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Congressional Redistricting Law: Background and Recent Court Rulings

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Summary

In addition to various state processes, the legal framework for congressional redistricting involves constitutional and federal statutory requirements. Interpreting these requirements, in a series of cases and evolving jurisprudence, the U.S. Supreme Court has issued rulings that have significantly shaped how congressional districts are drawn and the degree to which challenges to redistricting plans may succeed. As the 2020 round of redistricting approaches, foundational and recent rulings by the Court regarding redistricting are likely to be of particular interest to Congress. This report analyzes key Supreme Court and lower court redistricting decisions addressing four general topics: (1) the constitutional requirement of population equality among districts; (2) the intersection between the Voting Rights Act and the Equal Protection Clause; (3) the justiciability of partisan gerrymandering; and (4) the constitutionality of state ballot initiatives providing for redistricting by independent commissions.

The Supreme Court has interpreted the Constitution to require that each congressional district within a state contain approximately an equal number of persons. This requirement is sometimes referred to as the "equality standard" or the principle of "one person, one vote." In several cases, the Supreme Court has described the extent to which population equality among districts is required. For congressional districts, less deviation from precise equality has been held by the Court to be permissible than is permissible for state legislative districts.

In addition, congressional districts are required to comply with Section 2 of the Voting Rights Act (VRA), which prohibits any voting qualification or practice that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. This includes congressional redistricting plans. Under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts, in which a racial or language minority group comprises a voting majority. However, under the Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment, if race is the predominant factor in the drawing of district lines, then a "strict scrutiny" standard of review applies. To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest. These cases are often referred to as "racial gerrymandering" claims because the plaintiffs argue that race was improperly used in the drawing of district boundaries. Much of the Supreme Court's redistricting jurisprudence has been triggered by disputes involving the intersection between requirements under the VRA and the constitutional standards of equal protection. For example, during its current term, the Court has decided one case regarding the degree to which racial considerations are permitted to impact how district lines are drawn and is considering another such case.

While *racial* gerrymandering claims have been a recent focus of litigation, the Supreme Court is also currently considering an appeal of a case involving *partisan* gerrymandering. In February 2017, a state appealed a three-judge federal district court ruling that invalidated a redistricting map as an unconstitutional partisan gerrymander. This case presents the Court with an opportunity to establish a standard for determining what constitutes unconstitutional partisan gerrymandering. While leaving open the possibility that such claims may be justiciable (that is, within the scope of judicial review), to date, the Supreme Court has yet not decided on a standard for assessing such claims.

Finally, a 2015 Supreme Court ruling held that the Elections Clause of the Constitution permits states to create nonpartisan independent redistricting commissions for congressional redistricting by ballot initiatives and referenda. If more states adopt similar laws, it could change the process of congressional redistricting nationwide.

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Congressional redistricting involves the drawing of district boundaries from which voters elect their representatives to the U.S. House of Representatives.[1] Prior to the 1960s, court challenges to redistricting plans were generally considered to present non-justiciable political questions that were most appropriately addressed by the political branches of government, not the judiciary.[2] However, in 1962, in the landmark case of *Baker v. Carr,* the Supreme Court held that a constitutional challenge to a redistricting plan is not a political question and is justiciable.[3] Since then, in a series of cases and evolving jurisprudence, the U.S. Court has issued rulings that have significantly shaped how congressional districts are drawn.

Recently, the Supreme Court and lower courts have focused on challenges to district maps. As the 2020 round of redistricting approaches, these decisions are likely to be of particular interest to Congress. For example, in addressing the requirement of population equality among districts, the Court has held that the standard does not require congressional districts to be drawn with precise mathematical equality, but instead requires states to justify population deviation among districts with "legitimate state objectives."[4] During its current term, the Court has decided one case regarding the degree to which racial considerations are permitted to impact how district lines are drawn and is considering another such case.[5] Furthermore, the Supreme Court is currently considering an appeal from a three-judge federal district court ruling involving partisan gerrymandering.[6] This case presents the Court with an opportunity to establish a standard for determining what constitutes unconstitutional partisan gerrymandering. In addition, in 2015, the Court upheld, under the Elections Clause, an Arizona constitutional provision that was enacted by ballot initiative establishing an independent commission for drawing congressional districts.[7]

This report first discusses the constitutional and statutory framework of congressional redistricting, including the Elections Clause, the Equal Protection Clause of the Fourteenth Amendment, and the Voting Rights Act. The report then analyzes key foundational and recent Supreme Court and lower court redistricting decisions addressing four general topics: (1) the constitutional requirement of population equality among districts; (2) the intersection between the Voting Rights Act and the Equal Protection Clause, also known as claims of racial gerrymandering; (3) the justiciability of partisan gerrymandering; and (4) the constitutionality of state ballot initiatives providing for redistricting by independent commissions.

[1] For discussion of the processes of congressional apportionment and redistricting, see CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, and CRS Report R42831, *Congressional Redistricting: An Overview*.

[2] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946) ("To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.").

[3] 369 U.S. 186 (1962).

[4] *See* Tennant v. Jefferson Cty. Comm'n, 133 S. Ct. 3 (2012), discussed *infra* at page 5.

[5] *See* Bethune-Hill v. Va. State Bd. of Elections, No. 15-680, 2017 U.S. LEXIS 1568, at *16 (U.S., Mar. 1, 2017); Cooper v. Harris, No. 15-1262, discussed *infra* at pages 10-12.

[6] *See* Whitford v. Gill, No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 160811 (W.D. Wis., Nov. 21, 2016), discussed *infra* at pages 14-17.

[7] *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015), discussed *infra* at pages 17-19.

Background: Constitutional and Statutory Requirements

Following and based on each decennial census,[8] the 435 seats in the U.S. House of Representatives are apportioned—or divided up—among the 50 states,[9] with each state entitled to at least one Representative.[10] A federal statute requires that apportionment occurs every 10 years.[11] Accordingly, in order to comport with the constitutional standard of equality of population among districts, discussed below, at least once every 10 years, most states must draw new congressional district boundaries in response to changes in the number of Representatives apportioned to the state or shifts in population within the state.[12]

In addition to various state processes,[13] the legal framework for congressional redistricting involves constitutional and federal statutory requirements.

Constitutional Provisions

In recent challenges to redistricting maps, constitutional provisions including the Elections Clause and the Fourteenth Amendment's Equal Protection Clause have been invoked. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[14] The Equal Protection Clause ensures that "[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."[15] In addition, redistricting maps are required to comport with the Voting Rights Act of 1965, which was enacted under Congress's authority to enforce the Fifteenth Amendment.[16] The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition

[8] U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

[9] U.S. CONST. amend. XIV, § 2, cl. 1 ("Representatives shall be apportioned among the several States according to their respective numbers.... ").

[10] U.S. CONST. art. I, § 2, cl. 4 ("The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative.... ").

[11] 2 U.S.C. § 2a(a).

[12] In general, however, it does not appear that states are prohibited from enacting redistricting plans mid-decade, particularly in order to replace court-ordered plans. The Supreme Court has announced that the Constitution and the Court's own case law "indicate that there is nothing inherently suspect about a legislature's decision to replace, mid-decade, a court-ordered plan with one of its own." League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 418-19 (2006).

[13] *See, e.g.,* All About Redistricting, Professor Justin Levitt's guide to drawing the electoral lines at http://redistricting.lls.edu/who-state.php.

[14] U.S. CONST. art. I, § 4, cl. 1.

[15] U.S. CONST. amend. XIV, §§ 1 & 5.

[16] The Fifteenth Amendment was ratified in 1870. However, notwithstanding its ratification, in subsequent years, in some states, the use of various election procedures diluted the impact of votes cast by African Americans or prevented voting by African Americans entirely. Therefore, Congress enacted the Voting Rights Act of 1965. *See* H. REP. NO. 89-439, at 1, 11-12, 15-16, 19-20, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44, 2446-47, 2451-52 (discussing discriminatory procedures such as poll taxes, literacy tests, and vouching requirements).

of servitude," and provides Congress with the power to enforce its requirements with appropriate legislation.[17]

Voting Rights Act

Section 2

Congressional district boundaries in every state are required to comply with Section 2 of the Voting Rights Act (VRA). Section 2 authorizes the federal government and private citizens to challenge discriminatory voting practices or procedures, including minority vote dilution, (that is, the diminishing or weakening of minority voting power). Specifically, Section 2 prohibits any voting qualification or practice applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[18] This includes congressional redistricting plans. Section 2 further provides that a violation is established if, based on the totality of circumstances, electoral processes are not equally open to participation by members of a racial or language minority group in that the group's members have less opportunity than other members of the electorate to elect representatives of their choice.[19]

Section 5 Preclearance Rendered Inoperable

Until 2013, when the Supreme Court issued its ruling in *Shelby County v. Holder*,[20] Section 5 of the VRA was construed to require several states and jurisdictions covered under Section 4(b) of the VRA to obtain prior approval or preclearance for any proposed change to a voting law, which included changes to redistricting maps.[21] In order to be granted preclearance, the state or jurisdiction had the burden of proving that the proposed map would have neither the *purpose* nor the *effect* of denying or abridging the right to vote on account of race or color, or membership in a language minority group.[22] Moreover, as amended in 2006, the statute expressly provided that its purpose was "to protect the ability of such citizens to elect their preferred candidates of choice."[23] Covered jurisdictions could seek preclearance from either the Department of Justice (DOJ) or the U.S. District Court for the District of Columbia.[24] If preclearance was not granted, the proposed change to election law could not go into effect.[25]

In *Shelby County*, the Court invalidated Section 4(b)[26] of the VRA, holding that the application of the coverage formula to certain states and jurisdictions departed from the "fundamental principle of equal sovereignty" among the states without justification in light of current conditions.[27]

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[17] U.S. CONST. amend. XV, §§ 1 & 2.

[18] 52 U.S.C. §§ 10301, 10303(f).

[19] *Id.* § 10301(b).

[20] 133 S. Ct. 2612 (2013).

[21] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 905-06 (1995) ("The preclearance mechanism applies to congressional redistricting plans, and requires that the proposed change 'not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'") (internal citations omitted).

[22] 52 U.S.C. § 10304 (emphasis added). *See also* 28 C.F.R. § 51.52(a) (2017).

[23] *Id.* § 10304(d).

[24] *Id.* § 10304(a).

[25] *Id.*

[26] *Id.* § 10303.

[27] *Shelby County*, 113 S. Ct. at 2623-31 (2013). The Court characterized the coverage formula as "based on 40-year old

Although the Court invalidated only the coverage formula in Section 4(b), by extension, Section 5 was also rendered inoperable. As a result of the Court's decision, nine states, and jurisdictions within six additional states, that were previously covered under the formula are no longer subject to the VRA's preclearance requirement. The covered states were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The six states containing covered jurisdictions were California, Florida, Michigan, New York, North Carolina, and South Dakota.[28]

Judicial Interpretation

In a series of cases, the Supreme Court has evaluated disputes over redistricting maps. These rulings and evolving jurisprudence have significantly affected how congressional districts are drawn and the degree to which challenges to redistricting plans may succeed. This jurisprudence can be seen to address four general areas: (1) the constitutional requirement of population equality among districts; (2) the intersection between the Voting Rights Act and the Equal Protection Clause; (3) the justiciability of partisan gerrymandering; and (4) the constitutionality of state ballot initiatives providing for redistricting by independent commissions.

Equality Standard: One Person, One Vote

The Supreme Court has interpreted the Constitution to require that each congressional district within a state contain an approximately equal number of persons. This requirement is sometimes referred to as the "equality standard" or the principle of "one person, one vote."[29] In 1964, in *Wesberry v. Sanders*,[30] the Supreme Court interpreted provisions of the Constitution stating that Representatives be chosen "by the People of the several States"[31] and "apportioned among the several States ... according to their respective Numbers"[32] to require that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[33] Later in 1964, the Court issued its ruling in *Reynolds v. Sims* with regard to state legislative redistricting.[34] In *Reynolds*, the Supreme Court held that the one person, one vote standard also applied in the context of state legislative redistricting and that the Equal Protection Clause requires all who participate in an election "to have an equal vote."[35]

In several cases since 1964, the Supreme Court has described the extent to which precise or ideal mathematical population equality among districts is required. Ideal or precise equality is the

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facts having no logical relation to the present day." *Id*. at 2629. *See also* CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

[28] 28 C.F.R. Part 51, Appendix ("Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended.") It does not appear, however, that the Court's decision affected Section 3(c) of the VRA, known as the "bail in" provision, under which jurisdictions can be ordered to obtain preclearance of voting laws if a court concludes that violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred. 52 U.S.C. § 10302(c). *See also* CRS Legal Sidebar WSLG607, *What is the "Bail In" Provision of the Voting Rights Act?*, by L. Paige Whitaker.

[29] *See* Gray v. Sanders, 372 U.S. 368 (1963) (holding that the conception of political equality means one person, one vote).

[30] 376 U.S. 1 (1964).

[31] U.S. CONST. art. I, § 2, cl. 1.

[32] U.S. CONST. amend. XIV, § 2. cl. 1.

[33] *Wesberry*, 376 U.S. at 7-8.

[34] 377 U.S. 533 (1964).

[35] *Id.* at 557-58.

average population that each district would contain if a state population were evenly distributed across all districts. The total or "maximum population deviation" refers to the percentage difference from the ideal population between the most populated district and the least populated district in a redistricting map.[36] It is important to note that for congressional districts, less deviation from precise equality has been held by the Court to be permissible than is permissible for state legislative districts.[37]

For example, in 1969, in *Kirkpatrick v. Preisler*, the Supreme Court invalidated a congressional redistricting plan where the district with the greatest population was 3.13% over the equality ideal, and the district with the lowest population was 2.84% below it.[38] The Court considered the maximum population deviation of 5.97% to be too great to comport with the "as nearly as practicable" standard set forth in *Wesberry*.[39] Subsequently, in *Karcher v. Dagett*, the Court held that "absolute" population equality is the standard for congressional districts unless a deviation is necessary to achieve "some legitimate state objective."[40] According to the *Karcher* Court, these objectives can include "consistently applied legislative policies" such as achieving greater compactness, respecting municipal boundaries, preserving prior districts, and avoiding contests between incumbents.[41] In *Karcher*, the Court rejected a 0.6984% deviation in population between the largest and the smallest district.[42]

More recently, in its 1983 decision in *Tennant v. Jefferson County Commission*, the Court further clarified that the "as nearly as is practicable" standard does not require congressional districts to be drawn with precise mathematical equality, but instead requires states to justify population deviation among districts with "legitimate state objectives.[43] Relying on *Karcher*, the Court in *Tennant* outlined a two-pronged test to determine whether a congressional redistricting plan passes constitutional muster. First, the challengers have the burden of proving that the population differences could have been practicably avoided.[44] Second, if the challengers succeed in meeting that burden, the burden shifts to the state to demonstrate "with some specificity" that the population differences were needed to achieve a legitimate state objective.[45] The Court emphasized that the state's burden here is "flexible," and depends on the size of the population deviation, the importance of the state's interests, the consistency with which the plan reflects those interests, and whether alternatives exist that might substantially serve those interests while achieving greater population equality.[46] In *Tennant*, the Court determined that avoiding contests between incumbents, maintaining county boundaries, and minimizing population shifts between districts were neutral, valid state policies that warranted the relatively minor population disparities in question. The Court also opined that none of the alternative redistricting plans that achieved greater population equality came as close to vindicating the state's legitimate

[36] *See, e.g.,* Brown v. Thomson, 462 U.S. 835, 842-43 (1983).

[37] *See, e.g.,* Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding a Connecticut legislative redistricting plan with a total maximum population deviation of 7.83%). *But see* Cox v. Larios, 542 U.S. 947 (2004) (summarily affirming the invalidation of a state legislative redistricting plan with a total maximum population deviation of 9.98%).

[38] 394 U.S. 526 (1969).

[39] *Id.* at 530-31.

[40] 462 U.S. 725, 740 (1983).

[41] *Id.*

[42] *See id.* at 728.

[43] 133 S. Ct. 3 (2012).

[44] *Id.* at 5 (quoting *Karcher*, 462 U.S. at 734, 740-41).

[45] *Id.*

[46] *Id.* (quoting *Karcher*, 462 U.S. at 741).

objectives.[47] Therefore, the Court upheld the 0.79% maximum population deviation between the largest and smallest congressional districts.[48]

Equal Protection and the Voting Rights Act

Much of the Supreme Court's redistricting jurisprudence has been prompted by disputes concerning the interplay between the requirements of the VRA and the constitutional standards of equal protection.[49] While the Equal Protection Clause of the Fourteenth Amendment prohibits a state from redistricting based on race without sufficient justification,[50] compliance with the VRA simultaneously demands that "the legislature always is aware of race when it draws district lines."[51] In an evolving line of cases, the Supreme Court has provided guidance to map drawers and the courts evaluating such maps on how to achieve the required "delicate balancing of competing considerations" in this complicated area of law.[52]

Voting Rights Act Requirements

Under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[53] A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.

In its landmark 1986 decision *Thornburg v. Gingles*, the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA.[54] Under this test, (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority must be able to demonstrate that the majority votes sufficiently as a bloc to enable the majority to defeat the minority group's preferred candidate absent special circumstances, such as the minority candidate running unopposed.[55] The *Thornburg* Court also opined that a violation of Section 2 is established if based on the "totality of the circumstances" and "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[56] The Court further listed the following factors, which originated in

[47] *Id.* at 8.

[48] *Id.*

[49] In a 1993 ruling, *Shaw v. Reno*, the Supreme Court first recognized a claim of racial gerrymandering, holding that the challengers to a redistricting plan had stated a claim under the Equal Protection Clause of the Constitution. *See* Shaw v. Reno, 509 U.S. 630, 639-52 (1993) (*Shaw I*).

[50] *See* Miller v. Johnson, 515 U.S. 900, 911 (1995).

[51] *Shaw I*, 509 U.S. at 646.

[52] Bethune-Hill v. Va. State Bd. of Elections, No. 15-680, 2017 U.S. LEXIS 1568, at *16 (U.S., Mar. 1, 2017).

[53] 52 U.S.C. §§ 10301, 10303(f).

[54] 478 U.S. 30 (1986).

[55] *Id.* at 50-51 (citation omitted). The three requirements set forth in *Thornburg v. Gingle*s for a Section 2 claim apply to single-member districts as well as to multi-member districts. *See* Growe v. Emison, 507 U.S. 25, 40-41 (1993) ("It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.")

[56] *Id.* at 44.

legislative history materials accompanying enactment of Section 2, as relevant in assessing the totality of the circumstances:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[57]

Further interpreting the *Gingles* three-pronged test, in *Bartlett v. Strickland*, the Supreme Court ruled that the first prong of the test—requiring a minority group to be geographically compact enough to constitute a majority in a district—can only be satisfied if the minority group would constitute more than 50% of the voting population in a single-member district.[58] In *Bartlett*, the state officials who drew the map argued that Section 2 requires drawing district lines in such a manner to allow minority voters to join with other voters to elect the minority group's preferred candidate, even if the minority group in a given district comprises less than 50% of the voting age population.[59] Rejecting this argument, a plurality of the Court determined that Section 2 does not grant special protection to minority groups that need to form political coalitions in order to elect candidates of their choice.[60] To mandate recognition of Section 2 claims where the ability of a minority group to elect candidates of choice relies upon "crossover" majority voters would result in "serious tension" with the third prong of the *Gingles* test, the plurality opinion determined, because the third prong requires that the minority be able to demonstrate that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[61] Therefore, the plurality found it difficult to envision how the third prong of *Gingles* could be met in a district

[57] *Id.* at 36-37 (quoting S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177). ("Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.")

[58] 556 U.S. 1, 25-26 (2009) (plurality opinion).

[59] *See id.* at 6-7.

[60] *See id.* at 15.

[61] *Id.* at 16.

where, by definition, majority voters are needed to join with minority voters in order to elect the minority's preferred candidate.[62]

In sum, in certain circumstances, Section 2 can require the creation of one or more majority-minority districts in a congressional redistricting plan. By drawing such districts, a state can avoid racial vote dilution, and the denial of minority voters' equal opportunity to elect candidates of choice. As the Supreme Court has determined, minority voters must constitute a numerical majority—over 50%—in such minority-majority districts.[63]

Constitutional Standards of Equal Protection

In addition to the VRA, however, congressional redistricting plans must also conform with standards of equal protection under the Fourteenth Amendment to the U.S. Constitution.[64] According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then a "strict scrutiny" standard of review is to be applied.[65] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest.[66] These cases are often referred to as "racial gerrymandering" claims because the plaintiffs argue that race was improperly used in the drawing of district boundaries.[67] Case law in this area has revealed that there can be tension between compliance with the VRA, previously discussed, and conformance with standards of equal protection.[68]

The Supreme Court has held that, in order to prevail in racial gerrymandering claims, plaintiffs have the burden of proving that racial considerations were "dominant and controlling" in the creation of the districts at issue. For example, in 2001, in *Easley v. Cromartie*, the Supreme Court upheld the constitutionality of a congressional district in North Carolina against the argument that

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[62] *Id.*

[63] In a related ruling, on March 10, 2017, by a 2-to-1 vote, a federal district court panel held that a Texas congressional redistricting plan contains violations of Section 2 of the VRA and the Equal Protection Clause of the Fourteenth Amendment. With regard to certain districts, the court held that the plaintiffs had established a Section 2 violation, including the denial of "Latino voters equal opportunity" and having the "intent and effect of diluting Latino voter opportunity." Perez v. Abbott, No. SA-11-CV-360, 2017 U.S. Dist. LEXIS 35012, at *242 (D. Tex., Mar. 10, 2017).

[64] U.S. CONST. amend. XIV, §1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

[65] *See* Miller v. Johnson, 515 U. S. 900, 916 (1995). *See also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains); CRS Report R42831, *Congressional Redistricting: An Overview*, by Royce Crocker.

[66] *Miller*, 515 U.S. at 916.

[67] *See, e.g., Shaw I*, 509 U.S. at 641 ("Our focus is on appellants' claim that the State engaged in unconstitutional racial gerrymandering.") The Court concluded "that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 649.

[68] *See, e.g., id.* at 653-57 (holding that if district lines are drawn for the purpose of separating voters based on race, a court must apply strict scrutiny review); *Miller*, 515 U.S. at 912-13 (holding that strict scrutiny applies when race is the predominant factor and traditional redistricting principles have been subordinated); Bush v. Vera, 517 U.S. 952, 958-65 (1996) (holding that departing from sound principles of redistricting defeats the claim that districts are narrowly tailored to address the effects of racial discrimination).

the 47% black district was an unconstitutional racial gerrymander.[69] In this long running litigation, the State of North Carolina appealed a lower court decision holding that the district, as redrawn by the legislature in 1997 in an attempt to cure an earlier violation, was still unconstitutional.[70] In so doing, the Court determined that the basic question presented in *Cromartie* was whether the legislature drew the district boundaries "because of race rather than because of political behavior (coupled with traditional, nonracial redistricting considerations)."[71] Applying its earlier precedents, the Court emphasized that the party challenging the legislature's plan has the burden of proving that racial considerations are "dominant and controlling."[72] In this case, though, the Court held that the challengers had not successfully demonstrated that race, instead of politics, predominantly accounted for the way the plan was drawn.[73] To the contrary, the Court announced that in cases such as this where a majority-minority district is being challenged and racial identification "correlates highly with political affiliation," the challenger must show that there were alternative ways for the legislature to achieve its legitimate political objectives, consistent with traditional redistricting principles.[74] In this case, the Court determined that the appellees had failed to make such a showing.[75]

More recently, the Court provided guidance as to the method for analyzing racial predominance. In its 2015 decision in *Alabama Legislative Black Caucus v. Alabama*,[76] the Court held that in determining whether race is a predominant factor in the redistricting process, and thereby triggering strict scrutiny, a court must engage in a *district-by-district* analysis instead of analyzing the state as an undifferentiated whole.[77] Further, the Court confirmed that in calculating the predominance of race, a court is required to determine whether the legislature subordinated traditional race-neutral redistricting principles to racial considerations.[78] The "background rule" of equal population is not a traditional redistricting principle and therefore should not be weighed against the use of race to determine predominance, the Court held.[79] In other words, the Court explained, if 1,000 additional voters need to be moved to a particular district in order to achieve equal population, ascertaining the predominance of race involves examining which voters were moved, and whether the legislature relied on race instead of other traditional factors in making those decisions.[80] The *Alabama* Court also determined that the preclearance requirements of Section 5 of the VRA,[81] which the Supreme Court's subsequent decision in *Shelby County*

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[69] 532 U.S. 234 (2001).

[70] *See* Cromartie v. Hunt, 133 F. Supp. 2d 407, 423 (E.D. N.C. 2000), *rev'd*, 532 U.S. 234 (2001).

[71] *Easley*, 532 U.S. at 256.

[72] *Id.* (citing *Miller*, 515 U.S. at 913).

[73] *See id.* at 257.

[74] *Id.* at 258.

[75] *Id.*

[76] 135 S. Ct. 1257 (2015). For further discussion, see CRS Legal Sidebar WSLG1230, *Supreme Court Rules: Incorrect Standards Used in Upholding Alabama Redistricting Map Against Claim of Unconstitutional Racial Gerrymandering*, by L. Paige Whitaker.

[77] *See* 135 S. Ct. at 1265-68.

[78] *See id.* at 1270.

[79] *Id.* at 1271.

[80] *See id.* at 1270-72.

[81] 52 U.S.C. § 10304. Section 5 of the VRA has been rendered inoperable as a result of the Supreme Court's 2013 ruling in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which invalidated the coverage formula in Section 4. For more information, see CRS Legal Sidebar WSLG574, *Supreme Court Strikes Key Provision of Voting Rights Act*, by L. Paige Whitaker, and CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

rendered inoperable, did not require a covered jurisdiction to maintain a particular percentage of minority voters in a minority-majority district.[82] Instead, the Court held that Section 5 requires that a minority-majority district be drawn in order to maintain a minority's *ability* to elect a preferred candidate of choice.[83] *Alabama* is notable in that minority voters succeeded in their equal protection challenge to districts that the state maintained were created to comply with the VRA. The decision also represents the Court's most recent interpretation of the requirements of Section 5 of the VRA, which may be of interest to Congress should it decide to draft a new coverage formula in order to reinstitute Section 5 preclearance.[84]

Most recently, in March 2017, the Supreme Court added clarification to the standard for determining racial predominance in a racial gerrymandering claim. In *Bethune-Hill v. Virginia State Board of Elections*,[85] the Court held that plaintiffs challenging a state legislative redistricting plan on racial gerrymandering grounds need not prove, as a threshold matter, that the plan conflicts with traditional redistricting criteria.[86] As a result, the Court remanded the case to the federal district court for consideration of whether 11 of the 12 "majority-minority" districts created by Virginia in 2011 are permissible.[87] As the Supreme Court observed in *Bethune-Hill*, following the 2010 census, when the Virginia legislature redrew its state legislative districts, the state was subject to preclearance under Section 5 of the VRA. Accordingly, the drafters "resolved that the new map must comply with the 'protections against ... unwarranted retrogression' contained in [Section] 5 of the Voting Rights Act" and drew 12 districts with a "black voting-age population" of at least 55%.[88] The Virginia legislature passed the plan in April 2011, and DOJ granted preclearance in June 2011.[89] However, in 2014, 12 registered Virginia voters—one of whom resided in each of the challenged districts—filed suit in federal district court arguing that the districts were racial gerrymanders in violation of the Equal Protection Clause.[90]

In *Bethune-Hill*, a majority of the Supreme Court held that the district court erred in applying, as a "threshold requirement or mandatory precondition" for establishing a claim of racial gerrymandering, that the plaintiffs demonstrate "a conflict or inconsistency" between the challenged redistricting map and traditional redistricting criteria.[91] While acknowledging that

[82] *See Ala. Legis. Black Caucus*, 135 S. Ct. at 1272.

[83] The principal dissent, written by Justice Scalia, joined by the Chief Justice and Justices Thomas and Alito, characterized the Court's ruling as "sweeping," predicting "profound implications" for future cases involving the principle of one person, one vote; the VRA; and the primacy of states to manage their own elections. *Id.* at 1274, 1281 (Scalia, J., dissenting). In a separate dissent, Justice Thomas criticized the Court's voting rights jurisprudence generally, and this case specifically, calling it "nothing more than a fight over the 'best' racial quota." *Id.* at 1281 (Thomas, J., dissenting).

[84] Section 5 of the VRA required several states and jurisdictions that were covered under Section 4(b) of the VRA to obtain prior approval or preclearance for any proposed change to a voting law, which included changes to redistricting maps. As a result, when the Supreme Court invalidated Section 4(b) in *Shelby County v. Holder*, discussed *supra*, Section 5 was rendered inoperable.

[85] No. 15-680, 2017 U.S. LEXIS 1568 (U.S., Mar. 1, 2017). For further discussion, see CRS Legal Sidebar WSLG1752, *Supreme Court Rules Racial Gerrymandering Claims Do Not Require Conflict with Traditional Redistricting Criteria*, by L. Paige Whitaker.

[86] *See* 2017 U.S. LEXIS 1568, at *20-21.

[87] *See id.* at *31. However, the Court affirmed the district court ruling with regard to House District 75, holding that the District was designed in a manner necessary for compliance with Section 5 of the VRA, which the Court "assume[d], without deciding," was a compelling state interest at the time the redistricting plan was drawn. *Id.* at *26.

[88] *Id.* at *10.

[89] *See id.* at *12-13.

[90] *See id.* at *13.

[91] *Id.* at *20-21.

such a conflict or inconsistency may be "persuasive circumstantial evidence" of racial predominance, the Court clarified that such a showing is not required.[92] In so doing, the Court rejected an argument made by the Commonwealth of Virginia in defending the redistricting map that the harm of racial gerrymandering arises from grouping together voters of the same race who lack shared interests and not from racially motivated line drawing in and of itself.[93] If an identical redistricting map could have been drawn in accordance with traditional redistricting criteria, the state argued that racial predominance has not been proven.[94] Sharply disagreeing, the Court quoted precedent that it viewed as establishing that "the 'constitutional violation' in racial gerrymandering cases stems from the 'racial purpose of state action, not its stark manifestation.'"[95] In other words, according to the Supreme Court, in determining racial predominance, courts must examine the "actual considerations" involved in crafting the redistricting map, not "post hoc justifications" that the legislature could theoretically have used in crafting the map, but did not.[96]

Also during its current term, the Supreme Court is considering another case that may shed further light on the complicated issue of race and redistricting, *Cooper v. Harris*.[97] In this case, a three-judge federal district court held that the 2011 North Carolina congressional redistricting map was an unconstitutional racial gerrymander in violation of the Equal Protection Clause.[98] Following the 2010 census, the North Carolina legislature redrew its congressional district map to include two new majority-minority districts, Congressional District (CD) 1 and CD 12.[99] In July 2011, the legislature enacted the new map, and in November, DOJ granted preclearance approval.[100] Subsequently, in 2013, the plaintiffs—one of whom is a registered voter in each of the challenged districts—filed suit in federal court, arguing that North Carolina used the VRA's preclearance requirements "as a pretext to pack African-American voters into North Carolina's Congressional Districts 1 and 12 and reduce those voters' influence in other districts."[101] In other words, the plaintiffs maintained that CDs 1 and 12 were unconstitutional racial gerrymanders.[102]

Characterizing CD 1 as "a textbook example of racial predominance," the district court determined that traditional redistricting criteria had been subordinated to the goal of achieving a

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[92] *Id.* at *21. Nonetheless, as a practical matter, the Court noted that it has not affirmed a predominance finding or remanded a case for determination of racial predominance where some deviation from traditional redistricting principles was not evident. *See id.*

[93] *See id.* at *19.

[94] *See id.* at *19-20.

[95] *Id.* at *19 (quoting Miller v. Johnson, 515 U. S. 900, 913 (1995)).

[96] *Id.* at *20.

[97] No. 15-1262. Although argued on the same day as *Bethune-Hill*, discussed *supra*, as of the date of this report, the Court has not yet issued a ruling in this case. A decision is expected by the end of the Supreme Court term in June.

[98] *See* Harris v. McCrory, 159 F. Supp. 3d 600, 627 (M.D. N.C. 2016). In July 2011, the legislature enacted the new map, and in November, received Department of Justice preclearance approval in accordance with Section 5 of the VRA. *See id.* at 607-09. For further background on this case, including related litigation in state court, see CRS Legal Sidebar WSLG1666, *Supreme Court to Consider a Second Redistricting Case in 2016 Term*, by L. Paige Whitaker. The State of North Carolina sought review from the Supreme Court, which considers direct appeals in such cases. 28 U.S.C. §§ 2284, 1253.

[99] *See Harris*, 159 F. Supp. 3d at 607-09.

[100] *See id.* at 608-09.

[101] *Id.* at 609.

[102] *Id.* The court observed that in this case, it was tasked with evaluating whether the state can defend a redistricting plan under the VRA using it as a "shield," in contrast to cases such as *Gingles* where a minority group invoked the VRA to challenge a redistricting plan, using it as a "sword." *Id.* at 623.

"racial quota, or floor, of 50-percent-plus-one-person."[103] Likewise, the court found that race predominated in creating CD 12 and that its creation was not "purely political" as the state had argued.[104] In view of its determination that race predominated in the creation of both CDs 1 and 12, the court applied strict scrutiny.[105] Assuming, without deciding, that compliance with the VRA was a compelling state interest,[106] the court found insufficient evidence to conclude that the creation of CD 1 was "reasonably necessary" to comply with the statute.[107] As the court observed, Supreme Court precedent requires that in order to defend the map successfully, the defendants must demonstrate compliance with the *Gingles* three-prong test.[108] Here, the court determined that the state had failed to prove the third prong of the test: "that the legislature had a 'strong basis in evidence' of racially polarized voting in CD 1 significant enough that the white majority routinely votes as a bloc to defeat the minority candidate of choice."[109] Regarding CD 12, the court similarly determined that the defendants "completely fail[ed]" to demonstrate a compelling interest for the legislature's use of race in drawing the district, and accordingly, invalidated it.[110]

In conclusion, while the VRA may require, under certain circumstances, the creation of one or more "majority-minority" districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority, redistricting maps are also subject to the constitutional standards of equal protection.[111] If race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations, then the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that interest.[112] In its most recent case law, the Court has held that in determining racial predominance in a redistricting map, a court must engage in a district-by-district analysis instead of analyzing the state as an undifferentiated whole.[113] The Court also held that challengers to a redistricting map alleging racial gerrymandering do not need to show, as a threshold requirement, that there is a conflict or inconsistency between the redistricting plan and traditional redistricting criteria.[114] In addition, during its current term, the Supreme Court is considering another case that may shed further light on the standards for determining unconstitutional racial gerrymandering.[115]

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[103] *Id.* at 611, 615.

[104] *Id.* at 616. The state had maintained that its goal was to increase the population of one party's voters in the district, while making the surrounding counties more hospitable to the other major party. *See id.*

[105] *See id.* at 610.

[106] *See id.* at 622 ("Although the Supreme Court has yet to decide whether VRA compliance is a compelling state interest, it has assumed as much for the purposes of subsequent analyses.").

[107] *Id.* at 623.

[108] *See id.* ("A failure to establish any one of the *Gingles* factors is fatal to the defendants' claim.").

[109] *Id.* at 624.

[110] *Id.* at 622.

[111] U.S. CONST. amend. XIV, §1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

[112] *See* Miller v. Johnson, 515 U. S. 900, 916 (1995). *See also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[113] *See* Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1272 (2015).

[114] *See* Bethune-Hill v. Va. State Bd. of Elections, No. 15-680, 2017 U.S. LEXIS 1568 (U.S., Mar. 1, 2017).

[115] *See Cooper v. Harris*, No. 15-1262.

Partisan Gerrymandering

The Supreme Court has defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power."[116] While leaving open the possibility that a claim of unconstitutional partisan gerrymandering could be within the scope of judicial review, as discussed below, the Supreme Court has been unable to decide on a manageable standard for making such a determination.[117]

In its 2004 decision in *Vieth v. Jubelirer,*[118] the Court addressed a claim of partisan gerrymandering, in which the challengers relied on the Fourteenth Amendment Equal Protection Clause as the source of their substantive right and basis for relief.[119] In *Vieth*, a plurality of four Justices determined that such a claim presented a non-justiciable political question.[120] The plurality argued that the standard previously articulated by a plurality of the Court in its 1986 decision of *Davis v. Bandemer* had proved unmanageable.[121] Under that standard, a political gerrymandering claim could succeed only where the challengers showed both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.[122] However, another plurality of four Justices in *Vieth* concluded that such claims are justiciable, but could not agree upon the standard for courts to use in assessing such claims.[123]

The deciding vote in *Vieth*, Justice Kennedy, concluded that while the claims presented in that case were not justiciable, he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."[124] Further, Justice Kennedy observed, that while the appellants in this case had relied on the Equal Protection Clause as the source of their substantive right and basis for relief, the complaint also alleged a violation of their First Amendment rights. According to Justice Kennedy, the First Amendment may be a more relevant constitutional provision in future cases that claim unconstitutional partisan gerrymandering because such claims "involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views."[125] In contrast, Justice Kennedy noted, an analysis under the Equal Protection Clause emphasizes the permissibility of a redistricting plan's classifications.[126] When race is involved, Justice Kennedy reasoned, examining such classifications is appropriate because

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[116] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015), discussed *infra* at 17-19.

[117] *See* Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion); League of United Latin Am. Citizens v. Perry ("LULAC"), 548 U.S. 399 (2006), discussed *infra*.

[118] 541 U.S. 267 (2004) (plurality opinion).

[119] *See id.* at 314 (Kennedy, J., concurring).

[120] *See id.* at 281 (Scalia, J., joined by Rehnquist, C.J., & O'Connor & Thomas, JJ.).

[121] *See id.* (arguing that Davis v. Bandemer, 478 U.S. 109, 127 (1986), which held that claims of partisan political gerrymandering are justiciable, was wrongly decided because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged").

[122] *See id.*

[123] *See id.* at 317-41 (2004) (Stevens, J., dissenting); *id.* at 343-55 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 355-68 (Breyer, J., dissenting).

[124] *Id.* at 306 (Kennedy, J., concurring).

[125] *See id.* at 314 (Kennedy, J., concurring).

[126] *See id.* at 315 (Kennedy, J., concurring).

classifying by race "is almost never permissible."[127] However, when the issue before a court is whether a generally permissible classification—political party association—has been used for an impermissible purpose, the question turns on whether the classification imposed an unlawful burden, Justice Kennedy maintained.[128] Therefore, he concluded that an analysis under the First Amendment "may offer a sounder and more prudential basis for intervention" by concentrating on whether a redistricting plan "burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association."[129]

Subsequently, in its 2006 decision, *League of United Latin American Citizens v. Perry ("LULAC")*,[130] the Court was again divided on the question of whether partisan gerrymandering claims are within the scope of judicial review.[131] In *LULAC*, Texas voters challenged a redistricting plan that had been enacted mid-decade, arguing that the plan was motivated by partisan objectives, served no legitimate public purpose, and burdened one group because of its political affiliation, in violation of the First Amendment and the Equal Protection Clause.[132] However, the Supreme Court disagreed. In *LULAC*, a plurality of four Justices opined that claims of unconstitutional partisan gerrymandering are justiciable, but could not agree upon a standard for adjudicating such claims.[133] An additional two Justices took the view that such claims are not justiciable.[134] However, the two Justices who had joined the Court since its ruling in *Vieth,* Chief Justice Roberts and Justice Alito, generally agreed with Justice Kennedy's position, leaving open the possibility that the Court might discern a standard for adjudicating unconstitutional partisan gerrymandering claims in a future case.[135] Therefore, in the aftermath of *LULAC*, it seems possible that a claim of unconstitutional partisan gerrymandering could be judicially reviewable, but the critical standard that a court could use to find such a violation and grant relief remain unresolved.[136]

Recently, in a potentially significant case, the Supreme Court was presented with another opportunity to craft such a standard. In February 2017, under a provision of federal law providing for direct appeals to the Supreme Court,[137] the State of Wisconsin appealed a three-judge federal district court ruling involving partisan gerrymandering. In this case, *Whitford v. Gill*,[138] the district court held, by a vote of 2 to 1, that a Wisconsin state legislative redistricting map constituted an unconstitutional partisan gerrymander.[139] Following the 2010 census, the Wisconsin legislature

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[127] *Id.* (Kennedy, J., concurring).

[128] *See id.* (Kennedy, J., concurring).

[129] *Id.* (Kennedy, J., concurring).

[130] 548 U.S. 399 (2006).

[131] In this ruling, the nine justices of the Supreme Court filed six different opinions, each with subparts.

[132] *See LULAC*, 548 U.S. at 416-17.

[133] *See LULAC*, 548 U.S. at 447-83 (Stevens, J., concurring in part & dissenting in part); *id.* at 483-91 (Souter, J, concurring in part & dissenting in part, joined by Ginsburg, J.); *id.* at 491-92 (Breyer, J., concurring in part & dissenting in part).

[134] *See id.* at 511-20 (Scalia, J., dissenting, joined by Thomas, J.).

[135] *See id.* at 492-511 (Roberts, C.J., concurring in part, concurring in the judgment in part, & dissenting in part, joined by Alito, J.).

[136] *See, e.g.*, Luis Fuentes-Rohwer, *Who's Afraid of the Hated Political Gerrymander?* 104 Ky. L.J. 561, 562 (2015-16) ("The Court's stated reason for its refusal to regulate this question is a professed lack of judicially manageable standards.")

[137] The Supreme Court considers direct appeals in such cases. 28 U.S.C. §§ 2284, 1253.

[138] No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 160811 (W.D. Wis., Nov. 21, 2016).

[139] *See id.* at *3.

redrew its state legislative redistricting map, which was signed into law by the governor in 2011.[140] In the 2012 election, "the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly."[141] In the 2014 election, "the Republican Party received 52% of the two-party statewide vote share and won 63 assembly seats."[142] The plaintiffs—registered voters in various counties and districts throughout Wisconsin—are "supporters of the Democratic party and of Democratic candidates and they almost always vote for Democratic candidates in Wisconsin elections."[143] The plaintiffs challenged the Wisconsin state legislative redistricting plan as treating voters "unequally, diluting their voting power based on their political beliefs, in violation of the Fourteenth Amendment's guarantee of equal protection," and "unreasonably burden[ing] their First Amendment rights of association and free speech."[144]

The district court agreed, holding that the First Amendment and the Equal Protection Clause prohibit a redistricting map that is drawn with the purpose, and has the effect, of placing a "severe impediment" on the effectiveness of a citizen's vote that is based on political affiliation and cannot be justified on other legitimate legislative grounds.[145] While acknowledging that the law of political gerrymandering is "still in its incipient stages" and "in a state of considerable flux," the court announced that it is clear that the First Amendment and the Equal Protection Clause protect the weight of a citizen's vote against discrimination based on the political preferences of the voter.[146] Relying on a 1968 Supreme Court ruling that had invalidated a state law that required new political parties to obtain a certain number of signatures in order to appear on the ballot, the court found a "solid basis" for considering the associational aspect of the plaintiff's claim of partisan gerrymandering:

> In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.[147]

Examining the evidence presented at trial, the court determined that one purpose of the redistricting plan was "to secure the Republican Party's control of the state legislature for the decennial period."[148] Although the drafters had created several alternative redistricting plans that would have had a less severe partisan impact,[149] the court found that the drafters had opted for the plan that, in comparison with the existing plan, significantly increased the number of districts containing voters who "lean[ed]" toward one political party.[150] Based on that and other factors,

[140] *See Whitford*, 2016 U.S. Dist. LEXIS 160811, at *28.

[141] *Id.* at *29-30.

[142] *Id.*

[143] *Id.* at *30.

[144] *Id.* at *34.

[145] *Id.* at *112.

[146] *Id.* at *110-11.

[147] *Id.* at *106-07 (quoting Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (emphasis omitted)).

[148] *Id.* at *130.

[149] *See id.* at *151.

[150] *Id.*

including numerous reports and memoranda considered by the drafters that addressed the partisan outcomes of various maps, the court concluded that even though the redistricting plan complied with traditional redistricting principles, it nonetheless had a purpose of "entrenching" one party in its control of the legislature.[151]

Furthermore, the court determined that the redistricting plan had the effect of ensuring that one political party would maintain control of the state legislature for a 10-year period.[152] This was accomplished, the court found, by allocating votes among the newly created districts in such a manner as to make it likely that the number of seats held by candidates of one political party would not to drop below 50% in any election scenario.[153] Notably, in this ruling, the court embraced a new measure of calculating asymmetry among districts, proposed by the plaintiffs, termed the "efficiency gap" or "EG."[154] As described by its creators, the EG "represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail."[155] In other words, as the court observed, EG measures two redistricting methods that are designed to diminish the electoral power of the voters of one party: "cracking" and "packing."[156] As used here, packing refers to the concentration of voters of one party into a limited number of districts so that the party wins those districts by large margins.[157] Cracking refers to the division of voters of one party across a large number of districts so that the party is unable to achieve a majority vote in any district.[158] EG, the court announced, is "a measure of the degree of both cracking and packing of a particular party's voters that exists in a given district plan, based on an observed electoral result."[159] The EG, the court decided, does not impermissibly require that each party receive a share of seats in the legislature in proportion to its vote share, but instead, measures the degree to which a redistricting plan "deviat[es] from the relationship we would expect to observe between votes and seats."[160]

Relying on the results from 2012 and 2014 elections, academic analyses, and the EG measure, the court held that the plaintiffs had demonstrated that the state legislative redistricting plan created a burden, "as measured by a reliable standard, on [their] representational rights."[161] In particular, the court found that having "actual election results" confirmed the reliability of the academic analyses so that the court was "not operating only in the realm of hypotheticals," which was a concern that Justice Kennedy voiced in *LULAC*.[162] Therefore, the court concluded that neither the

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[151] *Id.* at *152.

[152] *Id.*

[153] *See id.*

[154] *Id.* at *167.

[155] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap,* 82 U. CHI. L. REV. 831, 834 (2015).

[156] *Whitford,* 2016 U.S. Dist. LEXIS 160811, at *167.

[157] *Id.* at *167.

[158] *Id.*

[159] *Id.* at *167-68.

[160] *Id.* at *178.

[161] *Id.* at *176-77 (quoting LULAC, 548 U.S. 399, 418 (2006) (opinion of Kennedy, J.)). ("Indeed, acknowledging that the Constitution does not require proportionality, Justice Kennedy observed in LULAC that 'a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.'")

[162] *Id.* at *166 ("In *LULAC*, Justice Kennedy commented on a proposal by one of the amici to adopt a partisan-bias standard, which would compare how the two major parties 'would fare hypothetically if they each (in turn) had

Constitution, nor the Supreme Court's rulings in *Vieth* and *LULAC*, precluded it from considering the EG in order to ascertain partisan gerrymandering.[163]

Finally, the court held that the discriminatory effect of the plan is not explained by the political geography of Wisconsin, nor is it justified by a legitimate state interest.[164] Acknowledging the absence of explicit guidance on this question from the Supreme Court, the court determined it most appropriate to evaluate whether the partisan effect of a redistricting plan is justifiable, "i.e., whether it can be explained by the legitimate state prerogatives and neutral factors that are implicated in the districting process."[165] According to the court, although the "natural political geography" of Wisconsin played some role in how the redistricting map was drawn, this political geography was inadequate to explain the significant, disparate partisan effect of the plan as evidenced by the results of the 2012 and 2014 elections.[166] The most crucial evidence presented, the court said, was that the drafters had produced multiple alternative plans that would have achieved the same "valid" redistricting goals, but with a much smaller partisan advantage to one party, and opted not to use them.[167] After holding that the Wisconsin state legislative plan constituted an unconstitutional partisan gerrymander, the court deferred ruling on an appropriate remedy.[168] However, in January 2017, the court enjoined the State of Wisconsin from using the plan in all future elections and ordered the state to enact a new plan by November 1, 2017, for use in the November 2018 election.[169]

In sum, while the Supreme Court has left open the possibility that a claim of unconstitutional partisan gerrymandering could be within the scope of judicial review, it has been unable to decide on a manageable standard for making such a determination. Currently, the Supreme Court is considering an appeal that presents it with an opportunity to craft such a standard if it so chooses.[170]

Redistricting Commissions

In the majority of the states, the legislature has primary authority over congressional redistricting.[171] However, partly because of concerns about partisan gerrymandering, some states have adopted independent commissions for conducting redistricting. For example, Arizona[172] and

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received a given percentage of the vote.'") (internal citations omitted).

[163] *See id.*

[164] *See id.* at *3.

[165] *Id.* at *189-90.

[166] *Id.* at *191. The court further explained that "[t]he defendants' primary argument is that Wisconsin's political geography naturally favors Republicans because Democratic voters reside in more geographically concentrated areas, particularly in urban centers like Milwaukee and Madison. For this reason, they submit, any districting plan in Wisconsin necessarily will result in an advantageous distribution of Republican voters statewide just as [this plan] does." *Id.* at *192.

[167] *See id.* at *151.

[168] *See id.* at *248.

[169] *See* Whitford v. Gill, No. 15-cv-421-bbc, 2017 U.S. Dist. LEXIS 11380, *8 (W.D. Wis., Jan. 27, 2017). ("This plan must comply with our November 21, 2016 order but may be contingent upon the Supreme Court's affirmance of our November 21, 2016 order.")

[170] *See* Whitford v. Gill, No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 160811 (W.D. Wis., Nov. 21, 2016).

[171] *See, e.g.,* All About Redistricting, Professor Justin Levitt's guide to drawing the electoral lines at http://redistricting.lls.edu/who-state.php.

[172] ARIZ. CONST. ART. IV, pt. 2, §1.

California[173] created independent redistricting commissions by ballot initiative, thereby removing control of congressional redistricting from the states' legislative bodies and vesting it in such commissions. The ballot initiatives specify how commission members are to be appointed, and the procedures to be followed in drawing congressional and state legislative districts.

In its 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld the constitutionality of an independent commission, established by ballot initiative, for drawing congressional district boundaries.[174] In this case, the state legislature had filed suit challenging the constitutionality of the initiative creating the independent commission and the congressional maps adopted by the commission.[175] Affirming a lower court ruling,[176] the Supreme Court held that the Elections Clause of the Constitution permits a commission to draw congressional districts instead of a state legislature.[177] As previously noted, the Elections Clause provides that the times, places, and manner of holding congressional elections be prescribed in each state "by the Legislature thereof," but further specifies that Congress may at any time "make or alter" such laws.[178] Announcing that "all political power flows from the people," the Court stated that the history and purpose of the Elections Clause do not support a conclusion that the people of a state are prevented from creating an independent commission to draw congressional districts.[179] According to the Court, the use of the term "legislature" in the Elections Clause does not mean that only the state's representative body may draw redistricting maps.[180] Instead, in the Court's view, the main purpose of the Elections Clause was to empower Congress to override state election laws,[181] particularly those that involve political "manipulation of electoral rules" by state politicians acting in their own self-interest.[182] Thus, the Clause was not designed to restrict "the way" that states enact such legislation.[183]

In *Arizona*, the Court reviewed the cases in which it had previously considered the term "legislature" in the Constitution and read them to mean that the term differs according to its context.[184] For example, in a 1916 case, the Court had held that the term "legislature" was not limited to the representative body alone, but instead, encompassed a veto power held by the

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[173] CAL. GOV'T CODE §§ 8251-8253.6.

[174] 135 S. Ct. 2652 (2015).

[175] *See id.* at 2662.

[176] *See* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047 (D. Ariz. 2014). By a 2-1 vote, the three-judge panel held that removing congressional redistricting authority from the state legislature did not violate the Elections Clause. The term "Legislature," the court held, "encompasses the entire lawmaking function of the state." *Id.* at 1054 (quoting Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1278-79 (11th Cir. 2012)). The Arizona state legislature appealed the ruling to the U.S. Supreme Court in accordance with a federal law providing that constitutional challenges to federal or state legislative districts are considered by a three-judge federal district court panel, with direct appeal to the U.S. Supreme Court. 28 U.S.C. §§ 2284, 1253.

[177] *See Ariz. State Legis*., 135 S. Ct. at 2677.

[178] U.S. Const. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[179] *Ariz. State Legis*., 135 S. Ct. at 2677 (citing McCulloch v. Maryland, 17 U.S. 316 (1819)).

[180] *See id.* at 2673.

[181] *Id.* at 2672 ("[T]he Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'") (internal citations omitted).

[182] *Id.*

[183] *Id*.

[184] *See id.* at 2666-67.

people through a referendum.[185] Similarly, in a 1932 case, the Court held that a state's legislative authority included not just the two houses of the legislature, but also the veto power of the governor.[186] However, in a 1920 case, the Court held that in the context of ratifying constitutional amendments, the term "legislature" has a different meaning, one that excludes the referendum and a governor's veto.[187] While acknowledging that initiatives were not addressed in its prior case law, the Court saw no constitutional barrier to a state empowering its people with a legislative function.[188] Furthermore, even though the framers of the Constitution may not have envisioned the modern initiative process, the Court ruled that legislating through initiative is in "full harmony" with the Constitution's conception that the people are the source of governmental power.[189] The Court further cautioned that the Elections Clause should not be interpreted to single out federal elections as the one area where states cannot use citizen initiatives as an alternative legislative process.[190]

The Court also held that Arizona's congressional redistricting process comports with a federal redistricting statute, codified at Section 2a(c) of Title 2 of the U.S. Code, providing that until a state is redistricted as provided "by the law" of the state, it must follow federally prescribed congressional redistricting procedures.[191] Examining the legislative history of this statute, the Court determined that Congress clearly intended that the statute provide states with the full authority to employ their own laws and regulations—including initiatives—in the creation of congressional districts.[192] For example, when Congress amended the congressional apportionment statute in 1911, it eliminated the term "legislature," replacing it with the phrase "the manner provided by the laws."[193] The Court determined that, in making this change, Congress was responding to several states supplementing the representative legislature mode of lawmaking with a direct lawmaking role for the people through initiative and referendum.[194] As Congress used virtually identical language when it enacted Section 2a(c) in 1941, the Court concluded that Congress intended the statute to include redistricting by initiative.[195]

While Congress retains the power under the Constitution to make or alter election laws affecting congressional elections, *Arizona State Legislature* clarifies that states can enact such laws through the initiative process. For example, as discussed above, California has an initiative-established independent commission for drawing congressional district boundaries similar to Arizona.[196] The Court's ruling in *Arizona State Legislature* suggests that such initiative-established state constitutional provisions regulating the process of congressional redistricting are likely to withstand challenge under the Elections Clause.

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[185] *See id.* (citing Ohio *ex rel.* Davis v. Hildebrant, 241 U. S. 565 (1916)).

[186] *See id.* at 2667 (citing Smiley v. Holm, 285 U. S. 355 (1932)).

[187] *See id.* at 2666-67 (citing Hawke v. Smith (No. 1), 253 U. S. 221 (1920)).

[188] *See id.* at 2674. ("The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.")

[189] *Id.* at 2674.

[190] *See id.* at 2673.

[191] *See id.* at 2671.

[192] *See id.* at 2668-71.

[193] *Id.* at 2669.

[194] *Id.* at 2668-69.

[195] *See id.* at 2669-70.

[196] CAL. CONST., Art. XXI, § 2; Cal. Gov't. Code Ann. §§ 8251-8253.6.

Conclusion

In addition to various state processes, congressional redistricting is governed by the limits and powers of the Constitution and requirements prescribed under federal statutes. Interpreting such requirements, in a series of cases and evolving jurisprudence, the U.S. Supreme Court has issued rulings that have significantly shaped how congressional districts are drawn and the degree to which challenges to redistricting plans may be successful. As a result, the Court's case law has had a significant impact on the process of congressional redistricting. For example, while the Supreme Court has held that each congressional district within a state must contain approximately the same number of people, the Court has also held that the standard does not require congressional districts to be drawn with precise mathematical equality if population deviations are justified with "legitimate state objectives."[197] In addition, although the Voting Rights Act may require the creation of majority-minority districts, the Court has interpreted the Equal Protection Clause to require that if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations, then a strict scrutiny standard of review is to be applied.[198] To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest.[199] During its current term, the Court has decided one case regarding the degree to which racial considerations are permitted to impact how district lines are drawn and is considering another such case.[200] Furthermore, the Supreme Court is currently considering a direct appeal from a three-judge federal district court ruling[201] involving partisan gerrymandering.[202] This case presents the Court with an opportunity to establish a standard for determining what constitutes unconstitutional partisan gerrymandering if it so chooses. Finally, a 2015 Supreme Court ruling held that the Elections Clause of the Constitution permits states to create, by ballot initiatives and referenda, nonpartisan independent commissions for drawing congressional districts.[203]

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[197] *See* Tennant v. Jefferson Cty. Comm'n, 133 S. Ct. 3 (2012).

[198] *See* Miller v. Johnson, 515 U. S. 900, 916 (1995).

[199] *Id.*

[200] *See* Bethune-Hill v. Va. State Bd. of Elections, No. 15-680, 2017 U.S. LEXIS 1568, at *16 (U.S., Mar. 1, 2017); Cooper v. Harris, No. 15-1262.

[201] The Supreme Court considers direct appeals in such cases. 28 U.S.C. §§ 2284, 1253.

[202] *See* Whitford v. Gill, No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 160811 (W.D. Wis., Nov. 21, 2016).

[203] *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015).

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