

The Ghost Ship of Gerrymandering Law

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Commentators spent much of the 2017–18 term in a state of high excitement over the Court’s agreement to revisit the longstanding question of whether the Constitution provides a remedy for partisan gerrymandering. The Wisconsin and Maryland cases the Court was hearing featured tortured maps, colorful statehouse gossip, a tech angle (could a new test accurately measure the badness of gerrymanders?) and high constitutional theory (should the Court ground a remedy in Equal Protection or turn instead to the First Amendment?). Everyone understood that these cases might serve as a legacy for Justice Anthony Kennedy, nearing the end of his long and distinguished career, given that his position as swing vote might determine the outcome. Kennedy had played the same role a decade and a half earlier in 2004’s *Vieth v. Jubelirer*,¹ in which his concurrence, by leaving the door open to possible future relief, had prepared the path for this day.

What floated into harbor instead was something of a ghost ship—sails handsomely rigged, the captain’s table set with polished silver and china, but evacuated by its crew. Citing standing in the Wisconsin case and timing in the Maryland, the Court avoided the merits entirely and sent the disputes back to the lower courts. In particular, it said the Wisconsin complainants in *Gill v. Whitford*² would need to establish that gerrymandering affected districts in which they themselves lived, and it said the Maryland complainants in *Benisek v. Lamone*³ were not entitled to a preliminary injunction

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¹ 541 U.S. 267 (2004).

² 138 S. Ct. 1916 (2018).

³ 138 S. Ct. 1942 (2018).

although additional facts and legal developments might entitle them to relief as the case proceeded. Both cases remained alive as to nearly all of their factual and legal contentions.

Strikingly, both decisions were unanimous as to result, with *Benisek* affirmed *per curiam* and *Gill*—written by Chief Justice John Roberts, not by Kennedy—decked with reasonably cordial concurrences from justices on each respective ideological wing. All was harmony and cooperation.

Why did the Court back off the merits? What allowed it to assemble at least surface unanimity? Does the outcome reflect Kennedy's personal take, or the thinking of the justices more generally? And what if anything does the decision augur about the state of the gerrymandering issue at the Court with Kennedy retired?

What *Vieth* Teed Up

Cicadas in the mid-Atlantic region tend to come back every 13 or 17 years, and gerrymandering visitations at the high court have been on a not dissimilar cycle. The 2017–18 crop arrived 14 years after *Vieth v. Jubilerer*, which in turn emerged from its burrow 18 years after the decision in *Davis v. Bandemer*.⁴ (For completeness one would need to add 2006's *LULAC vs. Perry*,⁵ a mixed race-and-politics case that, for most purposes, did little more than confirm the *Vieth* divisions.)

Vieth left the law in a condition of suspenseful equipoise that might not have been expected to last 14 months, let alone years. Arising from a challenge to Pennsylvania congressional districts, it had called forth a spirited plurality manifesto from Justice Antonin Scalia, drawing a hard line: Even if political gerrymandering did violate the Constitution, there was no practicable way for the courts to ensure political fairness consistent with preserving a proper and limited judicial role—which meant that the whole project should be given up as not justiciable.⁶

The Court's four liberals—John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—vigorously defended the courts' presence in the area on equal protection grounds and argued that the Pennsylvania gerrymander was bad enough to deserve

⁴ 478 U.S. 109 (1986).

⁵ 548 U.S. 399 (2006).

⁶ *Vieth*, 541 U.S. at 281.

correction.⁷ At the same time, they proposed sharper definitions and tests to improve on the confusing standards prescribed back in *Davis v. Bandemer*, which had led to virtually no striking down of gerrymanders despite much futile litigation.⁸

Kennedy, in a separate concurrence later to be studied and parsed as if it were a religious text, took a middle position. The first two paragraphs give an overview:

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

When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention. With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.⁹

Kennedy agreed with the conservatives that “comprehensive and neutral principles” along with “rules to limit and confine judicial intervention” were not yet available to prevent disputes from multiplying beyond reason and generating “disparate and inconsistent” results from one challenge to the next.¹⁰ For now, therefore, the Pennsylvania challenge would have to be thrown out, even as the

⁷ See, e.g., *id.* at 319 (Stevens, J., dissenting).

⁸ See, e.g., *id.* at 344 (Souter, J., dissenting).

⁹ *Id.* at 306–7 (Kennedy, J., concurring).

¹⁰ *Id.* at 308.

door was left open for better approaches. He showed scant interest in his liberal colleagues' suggestions for new tests that might work. He even held out as a definite possibility that the Scalia bloc might in time woo him over: The "weighty arguments for holding cases like these to be nonjusticiable . . . may prevail in the long run."¹¹ But the long run had not yet arrived.

With Kennedy installed as the fulcrum on a Court otherwise divided 4-4, there were two possibilities for those who might seek a different result: Wait for the Court's composition to change, or persuade Kennedy that "clear, manageable, and politically neutral standards" had been discovered.

Through most of the 14 years that followed, waiting for the Court's composition to change was a path that, at least as to gerrymandering, led nowhere. Stevens and Souter were replaced by Elena Kagan and Sonia Sotomayor on the one side, and Sandra Day O'Connor and William Rehnquist by Samuel Alito and John Roberts on the other, but few expected those changes to disturb the 4-4 split. The same was true of the eventual replacement of Scalia by Justice Neil Gorsuch.

Which left Kennedy as the liberal target. How could he be brought around?

In 2014, University of Chicago law professor Nicholas Stephanopoulos and political scientist Eric McGhee published an article in the *University of Chicago Law Review* proposing a measure of partisan distortion they called the "efficiency gap."¹² It depended in turn on a concept termed "wasted votes," defined in a distinctive way to include both votes cast for losing candidates *and* votes cast for winning candidates that are surplus to the number of votes needed to win. In this construct, if a Democratic candidate wins a district by a margin of 60 votes to 40, the Republican side has racked up 40 wasted votes—all those cast for the loser—while the Democratic side has racked up 19 wasted votes, namely the 60 actually cast for the winner less the 41 votes needed to win. Totaling the Democrats' wasted votes for all districts statewide, doing the same for the Republicans, subtracting the lesser number from the greater, and dividing the difference by the total number of votes cast, yields a ratio that can be said to measure the efficiency with which a gerrymandered map

¹¹ *Id.* at 309.

¹² Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

permits the winning party to convert votes to seats, other things being equal—an “efficiency gap.”

If this sounds confusing, it is: This is not how casual observers or experts alike are used to talking about elections. But the practical use of the measure, it was argued, is that it can detect and rate in severity deliberate partisan gerrymanders—those in which the objective is “packing” opposing partisans into as few districts as possible while dispersing or “cracking” other concentrations of opponents among a larger number of districts where the gerrymandering party is likely to prevail. Because both packing and cracking tend to inflict wasted votes on the disfavored party, it was argued, successful gerrymanders will score high on the efficiency gap measure.

Stephanopoulos and McGhee went on to make another contention that was of some legal significance. Once a state’s efficiency gap was higher than about 0.07, or 7 percent, they said, it reached a point where a dominant party might win time after time even if it could not muster actual majority support among voters. This was especially relevant to state legislators, who (in a triumph of self-interest) draw maps for themselves. And it opened up the prospect at least in theory that a party with modest minority standing among voters, say 47-53, might nonetheless keep itself in office indefinitely.

The Origins of *Gill v. Whitford*

In 2011, following the 2010 Census, Wisconsin’s Republican legislature adopted districting maps for the state assembly after consultation with experts who assured them that the map was likely to yield the Republican Party a majority of assembly districts. In the following year’s elections, to quote one account, “Wisconsin Republicans won 48.6 percent of the two-party vote but took 61 percent of the Assembly’s 99 seats.”¹³

In 2015, Wisconsin residents sympathetic to the Democratic Party sued in federal court to challenge the 2011 map as a partisan gerrymander, with Prof. Stephanopoulos, coauthor of the efficiency gap test, as their lead lawyer. His test, and whether it fulfilled *Vieth*’s quest for a reliable and objective test for partisan gerrymandering, was at the heart of the case. In November 2016, a three-judge district

¹³Michael Wines, *Judges Find Wisconsin Redistricting Unfairly Favored Republicans*, N.Y. Times, Nov. 21, 2016, <https://www.nytimes.com/2016/11/21/us/wisconsin-redistricting-found-to-unfairly-favor-republicans.html>.

court accepted the plaintiffs' contentions and declared the redistricting unlawful under the Constitution, over a dissent from Judge William Griesbach.¹⁴ The plan, said the majority, imposed serious partisan burdens on Wisconsin Democrats, could not be justified in terms of nonpartisan redistricting principles, and tended to entrench Republicans in a self-perpetuating manner.

Under the distinctive procedure that applies to redistricting challenges, challenges of this sort start with three-judge panels and proceed directly on appeal to the U.S. Supreme Court, bypassing the federal circuit courts of appeals. In virtually a foregone conclusion given the prominence of the case and its result, the Court duly took up the case.

Gerrymandering, which stretches back to the rise of representational systems, had long been a target of good-government forces, but by 2017 it had emerged as something else: a heated subject in the Red-Blue political wars. Over the past couple of census cycles, Republicans had employed a superior playbook to out-organize and outmaneuver Democrats, using under-the-radar campaigns to install majorities in state legislatures and then apply specialized talent to the process of drawing maps. By 2017, there were more Republican gerrymanders than Democratic ones around the country, affecting both the state legislatures and congressional representation in such populous states as Texas, Pennsylvania, Ohio, Michigan, and North Carolina. Although Democrats had also gerrymandered some states such as Illinois and Maryland, there was no doubt that the Republicans had greater impact, which accounted for at least some of the Republican edge of 40–50 seats in the U.S. House of Representatives. More passionate Democrats even claimed that the entire margin arose from gerrymandering.

By 2017, to some on the left, partisan gerrymandering had come to stand not merely as an enduring political evil of many places and times, but as part of an interlocking set of abuses and advantages—so-called voter suppression, the presidential Electoral College, the small-state advantage in the U.S. Senate, and more, by which Republicans had “rigged” national politics so as to hold power whether or not they could command the loyalty of a voter majority.¹⁵

¹⁴ *Whitford v. Gill*, 218 F. Supp. 3d 837 (2016).

¹⁵ See, e.g., Michelle Goldberg, *Tyranny of the Minority*, N.Y. Times, Sept. 25, 2017, <https://www.nytimes.com/2017/09/25/opinion/trump-electoral-college-minority.html>.

Many on the right, of course, saw this critique as overblown at best. They pointed out that among Republicans' other electoral conquests at this point were a host of offices not elected by district and thus not subject to gerrymandering, including a lopsided majority of state governorships (33 to 16, with 1 independent), and even a 27-22 majority among state attorney generalships, an office where Democrats had traditionally done well. The U.S. Senate, of course, was also a body free of gerrymandering, and although it did favor small states, Democrats enjoyed many small-state strongholds of their own in places like New England and Hawaii.

Even so, the we-was-robbed tone of much popular commentary put the Supreme Court on notice: It was now being drawn into an exceptionally partisan battle.

Adding the Maryland Case

Just as Republicans in Wisconsin had enacted a thoroughgoing gerrymander based on the 2010 Census, so Democrats in Maryland led by Gov. Martin O'Malley had drawn one of the most bizarre congressional maps in the country. Maryland's third district was compared by a federal judge to a "broken-winged pterodactyl."¹⁶ One of the successful objectives had been to secure the defeat of longtime GOP Rep. Roscoe Bartlett by dissecting his western Maryland redoubt into two serpentine components, each of which could be attached to a Democratic-majority district anchored in the Montgomery County suburbs of Washington, D.C.

In 2013, Republican voters challenged the map. A three-judge panel's 2016 decision let the suit go forward, over one dissent.¹⁷ Unlike Wisconsin's statewide suit, the challenge by this point had been pared down to just one district, the sixth, the one from which Bartlett had been ousted. In 2017, the panel declined the plaintiffs' request for a preliminary injunction, instead staying the case pending the expected high court ruling in *Gill v. Whitford*. Plaintiffs asked

¹⁶ Carrie Wells, *Gerrymandering Opponents Highlight Convolution Districts*, Baltimore Sun, July 17, 2017, <http://www.baltimoresun.com/news/maryland/politics/blog/bs-md-gerrymander-meander-20170716-story.html>.

¹⁷ *Benisek v. Lamone*, 266 F. Supp. 3d 799 (2017). The case's circuitous path had earlier taken it to the Supreme Court on the issue of whether plaintiffs were entitled to a three-judge panel to hear their claim: see *Shapiro v. McManus*, 136 S. Ct. 450 (2015) (unanimous Court holds that three-judge panel is required).

the Court to review the case and, to some surprise, the Court agreed to do so: *Benisek v. Lamone* would become a companion case with its own separate oral argument in March (*Gill* had been argued in October).

What did the Maryland case bring that was not already present in the Wisconsin case? Notably, while Wisconsin's suit followed the main line of Court precedent by invoking equal protection theory, the Maryland plaintiffs had argued a theory of First Amendment retaliation: The state had identified them as a political minority based on their past electoral decisions and had taken adverse action against them by subjecting them to a hostile map. And that was significant because Kennedy's concurring opinion in *Vieth* had declared that 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. Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. Representative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the effect of burdening a group of voters' representational rights.¹⁸

In fact, the First Amendment road-not-taken had prompted a sharp exchange in the *Vieth* opinions. Scalia for the plurality had sniped that upholding a First Amendment challenge "would render unlawful all consideration of political affiliation in districting."¹⁹ Kennedy retorted that it was not so broad as that: A court would have to find

¹⁸ 541 U.S. at 314 (Kennedy, J., concurring).

¹⁹ 541 U.S. at 294.

that the mapmakers had not just taken into account citizens' political affiliation, but laid a burden on them because of it.²⁰

By accepting the Maryland case, at any rate, the Court in 2018 squarely faced Kennedy's suggestion to ground gerrymandering suits on a new constitutional rationale. And there was another advantage: The Court would be reviewing one gerrymander inflicted by Republicans and one by Democrats. Whichever way it decided, it could hope for greater cross-partisan legitimacy by showing that it would apply its rules to the sins of both parties alike.

As it did so, the Court was sure to draw lessons from its own modern history in two important areas in which it has sought to supervise electoral fairness: the one-person-one-vote cases, and the effort to correct disparate electoral treatment (including districting) based on race.

Equal Population and Racial Gerrymandering

The one-person-one-vote redistricting cases, *Baker v. Carr*²¹ and *Reynolds v. Sims*,²² are among the best known of the Warren Court era. Many of the 50 states did not regularly reapportion their legislative or congressional maps to reflect Census updates on population shifts, and some states organized the upper houses of their legislature by a criterion other than population—for example, providing each county with two senators. As with the U.S. Senate, that practice resulted in extreme variances in numbers of constituents per lawmaker, typically to the disadvantage of populous cities.

The results of the Court's decisions in *Baker v. Carr* and *Reynolds v. Sims* recall the anatomy of the bumblebee—theoretically dubious but in practice a great success. The theoretical skepticism arises because it is hard to picture either the Constitution's original language, or the Fourteenth Amendment of 1868 with its equal protection guarantee, as having been publicly understood at the time to bar the apportionment of state upper houses based on geography. Many state legislatures that ratified the post-Civil War Fourteenth Amendment had an upper house modeled on the U.S. Senate—yes, notoriously, the Framers had based the upper house of the federal

²⁰ *Id.* at 315 (Kennedy, J., concurring).

²¹ 369 U.S. 186 (1962).

²² 377 U.S. 533 (1964).

government's own legislative branch on geography rather than population. Appealing though state-level reform might be, the justices agonized over whether it could fairly be read into the Constitution under such circumstances.

Although criticized by some legal theoreticians,²³ the one-person-one-vote decisions quickly scored as a practical success. They were embraced and taken to heart by the public, the legal profession, and even to a remarkable extent the rural political elites whose power they had displaced. Proposals to overturn the decisions spluttered and went nowhere. Nor, notwithstanding Justice Felix Frankfurter's warnings about the "political thicket" the Court was entering,²⁴ were the decisions widely thought to have improperly dragged the courts into politics in ways that undermined their legitimacy. Even staunch conservatives who detested the Warren Court often spared the reapportionment cases their odium. After some turmoil in state legislatures, litigation subsided quickly, and by 1973 Justice William Brennan could write of the "truly extraordinary record of compliance with the constitutional mandate" of the cases.²⁵

What accounts for that development? Above all, the one-person-one-vote formula triumphed because it was objective, predictable, easily understood, readily applied, and neutral: Count the people and divide by the number of districts. There were admittedly a few further wrinkles—the Court was more forgiving about state legislative districts than about congressional, for example, allowing a plus-or-minus population variance of five percent.²⁶ But even that exception functioned in practice as a bright-line rule.

And with that rule, everyone knew what they had to do, whether they be mapmakers, potential objectors, or judges hearing a challenge: They all could count and divide. Whether a Republican or Democrat judge heard the case you would get the same answer. Although the subject was politics of a sensitive kind, the standard's mechanical quality helped insulate the courts from ill will and political attack.

²³ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Indiana L. Rev.* 1 (1971).

²⁴ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²⁵ *White v. Regester*, 412 U.S. 755, 779 (1973) (Brennan, J., dissenting).

²⁶ *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

Race and Partisanship

A second area in which the modern Court had sought to correct the electoral process was that of disparate treatment in electoral practices (including gerrymandering) based on race. Here its experience had been somewhat different: While the constitutional basis for stepping in was much clearer, it had not been so easy to apply clear and consistent standards.

Because race was at the very center of the post-Civil War amendments, there was no real doubt about whether the Constitution authorized the Court to remedy invidious local actions that burdened racial minorities in voting and campaigning for public office. All justices agreed that it did. But that still left plenty of room for disagreement. Were unintended burdens to be subject to remedies, or only those inflicted on purpose? What exactly counted as invidious, in cases where members of a racial minority might not agree on, say, the grouping of communities to be desired in a district map? Should gerrymanders to the disadvantage of white voters be handled in the same way as those disadvantaging black? What should happen in mixed motive cases, in which race-conscious lines were drawn in part (perhaps predominant part) for old-fashioned partisan motives?

As the courts struggled with these issues, they did not always come up with predictable and consistent answers. True, Congress's enactment of the Voting Rights Act meant that many issues could be resolved on the basis of statute without probing the constitutional text. Still, there was wobble in the ongoing jurisprudence, and cases kept arriving in which the Court was asked for clarification.

It was an open secret that maps favorable to black representation were often also favorable to Republican representation: Because blacks tended to vote Democratic as a bloc, constructing districts where they could elect their own often left remaining districts with a Republican tilt. In fact, more than one map devised with the approval, or at the instigation, of courts concerned to enhance minority representation was later cited in press accounts as an example of extreme partisan gerrymandering—though of course some of the maps might have been drawn from a mix of compliance motives and partisanship.

Parenthetically, it was a unifying and significant feature of the *Gill* and *Benisek* cases that neither presented race as a major complicating factor. The Court had good reason—as did many of the private

interest groups and amici—not to want public discussions of racial and of partisan gerrymandering to get too entangled.

The Court's Experience with Gerrymandering

In part through its review of racial gerrymandering claims, the Court had grown quite familiar with the details of redistricting, and with the lack of any consensus as to when a normal or acceptable level of political motivation, assuming there is such a thing, shades into an extreme or objectionable level.

Consider, for example, the common practice of consulting incumbents about what they would like their new district to look like. That practice is baldly political, and accordingly damned by many good-government advocates (who correctly see it as tending to entrench incumbents). Unsurprisingly, it is popular among incumbents themselves. And it need not necessarily amount to *partisan* gerrymandering, since incumbents of both parties may be accorded the privilege.

Then there's redistricting that inflicts an awkward or difficult district on a particular incumbent who, let's say, is considered less than collegial. This sets off even more tripwires on good government grounds, especially if the target is unpopular not so much with colleagues as with legislative bosses. Yet some legislators privately or publicly defend this practice as a prerogative that helps rein in fractious mavericks and enforce cooperativeness.

Does it make sense to attach farm counties to the district of an incumbent who has shown neither interest nor expertise in farm issues? It's hard to separate that judgment from politics. What about the widespread practice of basing new maps on old, so as not to needlessly shunt large populations around between districts? That's fraught with political implications for incumbents' chances of reelection.

***Bandemer*: Not a Good Start**

In the Court's first major encounter with political gerrymandering, *Davis v. Bandemer*,²⁷ it took up the issues that have puzzled it ever since: Are claims of partisan gerrymandering justiciable, and if so what standards should be used to adjudicate them?

Bandemer arose from a challenge to an Indiana statehouse map. There was no lack of partisan effect: Hoosier Republicans had

²⁷ 478 U.S. 109 (1986).

tinkered with districting in ways that seemed to have little rationale except to dunk the Dems, who in the subsequent election proceeded to win only 43 of 100 assembly seats though receiving 52 percent of the vote. Interestingly, considering the later evolution of the issue, the Republican National Committee entered the case as amicus alongside the American Civil Liberties Union and Common Cause to urge the overturning of what its own state party had done.

On one level, *Bandemer* was a win for the liberals, with the Court breaking 6-3 in favor of the proposition that partisan gerrymandering claims are indeed justiciable (earlier cases had left some doubt on that). In dissent, Justice Sandra Day O'Connor argued that the courts should know to stay out of an area that always and everywhere was going to be imbued with politics. There was "no clear stopping point," she warned.²⁸ Indeed, O'Connor—who unlike most of her colleagues had served for years in a state legislature—came close to defending baldly political motives in redistricting, hinting that they might serve to advance a "strong and stable two-party system."²⁹ Chief Justice Warren Burger and future Chief Justice William Rehnquist joined her.

But the six-justice majority could not agree on a standard for how to rule on such claims, and neither of its attempts provided clear guidance. Four justices, led by Justice Byron White, took the view that some politics in the process was okay, but that courts should step in to keep it from becoming "excessive," so as to prevent an "electoral system [from being] arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."³⁰ Such consistent degradation, they said, had not been shown here, so the maps would be upheld. Two others—Justice Lewis Powell, joined by John Paul Stevens—favored a totality-of-the-circumstances test and believed the Indiana gerrymander flunked it.

How to Address *Bandemer's* Failure?

The headline take-aways from *Vieth v. Jubelirer*, as noted above, were its vigorous Scalia plurality opinion and somewhat coy Kennedy concurrence. But *Vieth* is most usefully read in conjunction

²⁸ *Id.* at 147 (O'Connor, J., concurring in the judgement).

²⁹ *Id.* at 144.

³⁰ 478 U.S. at 132.

with *Bandemer* as part of a single interrupted conversation, like a doubleheader played by the same two baseball teams with an intervening gap of 18 years.

By the time the Court reconvened, the dimpled babies of 1986 had grown into the college freshmen of 2004, and almost everyone agreed that the limp “consistently degrade” plurality language from *Bandemer* had flopped. Lots of partisan gerrymandering was going on, but virtually no successful challenges to it were getting through the federal courts. But how exactly had it failed, and what should replace it? Once again, the Court was split with no overall majority, but the arguments had been sharpened, with Justice Scalia taking up the lance on behalf of what were now four conservatives (Burger having departed the Court, and Scalia and Clarence Thomas having joined).

Scalia began by noting that the Framers knew of the problem of political gerrymandering and had given Congress express power to fix the issue at least as to U.S. House seats: Article I, Section 4 of the Constitution confers on the legislative branch a power to prescribe regulations for the holding of House elections, and Congress has at times used this power to regulate districting.

Meanwhile, he wrote, attempts to apply the *Bandemer* standard in practice had been “one long record of puzzlement and consternation” in the lower courts: “Eighteen years of judicial effort with virtually nothing to show for it.”³¹ In fact “several districting plans . . . were upheld despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results.” And this lack of results was due to the flawed standard: “The lower courts were set wandering in the wilderness for 18 years not because the *Bandemer* majority thought it a good idea, but because five justices could not agree upon a single standard, and because the standard the plurality proposed turned out not to work.”³²

Then Scalia went a step further: not only had the effort failed, but any future efforts were destined to fail too. No standard was forthcoming that would parallel the “easily administrable standard of population equality” from the one-person-one-vote cases.³³ Even if political gerrymandering *did* violate the Equal Protection

³¹ Vieth, 541 U.S. at 281.

³² *Id.* at 303.

³³ *Id.* at 290.

Clause—and he came close to conceding that in some circumstances it did—the Court should quit trying to provide a remedy, there being no good reason to risk “the delay and uncertainty that brings to the political process and the partisan enmity it brings upon the courts.”³⁴

The liberal justices split among three dissents. Stevens was most unyielding on the need for a broad, even if that meant disruptive, remedy: “The concept of equal justice under law requires the State to govern impartially.”³⁵ Unlike most of the other justices, he also saw the Court’s jurisprudence on race-based gerrymandering as providing a judicially manageable standard even when applied to the more multifarious arena of political belief, which, as O’Connor had pointed out, ordinarily lacks the external visible dimension associated with race and comes in any number of varieties (parties have internal factions, for example), each potentially entitled to an equal protection guardian. Justice Souter, joined by Ginsburg, proposed breaking the inquiry into stages, at least some of which—such as checking for compactness and respecting the boundaries of political subdivisions—relied on traditional criteria of redistricting that lent themselves well to quantification and objective review. (Maps can be scored for compactness according to mathematical formulas, for instance, or for congruence based on how many or few county splits they impose.) Not enough, retorted Scalia: Subjectivity and uncertainty would still creep back in at various points, especially since the test’s bottom line was the prevention of a vaguely described “extremity of unfairness.”³⁶

Justice Stephen Breyer took a different tack, conceding that “pure politics often helps to secure constitutionally important democratic objectives,” but noting that political influences could become destructive.³⁷ He proposed that judges should “test for” situations in which a political minority had managed to entrench itself indefinitely as a majority through the gerrymander device.³⁸ Whatever the theoretical attractions of focusing the investigation this way, the question was whether such an inquiry would depend on too many uncertain

³⁴ *Id.* at 301.

³⁵ *Id.* at 317 (Stevens, J., dissenting).

³⁶ 541 U.S. at 295.

³⁷ *Id.* at 355 (Breyer, J., dissenting).

³⁸ *Id.* at 356.

evidentiary findings to yield a manageable standard. Was a single election result somehow typical of how things would go next time? How much depended on such vagaries as the running of a strong or weak candidate? As Scalia wrote, referring to one of the other proposed standards, “requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.”³⁹

A Court-ful of Misgivings

Reading both cases leaves it clear that Kennedy in his much-studied concurrence wasn’t the only justice troubled about the floodgates problem and ensuring that courts’ decisions were consistent and understandable. The *Bandemer* plurality was troubled as well: Not only had it erected various barriers to diagnosing an equal protection violation, but it warned against “[i]nviting attack on minor departures from some supposed norm” and cautioned courts to confine themselves to “serious” abuses.⁴⁰ Souter and Ginsburg were content to focus on cases with an “extremity of unfairness,” and the Breyer indefinite entrenchment standard would probably have given courts even less to do. Even Stevens had signed onto Powell’s *Bandemer* partial concurrence, which called for imposing a “heavy burden of proof” on plaintiffs since federal courts were “ill-equipped” to review districting decisions.⁴¹

The floodgates issue, incidentally, extended beyond the nation’s 435 congressional districts and roughly 7,300 state legislative districts. Federal courts might also be required to review district lines for county and city councils and more specialized government bodies.

On other issues, too, liberal and not just conservative justices had expressed doubts about broad judicial supervision—doubts that found echoes in the *Gill* and *Benisek* cases. For example, the dispute over whether challenges should be brought statewide or to particular districts began early on, with many of the liberals’ opinions, including that of Souter and Ginsburg, nodding toward the idea that

³⁹ 541 U.S. at 290.

⁴⁰ 478 U.S. at 133.

⁴¹ *Id.* at 185 (Powell, J., concurring in part and dissenting in part).

individual-district challenges might be superior both in ease of assessment and in reflecting the nature of equal protection as an individual right.⁴² In its remand of the Wisconsin case, of course, the Court as a whole did eventually side with the idea that courts should entertain complaints that people file about their own districts, rather than those filed by persons who feel aggrieved at how their party is faring in districts not their own.⁴³

Finally, members of both liberal and conservative blocs had expressed misgivings about basing unfairness findings on snapshots representing performance in a single election, since political tides ebb and flow, individual candidates in any one round may be strong or weak, and so forth. A version of this issue came up both in *Gill*, as we will see below, and in *Benisek*. In the latter, the state of Maryland's defense pointed out that even if Democrats schemed to make the sixth district unwinnable for Republicans, the GOP had come close to winning the seat in 2014 anyway, a wave year for local Republicans.

Expert Attacks

With Kennedy known to be the likely target of persuasion, the litigants' arguments and expert submissions focused on some of the concerns flagged in his *Vieth* concurrence. Was the efficiency-gap standard suitably neutral, objective, resistant to manipulation, and related to the constitutional text? Kennedy was such a stickler on the neutrality point that his concurrence had even raised doubts about whether judges could properly enforce the measures of good redistricting practice in widest use around the states—those of compactness and of congruence with county and city boundaries.⁴⁴ The problem, as he saw it, is that those standards are not free from partisan impact: In present-day America, Democrats tend to congregate in cities, which means maps drawn to achieve neutral standards such as compactness and congruence tend to generate a slight Republican advantage, maybe two percentage points.

Opponents assailed the efficiency-gap theory as pretending to a neutrality that it would in no way embody in practice. For example,

⁴² *Vieth*, 541 U.S. at 353 (Souter, J., dissenting).

⁴³ *Gill*, 138 S. Ct. at 1930.

⁴⁴ *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring).

if even a sublimely impartial map drawn by the hand of the Recording Angel would saddle Democrats with more wasted votes owing to city concentration, then proclaiming a 7-percent gap as trigger starts Republicans out closer to the penalty line, meaning that Democrats can commit considerably more mischief before getting caught at it. In fact some of the maps that scored worst on the efficiency gap in plaintiffs' own submissions were drawn up by putative neutrals such as bipartisan commissions or courts themselves.

Nor was the efficiency gap free from problems of snapshots and their timing. (Indeed, its advocates recognized and sought to analyze that.) Also disturbing, if a test were elevated to the status of evidence with vital legal consequences, actors might find ways of manipulating wasted-vote scores. For example, parties often decide not to run a sacrificial-lamb candidate in a district that is safe for the other side, thus accepting a zero vote when they could have obtained (say) a 25-percent share. But that decision influences efficiency gap scores, giving each party an artificial reason to contest futile races—or alternatively request that scores be based on the vote totals missing nominees “should” have gotten had they run, a dangerous speculation.

Foreshadowing

There were early clues that *Gill* was not going to be an easy sell to Kennedy. Within hours of taking the case, the Court issued a stay of the order below, with Kennedy siding with the conservative wing over dissents from the four liberals. Decisions on stays often provide a peek into justices' preliminary thinking.⁴⁵

By February, more clues suggested that the Supreme Court was leaning against a big decision. Rather than fast-track consideration of its second case, *Benisek*, the Court instead set an oral argument date of March 28. Any decision announcing the applicability of a new constitutional standard would throw one or both states into confusion: Absentee military primary ballots are printed as early as the spring, and the Maryland legislature, for one, adjourns for the year in early April. Of course the Court might have tried to introduce

⁴⁵ See Josh Blackman, On the Roberts Court, A Grant of a Stay, Followed by a Cert Grant, Almost Always Yields a Reversal, JoshBlackman.com, July 10, 2017, <http://joshblackman.com/blog/2017/07/10/on-the-roberts-court-a-grant-of-a-stay-followed-by-a-cert-grant-almost-always-yields-a-reversal>.

a new standard in a staged or prospective way, but its lack of a sense of urgency was hard to miss.

At each of the two oral arguments, the first comment from the bench foreshadowed the disposition of the case. In *Gill*, Justice Kennedy jumped in almost at once to cast doubt on whether standing should be statewide as opposed to by-district,⁴⁶ while in *Benisek*, Justice Ginsburg started off by questioning whether a preliminary injunction was needed when adequate relief was to be had later.⁴⁷

Concerns about manageability and floodgates were also much in evidence. In *Benisek*, for example, at least four justices of varying stripes (Alito, Roberts, Kagan, and Breyer) all brought up the prospect that a First Amendment standard would require the application of strict scrutiny to even the faint whiff of politics in an otherwise reasonable plan, thereby encouraging more challenges. There were also other concerns: At the *Gill* oral argument, Gorsuch, Breyer, Kagan, and Chief Justice Roberts all expressed floodgates concerns. Roberts also warned that if courts presumed to enforce an opaque mathematical test relying on “sociological gobbledygook,” ordinary citizens would start to assume that judges were ruling for one party because they wanted that party to win. “And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.”⁴⁸

The ultimate anticlimax thus came as little surprise. The Wisconsin complainants would have to go back and configure their case so as to demonstrate standing in their own home districts; the Maryland complainants would have to go back and develop the record further. Concurring on behalf of the four liberals, Justice Elena Kagan was of the opinion that once the complainants lined up plaintiffs who lived in the right districts, they could proceed to introduce statewide evidence and seek statewide remedies, which would leave them with more or less the full scope of what liberal litigation groups had wanted.⁴⁹ Only Justices Thomas and Gorsuch, although they concurred in the judgment, would have ended the Wisconsin complainants’ case outright rather than permit a standing do-over.⁵⁰

⁴⁶ Transcript of Oral Arg. at 4, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

⁴⁷ Transcript of Oral Arg. at 4, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333).

⁴⁸ *Gill*, Transcript, *supra* note 46, at 40.

⁴⁹ *Gill*, 138 S. Ct. at 1934 (Kagan, J., concurring).

⁵⁰ *Id.* at 1941 (Thomas, J., concurring).

Conclusion

Some commentators claimed to see in the 2017–18 term the Year of the Sidestep, given the other big cases that ended anticlimactically, notably *Masterpiece Cakeshop*, in which the Court dodged the expected Culture War clash by going off on a less contentious tangent to send the case back for more processing.

But such comparisons are not needed here. In the end, the Court saw little temptation to jump either way and thus face high risks to its institutional legitimacy. The framing of the issue in the liberal press as one of systematic national election-stealing by Republicans meant that a 5-4 decision to uphold the maps and rule out future relief would expose the Court to another bitter, sustained attack on its institutional role like the brouhaha that followed *Citizens United*. To the conservatives, at least, a jump into an open-ended new standard would risk a loss of political legitimacy just as surely, even if the slow way.

Following Justice Anthony Kennedy's decision to retire, it would not be surprising if liberal forces seek to avoid a showdown at the high court on this issue for a while, as they bide their time waiting for a more favorably disposed Court.

But whatever happens at the Court, there are good reasons for states to act on their own to curb the evils of partisan gerrymandering without looking to One First Street. Measures to prescribe strong standards of compactness and congruence; take line-drawing out of the hands of self-interested incumbents; provide for transparency, open data access, and public map submission; and ensure strong judicial review in state courts made sense on June 17, 2018, and they continued to make sense on June 19. Moreover, they do not require waiting on a Court that may stay perched on its fence for many years to come.

The Court has kicked the issue down the road. The rest of us shouldn't. Partisan gerrymandering remains a distinctive political evil, a force for entrenching undeserving incumbency, and a worthy target for efforts at reform.