymander because it "purposely prevented proportional representation," the Supreme Court reversed the decision and wrote that "our cases clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," 478 U.S. 109, 130 (1986). However, just because the Constitution doesn't *require* proportional representation, it does not *forbid* it either. Any state legislature is free to enact a standard of proportional representation into its redistricting process. And Congress is also free to create a standard of proportional representation for states to follow when drawing congressional districts. While this outcome is highly unlikely, it

underscores the point that partisan gerrymandering is as much a political issue as a legal one. This means that states are not constrained by the limited number of provisions in the U.S. Constitution that speak to fairness and representation. So while proportional representation may be a pipe dream, states are also free to adopt redistricting standards that incorporate curvature, the efficiency gap, Reock scores, and computer simulations.

A call to action

The purpose of this book is to introduce mathematicians, geometers, and social scientists to the challenges of defining and evaluating partisan gerrymanders. Our goal in this chapter is to press these non-legal constituencies to understand the multiple levels why political gerrymandering is a difficult problem to solve. Gerrymandering is a sickness whose cause(s) and cure(s) are hotly contested. Imagine you are sick and a series of doctors says "you are going to die, but we have no clue why and no idea how to cure you. All we know is that we are unanimous in the fact that you are going to die." Understanding the cause(s) of gerrymandering is just as important as, and perhaps necessary to, understanding its cure(s). This understanding can be evidence-based, driven by logic and theory, or even based on intuition. But our understanding needs to be articulated clearly, widely disseminated, and ultimately popularized.

Empirical data may or may not provide a magic bullet that resolves this issue, but quality data will no doubt play an important role. For example, to the extent that the Court is concerned about the durational impact of a gerrymandering plan (see, e.g. in *Bandemer v. Davis*) data on population shifts, changing sentiments, and campaign strategy will prove useful. To the extent that the Court's preferred standard is based on the idea of partisan symmetry, metrics like the efficiency gap and the mean-median difference will be more relevant. And whether courts evaluate electoral harms under the Equal Protection Clause or the First Amendment, estimates of electoral outcomes, including simulated outcomes, are likely to come into play.[xv]

Perhaps most importantly, despite our disproportionate focus on the U.S. Supreme Court, there are real opportunities for action at the state and local level. Justice Brandeis famously wrote that "it is one of the happy incidents of the federal system that a single

courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 388 (1932). Regardless of the outcome of the various gerrymandering cases the Court will hear in the next few years, there is room for readers to exercise their preferred solutions; first at the local and state level and then perhaps at the federal level. School boards, city councils, and state legislatures can be laboratories for establishing new frameworks that will change the way people think about gerrymandering. These laboratories are also venues for testing out new theories, experimenting with different methodologies, and observing the effectiveness of various remedies (e.g., single-member districts vs. transferable votes). More testing will lead to more understanding, and more understanding will improve the quality of challenges raised in the courts in the future. Justice Felix Frankfurter served on the Supreme Court from 1939 to 1962. He was skeptical that courts were equipped to address the problems of political gerrymandering. Whether or not you agree with his view on the justiciability of these issues, Frankfurter gently reminded readers that the source of all government power "ultimately lies with the people...the vigilance of the people in exercising their political rights," *Colegrove v. Green*, 328 U.S. 549, 554-555 (1946). We are far from a settled legal equilibrium, meaning all hands on deck.

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[i] "We conclude that the complaint's allegations [that the state of Tennessee's refusal to redistrict for 60 years] present[s] a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision," *Baker v. Carr*, 369 U.S. 186, 237 (1962).

[ii] "The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment,"478 U.S. 109, 147 (1986).
[iii] See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland County*, 390 U.S. 474 (1968); *Kirkpatrick v. Preisler,* 394 U.S. 542 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989).
[iv] "Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution," *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring).
[v] *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).
[vi] See, e.g., Lax, Jeffrey R. and Justin H. Phillips. 2012. "The Democratic Deficit in the States," *American Journal of Political Science*, Vol. 56, No. 1, pp. 148-166.
[vii] See, e.g., Stephanopoulos, Nicholas O. 2014. "Elections and Alignment," *Columbia Law Review*, vol. 114, pp. 283-365.
[viii] Justin Levitt has argued that partisanship should be evaluated along a spectrum that distinguishes partisan considerations by type (e.g., coincidental, ideological, responsive, tribal) rather than by degree. *See* Levitt, Justin. 2014. "The Partisanship Spectrum," *William & Mary Law Review*, vol. 55, pp. 1787-1868.
[ix] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 468 (2006) (fn. 9).
[x] See Pegden, Wesley, Ariel D. Procaccia, and Dingli Yu. 2017. "A Partisan Districting Protocol with Provably Nonpartisan Outcomes," *Working paper* available at: https://arxiv.org/abs/1710.08781.
[xi] Wang, Samuel S.-H. 2017. "Three Tests for Practical Evaluation of Partisan Gerrymandering," *Stanford Law Review*, vol. 68, pp. 1263-1321.
[xii] Foley, Edward B. 2018. "Constitutional Preservation and the Judicial Review of Partisan Gerrymanders," *University of Georgia Law Review* (forthcoming 2018).
[xiii] Pildes, Richard H. 2018. "The Elections Clause as a Structural Constraint on Partisan Gerrymandering of Congress," *SCOTUSblog Symposium*, June 19, 2018.
[xiv] See, e.g., Hasen, Richard L. 2018. "Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases," *William & Mary Law Review*, Vol. 59, No. 5, pp. 1837-1886.
[xv] For a more detailed framework about how empirical data and mathematical tools can most effectively be utilized in litigation, see Wang, Samuel S.-H. 2018. "An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into a Two-Part Framework," *Harvard Law Review Blog*, April 11 at https://blog.harvardlawreview.org/an-antidote-for-gobbledygook-organizing-the-judges-partisan-gerrymandering-toolkit-into-a-two-part-framework/.