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Courting Justice . . . Kennedy: A Failed Attempt at Solving Partisan Gerrymandering

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I. Introduction

222. Most people probably agree that partisan gerrymandering is "distasteful."[3] Partisan gerrymandering entrenches politicians in power, contravening the will of the people and democratic principles. The state legislature, the body responsible for redistricting, often possesses the power — but not the will — to fix the problem. As politicians seek reelection, it stands to reason that politicians will use the redistricting process to benefit their electoral success and their parties, thus perpetuating partisan gerrymandering.

223. Over three decades ago, the Supreme Court stepped in to redress partisan gerrymandering. In 1986, in *Davis v. Bandemer*,[4] the Court first ruled that partisan gerrymandering challenges are justiciable. But from 1986 to 2004, a district map had never been successfully stricken as a partisan gerrymander because the test formulated by the *Bandemer* plurality was so exacting. From 2004 to present day, the Court has not been able to agree on a standard, and thus has not stricken a map as an unconstitutional partisan gerrymander. The *Vieth v. Jubelirer*[5] Court divided along partisan lines, with the liberal justices favoring challenges and the conservative justices concluding that such claims are non-justiciable. Justice Kennedy sat in the middle of the divide, not willing to find partisan gerrymandering challenges non-justiciable, but also not agreeing on a standard.

3 Transcript of Oral Argument at 42, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

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

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

224. In *Vieth*, Justice Kennedy expressed his belief that the First Amendment may be the more appropriate vehicle for challenging a map. Until that point, petitioners brought partisan gerrymandering challenges under the Equal Protection Clause. A couple of years later in *LULAC v. Perry*,[6] Justice Kennedy voiced what some deemed favorable words for partisan symmetry — a standard for measuring how similarly or dissimilarly each party translates votes to seats.

225. The Court's composition has changed since *Vieth* and *LULAC*, but challengers understood that Justice Kennedy possesses the crucial fifth vote. For this reason, two partisan gerrymandering cases that have worked their way up to the Court were litigated under First Amendment theories and the use of partisan symmetry. The first case is *Gill v. Whitford*,[7] which the Court set for argument in October 2017. After hearing argument in *Gill*, the Court set another partisan gerrymandering case — *Benisek v. Lamone*[8] — for argument in March 2018.

226. *Gill* was an Equal Protection Clause and First Amendment challenge to the statewide Wisconsin map, which was drawn by Republicans. The challengers in *Gill* advanced a new measure of partisan symmetry called the "efficiency gap." The efficiency gap compares how each party wastes votes in a statewide districting map. Wasted votes are defined as each vote cast for a losing candidate and each vote over the bare minimum required to win an election. *Benisek v. Lamone*, in contrast, was a First Amendment challenge to a single district of Maryland's map drawn by Democrats. With two theories and two different maps drawn by different political parties, the Court appeared poised to solve partisan gerrymandering once and for all.[9]

227. But when the *Gill* and *Benisek* opinions were issued, no standard could be found. Instead, the Court kicked *Benisek* under the standard of review and *Gill* for lack of standing.[10] The justices agreed on one thing: the Court did not want to tackle the merits of the partisan gerrymandering cases. *Gill* does do something, though. It requires vote dilution theories to be brought on a district-by-district basis. The efficiency gap does not, however, measure vote dilution on a district-by-district basis. Instead, the efficiency gap provides a measurement of the gerrymandering effects on a statewide basis.[11] Therefore, proceeding on a vote dilution theory, future challengers will need to use alternative evidence to make a sufficient showing of standing.

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6 *LULAC v. Perry*, 548 U.S. 399 (2006).

7 *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

8 *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

9 *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

10 *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

11 *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018).

228. *Gill* was not all bad news for challengers. The Court remanded the case, instead of dismissing, and allowed the challenger the opportunity to relitigate the case under the new standing framework. The *Gill* decision — though nine to zero, except for Part III — is a relatively narrow holding. Additionally, Justice Kagan authored a concurrence in which she provided a roadmap for future challenges. Her concurrence garnered the support of Justices Ginsburg, Breyer and Sotomayor. Justices Kagan and Sotomayor, neither of whom was part of the *Vieth* Court, staked out positions in favor of partisan gerrymandering challenges.[12]

229. Most importantly, the Court did not revisit whether partisan gerrymandering claims are justiciable.[13] But after the Court issued *Benisek* and *Gill*, something happened: Justice Kennedy announced his retirement.[14] With the departure of Justice Kennedy in July, Justice Kavanugh will be taking the bench. Justice Kennedy protected the justiciability of partisan gerrymandering challenges; Justice Kavanaugh may not. Accordingly, with a new justice, the Court may have the votes to vindicate Justice Scalia's plurality in *Vieth* and rule that partisan gerrymandering challenges are non-justiciable. In accordance, "even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience."[15]

230. Part I of this article provides an overview of the redistricting process in the United States, including how technological advances have allowed for increased partisan advantage in redistricting. Part II discusses the Supreme Court's jurisprudence in redistricting cases prior to *Benisek* and *Gill*. Part III describes the efficiency gap and analyzes the efficiency gap after *Gill*. Part IV begins with the background on the First Amendment theory for a partisan gerrymandering claim and goes on to conduct a post-mortem of the theory after *Gill* and *Benisek*. Finally, Part V considers standing for future partisan gerrymandering challengers.

II. The Landscape of the Redistricting Process and Partisan Gerrymandering in the United States

231. Historically, redistricting has been a relatively unrestricted power exercised by the legislatures of states. In the second half of the 20th century, however, both the U.S. legislature and the Supreme Court stuck their oars in redistricting waters. In *Reynolds v. Sims*,[16] the Supreme Court imposed the one person, one vote rule which requires

12 *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

13 *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

14 Justice Anthony M. Kennedy, Letter from Justice Kennedy to President Trump (June 27, 2018).

15 *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015).

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

districts of roughly equal population. With the Voting Rights Act,[17] Congress stepped in to prevent the dilution of minority votes. And the Supreme Court has applied the Equal Protection Clause to strike redistricting maps as unconstitutional racial gerrymanders.[18] State legislatures otherwise possess broad authority to draw the district lines in their state.

232. Since the founding of the United States and the beginning of the redistricting process, states' legislators have used their redistricting power for party advantage. This process, named partisan gerrymandering, occurs when a political party in power uses its district drawing power to draw the districts in a way that favors that party in elections. The term gerrymandering traces its roots to founding father and American statesman, Elbridge Gerry (pronounced "Gary"). Then-governor Elbridge Gerry famously, or infamously, reshaped a district in the Massachusetts map to resemble a salamander in order to favor the Democratic-Republicans. "The term 'gerrymander' is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander."[19] Though Gerry and his salamander map coined the term gerrymandering, the practice in the United States actually precedes Gerry's salamander map and the First United States Congress with Patrick Henry's gerrymandered James Madison's district in Virginia.[20] In fact, the practice dates back to England.[21]

233. Indeed, partisan gerrymandering has been a part of the American political system since its inception and democratic principles have survived. But advancement in map drawing software has enabled map drawers to draw districts in a way that maximizes partisan advantage while still complying with traditional redistricting criteria.

Overview of Redistricting

234. The federal rules for state redistricting require two things: (1) equally populated districts, and (2) racially neutral districts. The Constitution provides that a state's population dictates the number of representative to be elected. And every 10 years a census is to be conducted to determine the number of congressional seats.[22] The Equal Protection Clause and the Voting Rights Act also provide constraints on states. The Voting

17 Voting Rights Act, §§ 2, 5 (1965).

18 See, e.g., *Shaw v. Hunt,* 517 U.S. 899, 902 (1996).

19 *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).

20 See, e.g., RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS, 148 (2006).

21 Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1043 (2005); *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

22 U.S. CONST. art. I, § II.

Rights Act prohibits states from drawing districts that dilute the votes of minorities.[23] And the Supreme Court has held that the Equal Protection Clause prohibits states from drawing districts based on race.[24]

235. In addition to the federally imposed regulations, individual states frequently impose their own redistricting restrictions. These commonly include contiguity, compactness, community interest and political boundaries.[25] Ohio, for instance, requires contiguity and compactness and compels consideration of political boundaries.[26] Similarly, California has a provision in its constitution that requires contiguity, respect for political boundaries, respect for community interests and, if possible, compactness.[27]

236. Beyond the federal and state constraints, states are free to dictate the redistricting process. Indeed, the U.S. Constitution provides that states may govern the time, place and manner of holding elections for congressman and senators, though Congress may preempt state regulation. "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, except as to the Places of chusing Senators."[28] This has resulted in a wide variety of methods for conducting the redistricting process.

237. To combat partisan gerrymandering, some states have enacted independent commissions and provided those commissions with the redistricting power. For example, for state legislative redistricting, Ohio employs a redistricting board consisting of the governor, auditor, secretary of state and four people appointed by the majority and minority leaders of the General Assembly.[29] Similarly, California utilizes a 14-member independent commission comprised of five Democrats, five Republicans and four members who are neither Republicans nor Democrats.[30] But other states, like Wisconsin, use the normal legislative process for redistricting, allowing the majority party to control the process.[31]As of the writing of this article, only seven states employ independent commissions for the drawing of U.S. congressional districts, and 13 states employ inde-

23 *Thornburg v. Gingles*, 478 U.S. 30, 47–48 (1986).

24 *Shaw v. Reno*, 509 U.S. 630, 648–49 (1993).

25 See generally, Christopher Z. Mooney, *Legislative Redistricting in the 50 States in 2010: Best Practices*, THE ILLINOIS REPORT 2011 (2011).

26 Ohio CONST. art. XI, § 7.

27 Cal. CONST. art. XXI, § 2(d).

28 U.S. CONST. art. I, § IV.

29 Ohio CONST. art. XI, § 1.

30 Justin Levitt, CALIFORNIA, ALL ABOUT REDISTRICTING (2019).

31 See Wis. CONST. art IV, § I, III.

pendent commissions for the drawing of state legislative districts.[32]

238. Additionally, some states have enacted measures that require bipartisan approval for maps or a supermajority. Connecticut and Maine[33] both require a two-thirds majority approval for a redistricting map. This past primary season Ohio passed a new redistricting measure through the ballot initiative process, which requires bipartisan approval of a congressional redistricting map.[34] That is, 50 percent of each of the two largest political parties will need to approve the map.[35]

Forms of Partisan Gerrymandering

239. When state legislatures use the redistricting process for partisan advantage, they do so using the packing and cracking method. Packing occurs when voters for a rival party are squeezed into the same districts, thereby creating districts that are mostly the voters of the rival party.[36] Because in these districts the rival party voters have much higher than 50 percent of the votes, votes for the rival party are "wasted." That is, those votes could have been cast in another district where their party lost and allowed that party to obtain another seat. Cracking occurs when voters for the rival party are split across many districts, preventing the voters from gaining a majority in those districts.[37]

240. While there is little debate as to whether partisan gerrymandering is desirable or a problem, a strong divide has occurred with how to remedy the issue. As provided above, state legislatures control the redistricting process. State legislatures also are partisans who are interested in seeing their party in power. For this reason, the party that possesses control over the legislature will be motivated to design the redistricting process in a way that allows that party to stay in power as indicated in Breyer's dissent: "The party that controls the process has no incentive to change it."[38]

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32 *Redistricting Commissions: State Legislative Plans,* NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 21, 2019).

33 Conn. CONST. art. III, § 6; Me. Rev. Stat. 21-A § 1206 (2018).

34 *Ohio Issue 1, Congressional Redistricting Procedures Amendment (May 2018)*, BALLOTPEDIA.ORG, (2018).

35 *Ohio Issue 1, Congressional Redistricting Procedures Amendment (May 2018)*, BALLOTPEDIA.ORG, (2018); Proposed Constitutional Amendments, Article XIX, Sec. 1(A), OHIO SECRETARY OF STATE, (2018).

36 Gerald J. Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform To Rein in Partisan Gerrymandering*, 29 YALE L. & POL'Y REV. 2, 544 (2010); *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004).

37 Samuel S.H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1271 (2016).

38 *Vieth v. Jubelirer*, 541 U.S. 267, 363 (2004).

Map Drawing Technology and Partisan Gerrymandering

241. The methods of partisan gerrymandering today are not the methods employed in *Vieth* — and a far cry from those employed by Elbridge Gerry. As present in *Benisek* and *Gill*, map drawers possess sophisticated software that allows for greater map manipulation for partisan advantage.[39] The map drawers in *Gill* used software called autoBound. Tad Ottman, Senate Majority Leader of Wisconsin, described how the software is used:

> [Y]ou would open up a plan that you'd been working on or label a new plan and assign it the Assembly district that you wanted to work with and then you could also pick a color that you wanted that Assembly district to be. It's sort of like a color-by-number exercise . . . .
>
> You also determine what other layers that you want to look at on the screen. There were a number of different overlays that you have, anywhere from existing Senate and Assembly districts, . . . count[y] boundaries, municipal boundaries, ward boundaries all the way down to census block boundaries. As a practical matter what you tried to do is you would zoom in the region of your screen to the area that you're looking at to the smallest amount that you could see and then have kind of the fewest layers displayed that you would need because the more information that you were requiring it to display slows down the computer speed a lot and makes it really slow to render. . . . .
>
> And then what you would do is there were a couple different ways that you could add population to the district.

242. Using census data, the autoBound software provides users with a partisan score.[40] As of the date of this article, 29 states utilize autoBound software.[41] The map drawers in *Benisek* used similar software called Maptitude.[42] Maptitude similarly predicts the likelihood that a voter will vote Democrat or Republican and also has an Efficiency Gap feature that provides an efficiency gap estimate for a map.[43]

243. The success of Redistricting Majority Project (REDMAP) perhaps best underscores the effectiveness of controlling the redistricting process. REDMAP was an initiative by the Republican State Leadership Committee that directed resources to state legislative elections. The RSLC's rationale for the strategy is as follows:

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39 See *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018); see also Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2160 (2018) .

40 *Whitford v. Gill*, 218 F. Supp. 3d 837, 847–49 (W.D. Wisc. 2016).

41 *Autobound:Redistricting Software*, CITYGATEGIS.COM, (2019).

42 *Benisek v. Lamone*, 266 F. Supp. 3d 799, 823 (D. Maryland 2017).

43 *Caliper Mapping and Transportation Glossary*, CALIPER.COM, (2015).

> Controlling the redistricting process in these states would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn. Drawing new district lines in states with the most redistricting activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.[44]

244. This strategy, according to the RSLC, was successful. In the 2010 elections, Democrats secured 1.1 million more votes for U.S. Congressional races, yet the Republican party obtained a 30-seat majority in the House. An example of this claimed success is Ohio. The RSLC allocated approximately $1 million towards Ohio state legislature races, which resulted in Republicans taking control of the Ohio House and the redistricting process. The "Republican redistricting," according to the RSLC, "resulted in a net gain for the GOP state House caucus in 2012, and allowed a 12–4 Republican majority to return to the U.S. House of Representatives — despite voters casting only 52 percent of their vote for Republican congressional candidates."[45]

III. The History of Gerrymandering Challenges

245. The Court's entry into the partisan gerrymandering arena began with a series of malapportionment cases. In *Baker v. Carr,* the Court first grappled with whether challenges to redistricting maps are even justiciable. Over two decades after answering the justiciability question in the affirmative, the Court heard its first challenge to a map based on the theory that the map was an unconstitutional gerrymander. Fast forward to present day and the Court has still not settled on a standard for partisan gerrymandering challenges, even after *Gill* and *Benisek*.

The Emergence of Redistricting Challenges through Malapportionment Cases

246. Redistricting challenges have their roots in *Baker v. Carr* — a dramatic case behind the scenes. In *Baker*, a malapportionment challenge brought under the Equal Protection Clause was before the Court. Tennessee had failed to redistrict in 60 years. The urban populations grew at a much faster rate than their rural counterparts, resulting in greater voting power for rural voters. Tasked with determining whether the Court may decide questions of redistricting, the Court initially divided four to four, with Justice Whittaker

44 *2012 Redmap Summary Report*, The Redistricting Majority Project, (Jan. 4, 2013).

45 *2012 Redmap Summary Report*, The Redistricting Majority Project, (Jan. 4, 2013).

wavering on the fence. Caught between Justice Douglas on the one end lobbying for justiciability and Justice Frankfurter at the other end advising restraint, Justice Whittaker felt the monumental import of the decision and succumbed to a nervous breakdown that ended his career on the Highest Court.[46] Almost a year after *Baker* was argued, the Court ruled — without Justice Whittaker — that the malapportionment challenge to Tennessee's map was justiciable.[47]

247. Shortly after the *Baker* decision, with the phrase "[l]egislators represent people, not trees or acres," the one person, one vote standard emerged in *Reynolds v. Sims*. One person, one vote requires states to draw districts with roughly equal population.This standard grew out of the Equal Protection Clause and was rooted in the idea that unequal districts are undemocratic. The dissent argued that this expansive view of the Equal Protection Clause spilled over into judicial activism.[48]

Partisan Gerrymandering Challenges and the Failed Attempts to Announce a Standard

248. While the '60s malapportionment cases provided the impetus for the Court to extend its political reach to redistricting, it would be another couple of decades before the Court ventured into partisan gerrymandering challenges. The Court finally addressed partisan gerrymandering challenges in *Davis v. Bandemer*. In *Bandemer*, the Court ruled that political gerrymandering challenges are justiciable and established a plurality standard for evaluating such challenges. Justice White, writing for the majority, garnered a six justice majority for the justiciability holding, finding a mix of support among other conservative justices as well as liberal justices. Justices Brennan, Marshall, Blackmun, Powell, and Stevens signed on to the justiciability holding. The *Bandemer* opinion rejected the notion that a standard must presently be announced in order for partisan gerrymandering challenges to be justiciable.[49]

249. Despite grappling with the issue in the '80s, the search for judicially manageable standards has become a recurring issue for courts fielding partisan gerrymandering challenges today. But the issue remained ever clear for the *Bandemer* Court, as Justice White failed to pull in a fifth justice for the part of the opinion announcing a standard. The plurality first held that a partisan gerrymandering challenge must demonstrate discriminatory intent and discriminatory effect. The plurality made two important points on the

46 *More Perfect: The Political Thicket*, WNYC, (June 10, 2016).

47 *Baker v. Carr*, 369 U.S. 186, 191 (1962).

48 See Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729, 1740 (2018); *Reynolds v. Sims*, 377 U.S. 533, 559, 566, 590 (1964).

49 *Davis v. Bandemer,* 478 U.S. 109, 123 (1986).

discriminatory effect prong: (1) the Constitution does not compel proportionality and (2) a discriminatory effect will be found only when the districts have been arranged in a manner to "degrade a voter's or a group of voters' influence on the political process as a whole."[50] That the districts have been drawn in a manner that makes it more difficult for a group of voters to elect the candidate will not carry the day under this standard.

250. Time has proven that Justice White's formulation failed both in being too strict and in offering proper guidance to lower courts — or, for that matter, legislators. Eighteen years of cases followed *Bandemer*, and in those years, only one court found a redistricting map to violate the Equal Protection Clause.[51] After the one decision that did find a constitutional violation, the challenging party achieved such success in the next elections under the gerrymandered map that the Fourth Circuit reversed the trial court's ruling.[52] The *Bandemer* test proved too strict in that it essentially requires challengers to prove that they were "shut out of the entire political process."[53] Justices Powell and Stevens foresaw that the plurality struck too unreasonably high of a standard. For this reason, Justice Powell's concurrence and dissent attempted to rectify the lack of guidance in the plurality opinion by providing a number of factors for courts to consider: the legislative process used for drawing the map, adherence to political subdivisions and compactness.[54]

251. Since the Court's failed attempt at fashioning a standard in *Bandemer*, the Court spoke twice more on the standard for partisan gerrymandering, prior to the *Gill* and *Benisek* opinions. The first of those cases was *Vieth v. Jubelirer*. Justice Scalia announced the judgment of the Court and authored the plurality opinion. Notably, Justice Scalia and the conservative end of the Court sought to overturn the justiciability ruling in *Bandemer*, but Justice Kennedy prevented the plurality from gaining a fifth vote for a non-justiciability holding. The Scalia plurality also recognized the shortcomings of the *Bandemer* test and declined to affirm its continued application.[55]

252. Justice Kennedy's concurrence did more than just prevent a non-justiciability holding. In his concurrence, he also offered fodder for future challengers interested in reading the tea leaves. One, Justice Kennedy expressed a preference for future challenges to

50 *Davis v. Bandemer*, 478 U.S. 109, 127, 132 (1986).

51 Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 360 (2017); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 840 (2015).

52 Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 360 (2017).

53 Michael Weaver, *Uncertainty Maintained: The Split Decision Over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1308 (2005).

54 *Davis v. Bandemer*, 478 U.S. 109, 169–70, 173–78 (1986).

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

be brought under the First Amendment, believing this to be the more relevant challenge. "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." Two, Justice Kennedy expressed interest in challengers pursuing new technology to more precisely measure the burden imposed by a redistricting plan.[56]

253. The next important development in partisan gerrymandering jurisprudence came in *LULAC v. Perry*. *LULAC* consisted of a mid-decennial redistricting that occurred after the Republicans gained control of the state legislature. Ultimately, the Court struck the map under the Voting Rights Act, obviating the need to make a ruling on the partisan gerrymandering challenge. Nonetheless, the Court — in particular Justice Kennedy — went on to discuss the viability of the partisan gerrymandering challenge.[57]

254. At the center of the partisan gerrymandering challenge was an amicus brief submitted by Professors King and Grofman.[58] In the amicus brief, the professors proposed a new standard to judge partisan gerrymandering — partisan symmetry. Partisan symmetry "compares how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote." Symmetry requires the comparison of one hypothetical election against another and fairness is defined as each candidate being treated equally for receiving a certain percentage of the votes. The measure of partisan symmetry is partisan bias — that is, the difference in how each party would fare in the hypothetical elections. Engaging in this hypothetical election analysis requires use of computer programs that utilize inputs, such as election results, presence of an incumbent and whether the election is contested.[59]

255. Five of the justices in *LULAC* expressed interest in partisan symmetry. Justices Souter and Ginsburg indicated that the Court has interest in exploring partisan symmetry, and Justices Stevens and Breyer wrote that partisan symmetry is "a helpful (though certainly not talismanic) tool." Lastly Justice Kennedy attached some import to partisan symmetry, though his opinion expressed skepticism. Specifically, Justice Kennedy wrote: "Without altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional

56 See Michael Weaver, *Uncertainty Maintained: The Split Decision Over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1329 (2005); *Vieth v. Jubelirer*, 541 U.S. 267, 312–314 (2004).

57 *LULAC v. Perry*, 548 U.S. 399 (2006) (then-Texas Solicitor General Ted Cruz — along with Greg Garre — argued in defense of the Texas map).

58 Brief of Amici Curiae Professors Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz, in Support of Neither Party, *LULAC v. Perry*, 548 U.S. 399 (2006).

59 Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 ELECTION L.J. 2, 5, 7–10 (2007).

partisanship." His discounting of partisan symmetry stems from two shortcoming of the standard: (1) that courts must guess where vote switchers will lie and (2) that the fairness determination is made on the basis of a hypothetical, not actual, election.[60]

256. Despite several promising remarks from the Court, no redistricting challenge has sought to employ partisan symmetry[61]— until *Gill v. Whitford*.

IV. The Efficiency Gap

257. *Gill* and *Benisek* brought the Court two new strategies for tackling partisan gerrymandering — both seizing upon the favorable words of Justice Kennedy. *Benisek* is litigated under solely a First Amendment challenges. *Gill*, on the other hand, is primarily a vote dilution claim under the Equal Protection challenge. The challengers in *Gill*, however, employ the efficiency gap, which is a new measure of partisan symmetry that addresses Justice Kennedy's criticisms in *LULAC*. The two cases also provided the Court with one Democrat-drawn map and one Republican-drawn map. That fact that the two gerrymandered maps were drawn by different political parties could have enabled the Court to dampen partisan concerns.

What is the Efficiency Gap?

258. Following the *LULAC* decision, proponents of partisan gerrymandering challenges seized upon the favorable commentary towards partisan symmetry and developed a new measure of partisan symmetry — the efficiency gap. The efficiency gap simply measures wasted votes. Wasted votes is defined as any vote cast for the losing candidate and any vote cast for the prevailing candidate above the amount needed to win the election. To measure the efficiency gap, the wasted votes for each party is subtracted and then divided by the total number of votes cast. No newfangled mathematical methods or computer programs are required, just subtraction and division.[62]

259. A hypothetical is the easiest way to illustrate how the efficiency gap operates. Suppose, for example, a state has three 100-person single-member districts (A, B, and C). Suppose further that in District A, Democrats win 90 percent of the vote and Republicans 10 percent; in District B, Democrats win 40 percent of the vote and Republicans

60 *LULAC v. Perry*, 548 U.S. 399, 420 (2006).

61 Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 846 (2015); David Shultz, *The Party's Over: Partisan Gerrymandering And The First Amendment*, 36 CAP. U.L. REV. 1 (2007).

62 Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850–51 (2015).

win 60 percent; and in District C, Democrats also win 40 percent of the vote and Republicans also win 60 percent. Under this scenario, Democrats have received 170 out of the 300 votes but only won one seat. Republicans, on the other hand, won only 130 out of the 300 votes but won two seats.

260. To calculate the efficiency gap, we first start by tallying the wasted votes. Next, we sum the wasted votes, to obtain the net wasted votes. The following table represents the tallies of the votes and wasted votes:

261.

District	Democrat Votes	Republican Votes	Democrat Wasted Votes	Republican Wasted Votes	Net Wasted Votes
1	90	10	40	10	30 Democrat
2	40	60	40	10	30 Democrat
3	40	60	40	10	30 Democrat
Total	170	130	120	30	30 Democrat

262. Now that we know the net wasted votes is 90, we divide this number by the total number of votes case (i.e., 90/300), which calculates to an EG of 0.3. By and large, the calculations are simple.

A Critical Look at the Efficiency Gap

The Efficiency Gap's Ability to Redress LULAC's Criticisms of Partisan Symmetry

263. When Justice Kennedy voiced his criticism of partisan bias, Nicholas Stephanopoulos and Eric McGee listened. Recall Justice Kennedy's criticism of partisan symmetry in LULAC: (1) it requires courts to speculate as to where vote switchers will reside and (2) it requires use of hypothetical elections. Partisan bias compares how each political party would fare in an election if those parties garnered a certain percentage of vote and thus requiring hypotheticals and speculation. In contrast, the efficiency gap uses results from actual elections.[63] Therefore, the efficiency gap does not require use of hypothetical elections or speculation as to where voters will reside.

63 *LULAC v. Perry*, 548 U.S. 399, 419 (2006); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 862 (2015).

Criticism of the Efficiency Gap

264. While Justice Kennedy's criticism of partisan bias may be addressed, the efficiency gap suffers its own infirmities: (1) the premise behind the efficiency gap is grounded in the belief that the Equal Protection Clause requires balanced maps and (2) the efficiency gap attributes all inequality in a map to partisan gerrymandering. On the first score, and most fundamentally, the Court has never required equal conversion of votes to seats between Democrats and Republicans. Justice Kennedy specifically rejected the notion that the Constitution requires that a majority of the voters elect a majority of the representatives.[64]

265. For the second point, the efficiency gap does not differentiate between wasted votes caused by partisan gerrymandering and wasted votes resulting from more benign causes. Democrats tend to pack into dense cities, whereas Republicans sprawl into less dense regions.[65] When Democrats win an urban district by a high percentage of votes, they are increasing their overall vote count but wasting those extra votes. The efficiency gap merely tallies up the wasted votes, regardless of cause, that occur under a redistricting plan.[66] For this reason, the efficiency gap would attribute this natural packing to improper partisan gerrymandering, which has led some Republicans to argue that the efficiency gap possesses an inherently pro-Democrat tilt.[67]

266. But the efficiency gap's inability to discern cause may not be lethal, as the current composition of tests requires courts to consider intent and justifications. If the map drawers did not have the intent to cause partisan advantage or if the political geography explains the high efficiency gap, then a redistricting map would not be struck. Furthermore, courts may use other evidence in conjunction with the efficiency gap to determine whether a map is an unconstitutional partisan gerrymander. That the efficiency gap is not the Holy Grail standard for partisan gerrymandering challenges is not cause alone to wholly discount its usefulness.

267. Random map drawing software may be used in conjunction with the efficiency gap to ferret out high efficiency gaps attributable to intentional partisan gerrymandering

64 *Vieth v. Jubelirer*, 541 U.S. 267, 308 (Kennedy, J., Concurring); see also Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729, 1744 (2018).

65 Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 J. POL. SCI. 239 (2013); Jowei Chen & David Cottrell, *Evaluating Partisan Gains From Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 ELECTORAL STUD. 329 (2016).

66 Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 852 (2015).

67 Brief of Amicus Curiae Republican National Committee In Support of Appellants at 6, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

versus the natural political features of a map. For example, one political scientist took the Wisconsin map in *Gill* and used a program to randomly draw 200 redistricting maps that comport with traditional redistricting criteria. Seventy-two percent of the maps drawn possessed an efficiency gap of 3 percent or less, compared with the efficieny gap of 15.2 percent for Act 43. Act 43 also only keeps 14 counties intact, while the 200 random maps keep 18 to 25 counties intact.[68] Further, in the simulated maps, Republicans contained a majority in 38.4 percent to 47.4 percent of the districts. Under Act 43, 56 seats were Republican leaning.[69]

268. The efficiency gap's relationship with proportionality also requires explanation, as opponents of the efficiency gap have assailed the standard as a form of proportionality.[70] The Court, including Justice Kennedy, has consistently stated that the Constitution does not impose a proportionality requirement.[71] But the efficiency gap does actually amount to proportional representation. It does, however, bare a relationship to proportionality. Instead of measuring the translation of votes to seats, the efficiency gap measures the amount of undeserved seats won relative to a system where votes are wasted equally.[72]

269. That the efficiency gap departs from proportionality actually creates a weakness for maps where the prevailing party receives 75 percent or greater of the vote. When the prevailing party receives 75 percent of the vote and wins every seat and the losing party obtains 25 percent of the vote, the map will have an efficiency gap of zero.[73] As the percentage of votes for the prevailing party exceeds 75 percent, a negative efficiency gap is generated. Therefore, the efficiency gap will not detect partisan gerrymandering for maps where the prevailing party wins a supermajority of the vote.

Gill and the Efficiency Gap

270. Criticism aside, the Court never reached the merits in *Gill*, and thus never considered the efficacy of the efficiency gap. Whether the efficiency gap may be used effectively in partisan gerrymandering challenges will, therefore, be left for another day. Nonetheless, the Court did elucidate a standing framework, highlighting a new criticism of the

68 Jowei Chen, *The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin's Act 43 Assembly Districting Plan*, 16 ELECTION L.J. 1, 6 (2017).

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

70 *Brief of the Wisconsin Institute for Law & Liberty as Amicus Curiae in Support of Appellants* 1932, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

71 *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (2006); *Vieth v. Jubelirer*, 541 U.S. 267, 338, 532 (2004); *Davis v. Bandemer*, 478 U.S. 109, 130 (1986).

72 Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 854 (2015).

73 Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1203–04 (2018).

efficiency gap: the efficiency gap only measures asymmetry of a statewide map, not how gerrymandered an individual district is.

271. The Court reversed and remanded *Gill* back to the district court for lack of standing. In doing so, the Court held that the injury in a vote dilution claim is specific to an individual. For this reason, challengers that pursue vote dilution theories will need to advance some evidence to establish an individual injury in that individual's district. "The difficulty for standing purposes is that [measures of partisan symmetry] are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens." The efficiency gap, however, does not test which districts are gerrymandered and instead tests the partisan symmetry of an entire map. Therefore, the efficiency gap alone will not be sufficient to establish standing for a vote dilution claim. Once back at the district court, the *Gill* challengers will need to present some evidence other than the efficiency gap to establish standing. This may be the alternative mapping suggested in Justice Kagan's concurrence, that a challenger may satisfy standing by "produc[ing] an alternative map (or set of alternative maps) — comparably consistent with traditional districting principles — under which her vote would carry more weight."[74]

272. That is not to say that the efficiency gap — and other measures of partisan asymmetry — should be scrapped. The measure may still provide a useful metric on a statewide basis and has the benefit of easy math and clear lines. Going forward, however, challengers pursuing vote dilution claims will need to make an initial threshold showing of standing through other metrics.

V. The First Amendment Approach

273. Departing from the jurisprudence behind the Equal Protection Clause and gerrymandering challenges, challengers brought a partisan gerrymandering challenge under the First Amendment in *Benisek*.[75] The challengers, perhaps, seized hold of the favorable words voiced by Justice Kennedy in *Vieth*. In *Vieth*, Justice Kennedy suggested that the First Amendment may be the more appropriate vehicle for bringing partisan gerrymandering challenges. While analytically distinct from an Equal Protection challenge, the Court still must decide a standard for determining when a map goes too far.[76]

74 *Gill v. Whitford*, 138 S. Ct. 1916, 1920–21, 1933, 1936 (2018).

75 *Benisek v. Lamone*, 266 F. Supp. 3d 799, 823 (D. Maryland 2017).

76 *Vieth v. Jubelirer,* 541 U.S. 267, 314 (2004); *Vieth v. Jubelirer,* 541 U.S. 267, 315 (2004); Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729, 1756 (2018).

Justice Kennedy's First Amendment Theory in Vieth

274. Justice Kennedy's *Vieth* concurrence originally laid the framework for partisan gerrymandering challenges to be brought under the First Amendment. The First Amendment prohibits states from "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." Therefore, when a state draws a map with the intent and effect of disadvantaging one group because of their political beliefs, the First Amendment is implicated according to Justice Kennedy. The First Amendment's emphasis on the burden can be contrasted with the Equal Protection Clause, where emphasis is placed on the classification.[77]

275. Though the First Amendment discussion gained little traction in *Vieth*, the theory spilled over into *LULAC*. In *LULAC*, Justice Stevens wrote a concurrence in which he voiced his strong agreement for the First Amendment theory. Specifically, he wrote: "the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from 'penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or their expression of political views.'"[78]

276. The original First Amendment theory primarily grew out of the Court's patronage cases.[79] In those cases, the Court ruled that states may not consider partisanship during the employment process for non-policymaking government jobs, unless political affiliation can be considered an appropriate job requirement.[80] This line of cases resulted from a history of providing jobs for party supporters and refusing to consider individuals of the opposition party for those jobs.[81]

277. However, the patronage cases may not be the appropriate jurisprudence from which to draw comparisons. That the patronage cases require states not to consider partisanship at all was a significant criticism of the First Amendment analysis in *Vieth*. The Court has previously stated that the Constitution does not require zero consideration of partisanship.[82] So on this score, partisan gerrymandering departs significantly from the patronage cases. Additionally, the burden felt in the patronage cases fell outside of

77 *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004).

78 *LULAC v. Perry*, 548 U.S. 399, 462 (2006).

79 Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 408 (2005).

80 See, e.g., *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Branti v. Finkel*, 445 U.S. 507, 518–19 (1980); *Elrod v. Burns*, 427 U.S. 347, 372–73 (1976).

81 *Elrod v. Burns,* 427 U.S. 347, 353–54 (1976).

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

the political process (e.g., losing one's job),[83] and challengers had to demonstrate they would have retained their job if politics played no part. Again, this is starkly different than partisan gerrymandering challenges that are part of the political process.

278. Beyond the difficult patronage analogy, lower courts have struggled to define the harm for a First Amendment challenge. Essentially, a First Amendment challenge requires courts to decide what voters' representational rights are. In *Kidd v. Cox*,[84] the Georgia District Court found no First Amendment violation because "[p]laintiffs are every bit as free under [the 2016 Plan] to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." Another First Amendment challenge was rejected because that court failed to acknowledge a link between the ability to elect a candidate of one's choice and political expression under the First Amendment.[85]

279. Proponents of the First Amendment theory have worked to quell these criticisms by redefining the harm and straying from the patronage cases. First, the harm inflicted by a partisan gerrymander under the First Amendment can be viewed as systemic discrimination against the representational rights of a group of voters, not simply diminished electoral success.[86] The discrimination caused by the gerrymander, therefore, is the harm in and of itself.[87] So while voters may not possess a right to electoral success under the First Amendment, partisan gerrymandering still harms a group of voters through discrimination.

280. Second, the Supreme Court's First Amendment jurisprudence already contains a long line of voting as association cases, where the Court has stated that the First Amendment protects the associational rights of voters in the electoral process.Critically, this line of cases recognizes a balancing test, in which the injuries are weighed against the state interests. Therefore, the all-or-nothing test of the patronage cases does not restrict the Court, nor would the Court need to break new ground in its jurisprudence.[88]

281. At its core, a partisan gerrymandering challenge, even under the First Amendment, will require the Court to implement an objective standard to apply for determining when a map goes too far. And the Court is no closer to resolving this issue after *Benisek* and *Gill*.

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83 Samuel Issacharoff & Pamela Karlan, *Where to Draw The Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 563 (2004).

84 *Kidd v. Cox*, No. 1:06-cv-0997, 2006 U.S. Dist. LEXIS 29689 (N.D. Ga. 2006).

85 *Radogno v. Ill. State Bd. of Elections*, 836 F.Supp.2d 759, 21 (N.D. Ill. 2011).

86 Daniel P. Tokaji, *Gerrymandering and Association,* 59 WM. & MARY L. REV. 2159, 2201 (2018).

87 Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 383 (2017).

88 Daniel P. Tokaji, Gerrymandering and Association, 59 WM. & MARY L. REV. 2159, 2183, 2185 (2018).

The First Amendment Challenge after Gill and Benisek

282. Like in *Gill*, the Court never reached the merits of *Benisek v. Lamone*. *Benisek* came to the Court from the trial court's denial of a preliminary injunction. Ultimately, the Court affirmed the trial court's denial of the preliminary injunction under the abuse of discretion standard.[89]

283. The Court found that the balance of equities tipped in favor of denying the preliminary injunction because of the long delay in bringing the challenge. The per curiam opinion noted that the challengers waited six years, including three general elections, before bringing the preliminary injunction. Additionally, the deadline had passed by which the map could have been redrawn in time for the coming elections. This — along with the Court's pending decision in *Gill*, which could have announced a standard — equated to a decision within the discretion of the trial court. Absent from the preliminary injunction analysis was the likelihood of success on the merits factor. In short, the Court's per curiam provided election law onlookers with no answers or clues for future First Amendment challenges.[90]

284. The challengers in *Gill* also alleged a First Amendment violation. But the challengers did not sufficiently advance the First Amendment challenge "with sufficient clarity or concreteness," according to the Court. For this reason, the Court never considered the viability of that theory, noting "[w]e leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies." The Court instead left the justiciability of a First Amendment challenge in limbo. Justice Kagan, however, wrote separately because the challengers "may have wanted to do more than present a vote dilution theory." She then went on to cite Justice Kennedy's Vieth concurrence discussing how partisan gerrymandering burdens the representational rights of voters. Going further, she discussed the associational harms that result, and her concurrence cited to the voting as association cases. This suggests that the associational right theory is gaining traction in the Court.[91]

285. While no precedent came out of *Gill* on the First Amendment theory, the challengers would be wise to listen to Justice Kagan's words and develop the First Amendment claim. At the very least, four justices on the Court indicated their desire for challengers to develop a First Amendment claim. And as discussed in the next section, a First Amendment challenge may provide the added benefit of standing for statewide challenges.

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89 *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018), aff'g *Benisek v. Lamone*, 266 F. Supp. 3d 799, 838 (D. Maryland 2017).

90 *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018).

91 *Gill v. Whitford*, 138 S. Ct. 1916, 1924, 1931, 1934, 1938 (2018).

VI. Standing after *Gill*

286. The *Gill* decision adds a new wrinkle for challenges under the Equal Protection Clause — standing. The challengers in *Gill* brought a statewide challenge to the map, seeking to require the entire map to be redrawn. The case was litigated under a vote dilution theory under the Equal Protection Clause and a freedom of association challenge under the First Amendment. Under the vote dilution theory, challengers claimed that, by gerrymandering the Wisconsin map, a Democrat in any district suffers injury in that she has a diminished ability to see her party in the legislature.

287. The Court wholly rejected the theory that a challenger may bring a vote dilution claim on a statewide basis. A person's right to vote, the Court reasoned, is individual in nature. Since the vote dilution theory claims injury to a person's voting power, the injury is particular to that individual and her vote. Voters only vote for representatives in their district, so no harm is felt to voting rights based on elections in other districts. For support, the Court drew from its racial gerrymandering jurisprudence, where the Court has limited challenges to the district of the challenger.[92]

288. The opinion also parses out injury and remedy. In doing so, the Court clarified that *Baker* and *Reynolds* required statewide redistricting as the remedy for the injury. Because votes received unequal weight in those cases, the only way to equalize vote strength is to redistrict the whole map. Partisan gerrymanders, however, may affect some districts but not others, so a statewide remedy may not be necessary.[93]

289. So that leaves future challengers questioning how to demonstrate vote dilution on a district-by-district basis. Justice Kagan's concurrence suggested that challengers can meet this burden easily through the use of alternative maps. The use of alternative mapping software is readily in use and was actually proposed to address criticism of the efficiency gap. Once the initial standing burden is met, the case may proceed to the merits, and the court may consider statewide evidence.[94] But if challengers seek to pursue a First Amendment theory, then according to Justice Kagan, the injury is not district specific, and therefore statewide evidence may satisfy the standing requirements.[95] Ultimately, there is no precedent for First Amendment standing, so it remains uncertain whether a First Amendment challenge can be brought on a statewide basis.

92 *Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1930 (2018).

93 *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018).

94 *Gill v. Whitford*, 138 S. Ct. 1916, 1936–37 (2018) (citing *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

95 *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (2018).

290. Since deciding *Gill* the Court has vacated and remanded the partisan gerrymandering challenge to the North Carolina map. In *Rucho*, the Middle District of North Carolina struck the North Carolina map under both the First Amendment and the Equal Protection Clause. In addition to being litigated under an Equal Protection clause and First Amendment theory, the case was also litigated under a statewide and district-by-district theory. The Middle District Court of North Carolina found that the challengers possessed standing under both theories.[96]

291. Nonetheless, the Court's order requires the lower court to reconsider the case in accordance with the *Gill* ruling — i.e., reconsider the challengers' standing. As noted in Kagan's concurrance:

> [A]t some points in this litigation, the plaintiffs complained of a different injury — an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case.

292. The order provides no further clarification, but it may view the vote dilution statewide challenge as the driving claim in *Rucho*, as it did in *Gill*.[97]

293. Both the *Rucho* case and *Lamone v. Benisek* have made their way back up to the Court for OT 2018. The Court heard argument in both cases and now stands poised to take another swing at partisan gerrymandering challenges — this time without Justice Kennedy.

VII. Conclusion

294. The Supreme Court balked at the opportunity to implement a standard for partisan gerrymandering challenges. Neither *Gill* nor *Benisek* was decided on the merits, and therefore the Court provided no precedent on First Amendment challenges or the efficiency gap. What did come out of *Gill* was an additional hurdle — standing. Vote dilution claims will need to be brought on a district-by-district basis and be coupled with some evidence of vote dilution in the district of each challenger. Alternatively, First Amendment claims may be able to proceed on a statewide basis, though no precedent emerged on this point. Justice Kagan's concurrence, however, breathed new life into First Amendment claims, and future challengers will likely pursue this theory. In

96 *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 609, 672, 683 (M.D. N.C. 2018).

97 *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

the last analysis, the Court is no closer to a standard for partisan gerrymandering challenges, and Justice Kennedy's retirement leaves the future of such challenges on unsure footing.