

The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent

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THE GERRYMANDER AND THE CONSTITUTION:
TWO AVENUES OF ANALYSIS AND THE QUEST FOR A
DURABLE PRECEDENT

EDWARD B. FOLEY*

ABSTRACT

It has been notoriously difficult for the United States Supreme Court to develop a judicially manageable—and publicly comprehensible—standard for adjudicating partisan gerrymandering claims, a standard comparable in this respect to the extraordinarily successful “one person, one vote” principle articulated in the Reapportionment Revolution of the 1960s. This difficulty persists because the quest has been for a gerrymandering standard that is universalistic in the same way that “one person, one vote” is: derived from abstract ideas of political theory, like the equal right of citizens to participate in electoral politics. But other domains of constitutional law employ particularistic modes of reasoning in sharp contrast to the universalism of the “one person, one vote” principle. Particularism can provide a judicially manageable standard for partisan gerrymandering claims by making the original gerrymander—the one that provided the name for this category of pernicious partisanship—a fixed historical benchmark to judge the distortion of legislative districts.

This particularistic reasoning should be persuasive to Justice Anthony Kennedy, especially if rooted in the First Amendment (home to other well-known examples of particularistic analysis), and if also combined with a cogent explanation why the First Amendment right must remain “judicially underenforced” relative to its potential scope

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on universalistic grounds, because of the barrier imposed by the political question doctrine's need for a judicially manageable standard. Particularism, in other words, defines not necessarily the full First Amendment right from a theoretical perspective, but only the judicially enforceable portion of it. Even more important than persuading Justice Kennedy, however, is convincing a Supreme Court controlled by conservative Justices—after Justice Kennedy has been replaced by another Justice like Justices Clarence Thomas, Samuel Alito, or Neil Gorsuch—not to overrule an opinion in which Justice Kennedy has identified a judicially manageable standard for invalidating partisan gerrymanders as unconstitutional. On this crucial point, particularism has distinct advantages over universalism, including facilitating the possibility that the Justice Kennedy-authored precedent quickly becomes imbedded in the nation's political culture, and because the public easily understands (and embraces) a precedent that renders unconstitutional a district as disfigured as the original gerrymander. A precedent that becomes an integral element of America's public self-understanding in this way is one that conservatives on the Court would have difficulty overruling and, indeed, little interest in repudiating insofar as it is historically grounded and limited by the kind of particularistic reasoning that conservatives consider acceptable.

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INTRODUCTION

Ever since *Vieth v. Jubelirer*,¹ the effort has been to develop a judicially enforceable standard that will convince Justice Anthony Kennedy to invalidate a partisan gerrymander as unconstitutional.² The so-called “symmetry standard” did not work in *League of United Latin American Citizens (LULAC) v. Perry*, at least not all by itself.³ Now the focus is on the “efficiency gap” as an alternative measure of partisan bias.⁴ There is also the attempt to use the First Amendment, as Justice Kennedy himself suggested in *Vieth*,⁵ as a more promising constitutional vehicle than equal protection for formulating a judicially manageable method of identifying when a redistricting map is infected with excess partisanship.⁶ Now that the Court has under review the case from Wisconsin, *Gill v. Whitford*,⁷ the

1. 541 U.S. 267 (2004).

2. See Richard L. Hasen, *Justice Kennedy's Beauty Pageant*, ATLANTIC (June 19, 2017), https://www.theatlantic.com/politics/archive/2017/06/justice-kennedys-beauty-pageant/530790/?utm_source=twb [<https://perma.cc/2GY5-3JSR>].

3. After observing that “one of the *amici* proposes a symmetry standard that would measure partisan bias by compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote,” Justice Kennedy opined: “Without altogether discounting its utility in redistricting planning and litigation, I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship.” 548 U.S. 399, 419-20 (2006) (plurality opinion) (quoting Brief for King et al. at 5, *LULAC v. Perry*, 548 U.S. 399 (2006) (No. 05-204)).

4. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 851-52 (2015) (defining the “efficiency gap” metric). The efficiency gap is the heart of the lawsuit, now before the Supreme Court, against Wisconsin’s districting of its legislative assembly. See Jo Craven McGinty, *The Numbers: Formula Measures Impact of Partisan Gerrymandering*, WALL ST. J. (June 24, 2017), <https://www.wsj.com/articles/formula-measures-impact-of-partisan-gerrymandering-1498222800> [<https://perma.cc/D2NT-93P5>].

5. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (“The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering.”).

6. The First Amendment is the focus of a lawsuit that attacks the blatant gerrymandering of Maryland’s congressional districts. See Second Amended Complaint at ¶¶ 7(a)-(c), 10, *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017) (No. 1:13-cv-03233-JKB), ECF No. 44. Professor Daniel Tokaji’s contribution to this Symposium also rests specifically on the First Amendment. See Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2162-64 (2018) (positing three reasons why the First Amendment’s protection of expressive association is the strongest basis for partisan gerrymandering claims).

7. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No.

fervent hope of many is that Justice Kennedy will find himself persuaded by one of these new approaches.⁸

It should be evident, however, that it is not enough to convince Justice Kennedy that the judiciary is capable of condemning partisan gerrymanders as unconstitutional.⁹ Putting aside the obvious need to hold on to the votes of the four Democratic appointees to the Court,¹⁰ there is the issue of whether Justice Kennedy's replacement on the Court—after he steps down—will adhere to a precedent that subjects gerrymanders to judicial invalidation. In other words, it does no good for Justice Kennedy and the four Democratic appointees to strike down a gerrymander in the spring of 2018, if Justice Kennedy leaves the bench later that year (or the next) and President Donald Trump replaces him with a Justice Antonin Scalia-like conservative who, believing that gerrymanders are nonjudiciable, joins in 2022 with four other Republican appointees (Justices Clarence Thomas, John Roberts, Samuel Alito, and Neil Gorsuch) to overrule the 2018 Justice Kennedy-led decision that struck the gerrymander down.

Justice Kennedy knows well the raw power to overrule a recent precedent solely because one member of the Court has been replaced with another. Justice Kennedy, after all, wrote the opinion in *Citizens United v. FEC*,¹¹ which overruled the seven-year-old *McConnell v. FEC*,¹² solely because Justice Sandra Day O'Connor, who had

16-1161 (U.S. Oct. 3, 2017).

8. Rick Hasen colorfully describes this as a “beauty pageant” in which jurisprudential contestants parade themselves before Justice Kennedy in the hope that he will select one, rather than none, as worthy. Hasen, *supra* note 2.

9. See *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

10. There is little doubt that the four Democratic appointees to the Court (Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) would quickly join a Justice Kennedy opinion finding an unconstitutional partisan gerrymander in the Wisconsin case—especially given their recorded votes to deny the stay that the Court granted in *Gill*. *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (No. 16-1161) (order granting stay). The more uncertain, but delicate, issue is whether any of the four Democratic appointees on the Court—either Justices Ginsburg or Breyer, most probably—would, for health reasons, be unable to remain on the Court until *Gill* is ultimately decided. Justice Ginsburg publicly assured audiences that she is doing all she can to remain fit and is urging her colleagues, including Justice Kennedy, to do the same. Ariane de Vogue, *Ginsburg Talks Partisan Rancor, Electoral College and Kale*, CNN (Feb. 7, 2017), <http://www.cnn.com/2017/02/07/politics/ruth-bader-ginsburg-electoral-college/index.html> [<https://perma.cc/E2GT-3DHD>].

11. 558 U.S. 310, 365 (2010).

12. 540 U.S. 93 (2003).

supplied the crucial fifth vote in *McConnell*, stepped down in 2006 and was replaced by the more conservative Justice Alito.¹³ Even if Justice Kennedy supplies the crucial fifth vote to invalidate a gerrymander in 2018, he must be well aware that he can do nothing to prevent his replacement from exercising the pure judicial power to overrule that decision in exactly the same way that the addition of Justice Alito to the Court gave him the power to jettison *McConnell*.¹⁴

Despite this raw power of five Justices to overrule any precedent they wish to discard, not all precedents are equally vulnerable to overruling. Some decisions, even if 5-4 and sharply divisive when rendered, gather a staying power over time and thus resist an effort to undo them. For example, *Miranda v. Arizona*, the Warren Court case that established the now-famous *Miranda* warnings,¹⁵ was 5-4 and extremely controversial, with many conservatives wishing for decades to eradicate it.¹⁶ But when the question whether to overrule it actually came before the much more conservative Rehnquist Court in *Dickerson v. United States*,¹⁷ the Justices upheld it by a vote of 7-2,¹⁸ with the archconservative Chief Justice William Rehnquist himself writing the opinion for the majority (which included Justices Kennedy and O'Connor, both President Reagan appointees).¹⁹ *Miranda*, Chief Justice Rehnquist explained, had "become part of our national culture."²⁰ He and his fellow conservatives on the Court were unwilling to unravel the fabric of the nation by attempting to tear *Miranda* from it.²¹

13. See Jeff Clements, *Justice in the Balance: Citizens United v. Federal Election Commission*, AM. CONST. SOC'Y: ACS BLOG (June 16, 2016), <https://www.acslaw.org/acsblog/justice-in-the-balance-citizens-united-v-federal-election-commission?page=1#> [<https://perma.cc/3GW8-LVV3>]; David Stout, *Alito Is Sworn in as Justice After 58-42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), <http://www.nytimes.com/2006/01/31/politics/politicsspecial1/alito-is-sworn-in-as-justice-after-5842-vote-to.html> [<https://perma.cc/YED3-9U8R>].

14. See Clements, *supra* note 13.

15. 384 U.S. 436, 467-73 (1966).

16. See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1057-58 (1998).

17. 530 U.S. 428, 443 (2000).

18. *Id.* at 430.

19. *Id.* at 431.

20. *Id.* at 443.

21. See *id.*

The key point, then, is that the Court's precedents are capable of gathering a cultural force that immunizes them from subsequent overruling even by newly appointed Justices who are ideologically opposed to them. The Second Amendment decision, *District of Columbia v. Heller*, likely has this character.²² Although also a 5-4 decision²³ and extremely controversial,²⁴ it is doubtful that it would have been overruled even if Hillary Clinton had won the presidency and Merrick Garland, or another Democratic appointee, had replaced Justice Scalia. Like *Miranda*,²⁵ *Heller* has become ingrained in the national culture, and it would have been too disruptive and counterproductive for liberals, despite despising it, to get rid of it.²⁶

Justice Kennedy clearly hopes that something similar happens to *Obergefell v. Hodges*, his opinion for a 5-4 Court that required all fifty states to extend an equal right to marry to same-sex, as well as opposite-sex, couples.²⁷ If President Trump replaces Justice Kennedy with a Scalia-like Justice, then in theory there would be a new five-vote majority hostile to *Obergefell*. But notwithstanding the fact that this new five-vote majority likely would not have recognized a constitutional right to gay marriage if it had controlled the Court in *Obergefell* itself, it does not automatically follow that this new five-vote majority will pull the trigger to overrule *Obergefell*.²⁸ On the contrary, Justice Kennedy's opinion embracing marriage equality is quickly becoming interwoven into the national culture,²⁹ and it is

22. 554 U.S. 570 (2008).

23. *Id.* at 572.

24. See Alex Altman, *The Future of Gun Control*, TIME (June 26, 2008), <http://content.time.com/time/nation/article/0,8599,1818325,00.html> [<https://perma.cc/QHK7-2S4F>] (discussing Justice Steven's *Heller* dissent).

25. See *Dickerson*, 530 U.S. at 443.

26. See Adam Winkler, *Why the Supreme Court Won't Impact Gun Rights*, ATLANTIC (June 7, 2016), <https://www.theatlantic.com/politics/archive/2016/06/why-the-supreme-court-wont-restrict-gun-rights/485810/> [<https://perma.cc/VM8U-VPW3>] ("Plus, there is one really strong reason *not* to overturn *Heller*: It would spark a backlash that would make the political movement to reverse *Roe* seem like a schoolyard kerfuffle.... The justices know this—as do gun-control advocates. Several of the latter have told me they would not ask the Court to overturn *Heller*, even if a liberal is appointed to fill Scalia's seat."); see also Allen Rostron, *The Past and Future Role of the Second Amendment and Gun Control in Fights over Confirmation of Supreme Court Nominees*, 3 NE. U. L.J. 123, 173 (2011) (predicting that *Heller* "will never be expressly overruled").

27. 135 S. Ct. 2584, 2591, 2604-05 (2015).

28. See *supra* notes 15-21 and accompanying text.

29. See Ruth Marcus, *If You're Reading This, Justice Kennedy, Please Don't Retire*, WASH.

unlikely that even conservatives ideologically opposed to it will see overruling it as a worthwhile expenditure of judicial capital.³⁰

So, clearly, some precedents acquire this kind of staying power.³¹ But, just as clearly, not all do.³² *McConnell* was unable to resist being overruled in *Citizens United*.³³ Thus, the crucial question for any anti-gerrymandering precedent that Justice Kennedy might render before retiring is whether—like *Dickerson*, *Heller*, and perhaps *Obergefell*—it also could be capable of gaining the necessary staying power.

To consider this crucial question, it is necessary to analyze not only what arguments might convince Justice Kennedy in the first instance to support an anti-gerrymandering majority opinion, but more importantly, what arguments down the road might potentially convince hostile Justices—like Justices Roberts, Alito, Gorsuch, or whoever replaces Justice Kennedy himself—to refrain from overruling that anti-gerrymandering precedent. In thinking along these lines, one must ask what attributes of an anti-gerrymandering precedent might enable it to generate the cultural status that helps make it resistant to subsequent repudiation. To conduct this inquiry, in turn, it becomes necessary to contemplate more broadly the nature of constitutional rights and their role in national culture.

POST (Feb. 3, 2017), https://www.washingtonpost.com/opinions/if-youre-reading-this-justice-kennedy-please-dont-retire/2017/02/03/d3a039e6-ea3e-11e6-bf6f-301b6b443624_story.html [<https://perma.cc/AXW8-N6TC>] (suggesting, and hoping, that *Obergefell* and other gay rights precedents authored by Justice Kennedy “are already so woven into the social fabric that a future court, a court without a Kennedy to protect his precedents and their underlying rationale, will be reluctant to unwind them”).

30. See Carl Eric Scott, *The Post-Obergefell Political Trap*, NAT'L REV. (July 3, 2015, 7:16 PM), <http://www.nationalreview.com/postmodern-conservative/420740/post-obergefell-political-trap-carl-eric-scott> [<https://perma.cc/AX2S-F45U>].

31. See *supra* notes 15-21 and accompanying text.

32. See *supra* notes 11-13 and accompanying text.

33. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

I. UNIVERSALISM AND PARTICULARISM IN THE EXPOSITION OF
CONSTITUTIONAL RIGHTS³⁴

In the Court's jurisprudence, some constitutional rights aspire to be universal human rights. In *Obergefell*, Justice Kennedy depicted the right to gay marriage this way.³⁵ As he described it, the right to have a soulmate, regardless of one's sexual orientation, inheres in being human.³⁶ "Marriage responds to the universal fear that a lonely person might call out only to find no one there,"³⁷ Justice Kennedy wrote for the Court.

Not all constitutional rights, however, are universalistic in nature. The right recognized in *Heller* surely is not.³⁸ Other civilized nations have strict limits on gun ownership, and a personal right to possess a handgun would be inconsistent with the laws, including constitutional law, of those societies.³⁹

The reasoning in *Heller*, too, had no pretense to universalism. On the contrary, its recognition of the handgun right was rooted in the distinctive circumstances of American history and social customs.⁴⁰ Inevitably recognizing that the authors of the Second Amendment

34. Other authors have articulated the dichotomy between universalism and particularism in constitutional interpretation and the identification of constitutional rights. *See, e.g.*, Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327, 1337-40 (2000) (book review). My use of this dichotomy emphasizes the methodological distinction in the judicial reasoning used to delineate the contours of generally worded constitutional clauses. Universalistic reasoning seeks to define these clauses through the invocation of overarching general principles, usually derived from abstract philosophical ideas. Particularistic reasoning, conversely, seeks to specify the meaning of these clauses by anchoring them in concrete instances of America's national experience, with a preference for those experiences most deeply rooted in American history, and thus mostly likely to be most deeply ingrained in America's collective national character.

35. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599-2601 (2015).

36. *See id.* at 2599.

37. *Id.* at 2600.

38. *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

39. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN REL. (Jan. 12, 2016), <https://www.cfr.org/background/under/us-gun-policy-global-comparisons> [<https://perma.cc/8A7C-8TPM>]; *see also* Juliette Jowit et al., *So, America, This Is How Other Countries Do Gun Control*, GUARDIAN (Mar. 14, 2016, 4:57 PM), <https://www.theguardian.com/us-news/2016/mar/15/so-america-this-is-how-you-do-gun-control> [<https://perma.cc/L6XT-Y8J4>].

40. *Heller*, 554 U.S. at 592. Justice Scalia's opinion for the Court in *Heller* is an exegesis on the history of gun rights in America, including "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *Id.* at 605.

could not have envisioned the kind of firepower capable of handgun technology today, the *Heller* Court ruled that the constitutional right to possess a gun is limited to whatever types of gun happen to be “in common use” at the current moment.⁴¹ This limitation permits the government to ban fully automatic weapons because, being especially “dangerous and unusual,” they are not widespread.⁴²

Some constitutional rights are mixed, or hybrid, insofar as they have some dimensions that seem universalistic, while in other respects seem particularistic. The freedom of speech is an example.⁴³ The basic right to express an opinion on an issue of public concern transcends the particular circumstances of American history and culture and, instead, is essential in any society that purports to respect basic human dignity.⁴⁴ Other aspects of First Amendment jurisprudence, by contrast, are specifically rooted in the particular circumstances of American historical and cultural experience. *New York Times Co. v. Sullivan*, the Court’s pronouncement of constitutional constraints upon a state’s libel laws,⁴⁵ famously predicated its holding on the observation that the Alien and Sedition Acts, while initially enforced by federal judges, were deemed unconstitutional “in the court of history.”⁴⁶ Since Thomas Jefferson and James Madison vehemently protested their adoption,⁴⁷ the Alien and Sedition Acts have been held up as precisely the kind of governmental effort to muzzle dissent that the First Amendment is designed to protect against.⁴⁸

41. *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

42. *See, e.g., id.*

43. U.S. CONST. amend. I.

44. *See, e.g.,* JOHN STUART MILL, ON LIBERTY 35-36 (7th ed. 1871); Steven Pinker, *Why Free Speech Is Fundamental*, BOS. GLOBE (Jan. 27, 2015), <https://www.bostonglobe.com/opinion/2015/01/26/why-free-speech-fundamental/aaAWVYFscrhFCC4ye9FVjN/story.html> [<https://perma.cc/SD5M-84R2>]; *see also* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 152-53 (1989) (articulating, as one important justification for free speech, “the idea that ... [a]s a matter of basic human respect we may owe it to each other to listen to what each of us has to say, or at least not to foreclose the opportunity to speak and to listen”).

45. 376 U.S. 254, 267-68, 283-84 (1964).

46. *Id.* at 276; *see also* Edward B. Foley, *Wechsler, History, and Gerrymandering*, SCOTUSBLOG (Aug. 11, 2017), <http://www.scotusblog.com/2017/08/symposium-wechsler-history-gerrymandering/> [<https://perma.cc/YY5N-ZZ59>] (explaining how the Court relied upon Herbert Wechsler’s brief for this crucial point).

47. *N.Y. Times Co.*, 376 U.S. at 274-75.

48. *See, e.g.,* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 318 & n.88 (1986) (describing how the Court “got it right” in *New*

Similarly, the special First Amendment prohibition against prior restraints is not a principle derivable from pure political theory.⁴⁹ Rather, it stems from the historical concern with laws attempting to license the press.⁵⁰ So, too, with the categorical exception of obscenity from First Amendment protections.⁵¹ A purely theoretical—and universalistic—conception of free expression would have difficulty articulating the basis for excluding sexually explicit speech from the scope of the protected freedom.⁵² But a First Amendment jurisprudence that is rooted, at least in part, in the particular circumstances of American history and social customs can formulate a rationale for keeping “prurient” speech off-limits.⁵³ Indeed, the Court’s test for determining obscenity is itself inherently particularistic insofar as an essential element of the test is that prurience must be evaluated according to “contemporary community standards.”⁵⁴

York Times Co. v. Sullivan when it embraced the historical repudiation of the Alien and Sedition Acts); Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1983 n.16 (2006) (explaining how *Sullivan*, by relying upon the historical repudiation of the Alien and Sedition Acts, is a canonical example of how “historical Application Understandings can become foundational even if not so held at the time of the founding”); see also ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 65 (1991).

49. See, e.g., John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983) (arguing on theoretical grounds for dispensing with the doctrine of prior restraint, for it “no longer warrants use as an independent category of First Amendment analysis”).

50. See, e.g., Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 693 (1988) (defending the doctrine of prior restraint, despite its theoretical weaknesses, because of its particular role in the development of America’s free speech tradition).

51. See *Miller v. California*, 413 U.S. 15, 23 (1973).

52. Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 472-73, 475 (1993).

53. Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM. L. & POL’Y 385, 398, 415 (2012) (explaining that Justice William Brennan used an originalist methodology in *Roth* to conclude that the First Amendment did not protect obscenity). Justice Scalia, consistent with his generally originalist approach to constitutional interpretation, understood the exclusion of obscenity from First Amendment protection on purely historical, rather than theoretical, grounds. See John A. Humbach, *‘Sexting’ and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 441 n.43 (2010) (citing Scalia’s opinion in *Heller*, among other authorities, on this point).

54. *Miller*, 413 U.S. at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

A. *The Weakness of Universalism with Respect to Partisan Gerrymanders*

The effort to use the Equal Protection Clause to constrain legislative districting has been framed mostly as a matter of complying with universalistic demands of democracy. The foundational principle of “one person, one vote,” articulated in *Reynolds v. Sims*⁵⁵ to insist that states apportion their legislative districts so that they all are roughly equal in population,⁵⁶ was so conceived. The *Reynolds* Court justified its insistence on “one person, one vote” as essentially emanating arithmetically from the very definition of democracy: “It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State’s voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once.”⁵⁷ Therefore, the Court reasoned, it would be equally untenable “that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State.”⁵⁸

Building upon the success of the equal protection claim in *Reynolds*, the challenge to partisan gerrymandering of districts that comply with “one person, one vote” has been framed in similarly universalistic terms. Whether conceived of as the right of each voter to have an equal opportunity to be part of a winning coalition without improper bias on the part of the legislative mapmaker,⁵⁹ or alternatively the equal right of each political party to compete for votes without improper bias built into the legislative map,⁶⁰ the underlying idea is that partisan gerrymandering is inconsistent with the basic principle of equal representation for all citizens inherent in the very concept of democracy itself.⁶¹ If the Equal

55. 377 U.S. 533, 558 (1964).

56. *Id.* at 568.

57. *Id.* at 562.

58. *Id.*

59. See Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 267 (2006).

60. See Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 397, 413-14 (2005).

61. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 606 (2002).

Protection Clause of the Fourteenth Amendment entails this basic principle of electoral equality, as *Reynolds* insisted,⁶² then it ought to be possible to derive a constitutional prohibition against partisan gerrymandering from the Equal Protection Clause.

The logic is a simple syllogism. The major premise is that equal protection encompasses electoral equality. The minor premise is that partisan gerrymandering contravenes electoral equality. Ergo: partisan gerrymandering contravenes equal protection.

The new “efficiency gap” metric,⁶³ which is at the heart of the challenge to Wisconsin’s map in *Gill*⁶⁴—and thus now squarely before the Supreme Court⁶⁵—rests on this kind of universalistic reasoning. The “efficiency gap” measures each party’s number of wasted votes, which are calculated by combining (1) all the votes cast for the party’s candidates in legislative districts that the party did not win and (2) all the extra votes, beyond the bare minimum necessary for victory, cast for the party’s candidates in those districts that the party did win.⁶⁶ The *gap* is the difference between each party’s number of wasted votes.⁶⁷

The premise of the “efficiency gap” as an appropriate measure for evaluating a state’s compliance with the constitutional requirement of electoral equality is that a legislative map should have no built-in bias in favor of one political party, and thus ideally the average “efficiency gap” over the ten-year duration of the map should be zero (or thereabouts).⁶⁸ A hypothetical map in which each legislative district is exceptionally competitive, producing 51-49 wins in every election, might oscillate sharply with large “efficiency gaps” in favor of one party in some years, followed by large “efficiency gaps” in favor of the other party in other years.⁶⁹ After all, a 51-49 district

62. *Reynolds*, 377 U.S. at 565.

63. Stephanopoulos & McGhee, *supra* note 4, at 851-52.

64. See Complaint at ¶¶ 5-7, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

65. See *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (No. 16-1161) (order granting stay).

66. Stephanopoulos & McGhee, *supra* note 4, at 851.

67. *Id.* at 851-52.

68. The plaintiffs in *Gill* acknowledged that, as a practical matter, it would be necessary to set a threshold for determining how much deviation from the ideal would render a map unconstitutional, just as it is necessary to set a threshold for deviations from one person, one vote.

69. The developers of the efficiency gap themselves recognize the potential volatility

causes one party to waste 49 percent of the total votes in that district, while the other party wastes only 1 percent of the total votes, for a gap of 48.⁷⁰ In principle, however, these large-but-oscillating “efficiency gaps” would average out to zero over time (and across districts), since if the districts are truly competitive in that each party has an equal chance to prevail in them in each election, then presumably each party will receive its roughly equal share of 51-49 wins.

It is easy to imagine a map that is consistently biased in favor of one political party and thus routinely produces an efficiency gap to that party’s advantage. Imagine, for example, that a state has a ten-district map, with each district having 1,000,000 voters. Assume that the state is consistently a 50-50 state overall, but that the districts are drawn so that Party *A* always wins eight of them 55-45, while Party *B* always wins only two of them 70-30:

District	Party A	Party B
1	550,000	450,000
2	550,000	450,000
3	550,000	450,000
4	550,000	450,000
5	550,000	450,000
6	550,000	450,000
7	550,000	450,000
8	550,000	450,000
9	300,000	700,000
10	300,000	700,000

These results produce an efficiency gap of 30 percent, calculated as follows.⁷¹ In Districts 1-8, Party *B* wastes all of its 450,000 votes in each district,⁷² for a subtotal of 3,600,000 wasted votes. By contrast, Party *A* wastes only 50,000 (minus 1, but ignore for rounding

inherent in the metric. *Id.* at 889. This volatility was a source of significant concern for the dissenting district court judge in *Gill. Gill*, 218 F. Supp. 3d at 959-60 (Griesbach, J., dissenting).

70. See Stephanopoulos & McGhee, *supra* note 4, at 851-52.

71. See *id.* at 850-52 (describing how to perform an efficiency gap calculation).

72. See *id.* at 850-51.

purposes) votes in each district,⁷³ for a subtotal of 400,000. In Districts 9 and 10, Party A wastes all of its 300,000 votes in each,⁷⁴ for a subtotal of 600,000. In these two districts, Party B wastes 200,000 votes (minus 1, but again ignore) in each,⁷⁵ for a subtotal of 400,000. Party A's total number of wasted votes is 1,000,000, whereas Party B's total number of wasted votes is a staggering 4,000,000—four times as many as Party A. Expressed as a percentage of the 10,000,000 votes in the state overall, the efficiency gap of 3,000,000 votes is 30 percent.⁷⁶ If an efficiency gap of that magnitude favoring Party A is durable election after election, this number is a strong indication of the considerable extent to which the map has a built-in advantage for Party A.⁷⁷

Other newly proposed mathematical measures of partisan bias in redistricting are similarly universalistic insofar as they start with the premise that a particular form of equality is ideal and that any significant deviation from this equality demonstrates the map's built-in bias. For example, the “mean-median difference” compares a party's average vote share across all districts with the party's vote share in the median district (which is the district in the middle of all districts arrayed from largest to smallest in terms of the party's vote share in each district).⁷⁸ Ideally, a party's mean and median vote shares should be the same.⁷⁹ When they are, a party's percentage of votes in the state as a whole matches the party's percentage of votes in the tipping-point district, the district that gives one party or the other the majority of seats elected using this map.⁸⁰

A party, of course, should have no guarantee of winning a majority of seats. But a map that is evenly balanced between two parties will tend to give each party an equal chance of winning the tipping-

73. *See id.* at 851.

74. *See id.* at 850-51.

75. *See id.* at 851.

76. *See id.* at 851-52.

77. *See id.* at 854.

78. *See* Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 *ELECTION L.J.* 312, 316 (2015) (advocating use of the mean-median metric); *see also* Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 *STAN. L. REV.* 1263, 1304-07 (2016) (proposing the mean-median test as the basis for one of several metrics to detect partisan gerrymanders).

79. *See* McDonald & Best, *supra* note 78, at 316.

80. *See id.*

point district as each party's share of the total votes cast in the state approaches 50-50.⁸¹ Thus, if Party *A* wins 52 percent of votes statewide, it will also win 52 percent of the votes in the median district if the map is ideally balanced this way and hence the mean-median difference is zero.⁸²

Conversely, a map is skewed, or biased, against a party insofar as the party's average vote share exceeds its vote share in the median, or tipping-point, district.⁸³ Suppose, again, that Party *A* wins 52 percent of votes statewide, but this time its vote share in the median district is only 48 percent. This discrepancy signifies that some of Party *A*'s extra votes have been "packed" into the relatively few districts (below the median) in which Party *A* did especially well.⁸⁴ The map is biased against Party *A* in this respect.⁸⁵ (In the ten-district example above to illustrate the efficiency gap, Party *B*'s average vote share is 50 percent, but its median vote share is only 45 percent, thereby indicating the degree to which the map is skewed against Party *B*.)

While mathematical measures like the "efficiency gap" and the "mean-median difference" have the virtue of being theoretically pristine and precise, they suffer from an unavoidable vulnerability. The Constitution, as Justice Kennedy has patiently explained, does not require legislative maps to be evenly balanced, or anything close to it, with respect to the ability of political parties and their voters to translate votes cast for a party's candidates into seats won by the party's candidates.⁸⁶ The sociological clumping of Democrats in cities, with the corresponding dispersal of Republicans in rural and exurban areas, puts Democrats at an inherent disadvantage in any

81. *See id.*

82. *See id.*

83. *See id.* at 317.

84. *See id.* at 317-18.

85. *See id.* at 318.

86. In *Vieth*, Justice Kennedy observed: "There is no authority for" the proposition that "a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation." *Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in the judgment). He also observed: "[I]f we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another." *Id.* at 309. In *LULAC*, furthermore, Justice Kennedy emphasized: "[T]here is no constitutional requirement of proportional representation." *LULAC v. Perry*, 548 U.S. 399, 419 (2006) (Kennedy, J.).

legislative map drawn according to conventional geographical considerations, like the compactness of a district's shape or conforming district lines insofar as possible to the existing boundaries of cities, counties, and other local units of government.⁸⁷

This point is true whether one uses the “efficiency gap” or the “mean-median difference” or any other mathematical measure designed to evaluate the extent to which a map treats parties and their voters equally. Democrats packed tightly into urban districts will tend to waste more votes than their more efficiently distributed Republican counterparts. Similarly, by winning especially big in the major metropolitan areas, Democrats can run up the score in terms of their average vote share without improving at all their vote share in the tipping-point district. Indeed, something like this happened in the 2016 presidential election, with Hillary Clinton accentuating the blueness of already blue California,⁸⁸ but failing to win more votes than Donald Trump in the battleground states that determined which candidate crossed the Electoral College tipping point.⁸⁹ Simply put, the Constitution permits a legislative map putting Democrats at this inherent disadvantage when the map is merely reflecting existing geographical realities.

The straightforward syllogism thus has a flaw. Its major premise is sound: the Equal Protection Clause does encompass a principle of electoral equality. Its doing so is what yields the doctrine of “one

87. Justice Kennedy explicitly recognized this specific point: “[C]ompactness standards help Republicans because Democrats are more likely to live in high density regions.” *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring in the judgment) (citing Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 POL. GEOGRAPHY 989, 1000-06 (1998)); see also Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 247, 262 (2013) (discussing the compactness of Democratic voters in towns in Florida that are often subsumed into predominately rural and Republican districts); Nicholas Goedert, *Gerrymandering or Geography? How Democrats Won the Popular Vote but Lost the Congress in 2012*, 1 RES. & POL. 1, 1-2 (2014) (suggesting that the issue for Democrats “is not gerrymandering, but districting itself”).

88. Clinton won 61.7 percent of the vote in California, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 8, 2016, GENERAL ELECTION 6 (2016), whereas Obama won less, 60.2 percent, in 2012, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 6, 2012, GENERAL ELECTION 7 (2012).

89. Nate Silver, *Donald Trump Had a Superior Electoral College Strategy*, FIVETHIRTYEIGHT (Feb. 6, 2017), <https://fivethirtyeight.com/features/donald-trump-had-a-superior-electoral-college-strategy/> [<https://perma.cc/4E5G-ALEL>].

person, one vote,” which remains good law.⁹⁰ But it turns out that the syllogism’s minor premise is faulty. The principle of constitutionally protected electoral equality does not require equal treatment of political parties and their voters that insists upon legislative maps that are evenly balanced between parties. The constitutionally protected principle of electoral equality is more limited: it produces the mathematical formula of “one person, one vote” to guarantee that each citizen’s vote counts the same in legislative representation, but it does not entail an equivalent mathematical formula for producing maps equally favorable to the competing political parties.

Given this truth, defenders of mathematical methods for testing partisan imbalance in a legislative map have endeavored to develop subsidiary tools designed to distinguish between imbalances caused by valid geographical factors, on the one hand, and those caused by improper partisanship on the other. One such strategy is to employ the ever-increasing power of computers to generate myriads of maps consistent with valid geographical factors, but excluding any overt consideration of partisanship, and then see if the actual legislative maps fall within the array of the computer-generated maps.⁹¹ If the legislative map does not fall within the array of the computer-generated maps, then it is an outlier, and presumably partisanship rather than geography is what explains the actual legislative map.⁹²

A challenge for this strategy is that some degree of partisanship, even beyond considerations of geography, is constitutionally permissible—at least according to long-standing Supreme Court precedent and most of its Justices, including Justice Kennedy.⁹³ To be sure,

90. See *Reynolds v. Sims*, 377 U.S. 533, 558, 568 (1964).

91. See, e.g., Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 *ELECTION L.J.* 331, 332 (2015); 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, 331-32 (2016); see also Bruce E. Cain et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 *WM. & MARY L. REV.* 1521 (2018) (utilizing a supercomputer algorithm as a method for determining unconstitutional partisan gerrymandering).

92. Chen & Cottrell, *supra* note 91, at 332.

93. Justice Kennedy expressed the point this way in his *Vieth* concurrence:

A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible,

Justice John Paul Stevens famously argued that any consideration of partisan advantage beyond what geography afforded should be off-limits in drawing legislative maps.⁹⁴ But the rest of the Justices were unwilling to go so far. They recognized that historically the task of drawing legislative maps had been entrusted to the legislatures themselves and thus the practice inevitably would be infused with partisanship.⁹⁵ It could not be reasonably expected that partisan politicians in control of the redistricting process, in choosing among alternative maps that are all somewhat attentive to

were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.

Vieth v. Jubelirer, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). Justice Kennedy added: the mere fact “that the legislature adopted political classifications” in its redistricting “describes no constitutional flaw.” *Id.* at 313.

Justice Scalia’s plurality in *Vieth* put the point even more bluntly: “The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.” *Id.* at 285 (plurality opinion); see also *id.* at 286 (“[P]artisan districting is a lawful and common practice.”).

94. As Justice Stevens put it in his *LULAC* dissent, “[a] purely partisan desire” to minimize the power of those opposing a political party does not qualify as a “legitimate governmental purpose” under Fourteenth Amendment analysis. *LULAC v. Perry*, 548 U.S. 399, 448 (2006) (Stevens, J., concurring in part and dissenting in part). Justice Stevens elaborated:

The requirements of the Federal Constitution that limit the State’s power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment’s prohibition against invidious discrimination, and the First Amendment’s protection of citizens from official retaliation based on their political affiliation. The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. Similarly, 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.’ These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially.

Id. at 461-62 (alteration in original) (citations omitted) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)).

95. In his *Vieth* dissent for himself and Justice Ginsburg, Justice Souter candidly acknowledged: “[S]ome intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent.” *Vieth*, 541 U.S. at 344 (Souter, J., dissenting). Justice Scalia, in turn, quoted this language to support the proposition that the judicial line-drawing challenge was to distinguish the point at which there is too much partisanship to be constitutionally permissible—or, as Justice Scalia colorfully described it, “the difficult position of drawing the line between good politics and bad politics.” *Id.* at 298-99 (plurality opinion).

geographical considerations, would not also inject an extra dose of partisanship in drawing boundaries in order to give their party a bit of a boost.⁹⁶ The challenge was figuring out when this extra boost of partisan advantage went *too far* and was *excessive*.⁹⁷ As Justice Kennedy put it in the conclusion to his *Vieth* concurrence: “The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned.”⁹⁸

The judiciary needed a tool for detecting when the partisans in charge of the redistricting process had crossed the line and abandoned that necessary decency and self-restraint in the exercise of their mapmaking power.

The difficulty, however, is that there is no easy measure of excessiveness. One can run all the computer simulations that one wants. But unless one can tell the computer how much partisanship as a factor beyond geography is too much partisanship, the computer will not be able to distinguish permissible from impermissible partisanship. It is easy to measure deviations from an absolute, like a zero “efficiency gap” or a zero “mean-median difference,” but if *some* partisanship beyond geography is okay, how does one tell the computer to identify when a mapmaker has exceeded the undefined permissible limit of partisanship? No mathematical test, as Justice Scalia observed in the *Vieth* plurality, “can possibly be successful unless one knows what he is testing *for*”⁹⁹—the inescapable need being to answer the pre-mathematical question, “How much political motivation and effect is too much?”¹⁰⁰

96. *See id.* at 286 (plurality opinion).

97. In his *Vieth* plurality, Justice Scalia made clear that he agreed with the dissenters (and Justice Kennedy) that “an *excessive* injection of politics is *unlawful*,” but he also asserted that the converse was equally true: “[S]etting out to segregate [voters] by political affiliation is (so long as one doesn’t go too far) lawful and hence ordinary.” *Id.* at 293.

98. *Id.* at 316 (Kennedy, J., concurring in the judgment).

99. *Id.* at 296-97 (plurality opinion).

100. Since this Symposium has been held and this Article written, the briefs filed in the Supreme Court in *Gill* have elucidated the way in which computer simulations can be used to distinguish excessive from permissible degrees of partisanship. *See* Edward B. Foley, *The Missing Link in Gerrymandering Jurisprudence*, ELECTION LAW @ MORITZ (Sept. 12, 2017, 4:35 PM), <http://moritzlaw.osu.edu/election-law/article/?article=13409> [<https://perma.cc/3H9Z-8L7P>]. In future work, I plan to analyze how this innovative use of computer simulations relates to the kind of particularistic reasoning I discuss in this Article. *See also* Edward B.

B. Particularism and Gerrymandering

The difficulties in developing a mathematical test for identifying excessive partisanship in the drawing of a legislative map, while obviously serious, should not cause Justice Kennedy—or his future replacement on the Court—to abandon the effort to formulate a judicially manageable standard for detecting impermissibly partisan gerrymanders. What should be jettisoned, instead, is the insistence upon the exclusive validity of a *universalistic* measure of unconstitutional gerrymandering, one derived from the essential nature of the redistricting enterprise. Instead, the quest for a constitutional standard for condemning excessively partisan redistricting should embrace the search for a *particularistic* metric of excessively partisan redistricting, one rooted in the distinctively American experience of the iconic gerrymander.¹⁰¹

The term “gerrymander” is used so frequently to refer to the generic practice of manipulating district lines to secure a partisan advantage that it is easy to forget, if only momentarily, that the term originates from one specific instance of such manipulation.¹⁰² “Gerrymander,” or “Gerry-mander” as it was first written, is the pejorative label attached to the salamander-shaped district approved by Governor Elbridge Gerry of Massachusetts in 1812.¹⁰³ The shape of the district was so grotesque that the inappropriate partisanship in drawing its boundaries was evident immediately from looking at the map.

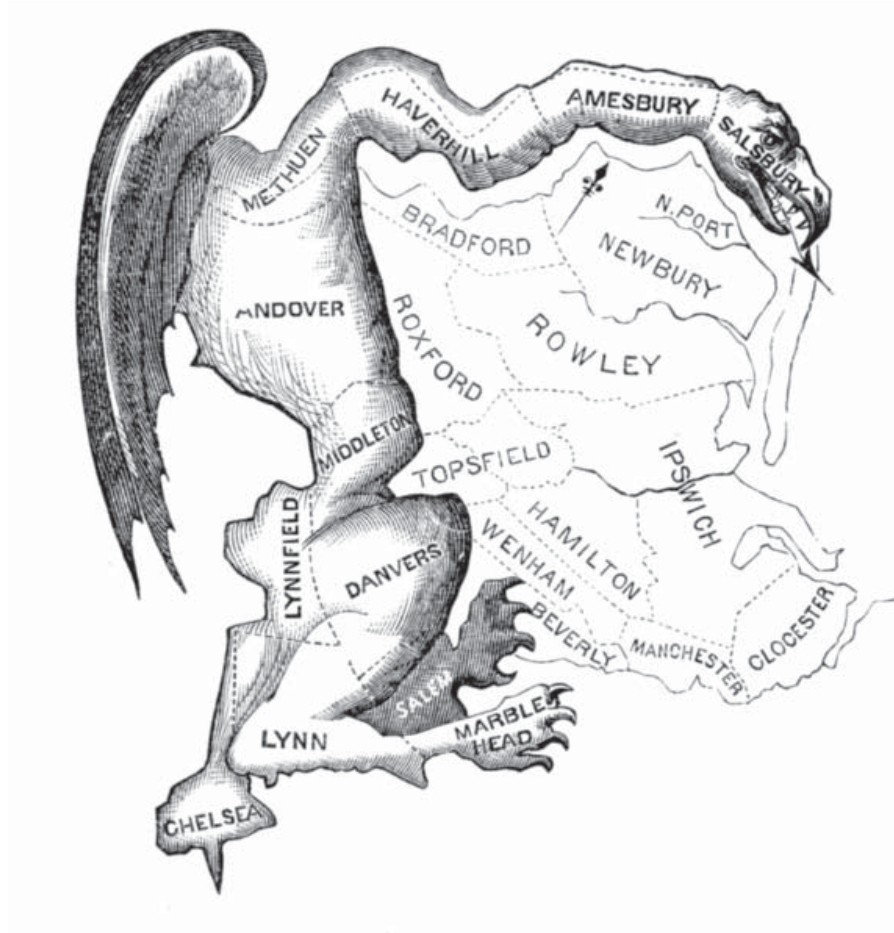
Foley, *Of X-Rays, CT Scans, and Gerrymanders*, ELECTION LAW @ MORITZ (Oct. 3, 2017, 6:32 PM), <http://moritzlaw.osu.edu/election-law/article/?article=13415> [<https://perma.cc/83MN-K844>].

101. See generally *The Gerry-Mander*, BOS. GAZETTE, Mar. 26, 1812, at 2.

102. See *id.*

103. *Id.*

Figure 1. The Original Gerrymander



It is possible to take this original gerrymander as not merely an illustration of improper redistricting, but indeed the very definition of improper redistricting—at least in the American context.¹⁰⁴ After all, by giving its name to the general category of legislative maps tainted by excessive partisanship, the original gerrymander itself

104. I explore this point in my article, Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 711-12 (2017).

delineates the point at which partisanship in the drawing of legislative districts becomes inappropriately excessive.¹⁰⁵ To be sure, not all newly gerrymandered maps look exactly like the original salamander-shaped district that provoked the contemptuous epithet. But in common parlance all newly gerrymandered districts are disfigured to the same degree as the original gerrymander, such that one can tell just as easily from merely looking at the map that something went horribly wrong in the drawing of it.¹⁰⁶ For example, a recent PBS explanation of Gerrymandering, or How Drawing Irregular Lines Can Impact an Election began with the origin of the term in Gerry's "salamander-shaped electoral district that benefited his party" and then illustrated the contemporary form of the practice with Maryland's especially egregious Third Congressional district, known as the "praying mantis."¹⁰⁷ A particularistic conception of unconstitutional gerrymandering would thus take the original gerrymander itself as the touchstone and judge invalid, at least presumptively, any equally disfigured district.¹⁰⁸

105. *See id.* at 712-13.

106. *See id.* at 713.

107. *Gerrymandering, or How Drawing Irregular Lines Can Impact an Election*, PBS: NEWSHOUR EXTRA (June 20, 2017), <http://www.pbs.org/newshour/extra/2017/06/gerrymandering-or-how-drawing-irregular-lines-can-impact-an-election/> [<https://perma.cc/7CJ2-GE3D>]; *see infra* Figure 2.

108. *See* Foley, *supra* note 104, at 720-21.

Figure 2. Maryland's Current Third Congressional District ("The Praying Mantis")¹⁰⁹



It is possible to measure any newly drawn district to determine whether or not its boundaries are distorted to the same extent as the original gerrymander.¹¹⁰ It is a simple calculation—as easy as comparing the perimeter of the original gerrymander to the perimeter of a circle with the same area (because a circle is the most undistorted shape possible, the degree to which a district deviates from a same-sized circle is a measure of the district's distortedness), and then doing the exact same comparison for any other district.¹¹¹

109. Christopher Ingraham, *America's Most Gerrymandered Congressional Districts*, WASH. POST (May 15, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/?utm_term=.487530d2848c [<https://perma.cc/S2F4-42Y2>].

110. Stephen Ansolabehere & Maxwell Palmer, *A Two-Hundred Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 742-44 (2016).

111. *Id.* at 747. Comparing the perimeter of the district to the perimeter of a circle with the same area is called the Schwartzberg measurement, after the author who first proposed it. See H.P. Young, *Measuring the Compactness of Legislative Districts*, 13 LEGIS. STUD. Q. 105, 108-09 (1988) (describing the Schwartzberg measurement). A mathematically equivalent measurement, known as Polsby-Popper, compares the area of the district with the area of a

If the new district's perimeter-compared-to-circle score equals or exceeds the original gerrymander's perimeter-compared-to-circle score, then the new district is just as gerrymandered as its original namesake (or at least presumptively so).¹¹²

It would be judicially manageable to set the constitutional standard for identifying excessively partisan redistricting by using the original gerrymander as the baseline in this way.¹¹³ Any district with a perimeter-compared-to-circle score as bad as, or worse than, the original gerrymander's score would be presumptively unconstitutional.¹¹⁴ As with any other type of constitutional test, the government would be given the opportunity to defend its apparently unconstitutional practice as actually necessary to achieve the government's proper objectives.¹¹⁵ Thus, despite a district measuring as distorted as the original gerrymander, or even more so, the government would have a chance to justify the district on the ground that its distorted shape really was necessary to accomplish valid geographical goals.¹¹⁶ But the government could not justify a distorted district as egregious as the original gerrymander on the ground that it was endeavoring to achieve an acceptable level of

circle with the same perimeter. See Ansolabehere & Palmer, *supra* note 110, at 747 & n.45. Since the two metrics are interchangeable, I focus on the Schwartzberg measurement because it seems more intuitively related to the distorting nature of a gerrymandered district: How much bigger is the perimeter of a district than it needs to be, in relation to the area of the district, as a result of manipulating the district's boundaries to achieve political purposes unrelated to the basic geography of the district? Schwartzberg quantifies this degree of distortedness.

The *Washington Post* has published Polsby-Popper scores for every current congressional district. Christopher Ingraham, *How Gerrymandered Is Your Congressional District?*, WASH. POST (May 15, 2014), <http://www.washingtonpost.com/wp-srv/special/politics/gerrymandering/> [<https://perma.cc/PE6V-MTGQ>]. Ansolabehere and Palmer have examined every congressional district historically to see how they compare to the original gerrymander, although they do not report all of their calculations in their published piece. See Ansolabehere & Palmer, *supra* note 110, at 743. With the *Washington Post* data that is publicly available, it would be possible to replicate their determination of which *current* congressional districts have a Polsby-Popper, or Schwartzberg, score equal to or worse than the original gerrymander. Maryland's current Third Congressional District is clearly one of these, as Ansolabehere and Palmer explicitly state. See *id.* at 758-59.

112. See Ansolabehere & Palmer, *supra* note 110, at 747.

113. For further discussion, see Foley, *supra* note 104, at 729.

114. See *id.*

115. See, e.g., *id.* at 722.

116. See *id.*

partisanship in the design of the district.¹¹⁷ Partisanship *to that extent* would be constitutionally out-of-bounds, as determined by the historically and specifically condemned excessiveness of the original gerrymander itself.¹¹⁸

This particularistic approach to defining an unconstitutional gerrymander uses a kind of mathematical test (the “perimeter-compared-to-circle score” previously mentioned), but it is not an effort at a universalistic measure of improperly partisan districting.¹¹⁹ This particularistic approach, it must be acknowledged, would leave unreviewable—at least as a matter of judicially enforceable federal constitutional law—any new district not as distorted as the original gerrymander.¹²⁰ Thus, there easily could be a newly drawn map in which partisanship rather than geography accounts for the drawing of particular district lines, but the resulting district boundaries are not as disfigured as the original gerrymander. But that fact is simply the consequence of pursuing a particularistic, rather than universalistic, approach. There being no universalistic way to measure excessiveness in the degree to which the desire for partisan advantage affected a district’s shape, the particularistic approach sets the constitutional test for excessiveness in terms of the historically and culturally identified measure of excessiveness: the original gerrymander itself.¹²¹ This approach necessarily leaves untouched the partisan manipulation of maps that fall short of the original gerrymander’s egregiousness. But particularism makes up for what it leaves uncovered by providing a precise way to identify—and invalidate—at least those extreme instances of partisan manipulation that rise to the same level as the original gerrymander, the image that comes to Americans’ minds when they condemn inappropriate districting as a *gerrymander*.

117. *See id.*

118. *See id.* at 725.

119. *See generally id.* at 720-24.

120. *See id.* at 727-28.

121. *See generally id.*

C. Tying a Particularistic Attack on Gerrymandering to Specific Constitutional Clauses

The fact that particularism provides a judicially manageable standard for invalidating excessively partisan maps, by itself, does not end the constitutional analysis. This judicial manageability still must be adequately linked to a constitutional clause, or doctrine, in order to give the judiciary the warrant to undertake the manageable inquiry. It might be manageable for the Court to insist that all public schools spend the same amount of money to educate each student, but the Court may not impose that standard—despite its manageability—if it cannot be adequately linked to the Constitution itself.¹²²

There are at least three alternative bases for linking the condemnation of the original gerrymander to the text of the Constitution.

1. Due Process

Elsewhere, I have offered an explanation for why the Due Process Clause of the Fourteenth Amendment provides a proper basis for invalidating gerrymanders as egregious as the original one.¹²³ I will not repeat that explanation here, except to provide a brief summary. First, the Due Process Clause has long been interpreted by the Supreme Court, and properly so, to embody a basic principle of fair play.¹²⁴ Second, besides applying to the areas of civil procedure and criminal law, where the Court has unanimously invoked it, this principle of fair play also appropriately applies to legislation governing elections, where the parties are engaged in a form of competition that deserves to be regulated by a norm of fair play.¹²⁵ Third, the history of America's experience leading up to the adoption of the Fourteenth Amendment indicates that Americans widely viewed the original gerrymander, along with similarly egregious legislative maps, as a breach of this fair play norm.¹²⁶ Putting these three

122. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973).

123. See *Foley*, *supra* note 104, at 710-20.

124. See *id.* at 711.

125. See *id.* at 725.

126. See *id.*

points together yields the conclusion that districts as distorted as the original gerrymander contravene due process, or at least they presumptively do, and thus will be invalid unless defended as necessary to achieve proper redistricting objectives.¹²⁷ This logic, it must be observed, is a type of syllogistic reasoning—but unlike the earlier syllogism, it does not suffer from a flaw in one of its component premises.

This due process reasoning, as sound as it is, is nonetheless only one of several ways to tie the objection of the original gerrymander to the provision of the Constitution.

2. *First Amendment*

As Justice Kennedy suggested in *Vieth*, the First Amendment stands as a potential basis for invalidating partisan gerrymanders insofar as the First Amendment generally prohibits advantaging or disadvantaging individuals because of their political beliefs or affiliations.¹²⁸ The problem, however, with invoking the First Amendment to invalidate partisan redistricting is that it, like the Equal Protection Clause, has been unable to distinguish between permissible and excessive degrees of partisanship in the drawing of district lines.¹²⁹ The attempts to develop a universalistic theory of improper partisanship, derived from the nature of political freedom itself, has foundered for the same kinds of reasons that universalism has failed to extract a judicially manageable standard of improper partisanship from solely the pure idea of political equality.¹³⁰

Yet, as we have already observed, First Amendment analysis need not be exclusively universalistic.¹³¹ On the contrary, First Amendment jurisprudence historically has been particularistic,

127. *See id.* at 711.

128. In Justice Kennedy's own words, "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." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

129. Briffault, *supra* note 60, at 408 ("[U]ltimately, the First Amendment argument fails.").

130. *Cf.* Tokaji, *supra* note 6, at 2162-64 (arguing why expressive association should be used to evaluate partisan gerrymandering claims).

131. *See supra* text accompanying notes 52-53.

certainly much more so than equal protection jurisprudence.¹³² The Alien and Sedition Acts are identifiable as unconstitutional on particularistic grounds quite apart from how their unconstitutionality fits into an overall theory of free speech.¹³³

The same type of analysis applies easily to the original gerrymander. It matters not how a pure theory of free expression would handle the problem of excessive partisanship in redistricting. Instead, all that matters is that the original gerrymander demarcates an injection of partisanship into the districting process that unfairly—and improperly—favors one party over another because of their differing political views.¹³⁴ The First Amendment bans government from differentiating among individuals based on their political views, at least when doing so crosses the line into becoming an impermissible form of such differentiation.¹³⁵ The original gerrymander singles out one such form, regardless of where else the constitutional dividing line may be drawn.¹³⁶ Thus, the original gerrymander—and all other districts equally distorted or even more so, which cannot be defended on nonpartisan geographical grounds—violate the First Amendment as improper discrimination on the basis of partisanship. This fundamental point holds true whether or not other forms of partisan discrimination, including other forms of partisan redistricting, also violate the First Amendment.¹³⁷

This mode of First Amendment analysis should suffice to demonstrate the original gerrymander's unconstitutionality as a First Amendment proposition. But there is more. Just as First Amendment jurisprudence defines obscenity by “contemporary community standards,”¹³⁸ so too does First Amendment jurisprudence identify improper districting by reference to the continuing cultural status of the original gerrymander. Both are examples of particularistic

132. See generally *Reynolds v. Sims*, 377 U.S. 533 (1964).

133. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-76 (1964).

134. See *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

135. See *id.*

136. See *Foley*, *supra* note 104, at 720.

137. See, e.g., Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 766 (2016) (arguing that “future litigants ... should ... [include] First Amendment association claims in their arsenal”).

138. *Miller v. California*, 413 U.S. 15, 24 (1973).

reasoning within First Amendment jurisprudence.¹³⁹ While reliance on the original gerrymander may be somewhat more historically rooted than the obscenity doctrine's invocation of "contemporary community standards,"¹⁴⁰ it is only because of obscenity's long-standing historical exclusion from First Amendment protection that there is a need to update that traditional exclusion with reference to contemporary community standards.¹⁴¹ Likewise, precisely because gerrymandering remains—and always has been—as objectionable in America's cultural self-understanding as it was when first denominated as such in the original "Gerry-mander," it is necessary to enforce a First Amendment prohibition on equivalently distorted contemporaneous gerrymanders, whatever else may or may not be prohibited by the First Amendment.

3. *Judicial Underenforcement*

There is, moreover, still another way to understand the relationship of this particularistic reasoning to overall First Amendment theory—a way that invokes the idea of "judicial underenforcement" of constitutional norms.¹⁴² This idea is that judges, particularly federal judges subject to the jurisdictional limitations imbedded in Article III of the Constitution, are unable to fully enforce, in the specific context of litigation, the values, and even the actual requirements, of the Constitution's substantive standards.¹⁴³ The Constitution holds all branches of the federal government, including Congress and the President, to certain standards. If Congress or the President breaches those standards, then Congress or the President has violated the Constitution—*has acted unconstitutionally*. Even so, it does not necessarily follow that the federal judiciary is capable of providing a remedy for this unconstitutional conduct.¹⁴⁴

The political question doctrine provides a classic example of a barrier to judicial enforcement of constitutional norms and require-

139. *See id.* at 24-25.

140. *Id.* at 24.

141. *See id.* at 20.

142. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

143. *Id.* at 1221.

144. *See id.*

ments.¹⁴⁵ The Senate might violate a defendant's Sixth Amendment right "to be confronted with the witnesses against him"¹⁴⁶ in the context of an impeachment trial when deciding whether to remove a federal judge from office because of allegations of bribery, but the Senate's "sole Power to try all Impeachments" under Article I, Section 3 precludes federal courts from enjoining the Senate's compliance with this Sixth Amendment right.¹⁴⁷ Similarly, a U.S. citizen has a Fifth Amendment right not to be targeted for assassination by the President without "due process of law."¹⁴⁸ But if the President as Commander-in-Chief in the Situation Room, upon advice from the Joint Chiefs of Staff and other national security advisers, orders the targeted military killing of a U.S. citizen on the ground that this citizen joined enemy forces waging war against America, then federal courts are powerless to intrude into those Situation Room deliberations and order the President to refrain from exercising that military judgment as Commander-in-Chief.¹⁴⁹ This judicial powerlessness exists in this particular factual context even if the nature of the President's Situation Room deliberations are inconsistent with what the federal judiciary would otherwise insist that the Due Process Clause of the Fifth Amendment requires before the U.S. government deliberately kills a U.S. citizen.¹⁵⁰

This judicial powerlessness does not mean that the constitutional rights do not exist. Nor does it mean that these rights have not been violated. It only means that these rights are *judicially underenforced* in the specific contexts in which the courts are incapable of enforcing them.¹⁵¹ Clearly, these same constitutional rights are judicially enforced in many other contexts: there are thousands of federal court cases insisting upon compliance with the Sixth Amendment's Confrontation Clause and the Fifth Amendment's Due Process Clause. Still, these well-established constitutional rights remain judicially underenforced in relation to their full scope—and

145. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1278 (2006).

146. U.S. CONST. amend. VI.

147. *Nixon v. United States*, 506 U.S. 224, 226 (1993).

148. U.S. CONST. amend. V.

149. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 12 (D.D.C. 2010).

150. See *id.*

151. See Sager, *supra* note 142, at 1221.

in relation to the full demands they impose upon other branches of government, whose officers have sworn obedience to the Constitution as a whole and who thus remain duty bound to obey the Constitution's full commands even to the extent that they are judicially unenforceable.¹⁵²

This concept of judicial underenforcement of constitutional norms explains why the federal judiciary would be unable to fully eliminate all partisan gerrymandering, yet at the same time have the power to constrain especially egregious partisan gerrymanders. One prong of the political question doctrine insists that courts employ "judicially manageable standards" to enforce constitutional norms.¹⁵³ Yet, for reasons already explored in this Article, there may be no judicially manageable way to distinguish *excessive* from acceptable levels of partisanship in the drawing of district lines.¹⁵⁴ If so, then the full extent to which partisan gerrymandering is actually unconstitutional may be beyond the federal judiciary's power to remedy.

Notwithstanding this point, the First Amendment's prohibition against excessive partisan gerrymandering need not be entirely unenforceable. Instead, there may be a judicially manageable way to provide partial, although not full, enforcement of this important First Amendment prohibition. A court that was capable of enforcing this prohibition at least to some extent would, to be sure, be leaving the prohibition underenforced. But in constitutional law, like elsewhere in life, a partial loaf of bread is much better than none at all.

The particularistic mode of analysis, by using the original gerrymander as the iconic benchmark of excessive partisanship, is able to provide that partial loaf.¹⁵⁵ It might be true that only a universalistic approach to the issue of partisan gerrymandering could enable a First Amendment prohibition against excessive partisanship to be fully remediable. But if that universalistic approach founders, because of a failure to provide a judicially manageable metric to distinguish excessive from acceptable levels

152. See generally *id.* (arguing that Congress and state courts be able to enforce constitutional norms even when the judiciary under enforces those norms).

153. Fallon, *supra* note 145, at 1276.

154. See *supra* text accompanying notes 98-100.

155. See Foley, *supra* note 104, at 729.

of partisanship, it does not follow that the effort to provide a judicial constraint on partisan gerrymanders must be abandoned entirely. Instead, a subset of unconstitutional partisan gerrymanders may remain subject to judicial remediation—specifically the subset of those gerrymanders at least as egregious as the original gerrymander. In sum, not all unconstitutional partisan gerrymanders will be susceptible to judicial relief; the relevant First Amendment norm will be judicially underenforced to that extent. Nonetheless, by enjoining any gerrymander as egregious as the original one, the federal judiciary would be enforcing the relevant First Amendment norm to a considerable degree (just not completely). That judicial underenforcement would be much better than no judicial enforcement at all.

This concept of judicial underenforcement, as applied to the problem of partisan gerrymanders, should appeal to Justice Kennedy given his opinion in *Vieth*.¹⁵⁶ There, he wrote of partisan gerrymanders as definitely violating the First Amendment, with the problem being that it just might not be possible for the courts to invalidate all unconstitutional gerrymanders.¹⁵⁷ If particularistic reasoning provides Justice Kennedy a judicially manageable means to invalidate a significant subset of unconstitutional gerrymanders, he should embrace that approach as satisfactory—and certainly as preferable to judicial abandonment of the field entirely—even if it leaves another subset of unconstitutional gerrymanders judicially unreachable.

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

157. Justice Kennedy observed: “If a State passed an enactment that declared ‘All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,’ we would surely conclude the Constitution had been violated.” *Id.* at 312. The difficulty was identifying those other cases, short of this polar extreme hypothetical, that crossed the constitutional line of impermissible “[e]xcessiveness,” which—as he also observed—“is not easily determined.” *Id.* at 316.

4. *Elections Clause*

A third possible basis for invalidating districts that are as disfigured as the original gerrymander is the Elections Clause in Article 1, Section 4 of the Constitution.¹⁵⁸ This clause provides:

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.¹⁵⁹

This clause obviously gives states the power to draw congressional districts, and it just as obviously gives Congress the power to remove that state power or to supersede it, including by Congress either choosing to draw congressional districts itself, or else by enacting federal statutes that constrain or prohibit gerrymandering in a state's drawing of these districts.¹⁶⁰ Although Congress undoubtedly has this power, Congress thus far has not exercised it, as Justice Scalia observed in *Vieth*, at least not in the form of explicitly outlawing gerrymanders.¹⁶¹

This observation, however, need not be the end of the matter. Just because Congress has not explicitly invoked its power to regulate interstate commerce in some specific respect, it does not follow that a state is free to interfere with interstate commerce in this specific way. Instead, pursuant to the Supreme Court's "dormant Commerce Clause" jurisprudence, the Court can invalidate a state's practice as antithetical to the underlying purposes of the Commerce Clause, at least until such time as Congress, exercising its power under that clause, chooses to validate the state's seemingly inappropriate practice.¹⁶²

Something similar is conceivable for the Elections Clause. Gerrymandering, at least in forms as extreme as the original gerrymander itself, is antithetical to the basic purpose of the

158. U.S. CONST. art. I, § 4.

159. *Id.*

160. *See id.*

161. *Vieth*, 541 U.S. at 275-76 (plurality opinion).

162. *See, e.g.*, Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 623-24 (1997) (discussing theoretical justifications for dormant Commerce Clause jurisprudence).

Elections Clause, which is to provide the legislative authority necessary to hold congressional elections so that Representatives may be fairly chosen by “the people of the several States,” as specified in Article I, Section 2.¹⁶³ The “people” of a state cannot engage in this function properly when congressional districts are as disfigured as they were in the original gerrymander. Thus, gerrymandering by a state to that extent must be an implicit violation of the Elections Clause in the same way that protectionist state laws violate the dormant Commerce Clause unless and until validated by Congress.¹⁶⁴ Indeed, the notion of a state exceeding its powers under the Elections Clause by engaging in gerrymandering is analytically even more sound than similar dormant Commerce Clause reasoning, because a state has the power to engage in congressional districting only because the Elections Clause gives it that power, whereas states may regulate commercial activities pursuant to their general police powers even without regard to the authority of Congress under the Commerce Clause.¹⁶⁵ Thus, the Court should be able to find more readily that a state implicitly exceeded its Elections

163. U.S. CONST. art. I, § 2.

164. Implied limits on gerrymandering under the Elections Clause, like implied limits on protectionism under the Commerce Clause, with both forms of implied limits revisable by Congress pursuant to its explicit legislative powers under both clauses, can be understood as forms of what Henry Monaghan famously called “constitutional common law.” Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); see also Dan T. Coenen, *The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules*, 77 FORDHAM L. REV. 2835, 2890 (2009) (arguing, after careful consideration, in favor of a “provisional, politically reversible style of decision making” in various domains of constitutional law as consistent with a philosophically virtuous “spirit of tentativeness” and “moderation”).

165. On the differences between the Elections Clause and the Commerce Clause for the purposes of federalism, see generally Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 778, 782 (2016). The Supreme Court, moreover, in an opinion by Justice Scalia, has explained why the Elections Clause is different for federalism purposes:

There is good reason for treating Elections Clause legislation differently: The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to “make or alter” state election regulations.... Moreover, the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States’ “historic police powers,” the States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it “terminates according to federal law.”

Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2256-57 (2013) (citations omitted).

Clause authority than the Court should be able to condemn a state law on dormant Commerce Clause grounds.¹⁶⁶

In any event, this kind of Elections Clause analysis would be a form of particularistic reasoning. What would be invalid as implicitly inconsistent with the basic purpose of the Elections Clause would be distorted redistricting as egregious as the original gerrymander.¹⁶⁷ This implication would derive from the original gerrymander's special role in American history and the recognition of its inconsistency with the Constitution's expectation for a House of Representatives appropriately elected by the "people" within each state.¹⁶⁸ To be sure, exercising its own power under the Elections Clause, Congress could go considerably further and invalidate forms of partisan redistricting not nearly so egregious as the original gerrymander—just as Congress can go much further in protecting interstate commerce than banning those protectionist state practices implicitly invalid under "dormant Commerce Clause" analysis.¹⁶⁹ Moreover, if it so chose, Congress could even decide to explicitly approve distorted congressional districts as extreme as the original gerrymander—although the evident inappropriateness of so doing would likely prevent Congress from attempting such a move.

Which mode of particularistic reasoning—Due Process, First Amendment, or Elections Clause—is preferable? Given his concurrence in *Vieth*, Justice Kennedy would likely find the First Amendment approach most congenial, particularly as it is bolstered

166. It is no secret that some conservative Justices on the Court, especially Justices Scalia and Thomas, have been hostile to dormant Commerce Clause jurisprudence on the grounds that it is inconsistent with basic federalism principles. Most recently, in *Comptroller of the Treasury v. Wynne*, Justice Scalia continued to decry "how wrong our negative Commerce Clause jurisprudence is in the first place." 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting). Justice Thomas expressed a similar view. *Id.* at 1811 (Thomas, J., dissenting). Not all conservatives, however, agree—as evidenced by the fact that Justice Alito wrote the majority opinion in the same case, in which both Chief Justice Roberts and Justice Kennedy joined. *Id.* at 1792 (majority opinion). In any event, as already explained, the federalism considerations are entirely different with respect to the Elections Clause, compared to the Commerce Clause, for reasons that Justice Scalia himself expressly recognized for the Court in *Arizona v. Inter Tribal Council of Arizona, Inc.* See *supra* note 165 and accompanying text.

167. See U.S. CONST. art. I, § 4.

168. See *id.* art. I, § 2.

169. See *id.* art. I, § 8, cl. 3.

by the notion of “underenforced” constitutional norms.¹⁷⁰ Yet, as described at the outset, the key question—especially now that *Gill v. Whitford* is pending before the Court—is not only what might persuade Justice Kennedy, but also what has the best chance of convincing future Justices, after Justice Kennedy leaves the Court, not to abandon any precedent Justice Kennedy might set in the meantime.¹⁷¹

D. Universalism, Particularism, and the Durability of Precedent

Some Supreme Court precedents premised on universalistic reasoning are capable of immense staying power. *Reynolds v. Sims* is certainly an apt illustration of this fact.¹⁷² Its doctrine of “one person, one vote” is entirely inconsistent with the jurisprudence of originalism that arose in the 1980s, especially with the elevation of William Rehnquist to Chief Justice and the simultaneous appointment of Antonin Scalia to the Court.¹⁷³ There is no serious claim

170. See *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment); Sager, *supra* note 142, at 1213.

171. Insofar as using the original gerrymander to set the constitutional benchmark for claims of improper partisanship in districting necessarily makes the constitutional standard turn on deviations from traditionally appropriate districting criteria, one might think that this approach conflicts with the Court’s recent decision in *Bethune-Hill v. Virginia State Board of Elections*. See 137 S. Ct. 788, 802 (2017). But *Bethune-Hill* involved a racial, not partisan, gerrymander, and as Justice Kennedy himself acknowledged in *Vieth*, race as a redistricting factor has a very different—and inherently problematic—status in constitutional law, compared to partisanship. *Vieth*, 541 U.S. at 307. Because partisanship becomes constitutionally objectionable only when it crosses a constitutional line of *excessiveness*, it makes sense for identifying improper partisanship to turn on the *distortion* of district boundaries, whereas the injection of race as a redistricting factor is unconstitutional whenever it controls the drawing of district lines. (It is for this reason, and in this race-specific context, that the Court in *Bethune-Hill* proclaimed: “The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications.” *Bethune-Hill*, 137 S. Ct. at 798.) Moreover, to the extent that the constitutional prohibition against excessive partisanship in redistricting is *judicially underenforced* because of the need for a judicially manageable standard that falls short of reaching all constitutionally objectionable redistricting, see *supra* note 143 and accompanying text, there is nothing anomalous about that judicially manageable standard being grounded in the identification of extreme deviations of traditional geographical considerations, even if the theoretical characterization of the relevant constitutional norm—without reference to the concern of judicial manageability—would be defined in ways other than specifically geographical terms.

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

173. “*Reynolds* ... cannot be defended on originalist grounds.” William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in*

that those who drafted or ratified the Fourteenth Amendment had any intention to require states to comply with a federal requirement of equally populated districts for their own state legislatures. As Justice John Harlan observed at great length in his *Reynolds* dissent, the Fourteenth Amendment specifically contemplates the denial of equal voting rights (imposing only a consequence to the state's share of congressional representation for certain forms of electoral inequality within a state), and at the time of the Fourteenth Amendment's ratification many states deviated from equally populated districts in the apportionment of their own legislative chambers.¹⁷⁴ Moreover, there is no doubt that if originalists like Justices Rehnquist or Scalia had been on the Court at the time of *Reynolds*, they would have joined Justice Harlan's opinion in repudiating the doctrine of "one person, one vote" as an entirely inappropriate and impermissible deviation from true constitutional meaning.¹⁷⁵

Nonetheless, *Reynolds* has never been overruled, nor its doctrine of "one person, one vote" repudiated. On the contrary, it has been reaffirmed repeatedly in every subsequent decade, including most recently in a case where ambiguity in its theoretical underpinnings was most directly exposed.¹⁷⁶ Moreover, in 1989, when the newly

Evaluating Constitutional Theory, 72 OHIO ST. L.J. 1251, 1267 (2011); see also Earl M. Maltz, *Inconvenient Truth: Originalism, Democratic Theory and the Reapportionment Cases*, 86 MISS. L.J. 1, 5 (2017) ("[F]rom an originalist perspective, the reasoning of the majority opinion in *Reynolds* is impossible to defend.").

174. At the outset of his dissent, Justice Harlan provided this overview:

[T]he Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it; and by the political practices of the States at the time the Amendment was adopted.

Reynolds, 377 U.S. at 590-91 (Harlan, J., dissenting). He then elaborated on each point in methodical detail. See *id.* at 593-615.

175. See, e.g., David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 304 (1976) ("[H]ad he been writing on a clean slate, Justice Rehnquist would have agreed with Justice Harlan, dissenting in *Reynolds v. Sims*."). In his separate concurrence in *Evenwel v. Abbott*, Justice Thomas, the Court's purest originalist, made clear his view that *Reynolds* cannot be squared with originalism: "In my view, the majority has failed to provide a sound basis for the one-person, one-vote principle because no such basis exists. The Constitution does not prescribe any one basis for apportionment within States." 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring in the judgment).

176. See *Evenwel*, 136 S. Ct. at 1124 (majority opinion); Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395, 1397 (2017) ("[T]he *Evenwel* case provoked

empowered originalist Supreme Court under the intellectual leadership of Justices Rehnquist and Scalia had the opportunity to curtail, or even just question, the reach of *Reynolds*—by refusing to apply that precedent to the upper chamber of New York City’s legislature, which was premised on a fair representation of each *borough* in that unified five-borough metropolis—the conservatives on the Court declined to do so.¹⁷⁷ Instead, without any murmur or hint of discomfort, the conservative Justices joined forces with the Court’s liberals in unanimously and vigorously forcing New York City to comply with “one person, one vote” as if that doctrine was irrefutable constitutional gospel.¹⁷⁸ In this way, *Reynolds* demonstrated its entrenched durability as a precedent despite its initial dubiousness as an exercise of constitutional interpretation.¹⁷⁹

Not all precedents premised upon universalistic reasoning, however, fare as well as *Reynolds*. In Establishment Clause jurisprudence, for example, the Court attempted to craft a doctrine rooted in a universalistic idea that all governments, to be fair to all their citizens, must be scrupulously neutral on matters of religious faith.¹⁸⁰ This attempt led to precedents such as *County of Allegheny v. ACLU*, in which the Court prohibited a local government from displaying a nativity scene to celebrate Christmas.¹⁸¹ Subsequently, however, the Court has repudiated its insistence on religious neutrality—including the *County of Allegheny* precedent specifically—on the particularistic ground that such neutrality is inconsistent with the long-standing American tradition of permitting local

some deep thinking about the values inherent in the one person, one vote cases.”).

177. See *Bd. of Estimate v. Morris*, 489 U.S. 688, 690, 701 (1989).

178. Writing for the unanimous Court, Justice Byron White was hardly begrudging about the Court’s duty to follow the *Reynolds* precedent; instead he extolled the philosophical essence of the reasoning in *Reynolds*:

If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts. Hence the Court has insisted that seats in legislative bodies be apportioned to districts of substantially equal populations.

Id. at 693-94.

179. Marshall, *supra* note 173, at 1267 (repeating this pithy quote: “*Reynolds* went from debatable in 1964 to unquestionable in 1968” (quoting LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 255 (2000))).

180. I explored this point in a previous article. See Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 *CASE W. RES. L. REV.* 963, 965 (1993).

181. 492 U.S. 573, 579, 621 (1989).

governments and their officials to utter proclamations that contain explicitly sectarian invocations.¹⁸²

Justice Kennedy, moreover, wrote the opinion for the Court that repudiated *County of Allegheny* and its universalistic aspiration that government always and everywhere maintain a posture of strict neutrality on matters of religion.¹⁸³ In *Town of Greece v. Galloway*, the Court rejected an Establishment Clause challenge to a local government's practice of opening official meetings with explicitly sectarian prayers, and—through Justice Kennedy's majority opinion—squarely and emphatically rejected the proposition “that the constitutionality of legislative prayer turns on the neutrality of its content.”¹⁸⁴ Furthermore, insofar as *County of Allegheny* provided support for that proposition, Justice Kennedy's opinion made abundantly clear its disavowal of that prior decision.¹⁸⁵

In *Town of Greece*, Justice Kennedy relied heavily upon the dissent in *County of Allegheny*, a dissent he happened to have authored.¹⁸⁶ The Court's 5-4 decision in *County of Allegheny* had Justice O'Connor joining the Court's four liberals at the time (Justices Brennan, Marshall, Blackmun, and Stevens) to find unconstitutional the local government's nativity scene because it was an official endorsement of Christianity.¹⁸⁷ Justice Kennedy wrote the dissent on this issue for himself and the Court's three other conservatives (Justices Rehnquist, Scalia, and White).¹⁸⁸ Thus, Justice O'Connor's retirement and the appointment of Justice Alito in her place is what permitted Justice Kennedy to turn his *County of Allegheny* dissent into a majority opinion for the Court in *Town of Greece*, which was also 5-4 but in the opposite direction.¹⁸⁹ In this respect, *Town of Greece* is just like *Citizens United*, and underscores what Justice Kennedy surely understands: that any 5-4 decision he were to write in *Gill* invalidating Wisconsin's legislative map as an unconstitutional partisan gerrymander is potentially just as vulnerable to a subsequent 5-4 undoing after he himself is replaced with

182. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819-20, 1825 (2014).

183. See *id.* at 1821.

184. *Id.*

185. See *id.*

186. See *id.* at 1819.

187. See *County of Allegheny v. ACLU*, 492 U.S. 573, 577 (1989).

188. See *id.*

189. See *Town of Greece*, 134 S. Ct. at 1815.

a more conservative Justice, as *County of Allegheny* was undone 5-4 in *Town of Greece*.¹⁹⁰

The key point here is that the universalistic nature of the reasoning in *County of Allegheny* did not protect it from being summarily dispatched in *Town of Greece* once Justice Kennedy garnered a fifth vote for his point of view on the issue of government prayer. As an exercise of universalistic reasoning, *County of Allegheny* simply lacked the inherent staying power that *Reynolds* possessed. The “one person, one vote” doctrine quickly imbedded itself in America’s constitutional psyche, and became an inherent and indispensable element of what it means for America to be a democracy—and this was true even though it had never been so previously.¹⁹¹ By contrast, the idea that government should be steadfastly neutral on matters of religion never took hold in America’s constitutional psyche in the same way as “one person, one vote,” no matter how sound that idea might be from a perspective of pure political theory.¹⁹² The lesson of *Town of Greece* for *Gill* is that a condemnation of partisan gerrymandering on universalistic grounds has no assurance of surviving Justice Kennedy’s replacement (or Justice Ginsburg’s, or Justice Breyer’s) with a conservative if that universalistic reasoning is unable to quickly imbed itself in America’s public self-understanding.¹⁹³

As a general proposition, precedents rooted in particularistic reasoning are more likely to have the kind of staying power that resists subsequent overruling than precedents dependent upon universalistic reasoning. The explanation for this distinction is that particularistic precedents, by being premised upon elements of America’s cultural traditions, already have a head start on becoming ingrained in America’s public understanding of its own constitutional heritage.¹⁹⁴ *Heller* is a clear illustration. By drawing explicitly and extensively on America’s cultural tradition of gun ownership,

190. *See id.* at 1813-14, 1819.

191. *See supra* note 176 and accompanying text.

192. *See supra* notes 180-82 and accompanying text.

193. *Compare* Marcus, *supra* note 29 (suggesting that *Obergefell* and other gay rights precedents written by Justice Kennedy are so ingrained in our social fabric that in the future courts will be reluctant to overrule or abrogate them), *with Town of Greece*, 134 S. Ct. at 1816 (abandoning the universalistic precedent set in *County of Allegheny*, which did not become imbedded in the public’s cultural self-understanding).

194. *See supra* note 34.

the Court's opinion in that Second Amendment case immediately ensconced itself within that tradition and thus became an integral part of the nation's understanding of itself and its constitutional law.¹⁹⁵

Furthermore, conservative jurists are more willing to accept a precedent that is explicitly premised on history and tradition, rather than an exegesis of some universalistic proposition.¹⁹⁶ For one thing, a precedent rooted in the nation's history and tradition is likely to be narrower in scope—and also in potential implications down the road—than a precedent sounding in some abstract universalistic proposition—and for this reason alone more likely to appeal to conservatives on the Court. For another, adherence to history and tradition is inherently conservative in orientation, especially as compared to considering the yet unrealized ramifications of universalistic principles. Consequently, a particularistic precedent starts off much more likely to be congenial to conservatives on the Court than a universalistic one.¹⁹⁷

The “substantive due process” holding of *Moore v. City of East Cleveland*¹⁹⁸ is a good illustration of this truth. The holding in *Moore* invalidated a local zoning ordinance insofar as it prohibited a grandmother from living in the same home as her grandchildren.¹⁹⁹ Justice Lewis Powell's opinion explaining the basis of this “substantive due process” determination emphasized the deep-rooted historical tradition within America of respecting the essential role of grandparents in families.²⁰⁰ Justice Powell recognized that “[s]ubstantive due process has at times been a treacherous field for this Court.”²⁰¹ But he stressed that those risks could be minimized by

195. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

196. See *infra* notes 208-14 and accompanying text.

197. See, e.g., J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 22 (2000).

198. 431 U.S. 494 (1977).

199. *Id.* at 499-500 (plurality opinion).

200. *Id.* at 502-04. Justice Powell's opinion was a plurality for himself and three others. *Id.* at 495. Justice Stevens joined the judgment of the Court, but relied on a separate and idiosyncratic Takings Clause rationale. See *id.* at 513-21 (Stevens, J., concurring in the judgment). Justice Powell's plurality has since been taken as representing the narrower, and thus controlling, opinion for the Court in the case. See Pala Hersey, *Moore v. City of East Cleveland: The Supreme Court's Fractured Paean to the Extended Family*, 14 J. CONTEMP. LEGAL ISSUES 57, 61 (2004) (“[H]istory has been charitable to the *Moore* plurality decision.”).

201. *Moore*, 431 U.S. at 502 (plurality opinion).

confining “substantive due process” analysis to considerations of history and tradition, rather than a search for abstract ideals.²⁰² “Appropriate limits on substantive due process,” he observed, “come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history.’”²⁰³ Conducting the appropriate historical inquiry, Justice Powell found not merely that “the institution of the family is deeply rooted in this Nation’s history and tradition,”²⁰⁴ but more specifically—and thus much more relevantly—that “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”²⁰⁵ In this way, the scope of the holding in *Moore* was cabined by this specific historical finding²⁰⁶ and, for example, did not extend to the right of a college fraternity to defeat a similar zoning ordinance even if upon some universalistic logic the right of “fraternity brothers” to dwell together should be considered as just as philosophically worthy as the status of grandparents and grandchildren in a biological family.²⁰⁷

The particularistic reasoning of Justice Powell’s opinion in *Moore* gave this precedent staying power that it would have lacked if the opinion had relied upon universalistic reasoning to reach the same result. For example, consider, Chief Justice Rehnquist’s treatment of *Moore* in the major substantive due process case of *Washington v. Glucksberg*, which involved physician-assisted suicide.²⁰⁸ Justice Rehnquist dissented in *Moore* itself, based on his general hostility as an originalist to the doctrine of substantive due process²⁰⁹—a hostility Justice Rehnquist expressed in a variety of contexts, most especially in abortion cases.²¹⁰ Yet, when it came time for Chief

202. *Id.* at 502-03.

203. *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

204. *Id.*

205. *Id.* at 504.

206. *Id.*

207. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2, 8-9 (1974).

208. 521 U.S. 702, 710, 720, 727 (1997).

209. Justice Rehnquist joined Justice Stewart’s dissent. *Moore*, 431 U.S. at 531 (Stewart, J., dissenting).

210. See, for example, Rehnquist’s dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Justice Rehnquist to provide a general account of substantive due process in the Court's *Glucksberg* opinion, the Chief Justice turned to Justice Powell's opinion in *Moore* as the best and leading explanation of the doctrine.²¹¹ Chief Justice Rehnquist did so specifically because Justice Powell's reasoning in *Moore* had been particularistic, rooted in history and tradition, rather than universalistic (as some of the Court's leading substantive due process precedents had been).²¹² The particularism of Justice Powell's opinion in *Moore*, in short, was acceptable to the increasingly conservative Court that had become dominated by Justices Rehnquist, Scalia, and other originalists.²¹³ While not preferable to an outright overruling of the entire substantive due process doctrine from a perspective of originalist purity,²¹⁴ the particularism of Justice Powell's approach in *Moore* was good enough, and thus could be adhered to by conservatives given the value of sticking with precedents that are not overly objectionable.

In light of all this, including the innate conservative preference for particularism over universalism, a 5-4 precedent that holds a partisan gerrymander unconstitutional is more likely to have the kind of staying power that can withstand a subsequent 5-4 overruling after Justice Kennedy leaves the Court, if the precedent that invalidates the partisan gerrymander is rooted in particularistic rather than universalistic reasoning. There is also the basic point that the public's understanding of gerrymandering, such as it exists, is rooted in the visual image of a gerrymandered district as a grossly improper disfigurement of how the district should appear.²¹⁵ This

211. In *Glucksberg*, Chief Justice Rehnquist quoted Justice Powell's opinion in *Moore* to lay the foundation for his own analysis: "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

212. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (extending the right to contraceptives, previously applicable only to married couples, to unmarried individuals). This holding relied on general theoretical principles, not tradition. See *id.*

213. See *Glucksburg*, 521 U.S. at 710, 720, 727.

214. Justice Thomas, for example, would jettison "substantive due process" entirely on originalist grounds, as he made clear in *McDonald v. City of Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in the judgment).

215. See *supra* text accompanying note 104; see also Foley, *supra* note 104, at 712-13.

point is certainly true of the original gerrymander itself.²¹⁶ Its salamander shape, in addition to contributing to the practice's name, is what made it so objectionable in the public's eyes.²¹⁷

The same point is equally true for the contemporary public's perception of what gerrymandering is and why it is so utterly reprehensible. Thus, when Jon Stewart's *Daily Show* decided to cover the topic of gerrymandering, it did so by lampooning the "art[istry]" necessary to produce such grotesquely distorted congressional districts as Illinois's Fourth.²¹⁸ It even concocted a gallery displaying a collection of especially "creative" exercises in redistricting.²¹⁹

Figure 3. Illinois's Fourth Congressional District (as depicted on Jon Stewart's *Daily Show*)²²⁰



216. See Foley, *supra* note 104, at 712-13.

217. See *supra* note 104 and accompanying text; see also Foley, *supra* note 104, at 712-13 (describing the historical record on this point in more detail).

218. *The Daily Show with Jon Stewart: American Horrible Story—Gerrymandering* (Comedy Central television broadcast Dec. 10, 2013).

219. *Id.*

220. *Id.*

Figure 4. “(Mis)Representations by Gerry Mander” (an art gallery of egregious redistricting on Jon Stewart’s Daily Show)²²¹



If a Supreme Court precedent invalidating a partisan gerrymander as unconstitutional is going to imbed itself into America’s political culture, and do so quickly (before a future Court has a chance to overrule that precedent), it most likely will attain this cultural status by focusing on the public’s perception of gerrymandering as visually grotesque.²²² If the Court can root the unconstitutionality of gerrymandering in this visual grotesqueness—gerrymandering is unconstitutional precisely because, and to the extent that, it is visually grotesque—then the Court’s holding will make sense to the public and thus come to reflect the public’s own understanding of the Constitution.²²³ The Court can achieve this linkage between the gerrymander’s unconstitutionality and its visual grotesqueness through straightforward particularistic reasoning: the original gerrymander was identified as an improper intrusion of partisanship in the drawing of district lines because of its blatantly disfigured shape;²²⁴ and thus, insofar as improper partisanship violates the

221. *See id.*

222. *See id.*

223. *See Foley, supra* note 104, at 712-13 (noting that people found the original gerrymander objectionable); *see also The Daily Show with Jon Stewart: The American Horrible Story—Gerrymandering, supra* note 218 (demonstrating that people cannot even identify shapes as congressional districts when they are not told what they are looking at).

224. *See Foley, supra* note 104, at 712-13.

Constitution (either the First Amendment or another provision), the disfigurement of the district in the original gerrymander—or any equally disfigured district today—is unconstitutional.²²⁵

This is constitutional reasoning that the public can easily understand and embrace, certainly more so than reasoning based on arcane mathematical metrics like the efficiency gap or the mean-median difference.²²⁶ Consequently, insofar as it will be more difficult for a future conservative Court to uproot an anti-gerrymandering precedent that quickly becomes imbedded in America's cultural self-understanding (in the same way that *Heller* did²²⁷), there is a greater chance of an anti-gerrymandering precedent protecting itself in this way by using particularistic reasoning premised upon the visual grotesqueness of the original gerrymander and all equivalent districting disfigurements, rather than a nonvisual measurement of a districting map's degree of partisan bias.²²⁸

In terms of the public's willingness to embrace the proposition that any districting as distorted as the original gerrymander is unconstitutional, it probably does not matter whether that particularistic reasoning is rooted in the Due Process Clause, the First Amendment, or the Elections Clause of Article I. As long as the public finds persuasive the idea that the Constitution, in one provision or another, renders invalid excessive partisanship in enacting the rules that govern electoral competition, then the public would readily accept the subsidiary proposition that the original gerrymander, and any other one at least as egregious, would qualify as excessive partisanship. And insofar as the public has been schooled on the fundamental idea that the authors of the Constitution were hostile to partisanship—an idea reflected in the *Federalist Papers*,²²⁹ which the public has been taught is an authoritative guide to understanding the Constitution's philosophical premises²³⁰—it

225. See *supra* notes 128-30 and accompanying text.

226. People denounced the original gerrymander as an “especially egregious weapon in this partisan war,” Foley, *supra* note 104, at 712, while the complicated mathematical reasoning of the efficiency gap theory has yet to gain acceptance by the American public.

227. See *supra* text accompanying note 26.

228. The nonvisual asymmetry approach has already proved unsuccessful. *LULAC v. Perry*, 548 U.S. 399, 420 (2006) (Kennedy, J.).

229. See, e.g., THE FEDERALIST NO. 10 (James Madison).

230. See, e.g., RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 249-56 (1969) (describing America's embrace of two-party politics as a development of Jacksonian Era democracy,

should not be difficult for the public to see one or more of the Constitution's clauses, or even the Constitution in its entirety, as rendering excessive partisanship invalid.

We have already seen that Justice Kennedy would most likely find the First Amendment as the most persuasive basis on which to rest a particularistic account of why any districting as egregious as the original gerrymander is unconstitutional.²³¹ Compared to the Due Process or Elections Clause alternatives, it is also possible that conservatives on the Court might see the First Amendment as a better basis for this kind of particularistic reasoning. After all, conservative Justices—especially in recent years—believe in a robust interpretation of the First Amendment in order to protect disfavored political opinions from improper government discrimination.²³²

Yet some conservatives might prefer the due process approach. In the same way that *Moore* was thoroughly rooted in historical analysis,²³³ and thus necessarily cabined by that history, a due process explanation for why the original gerrymander is unconstitutional could be confined strictly to the specific historical condemnation of that egregious map,²³⁴ along with any other that is equally egregious. First Amendment precedents, even those rooted in particularistic reasoning, have a way of expanding beyond their initial contours.²³⁵ That tendency toward expansionism could make judicial conservatives nervous, even if they might be otherwise inclined to uphold First Amendment protections for unpopular political beliefs.²³⁶ Consequently, on balance, conservatives might see a precedent holding a partisan gerrymander unconstitutional as being inherently more limited, and thus less potentially problematic

in contrast to the Founding Era hostility to factions and parties).

231. See *supra* note 170 and accompanying text; see also *supra* note 5 and accompanying text.

232. See generally WAYNE BATCHIS, *THE RIGHT'S FIRST AMENDMENT: THE POLITICS OF FREE SPEECH AND THE RETURN OF CONSERVATIVE LIBERTARIANISM* 99 (2016) (noting the Court's responses in various First Amendment cases).

233. See *Moore v. City of East Cleveland*, 431 U.S. 494, 502-05 (1977) (plurality opinion).

234. See *Foley*, *supra* note 104, at 712-13.

235. *New York Times Co. v. Sullivan*, although rooted in the unconstitutionality of the Alien and Sedition Acts, quickly created an entire new body of defamation jurisprudence within First Amendment law. See 376 U.S. 254, 273, 276, 283 (1964); BATCHIS, *supra* note 232, at 99.

236. See BATCHIS, *supra* note 232, at 99.

down the road, if it were squarely rooted in exclusively historical analysis under the Due Process Clause, rather than drawing upon possibly expansionist First Amendment principles.

Conservatives might be even more accepting of an anti-gerrymandering precedent that rested on the Elections Clause.²³⁷ Unlike either a due process or First Amendment holding, a decision based on the Elections Clause would be necessarily limited to congressional districting and inapplicable to the districting of state legislatures.²³⁸ Also unlike either a due process or First Amendment holding, Congress would be able to revise a decision based on the Elections Clause for reasons analogous to dormant Commerce Clause jurisprudence, as previously explained.²³⁹ In these two significant ways, an Elections Clause invalidation of a congressional gerrymander would be much more limited, representing much less of a judicial intrusion into the legislative prerogatives of a sovereign state than judicial invalidation of a gerrymander on either First Amendment or due process grounds. For these two reasons, an Elections Clause invalidation of a congressional gerrymander ought to be more congenial to judicial conservatives than either a First Amendment or due process ruling. To be sure, judicial conservatives have been hostile to the dormant Commerce Clause doctrine on the ground that it improperly interferes with sovereign legislative power reserved to the states.²⁴⁰ But conservatives need not have the same adverse reaction to judicial invocation of the Elections Clause as a basis for invalidating gerrymanders absent congressional approval. As already explained, states have no inherent sovereign power over *congressional* districts. Thus courts blocking congressional districts as egregious as the original gerrymander do not deprive states of a right that pertains to their status as sovereign members of the Union.²⁴¹ It is only to prevent a state legislature from improperly interfering with structuring representation in a manner that is in consistent with the Constitution's original purpose, as

237. See U.S. CONST. art. I, § 4, cl. 1.

238. Since Article I of the Constitution deals with Congress's powers, a decision based on the Elections Clause would not apply to the actions of state legislatures, which do not derive their authority from Article I of the Constitution. See *id.* art. I.

239. See *supra* note 164 and accompanying text.

240. See *supra* notes 162-65 and accompanying text.

241. See *supra* Part I.C.3.

reflected in the design of the Federal House of Representatives itself.²⁴² Treating this improper interference as presumptively invalid—unless and until Congress itself specifically ratifies it as appropriate—is in no way inconsistent with judicial conservatism. Accordingly, a particularistic condemnation of partisan gerrymandering that rests on the Elections Clause might ultimately be the mode of analysis most acceptable to conservatives on the Court, and thus most resistant to subsequent overruling after Justice Kennedy's retirement.

In the end, however, it may matter less which clause the Court uses as grounds for a particularistic condemnation of partisan gerrymandering than that the Court chooses particularistic rather than universalistic reasoning as its explanation for why partisan gerrymandering is unconstitutional. If a particularistic condemnation of partisan gerrymandering takes hold in the public imagination, and thus becomes entrenched in the public's understanding of the Constitution and the essential nature of American democracy, then it may be difficult for conservatives to repudiate that particularistic understanding regardless of whether it is technically linked to the First Amendment, due process, or the Elections Clause of Article I. Still, if one endeavored to write an opinion for the Court that invalidated a partisan gerrymander in such a way as to maximize the likelihood that the opinion would resist overruling down the road, one might be inclined to have the opinion rely specifically on the Elections Clause. This opinion would emphasize exactly how and why it was very narrow and limited in nature, invalidating congressional districts only as egregious as the original gerrymander. The opinion would explain that such districts were presumptively inconsistent with the original idea that the House of Representatives serve as the people's chamber, at least until and unless Congress itself approves such districts.²⁴³ One would write the opinion in this way with the hope that, first, it would capture the public's imagination as an essentially correct exposition of what it wanted its Constitution to mean and, second, future conservatives on the Court would view the opinion as sufficiently acceptable as an

242. *See supra* Part I.C.3.

243. *See generally supra* Part I.C.3.

exercise of constitutional interpretation that overruling it would not be worthwhile, especially given the public's embrace of it.²⁴⁴

II. WISCONSIN, MARYLAND, AND THE FUTURE OF GERRYMANDERING LAWSUITS IN FEDERAL COURTS

It would be advantageous for the Court to write a particularistic, rather than universalistic, opinion in holding a partisan gerrymander unconstitutional, in order to maximize the chances that this opinion will not subsequently be overruled. But there is an obstacle to implementing this objective. The Wisconsin case currently before the Court, *Gill v. Whitford* (hereinafter *Gill* or the Wisconsin case), does not lend itself easily to adopting a particularistic, rather than universalistic, approach to the condemnation of a partisan gerrymander as unconstitutional.

The plaintiffs in *Gill* framed their case in universalistic terms and did so by especially emphasizing the new “efficiency gap” method for measuring a legislative map’s partisan bias.²⁴⁵ Although the district court in ruling for the plaintiffs in *Gill* ultimately did not rely exclusively on the efficiency gap metric,²⁴⁶ it nonetheless articulated a universalistic test for detecting an unconstitutional partisan

244. Even if a precedent is not explicitly overruled, it can be narrowed considerably—or eviscerated to the point that it is overruled all but explicitly. See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 3 & n.4 (2010); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863-64 (2014). But complete (and dishonest) evisceration is rare, and leaving the core of a precedent intact even as its full reach is curtailed is far preferable—from the perspective of the precedent’s defenders—than a complete overruling. Ask any defender of *Roe v. Wade* whether the world is better off for the curtailment of *Roe* that occurred in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, or if it would have been just the same if the Court had completely overruled *Roe* in *Casey*. Justice Blackmun, the author of *Roe*, himself supplied the definitive answer to that question: “[J]ust when so many expected the darkness to fall, the flame has grown bright.... Make no mistake, the joint opinion of JUSTICES O’CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922-23 (1992) (Blackmun, J., concurring in the judgment in part and dissenting in part). Moreover, insofar as a precedent truly attains an entrenched status in the public’s conception of the nation’s identity, it becomes harder to eviscerate that precedent entirely by stealth measures, rather than pruning that precedent of arguable excesses while leaving its essence intact.

245. See Plaintiff’s Post-Trial Brief at 1, 10-11, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

246. *Whitford*, 218 F. Supp. at 903 (noting that evidence of “discriminatory effect” is “bolstered by the plaintiffs’ use of the ‘efficiency gap’”).

gerrymander. According to the district court, a legislative map is unconstitutional whenever it “(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.”²⁴⁷

The district court’s test, moreover, like the plaintiffs’ proposed approach, did not depend on a legislative map containing any misshaped districts, much less ones distorted to the extent of the original gerrymander.²⁴⁸ On the contrary, the district court explicitly disclaimed: “[T]he defendants’ contention—that, having adhered to traditional districting principles, they have satisfied the requirements of equal protection—is without merit.”²⁴⁹ In the Supreme Court, the plaintiffs continue to defend this position: “aesthetically pleasing districts nevertheless can be grossly gerrymandered,” the plaintiffs argue, meaning that these districts despite being “congruent and compact” and otherwise compliant with “traditional criteria” still may be designed to achieve “partisan advantage” and be “highly effective” in doing so.²⁵⁰

One might think that the Supreme Court, if it wished, could just disagree with the district court and the plaintiffs on this point and, of its own volition, adopt a constitutional standard that turns on whether a legislative map contains egregiously distorted districts. But there is an inherent structural impediment to the Court’s doing so in the pending Wisconsin case. The *Gill* plaintiffs framed their complaint as a *statewide* challenge to Wisconsin’s legislative map *as a whole*, not as an attack on one or more specific districts within the map.²⁵¹ The Supreme Court could not simply affirm the district court’s ruling in favor of the plaintiffs by relying on an alternative approach that focused on the egregiously distorted shapes of particular districts, rather than partisan tilt of the statewide map as a whole. Since the district court’s decree was an invalidation of the entire map,²⁵² as the plaintiffs sought, there would be a mismatch

247. *Id.* at 884.

248. *See id.* at 888-89 (“It is entirely possible to conform to legitimate redistricting purposes but still violate the Fourteenth Amendment because the discriminatory action is an operative factor in choosing the plan.”).

249. *Id.* at 889.

250. Motion to Affirm at 30-31, *Gill v. Whitford*, No. 16-1161 (U.S. May 8, 2017).

251. Complaint, *supra* note 64, at 29.

252. Amended Judgment, *Whitford*, 218 F. Supp. 3d 837 (No. 15-cv-421-bbc).

between the remedy and the right if the Supreme Court, unlike the district court, defined the relevant constitutional right as having a district with boundaries free from partisan manipulation as egregious as the original gerrymander.

Nor could the Supreme Court simply look to the record of the Wisconsin case and fashion an alternative remedy in favor of the plaintiffs that focused on the invalidation of specific districts, rather than the legislative map as a whole. Given the way *Gill* was litigated at trial, there is not currently evidence in the record that would permit the Supreme Court on appeal to hold that specific districts in Wisconsin are distorted at least as much as was the original gerrymander.²⁵³ At most, the Supreme Court could announce that the correct constitutional standard is one that measures the distortion of particular districts against the historical benchmark of the original gerrymander and then, vacating the lower court's decree, remand the case for further proceedings consistent with this correct constitutional test. Of course, on remand, the lower court might rule that the plaintiffs had missed their opportunity to present district-specific challenges and evidence,²⁵⁴ but in this situation at least the Supreme Court's opinion would articulate a constitutional standard showing what plaintiffs nationwide would need to do to be successful in any federal court challenge to a partisan gerrymander.

There is, furthermore, another structural impediment inherent in the Wisconsin case. If, as suggested above, the Supreme Court wanted to rely upon the Elections Clause, rather than the First Amendment or Due Process, as the basis for a judicially enforceable requirement that congressional districts remain free from partisan manipulation as severe as the original gerrymander, the Court could not issue this holding in the Wisconsin case. *Gill* is a challenge, not to Wisconsin's *congressional* districts, but instead solely to the districting map for the state's Assembly (the lower house of the state's own legislature).²⁵⁵ Thus, the Supreme Court cannot use

253. In their brief to the Supreme Court, the plaintiffs acknowledged that they eschewed any effort to attack specific districts in Wisconsin because of their distorted shape. See Brief for Appellees at 56-59, *Gill*, No. 16-1161 (U.S. Aug. 28, 2017).

254. The plaintiffs did not include any district-specific challenges in their initial complaint. See generally Complaint, *supra* note 64. In Wisconsin, claim preclusion would bar new litigation on this issue. See *Wis. Pub. Serv. Comm'n v. Arby Constr., Inc.*, 818 N.W.2d 863, 870 (Wis. 2012).

255. See generally Complaint, *supra* note 64.

Gill to announce that the proper constitutional standard is one derived from the Elections Clause and limited to congressional maps.²⁵⁶ If the Court said this in its opinion in *Gill*, it would be pure dicta,²⁵⁷ not a holding in the case. After all, the Court could not order in *Gill* a remand for consideration of an Elections Clause challenge to the legislative map at issue in the case.

For all of these reasons, *Gill* is hardly the most desirable vehicle for the issuance of an opinion that employs particularistic analysis to condemn a partisan gerrymander as unconstitutional.

There is, however, a more promising case that has made its way to the Supreme Court. *Benisek v. Lamone* (hereinafter *Benisek* or the Maryland case) is a district-specific challenge to Maryland's congressional map.²⁵⁸ Thus, it squarely permits consideration of whether specific congressional districts are unconstitutional for the particularistic reason that they are more egregiously distorted than the original gerrymander. Indeed, Maryland's Third Congressional District, the so-called "praying mantis,"²⁵⁹ and one of the most extremely disfigured districts currently in existence nationwide, easily meets—or should one say "flunks"?—this historically rooted, particularistic test.²⁶⁰ Moreover, precisely because *Benisek* concerns congressional districts, it would permit the Court to ground this particularistic test in the Elections Clause, and in fact the *Benisek* complaint includes an Elections Clause claim along with a First Amendment challenge to Maryland's gerrymandered congressional map.²⁶¹

To be sure, the *Benisek* plaintiffs have focused their complaint not on Maryland's Third Congressional District, despite its being especially disfigured,²⁶² but instead on the State's Sixth Congressional District.²⁶³ The reason is that the plaintiffs are emphasizing a First Amendment theory that defines the harm from gerrymandering as

256. The Elections Clause, located in Article I of the Constitution, only imposes limitations on actions of Congress, and not the States. See U.S. CONST. art. I, § 4, cl. 1.

257. See *dicta*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (defining dicta as including "ruling on an issue not raised," which has no precedential effect).

258. Second Amended Complaint, *supra* note 6, at 3.

259. See *supra* Figure 2.

260. See *supra* notes 110-11 and accompanying text.

261. Second Amended Complaint, *supra* note 6, at 37-38.

262. See *supra* Figure 2.

263. Second Amended Complaint, *supra* note 6, at 3.

the punishment of voters for previously electing a candidate from the opposing political party.²⁶⁴ Maryland's Sixth Congressional District apparently fits that theory especially well.

But the theory has its vulnerabilities. Maryland, like every other state, is obligated to draw new congressional districts every ten years as a result of population shifts within the state.²⁶⁵ Given this obligation, if there is nothing else wrong with the new districts that the state draws, it is not clear that it would be unconstitutional for a state to make one district less Republican, and another district more Democratic, than the corresponding district in the previous map had been. Republican voters, after all, are not constitutionally entitled to live in a majority-Republican district; nor are Democratic voters entitled to reside in a majority-Democrat district. There needs to be something else wrong with the shape of the district, beyond the mere fact that it has fewer Republicans and more Democrats, to make a district unconstitutional.

Even if this specific theory is weak, however, the Maryland case remains a good one for the Supreme Court to expound a cogent particularistic account of why an egregiously distorted congressional district is unconstitutional. *Benisek* is not confined to this specific theory or even to only the State's Sixth Congressional District.²⁶⁶ On the contrary, the *Benisek* complaint explicitly covers all of the State's eight congressional districts and, with respect to the Third, expressly attacks it as "the second most gerrymandered district in the country."²⁶⁷ Thus, despite the particular way the plaintiffs have litigated *Benisek* so far, it would be fairly easy for the Supreme Court to use this Maryland case to announce and apply a constitutional standard that turned on the extent to which specific districts were disfigured because of improper partisan manipulation.²⁶⁸

Consequently, if Justice Kennedy preferred to sustain a district-specific challenge to a congressional district on particularistic grounds concerning the district's malevolently misshaped bound-

264. *Id.* at 5.

265. See generally *supra* text accompanying note 55.

266. Second Amended Complaint, *supra* note 6, at 3, 17, 21.

267. *Id.* at 21.

268. The Supreme Court has scheduled oral argument in *Benisek* on March 28, 2018. See *Benisek v. Lamone*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/benisek-v-lamone/> [<https://perma.cc/8U7B-LPKU>]. *Benisek* is on appeal from the district court's denial of a preliminary injunction. See *id.*

aries, he could do so in the Maryland case while simultaneously rejecting the universalistic statewide challenge in the Wisconsin case.²⁶⁹ These simultaneous rulings would certainly soften the blow of the remand order, or even outright reversal, in *Gill*. Undoubtedly, the major takeaway from such simultaneous rulings—and indeed all headlines on the news accounts of them—would be that for the first time, the Court identifies a winnable constitutional challenge to a partisan gerrymander. The fact that one specific theory did not prevail would be a far-distant secondary consideration compared to the new development that a different mode of attack had finally proved successful.

Thus, for all those who worry that the Wisconsin case is the last chance for the Supreme Court to declare a partisan gerrymander unconstitutional,²⁷⁰ it is worth remembering that the Maryland case presents another opportunity. With the two cases at hand, the Court can consider both in relation to each other. At the very least, the Court should not dispose of *Gill* in such a way that would preclude in *Benisek*, either by the Court itself or by the district court on remand, further consideration of the district-specific claims that are distinctive to *Benisek* and absent in *Gill*.

CONCLUSION

This moment in American history is, indeed, a special one in terms of the opportunity to convince the Supreme Court that the Constitution is properly interpreted to entail a *judicially enforceable* constraint on partisan gerrymandering. But this special moment should be understood more broadly than just the *Gill* case from Wisconsin. Rather, the moment should be understood to encompass also the *Benisek* case from Maryland.

The opportunity to convince the Court, moreover, should be understood more broadly than convincing Justice Kennedy to join the Court's four liberals in identifying a standard for invalidating

269. One technical way the Court could accomplish this is to signal in its *Gill* opinion the appropriate standard to apply is the one announced in *Benisek* and then remand *Gill* for further consideration in light of the standard announced in *Benisek*.

270. See, e.g., Kimberly Strawbridge Robinson, *SCOTUS's Last Chance to Rein in Partisan Gerrymandering?*, BLOOMBERG BNA (June 1, 2017), <https://www.bna.com/scotuss-last-chance-n73014453015> [https://perma.cc/GZL2-EZH9].

partisan gerrymanders that all five of them embrace as judicially manageable. Instead, this opportunity should be understood to encompass convincing conservative Justices, after Justice Kennedy (and perhaps one or more of the Court's liberals) have retired, not to overrule a decision with which they disagree. Convincing Justice Kennedy is but a Pyrrhic victory if his replacement joins four conservatives on the Court to repudiate that decision in the Court's very next partisan gerrymandering case, just a few years later.

Thinking long-term in this way, one should quickly realize that considering potential standards for invalidating partisan gerrymanders that the Court might accept as judicially manageable, furthermore, should not be confined to the kind of universalistic modes of constitutional reasoning that conservatives abhor—modes of reasoning, for example, derived from abstract propositions of philosophy or political theory. Rather, one should also consider possible standards based on the kind of particularistic mode of reasoning that conservatives favor: reasoning rooted in, and confined by, particular circumstances of America's distinctive history and tradition. Thinking along these lines leads one back to the original gerrymander and to the recognition that it can, and should, be the judicially manageable benchmark for identifying unconstitutional partisan gerrymanders.