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## The Ballot Box: A Pathway to Greater Success in Addressing Political Gerrymandering Through State Courts

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## The Ballot Box: A Pathway to Greater Success in Addressing Political Gerrymandering Through State Courts

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# BREAKING THE BALLOT BOX: A PATHWAY TO GREATER SUCCESS IN ADDRESSING POLITICAL GERRYMANDERING THROUGH STATE COURTS

*Taylor Larson & Joshua Duden †*

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## INTRODUCTION

Political gerrymandering has essentially eliminated competitive elections for decades, leaving “[o]nly a small fraction of seats [seeing] meaningful competition in recent elections; the vast majority . . . are decided the day the district maps are drawn.”<sup>1</sup> In 2017, the U.S. Supreme Court developed a newfound interest in gerrymandering, leaving open the possibility that it could reform and reshape American democracy, and assist in ending the, at least, 207-year-old practice.<sup>2</sup>

By definition, a gerrymander is:

[T]he process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.<sup>3</sup>

“Packing” and “cracking” are two specific methods of gerrymandering. Packing “involves overly saturating one legislative district with the opposition party’s voters so that their influence is limited to the confines of [that] district.”<sup>4</sup> Cracking, on the other hand, “involves splitting the opposition party’s voters into many districts as a way of minimizing their impact.”<sup>5</sup> While technically correct, these definitions do not capture the legal and social ramifications of gerrymandering; the aftermath of which can be seen in election results today. Perhaps more appropriately, political

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<sup>1</sup> Alex Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 212 (2009) (citations omitted).

<sup>2</sup> Eric Randall, *Throwback Thursday: Happy Birthday, Gerrymandering*, BOS. MAG. (Mar. 26, 2015, 1:09 PM), <https://perma.cc/UV3G-CL2Z>.

<sup>3</sup> *Gerrymander*, BLACK’S LAW DICTIONARY (2d ed. 1910). For the most recent definition see *gerrymandering*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”).

<sup>4</sup> Sarah Friedmann, *How Does “Packing & Cracking” Work? ‘Last Week Tonight’ Tackled the Intricacies of Gerrymandering*, BUSTLE (Apr. 10, 2017), <https://perma.cc/E6WL-QV8T>; Complaint at 3, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16–1161).

<sup>5</sup> Friedmann, *supra* note 4; *Gill*, 138 S. Ct. at 1924 (citing plaintiffs’ complaint).

gerrymandering includes an implied requisite intent element in its definition: “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>6</sup>

This article will accomplish two tasks. First, it will address how political gerrymandering presents a hybrid-question for courts—a political and a constitutional question grounded in the First and Fourteenth Amendments. Second, this article will discuss two diverging challenges: the first being the federal challenges under the United States Constitution in *Gill v. Whitford* and *Benisek v. Lamone*, and the second being the Pennsylvania state constitutional challenge in *League of Women Voters of Pennsylvania*. Ultimately, this article seeks to provide a roadmap for successful challenges to political gerrymandering. Although federal remedies appear limited, this article argues that gerrymandering can be successfully measured, challenged, and cured in state courts and by state legislatures.

## I. LIMITATIONS

Unsurprisingly, the line between diminishing minority votes based on race and diluting or inflating the votes of a certain political party is rather thin.<sup>7</sup> While the authors attempt to solely address political gerrymandering, it is important to recognize that this practice is one limb of the larger beast. Thus, this article does not address the ramifications of racial gerrymandering, nor the potential gerrymandering claims that arise from census sampling.<sup>8</sup> Instead, it solely addresses challenges to politically gerrymandered district maps that have existed for over half a century without an answer from the Supreme Court.<sup>9</sup>

## II. HISTORY OF GERRYMANDERING

Like a living organism, gerrymandering has evolved through the ages—yet the tenets of this political practice trace back to the early history of the United States.<sup>10</sup> Notoriously, in 1812, the Massachusetts legislature

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<sup>6</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 271 n.1 (2004) (plurality opinion) (citing *Gerrymandering*, BLACK’S LAW DICTIONARY (7th ed. 1999)).

<sup>7</sup> Friedmann, *supra* note 4.

<sup>8</sup> See Linda Greenhouse, *Jarring Democrats, Court Rules Census Must Be by Actual Count*, N.Y. TIMES (Jan. 26, 1999), <https://perma.cc/JW3Z-V8S9>, for a discussion of census sampling.

<sup>9</sup> *Gill*, 138 U.S. at 1926 (“Over the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines.”).

<sup>10</sup> See generally Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <http://perma.cc/W534-GULB>.

passed a bill eventually signed by then-governor Elbridge Gerry,<sup>11</sup> that altered voting district lines into unnatural shapes in order to maintain majority control.<sup>12</sup> After seeing the new map, “an editor for the *Boston Gazette*, which supported the opposing Federalist party, looked at the odd shape of the new district and supposedly declared, ‘Salamander! Call it a Gerrymander!’”<sup>13</sup> Later, the *Boston Gazette* (“*Gazette*”) published the famed cartoon that immortalized the “gerrymander,” a “lizard-like winged beast with claws in Marblehead and jaws in Salsbury.”<sup>14</sup> The art of gerrymandering has since reared its lizard-like shape beyond the bounds of ancestral Massachusetts and into Ohio’s “Lake Erie Monster,”<sup>15</sup> and Pennsylvania’s “Goofy Kicking Donald Duck.”<sup>16</sup> These odd shapes and anti-contiguous maps have led to First Amendment and Equal Protection litigation, as well as Fifteenth Amendment litigation of racial gerrymanders, most recently in Wisconsin, Texas, Pennsylvania, Maryland, and North Carolina.<sup>17</sup>

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<sup>11</sup> See Erick Trickey, *Where Did the Term “Gerrymander” Come from?*, SMITHSONIAN MAG. (July 20, 2017), <https://perma.cc/XP3R-YJJW>, for a discussion of Elbridge Gerry. The Trickey article provides that: Governor Gerry “was a Founding Father: signer of the Declaration of Independence, reluctant framer of the Constitution, congressman, diplomat, and the fifth vice-president.” *Id.* He was also a “trusted confidant of John Adams” and “a dyspeptic hothead—a trait that got the better of him when he signed the infamous redistricting bill.” *Id.* Adams once wrote, “[i]f every Man here was a Gerry . . . the Liberties of America would be safe against the Gates of Earth and Hell.” *Id.* Furthermore, “across his long career, Gerry took principled stands for the Revolution, the American republic, limited government, and the Bill of Rights. But when his fears became obsessions, he overreacted and compromised his principles” in signing the redistricting bill. *Id.*

<sup>12</sup> See *id.* (“[T]he freakishly shaped district elected three Democratic-Republicans that year, 1812, breaking up the county’s previous delegation of five Federalist senators.”); Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Oct. 2012), <https://perma.cc/A3K6-BYJ8>.

<sup>13</sup> Randall, *supra* note 2. Other accounts also attribute the monster drawing to illustrator Elkanah Tisdale at a party hosted by a prominent Federalist. Trickey, *supra* note 11. Guests quipped about what the drawing looked like, until poet Richard Alsop coined the phrase Gerrymander. *Id.*

<sup>14</sup> Randall, *supra* note 2; Trickey, *supra* note 11 (“Gerry’s Federalist opponents saw the bill as another injury from his partisan vendetta. They responded with a satire so piercing, it has overshadowed all of Gerry’s other accomplishments in history.”).

<sup>15</sup> Trickey, *supra* note 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1919 (2018) (Wisconsin); *Perez v. Abbott*, 274 F. Supp. 3d 624, 636 (W.D. Tex. 2017), *rev’d*, 138 S. Ct. 2305 (2018) (Texas); *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 787 (Pa. 2018) (Pennsylvania); *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 WL 5816831, at \*13 (D. Md. Nov. 7, 2018) (Maryland); *Common Cause v. Rucho*, 240 F. Supp. 3d 376, 377 (M.D.N.C. 2017) (*per curiam*) (North Carolina). Despite being declared unconstitutional, the District Court for the Middle District of North Carolina ultimately upheld the map’s use in the 2018 midterms as “imposing a new schedule for North Carolina’s congressional elections would, at this late juncture, unduly interfere with the State’s electoral machinery and likely confuse voters and

### III. POLITICAL QUESTION HYBRIDITY OF VOTING RIGHTS BEFORE THE SUPREME COURT: IS POLITICAL GERRYMANDERING REVIEWABLE?

Between 1842 and 1911, Congress passed several Acts detailing requirements for electoral districts.<sup>18</sup> While state mapmakers took liberties with these requirements from the time of their enactment, it was not until 1962 that the Supreme Court heard a challenge by voters stemming from impermissible apportionments in Tennessee.<sup>19</sup> This challenge has subsequently provided the foundation for gerrymandering cases to question whether the matter is one that the Court can resolve.<sup>20</sup> All gerrymandering evaluations by the Supreme Court, political or otherwise, have since begun with the analysis of what constitutes a justiciable, versus a political, question.<sup>21</sup>

The political question doctrine dates back to *Marbury v. Madison*.<sup>22</sup> The Court in *Marbury* distinguished the difference between the nature of the political and legal questions and held the former cannot be answered in a court of law; rather, political questions must be addressed at the ballot box.<sup>23</sup> *Baker v. Carr*, the Tennessee redistricting challenge from 1962, presented the doctrinal limitation for what is justiciable in apportionment.<sup>24</sup> Justice Brennan, writing for the majority, provided factors to evaluate whether an issue presents a question best answered in a court of law or by the vote of the people.<sup>25</sup> Such factors include:

[T]extually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving [the issue]; impossibility for a court's independent resolution without expressing a

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depress turnout." James Doubek, *North Carolina Can Use Gerrymandered Map in November, Court Rules*, NPR (Sept. 5, 2018, 7:55 AM), <https://perma.cc/JBP9-N5MV>. The North Carolina map cannot be used, however, post-2018.

<sup>18</sup> Apportionment Act of 1911, Pub. L. No. 62-5, ch. 5, § 3, 37 Stat. 13, 14; Apportionment Act of 1901, ch. 93, § 3, 31 Stat. 733, 734; Apportionment Act of 1862, ch. 170, 12 Stat. 572, 572; Apportionment Act of 1842, ch. 47 § 2, 5 Stat. 491, 491.

<sup>19</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>20</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 271-72 (2004) (plurality opinion); *Nixon v. United States*, 506 U.S. 224, 226 (1993); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 291 (2d Cir. 2007); *League of Women Voters of Nassau Cty. v. Nassau Cty. Bd. of Supervisors*, 737 F.2d 155, 161 (2d Cir. 1984).

<sup>21</sup> See *infra* notes 39 and 41.

<sup>22</sup> *Marbury v. Madison*, 5 U.S. 137, 170 (1803) ("Questions, in their nature political, or which are, to the constitution and laws, submitted to the executive, can never be made in this court.").

<sup>23</sup> *Id.*

<sup>24</sup> *Baker*, 369 U.S. 186.

<sup>25</sup> *Id.* at 222-37.

lack of respect for a coordinate branch of government; impossibility of deciding the issue without an initial policy decision, which is beyond the discretion of the court; unusual need for unquestioning adherence to a political decision already made; potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>26</sup>

Further, Justice Brennan aptly noted, “the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection ‘is little more than a play upon words.’”<sup>27</sup>

While the *Baker* Court left the justiciability door cracked open, judges continue to grapple with the political question doctrine in today’s challenges to redistricting and, more specifically, political gerrymandering.<sup>28</sup> For instance, the Court held that gerrymandering was a justiciable question under the Equal Protection Clause in *Davis v. Bandemer* in 1986.<sup>29</sup> However, *Davis* was called in to question by *Vieth v. Jubelirer* in 2004.<sup>30</sup>

#### IV. THE MEAT AND POTATOES: IS POLITICAL GERRYMANDERING CONSTITUTIONAL?

*Vieth*, although not decided in the plaintiffs’ favor, contained the last thread of hope for apportionment challengers begging federal courts to intervene: Justice Kennedy’s “cryptic concurrence.”<sup>31</sup> While he sided with the conservative majority, Justice Kennedy effectively urged future challengers to provide the Court with a workable test with which to review gerrymandering claims; for all intents and purposes, he broadcasts himself as the swing vote.<sup>32</sup> Notably, he stated:

While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if

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<sup>26</sup> *Id.* at 217.

<sup>27</sup> *Id.* at 209 (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)).

<sup>28</sup> See Garrett Epps, *The Supreme Court’s Choice on Partisan Gerrymandering*, ATLANTIC (Mar. 28, 2018), <https://perma.cc/48PG-5XDW>.

<sup>29</sup> *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion).

<sup>30</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 303 (2004) (plurality opinion).

<sup>31</sup> Kim E. Rinehart et al., *Supreme Court Update: Gill v. Whitford, Benise v. Lamone*, NAT’L L. REV. (June 24, 2018), <https://perma.cc/KKC4-JC5C>; see also *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

<sup>32</sup> See David Daley, *Who Will Justice Kennedy Believe When it Comes to Gerrymandering?*, NEW YORKER (Oct. 3, 2017), <https://perma.cc/83U8-SCJ4>.

some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.<sup>33</sup>

Thus, it should be noted that Justice Kennedy's retirement diminishes the prospect of an end to partisan gerrymandering.<sup>34</sup> Any and all strategies to appeal to Justice Kennedy's call to discover the "limited and precise rationale"<sup>35</sup> after attempts made by modern cases discussed further in this article must be reworked to the call of a new Justice or to the possibility of a sitting Justice becoming the new swing vote.<sup>36</sup>

A. *Democrats Challenge Republicans on Wisconsin Map: Gill v. Whitford*

*Gill* was the first of two seminal political gerrymandering companion cases heard by the Supreme Court in Fall 2017. *Gill* was a challenge to a Republican-drawn map from Wisconsin in 2011.<sup>37</sup> After Wisconsin Republicans handily increased their majority in both the 2012 election cycle and 2014 midterms,<sup>38</sup> twelve liberal voters sought both a declaratory judgment, arguing that the Republican's use of the map violated the First and Fourteenth Amendments, and an injunction against the map's use in the 2016 election.<sup>39</sup> According to their complaint, "[s]ome of the plaintiffs [had] been packed into districts with other Democratic voters, while others live[d] in districts that [were] cracked by the Current Plan to disadvantage Democratic candidates in close races."<sup>40</sup> Recognizing that "a constitutional challenge ha[d] yet to succeed on [partisan gerrymandering grounds],"<sup>41</sup> petitioners distinguished their claim and presented a new, workable, mathematical test based on "the idea that a district plan should treat the major parties symmetrically with respect to the conversion of

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<sup>33</sup> *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

<sup>34</sup> Michael Wines, *Kennedy's Retirement Could Threaten Efforts to End Partisan Gerrymandering*, N.Y. TIMES (June 30, 2018), <https://perma.cc/MJ3J-282K>.

<sup>35</sup> *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

<sup>36</sup> See Sam Levine, *Anthony Kennedy's Retirement Is a Bad Sign for Fixing Gerrymandering*, HUFFPOST (June 28, 2018, 1:16 PM), <https://perma.cc/49B6-6CR9> (discussing how both sitting and future Supreme Court justices might take J. Kennedy's place as a potential swing vote).

<sup>37</sup> Amy Howe, *Argument Analysis: Cautious Optimism for Challengers in Wisconsin Redistricting Case?*, SCOTUSBLOG (Oct. 3, 2017, 2:13 PM), <https://perma.cc/ASF7-VDRD>.

<sup>38</sup> *Id.* ("In the 2012 elections, Republicans won slightly less than half of the statewide vote, which translated into 60 seats in the state's 99-seat assembly; by contrast, Democrats won just over half of the statewide vote but garnered only 39 seats. Two years later, Republicans won 52% of the vote and 63 seats, while Democrats won approximately 48% of the vote and 36 seats.").

<sup>39</sup> Complaint at 1, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 3:15-cv-00421-bbc).

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.* at 3.

votes to seats and that neither party should have a systematic advantage in how efficiently its popular support translates into legislative power.”<sup>42</sup> This is known as partisan symmetry.<sup>43</sup>

The test at the heart of *Gill*, developed in 2015 by Nicholas Stephanopoulos and Eric McGhee, is better known as the Efficiency Gap (“the Gap”).<sup>44</sup> The Gap attempts to measure wasted votes—votes that are either cast for a candidate who lost, or votes in excess of what the winning candidate needed.<sup>45</sup> Overall, the numbers suggest that partisan gerrymandering occurs in cases where there is a large difference between the parties’ wasted votes in a given election.<sup>46</sup> Accordingly, “[w]hen the efficiency gap is relatively small and roughly equivalent to the efficiency gaps that have traditionally existed, the map should not be deemed unconstitutional.”<sup>47</sup>

Ultimately, the Supreme Court did not respond to the accuracy of the Gap and declined to decide the case on the merits.<sup>48</sup> Chief Justice Roberts, writing for the majority, concluded that the plaintiffs lacked standing because, although they alleged that they had a personal stake in the reapportionment map, they never followed up with the requisite proof.<sup>49</sup> As a result, the case was remanded.<sup>50</sup>

#### B. *Republicans Challenge Democrats’ Maryland Map: Benisek v. Lamone*

During the same Term, the Supreme Court heard arguments for and decided *Benisek*, a challenge to a Democrat-drawn map from Maryland following the 2010 Census.<sup>51</sup> The case follows a complaint filed by John

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<sup>42</sup> *Id.*

<sup>43</sup> Anthony J. McGann, et al., *We Have a Standard for Judging Partisan Gerrymandering. The Supreme Court Should Use It*, WASH. POST (Feb. 2, 2017), <https://perma.cc/CDA3-C5TT>; Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514, 536 (1994).

<sup>44</sup> ERIC PETRY, BRENNAN CTR. FOR JUST., HOW THE EFFICIENCY GAP WORKS 1 (2017), <https://perma.cc/C3MW-33MH>.

<sup>45</sup> *Id.*; Epps, *supra* note 28.

<sup>46</sup> LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, EXTREME MAPS 4 (2017), <http://perma.cc/384S-RGDV>.

<sup>47</sup> Complaint at 3, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 3:15-cv-00421-bbc).

<sup>48</sup> *See Gill*, 138 S. Ct. at 1934.

<sup>49</sup> *Id.* at 1923.

<sup>50</sup> *Id.*

<sup>51</sup> *See* Amy Howe, *Argument Preview: For the Second Time This Term, Justices to Take up Partisan Gerrymandering*, SCOTUSBLOG (Mar. 23, 2018, 10:53 AM), <https://perma.cc/R9G3-4XJQ>.

Benisek, a Maryland resident, who sued the state after the Sixth Congressional District was redrawn to unseat a Republican.<sup>52</sup>

*Benisek* relied heavily on the First Amendment Freedom of Association but offered no metric by which the Court could calculate political gerrymandering.<sup>53</sup> The plaintiffs argued that the Court did not need mathematics to decide in their favor, just common sense:

Unlike the equal-protection approach to partisan gerrymandering, the First Amendment retaliation framework does not depend on a unifying definition of “fairness” or require courts to determine when a map has gone “too far.” It instead asks whether the State has imposed a real and practical burden (one that is more than *de minimis*) in retaliation for past political support for the opposition party . . . . As this Court’s ballot-access cases make clear, the inquiry is pragmatic and functional, turning not on statistical measures of imbalance, but on the practical effects of a gerrymander themselves.<sup>54</sup>

In a per curiam opinion, the Court again declined to address political gerrymandering on the merits, finding the plaintiffs in *Benisek* failed to show that the district court abused its discretion in denying the plaintiffs’ preliminary injunction.<sup>55</sup> The Court also held that it would be against the public interest to enjoin the map, “as an injunction might have worked a needlessly ‘chaotic and disruptive effect upon the electoral process.’”<sup>56</sup>

Consequently, *Gill* and *Benisek* are major setbacks that have “erected substantive barriers to political gerrymandering claims” in the future.<sup>57</sup> While it is likely that the Supreme Court will hear *Gill* again,<sup>58</sup> *Benisek* is indicative of the Court’s unwillingness to frustrate the electoral process.<sup>59</sup>

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<sup>52</sup> Neal Earley, *Supreme Court to Wait on Maryland Gerrymandering Case*, MONTGOMERY COUNTY SENTINEL (June 21, 2018), <https://perma.cc/5LC7-EWCQ>.

<sup>53</sup> See *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam).

<sup>54</sup> Brief of Appellants at 27, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333) (emphasis added).

<sup>55</sup> *Benisek*, 138 S. Ct. at 1945.

<sup>56</sup> *Id.* (citing *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976)).

<sup>57</sup> John Phillippe, *Symposium: Back to the Drawing Board for Political Gerrymandering Plaintiffs*, SCOTUSBLOG (June 19, 2018, 5:05 PM), <https://perma.cc/Z7L3-NWJE>.

<sup>58</sup> David Gans, *Symposium: The Fight to Vindicate Our Constitution’s Promise of Democracy Is Far from Over*, SCOTUSBLOG (June 19, 2018, 11:14 AM), <https://perma.cc/UTF5-FVYR>.

<sup>59</sup> *Benisek*, 138 S. Ct. at 1945.

V. ENTER STATE-BASED CHALLENGES: A NEW SUPERIOR AVENUE AND METRIC TO ADDRESS GERRYMANDERING WHERE THE U.S. CONSTITUTION BEARS LITTLE CONSEQUENCE

As a re-invocation of federalism and the Tenth Amendment, challengers to political gerrymandering experience greater success in state courts, where individual state constitutions often provide heightened protections.<sup>60</sup> The Tenth Amendment provides that the federal government only has specifically enumerated power over the states when specifically enumerated.<sup>61</sup> Otherwise, the powers to decide and act are reserved to the individual states.<sup>62</sup> State courts grant additional, broader protections to their citizens where the federal government and the Supreme Court do not;<sup>63</sup> this is evident in the realm of political gerrymandering where state courts have deemed the practice a justiciable question and specifically unconstitutional.<sup>64</sup> As the initial panel of judges noted in *Gill*, the “[r]eapportionment of state legislative districts is a responsibility constitutionally vested in the state government.”<sup>65</sup>

Prior to the most recent challenges, state courts have ruled against gerrymandering even without a clear way to measure its effects.<sup>66</sup> The Iowa Supreme Court opposed political gerrymandering over forty years ago, and the state has since been seen as a pinnacle of free and fair elections.<sup>67</sup> In 1972, voters in several Iowa districts sought to invalidate redistricting plans presented and approved by the state legislature following

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<sup>60</sup> See, e.g., *League of Women Voters of Pennsylvania v. Commonwealth*, 175 A.3d 282, 284 (Pa. 2018) (finding that the Congressional Redistricting Act of 2011 violates the state constitution).

<sup>61</sup> See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

<sup>62</sup> See e.g. *New York v. United States*, 505 U.S. 144, 156 (1992).

<sup>63</sup> See, e.g., *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018) (finding that the courts are suited to step in where the legislature does not act to remedy an unconstitutional redistricting plan); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784 (Iowa 1972).

<sup>64</sup> See Ronald K.L. Collins, *Looking to the States*, NAT’L L.J., Sept. 29, 1986, at S; see also *League of Women Voters of Pennsylvania*, 178 A.3d 737 (Pa. 2018).

<sup>65</sup> *Whitford v. Gill*, 218 F. Supp. 3d 837, 844 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018); see also *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”).

<sup>66</sup> See, e.g., *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d at 788 (Iowa 1972).

<sup>67</sup> Erin Murphy, *Evidence of Gerrymandering Prevalent Across U.S., but Not in Iowa*, SIOUX CITY J. (June 27, 2017), <https://perma.cc/Q6VY-5A9U>.

the 1970 U.S. Census because of their deviations from the standard population of the state at the time.<sup>68</sup> Relying on *Burns v. Richardson*, the Iowa Supreme Court sought to determine whether the districts constituted invidious discrimination.<sup>69</sup> The court held that invidiousness can be found where “a conscious effort is obviously present to devise and propose a plan which the legislature would adopt because [it] would protect individual legislators at the pools, and districts lacking population equality or compactness are created for this political purpose.”<sup>70</sup> Thus, without a metric such as the equation provided in *Gill*, and without specifically invoking a section in the Federal Constitution, the Iowa Supreme Court found that political gerrymandering is not only justiciable,<sup>71</sup> but also unconstitutional.<sup>72</sup>

#### A. *The State Challenge to the Pennsylvania Map*

In June 2017, the League of Women Voters and eighteen registered Democrats (one from each congressional district in Pennsylvania) sued Pennsylvania state officials asserting that the state’s 2011 redistricting plan violated the Pennsylvania Constitution.<sup>73</sup> The Pennsylvania Constitution provides for elections that are truly fair and equal.<sup>74</sup> Unlike other state constitutions<sup>75</sup> and the Federal Constitution, Pennsylvania’s Free

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<sup>68</sup> *In re Legislative Districting of Gen. Assembly*, 193 N.W. at 785-86, 789 (quoting *In re Legislative Districting of Gen. Assembly*, 175 N.W.2d 20, 26 (Iowa 1970)) (“[I]t is apparent from the record that in the commission plan as filed there are instances of districts being created to facilitate keeping present members in office and others providing boundaries to avoid having present members contest each other at the polls. The legislature made no apparent revision of the commission plan in this respect when enacting House File 781. When such factors enter into reapportionment it cannot be said that ‘a good faith effort to establish districts substantially equal in population has been made.’”) (citing *League of Nebraska Municipalities v. Marsh*, 242 F. Supp. 357, 360-61 (D. Neb. 1965)).

<sup>69</sup> *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d at 790.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 789 (“This court will retain jurisdiction of this matter, and will file opinion supplemental hereto to reflect the plan of apportionment developed by it in accord with the constitutional direction.”).

<sup>72</sup> *Id.* at 790.

<sup>73</sup> See generally *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

<sup>74</sup> PA. CONST. art. I, § 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”).

<sup>75</sup> The Iowa Constitution contains the language “Shall be entitled to vote” but not a guarantee of free and equal elections. See IOWA CONST. art II, § 1; *contra*, Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana and 20 other states do have similar provisions to this language. ARIZ. CONST. art. II, § 21, art. VII, § 2; ARK. CONST. art. III, §§ 1-2; COLO. CONST. art. VII, § 1, art. II, § 5; DEL. CONST. art. V, § 2, art. I, § 3; ILL. CONST. art. III, §§ 1, 3; and IND. CONST. art. II, §§ 1-2. For a great in-depth analysis of this provisional information see Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

and Equal Election Clause has been interpreted to entitle citizens to re-  
prieve from political gerrymandering.<sup>76</sup> Therefore, the Pennsylvania  
plaintiffs had a state-based cause of action.<sup>77</sup> Though an initial stay was  
granted in the case, petitioners sought extraordinary relief and the Penn-  
sylvania Supreme Court granted expedited review, remanding the case to  
the Commonwealth Court for trial in December 2017.<sup>78</sup> The Pennsylvania  
Supreme Court subsequently heard arguments on January 17, 2018.<sup>79</sup> Alt-  
though not reviewable by the Pennsylvania Supreme Court, the expert tes-  
timony presented by four witnesses, Doctors Jowei Chen, John Kennedy,  
Wesley Pegdon, and Christopher Warshaw, is most noteworthy as a meas-  
urable metric offered in the trial record.<sup>80</sup>

### 1. Dr. Jowei Chen: Evaluating Modern Algorithmic Redistricting Simulations

Dr. Jowei Chen, a redistricting research expert, took a three-prong  
approach to evaluating Pennsylvania's 2011 redistricting plan ("the Penn-  
sylvania Plan"):

- (1) whether partisan intent was the predominant factor in drawing of the Plan;
- (2) if so, what was the effect of the Plan on the number of congressional Democrats and Republicans elected from Pennsylvania; and
- (3) the effect of the Plan on the ability of the 18 individual petitioners to elect a Democrat or Republican candidate for congress [sic] from their respective districts.<sup>81</sup>

Using a computer algorithm, Dr. Chen created two sets of 500 redistricting plans.<sup>82</sup> The first set used "traditional Pennsylvania districting criteria,"<sup>83</sup> and the second set used additional criteria to protect the seventeen

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<sup>76</sup> See PA. CONST. art. I, § 5; *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

<sup>77</sup> PA. CONST. art. I, § 5.

<sup>78</sup> *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d at 766-67 (Pa. 2018).

<sup>79</sup> *Id.* at 767.

<sup>80</sup> *Id.* at 770-79.

<sup>81</sup> *Id.* at 770 (citation omitted).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ("[P]opulation equality; contiguity; compactness; absence of splits within municipalities, unless necessary; and absence of splits within counties, unless necessary.") (citation omitted).

incumbent legislators to determine if the additional factor could prove intent, and to account for the extreme partisan bias present in the Pennsylvania Plan.<sup>84</sup>

Set one, using only traditional redistricting criteria, resulted in only fourteen counties being divided into multiple congressional districts<sup>85</sup> which that is in contrast to the twenty-eight counties split into multiple districts under the Pennsylvania Plan.<sup>86</sup> The maximum number of districts that were split in that same simulation was sixteen.<sup>87</sup> Furthermore, the majority of simulations ran under the traditional approach rendered twelve to fourteen split counties, in contrast to the sixty-eight split counties present in the Pennsylvania Plan, showcasing the presence of undue influence.<sup>88</sup>

Dr. Chen's model also addressed geographic compactness using two widely accepted scoring techniques: The Reock Compactness Score and the Popper-Polsby Compactness Score.<sup>89</sup> As Professor Justin Levitt has aptly noted, "Few states precisely define what 'compactness' means . . . . Most observers look to measures of a district's geometric shape"<sup>90</sup> as required by the Supreme Court in *Reynolds v. Sims*.<sup>91</sup> After hundreds of simulations the Pennsylvania Plan appeared to be the least compact:

[N]o matter which measure of compactness [Dr. Chen used], it [was] very clear that the [Pennsylvania Plan] significantly and

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<sup>84</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 770-71. Other algorithmic sampling methods have been used to evaluate the fairness of redistricting plans for Pennsylvania. Taylor McNeil, *Tufts Mathematician to Aid in Pennsylvania Gerrymandering Case*, TUFTS NOW (Jan. 29, 2018), <https://perma.cc/HD47-CQA9>.

<sup>85</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 771.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 773.

<sup>88</sup> *Id.* at 772.

<sup>89</sup> *Id.* at 771. The Reock Compactness Score, the first model evaluated, is a "ratio of a particular district's area to the area of the smallest bounding circle that can be drawn to completely contain the district . . . .". The Popper-Polsby Compactness Score examines compactness "by first measuring each district's perimeter and comparing it to the area of a hypothetical circle with that same perimeter. The ratio of the particular district's area to the area of the hypothetical circle is [the] . . . Score" assigned. *Id.* For greater discussion on compactness and the measurement of the Reock Score, see Stephen Ansolabehere & Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 743, 746-47 (2016).

<sup>90</sup> *Where Are the Lines Drawn*, ALL ABOUT REDISTRICTING: PROFESSOR JUSTIN LEVITT'S GUIDE TO DRAWING THE ELECTORAL LINES, <https://perma.cc/T64H-697F> (last visited Jan. 18, 2018).

<sup>91</sup> *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

completely sacrifice[d] the traditional districting principle of geographic compactness compared to the sorts of plans that would have emerged under traditional redistricting principles.<sup>92</sup>

In Set Two, which included the protection of the seventeen incumbents, Dr. Chen found fifteen split counties, compared to the twenty-eight counties in the Pennsylvania Plan.<sup>93</sup> Additionally, the Pennsylvania Plan split far more municipalities than any of the simulated models.<sup>94</sup> Using real election data from Pennsylvania, Dr. Chen noted that the Plan resulted in thirteen Republican districts, and in no simulated model did the Republican candidates retain more than ten districts.<sup>95</sup> Taking into account the Republican geographic advantage, the outcome of the map was unnatural and implausible.<sup>96</sup> Dr. Chen noted, “an effort to protect incumbents would not have justified splitting up as many counties and as many municipalities as we saw split up in the [Pennsylvania] Plan.”<sup>97</sup>

Dr. Chen’s findings were not without critique, however, as respondents introduced through the testimony of Dr. Nolan McCarty, a Princeton University expert in redistricting and political analysis.<sup>98</sup> Dr. McCarty examined Dr. Chen’s findings and characterized the results as “imperfect,” countering that the Partisan Voting Index (“PVI”), based on presidential voting returns, showcased the underperformance of Democrats.<sup>99</sup> Established in 1997, the PVI seeks to measure how “each district performs at the presidential level compared to the nation as a whole.”<sup>100</sup> The court did not find Dr. McCarty’s testimony convincing and sided with Dr. Chen.<sup>101</sup>

## 2. Dr. John Kennedy: Evaluating the Political Geography

The plaintiffs’ second expert witness, Dr. John Kennedy, a specialist in political geography from West Chester University, also examined the Pennsylvania Plan.<sup>102</sup> Upon examination of the Pennsylvania Plan and

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<sup>92</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 772.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 773 (“[P]artisan intent subordinated traditional districting principles in the drawing the enacted plan.”) (citation omitted).

<sup>96</sup> *Id.* at 774.

<sup>97</sup> *Id.* at 772.

<sup>98</sup> *Id.* at 780.

<sup>99</sup> *Id.* (arguing that Democratic underperformance was due, in part at least, to candidate quality, incumbency, spending, national tides, and trends within the electorate).

<sup>100</sup> David Wasserman & Ally Flinn, *Introducing the 2017 Cook Political Report Partisan Voter Index*, COOK POL. REP. (Apr. 7, 2017), <http://perma.cc/Q3VD-4ZME>.

<sup>101</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 780-81.

<sup>102</sup> *Id.* at 775 (“[T]o see how it treated communities of interest, whether there were anomalies present, whether there are strangely designed districts, whether there are things that don’t

evaluation of the map for potential packing or cracking, Dr. Kennedy found that it negatively affected Pennsylvania's communities of interest to an unprecedented degree.<sup>103</sup> He also found that it contained more anomalies than ever before.<sup>104</sup> For example, Dr. Kennedy found that, under the Pennsylvania Plan, the state's Seventh District cracked Democratic voters into staunch Republican districts where their votes were diluted to the point that they no longer mattered.<sup>105</sup> To examine the impact of district packing, Dr. Kennedy pointed to the First District, where the Pennsylvania Plan had consolidated Democrats to reduce the potential negative impact on Republican districts.<sup>106</sup> Dr. Kennedy concluded that the Plan had been gerrymandered because it "[gave] precedence to political considerations over considerations of communities of interest" and disadvantaged Democratic voters.<sup>107</sup>

### 3. Dr. Wesley Pegden: Evaluating Probability to Showcase Partisan Bias

The third expert, Dr. Wesley Pegden, a mathematics professor at Carnegie Mellon University, testified to the presence of political gerrymandering after generating one trillion random, small changes to the Pennsylvania Plan.<sup>108</sup> He found that nearly 100%<sup>109</sup> of his manufactured plans were less partisan than the Pennsylvania Plan, which led Dr. Pegden to describe the plan as, "carefully crafted to ensure a [majority] advantage."<sup>110</sup> To combat Dr. Pegden, the Commonwealth introduced Dr. Wendy K. Tam Cho's testimony, but she conceded at trial that she had not reviewed Dr. Pegden's metrics, algorithms, or codes.<sup>111</sup> As a result, the court gave little weight to Dr. Cho's testimony and even less weight to her conclusions.<sup>112</sup>

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make sense, whether there are tentacles, whether there are isthmuses [and] whether there are other peculiarities.") (citation omitted).

<sup>103</sup> *Id.* (recognizing that communities of interest can include political affiliations of the community).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 776.

<sup>106</sup> *See id.*

<sup>107</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 776.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (finding 99.999999% were less biased than the Pennsylvania Plan).

<sup>110</sup> *Id.* (citation omitted).

<sup>111</sup> *Id.* at 779.

<sup>112</sup> *Id.* at 780.

#### 4. Dr. Christopher Warshaw: Evaluating Gerrymandering from a Historical Perspective

The final expert, Dr. Christopher Warshaw, an assistant professor of political science at George Washington University, noted the utility of *Gill*'s efficiency gap in determining the amount of wasted votes.<sup>113</sup> Using the Gap metric, Dr. Warshaw found that historically, the Pennsylvania efficiency gap hovered close to zero, as it should in states with more than six congressional districts.<sup>114</sup> However, following the enactment of the Pennsylvania Plan, the efficiency gap was between 15% and 24% in the majority's favor, such that Pennsylvania had the second largest efficiency gap since 1972 when one-person, one-vote went into effect.<sup>115</sup>

#### B. Federalism and the 2011 Pennsylvania Plan

The Pennsylvania Supreme Court thus found the Pennsylvania Plan "clearly, plainly, and palpably violate[d] the Free and Equal Elections Clause of our Constitution."<sup>116</sup> With no federal counterpart to protect electoral rights, the court held that the state constitution incorporates all aspects of the electoral process, and mandates that all voters must have an equal opportunity for their votes to translate to representation.<sup>117</sup>

Foremost, the court focused on the language of the state constitutional provision "free and equal."<sup>118</sup> Historically, "free and equal" has not been narrowly defined, but interpreted broadly to not only protect individuals, but also to exclude "all invidious discriminations between individual electors, or classes of electors, [and] also between different sections or places in the State."<sup>119</sup> The court further noted while the Pennsylvania General Assembly is empowered to regulate elections, the courts reserve the right to invalidate legislative action when it violates the constitution.<sup>120</sup>

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<sup>113</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 777.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 778.

<sup>116</sup> *Id.* at 801-02. See *Id.* at 802, note 63 which expressly dismisses plaintiffs' request for review under principles of free expression and equal protection instead asserting the Pennsylvania Constitution without regard to the Federal counterparts or provisions of the First and Fourteenth Amendments. Note 63 provides a determinative stance to place a boundary around the court's ruling and the potential review by the U.S. Supreme Court.

<sup>117</sup> *Id.* at 804; see also Douglas, *supra* note 75, at 100 ("[T]he U.S. Constitution does not grant the right to vote. It instead defines the right through a negative gloss, detailing the various reasons states cannot limit the franchise.").

<sup>118</sup> *League of Women Voters of Pennsylvania*, 178 A.3d at 802.

<sup>119</sup> *Id.* at 809 (quoting CHARLES R. BUCKALEW, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA 10 (1883)).

<sup>120</sup> *Id.*

Notably, this was not the first time that the Pennsylvania Supreme Court addressed this issue. In *Erfer v. Commonwealth*, the court held that:

It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power simultaneously suspended the constitution of our Commonwealth vis-à-vis congressional reapportionment. Without clear support for the radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to circumscribe the operation of the organic legal document of our Commonwealth.<sup>121</sup>

Accordingly, the court determined that political gerrymandering does present a justiciable question, and that voter rights are a state construct and therefore more properly addressed under state constitutions.<sup>122</sup> The Pennsylvania Plan violated the “free and equal” language of the Pennsylvania Constitution, and the remedy was to require the legislature to change the redistricting map with judicial oversight.<sup>123</sup> As it was empowered to act, and such action does not impede federal law, the Pennsylvania Supreme Court struck down the gerrymandered map without ever needing to invoke the Constitution.<sup>124</sup>

#### CONCLUSION

It is our contention that the most successful challenges to political gerrymandering will be found at the state level, similar to what occurred in Pennsylvania, regardless of any federal implications of *Gill*. State challenges insulate courts' decisions when appealing under explicit enumerated voting rights not necessarily present in the Federal Constitution.<sup>125</sup> State challenges also can be faster, as they have clear potential to reach decisions on the merits sooner than federal cases do.<sup>126</sup> Furthermore,

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<sup>121</sup> *Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002).

<sup>122</sup> *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083, 1084 (Pa. 2018) (per curiam).

<sup>123</sup> *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018).

<sup>124</sup> *See id.* at 825.

<sup>125</sup> *See Bush v. Gore*, 531 U.S. 98, 104 (per curiam) (“[T]he individual citizen has no federal constitutional right to vote . . . .”); *Hudleston v. Dwyer*, 322 U.S. 232, 237 (1944) (recognizing that decisions of the highest court in a state are generally conclusive upon the Supreme Court).

<sup>126</sup> *Compare League of Women Voters of Pennsylvania*, 175 A.3d 282 (Pa. 2018) (taking state court just over seven months to reach a final decision from the initial proceedings) *with Gill*, 138 S. Ct. 1916 (taking federal court nearly three years to reach a conclusion from the

while statutory changes can provide temporary relief from gerrymandered maps, statutes can change from year to year.<sup>127</sup> Ultimately, state judicial challenges or state constitutional amendments present the best hope for addressing gerrymandering and neutralizing redistricting influences, in turn making elections fairer for the people of the United States and the people of each individual state.

The Supreme Court has seemed to express a willingness to let states address political gerrymandering independent of the federal courts.<sup>128</sup> In *Grove v. Emison*, the Court reaffirmed its commitment to past precedent that reapportionment is a right of the states rooted in federalism principles and not in federal courts.<sup>129</sup> Relying on *Scott v. Germano*, the Court committed to be deferential to each state's right to retain jurisdiction to address state-specific actions, specifically redistricting.<sup>130</sup> *Grove* utilizes powerful language to show that states are the proper venue to address political gerrymandering where federal courts have been instructed to encourage state challenges and state solutions.<sup>131</sup> This past encouragement displays not only a commitment to federalism, but also expressly empowers state courts to address political gerrymandering head-on.<sup>132</sup>

Of course, state constitutional amendments may also provide a successful solution. With this in mind, it may be more attractive to pass state constitutional amendments incorporating a "free and fair elections" clause, as is present in Pennsylvania, in order to grant greater authority to state courts to decide this matter on state constitutional grounds. Though this option would bind state courts and offer an "out," effectively nullifying the need for federal interpretation, passing constitutional amendments is time consuming and contrary to the expedited need to address the issue

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initial proceedings). The Pennsylvania court granted a motion to expedite and decide, which appear more readily accessible in state courts.

<sup>127</sup> See LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, at SUMMARY (2014) ("When one of these 'substantive' canons applies, the Court frequently requires a 'clear statement' of congressional intent to negate it. A commonly invoked 'substantive' canon is that Congress does not intend to change judge-made law.").

<sup>128</sup> See, e.g., *Grove v. Emison*, 507 U.S. 25, 33 (1993).

<sup>129</sup> *Id.* ("In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.") (emphasis in original).

<sup>130</sup> *Id.* (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.")).

<sup>131</sup> *Id.*; see *Scott*, 381 U.S. at 409 (citing to additional case law).

<sup>132</sup> See *Grove*, 507 U.S. at 33.

of gerrymandering within the current socio-legal and electoral landscape.<sup>133</sup>

This is not to say that federal challenges will never work. Justice Kagan kept the possibility of addressing political gerrymandering on the federal level open in her *Gill* concurrence, after the case is addressed on remand.<sup>134</sup> In order to be successful, the argument would be built upon the foundation of First Amendment freedom of association, rather than the dominant arguments of Equal Protection violations.<sup>135</sup> Plaintiffs should also consider having the injured political party initiate the challenge in order satisfy standing requirements, which became the primary issue in *Gill*.<sup>136</sup> No matter how the argument is considered, there is still no guarantee of success at the federal level, especially given the lack of assurance in Justice Kennedy's swing vote following his retirement. This uncertainty only bolsters the notion that state challenges remain the superior approach to addressing political gerrymandering.

There are limits to this argument, of course, but the limitations are far outnumbered by the privileges and rights gained by successful challenges. State challenges do not always guarantee success, especially in states unwilling to go beyond the federal interpretation as it currently stands<sup>137</sup> or in states with narrower constitutional protections. While many states already have the constitutional framework to be successful by providing the right to vote and language of fairness that is not present in the Federal Constitution,<sup>138</sup> state parties, the possible petitioners with the best chance at success, may simply lack the willingness to move forward beyond the status quo.

Political gerrymandering remains a threat in the United States without a clear, judicial remedy available in federal court, especially following what could have been landmark cases, *Gill* and *Benisek*.<sup>139</sup> Recently, state

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<sup>133</sup> See Primo J. Cruz, Note, *POLS Gone Wild: Why State Constitutional Equality Provisions are a Proper Solution to Partisan Gerrymandering*, 42 RUTGERS L.J. 927, 929 (2011) (“[C]omprehensive redistricting reform through constitutional change can take a long time and is usually achieved only after successive failures.”).

<sup>134</sup> *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See e.g., STATE COURTS ADOPTING FEDERAL CONSTITUTIONAL DOCTRINE: CASE-BY-CASE ADOPTIONISM OR PROSPECTIVE LOCKSTEPPING, 46 WM. & MARY L. REV. 1499, 1502 (2005) (explaining that state courts often interpret their constitutions in “lockstep” with federal interpretations).

<sup>138</sup> See Douglas, *supra* note 75, at 133.

<sup>139</sup> Transcript of Oral Argument at 39, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) (statement of Paul Smith, answering the justices of the Court) (“[T]his is a cusp of a really serious . . . problem as gerrymandering becomes more sophisticated with computers and data analytics . . . and an electorate that’s very polarized and more predictable than it’s ever been before. If you let this go . . . we’re not going to have a judicial remedy for this problem,

courts have provided the guidance to challenge extreme partisan gerrymandering. Gerrymandering remains a very serious problem, but it is one that can be solved at the state level. In the next decade, as more maps are proffered to or by state legislatures, state courts may provide the perfect solution to cut off the last limb of this anti-democratic beast.

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in 2020, you're going to have a festival of copycat gerrymandering the likes of which this country has never seen. And it may be that you can protect the Court from seeming political, but the country is going to lose faith in democracy big time because voters . . . everywhere are going to be like the voters in Wisconsin and, no, it really doesn't matter whether I vote.").