Partisan Gerrymandering Back at the Supreme Court

Will the justices finally curb efforts to use control of redistricting to rig maps?

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On Friday, the U.S. Supreme Court announced that it would hear oral argument in March for partisan gerrymandering cases out of North Carolina and Maryland. The Court's announcement clears a path for the justices to rule on the constitutionality of partisan gerrymandering by the end of June 2019.

How North Carolina and Maryland's extreme partisan gerrymanders came to be

The North Carolina and Maryland congressional maps that are at issue in these cases are among this decade's starkest examples of extreme partisan gerrymanders, which lock in an artificial statewide majority for the political party drawing the maps, through good and bad election cycles.

The North Carolina cases (*Rucho v. Common Cause* and *Rucho v. League of Women Voters of North Carolina*) challenge the congressional map drawn by Republican lawmakers in 2016. That map was drawn to replace an earlier map that the federal courts struck down as an unconstitutional racial gerrymander. Like the old racially gerrymandered map, the new map has created an artificial 10-3 Republican advantage in a purple state that is among the most electorally competitive in the nation. In drawing the new map, North Carolina Republicans didn't hide their intent to maximize seats for their party. Representative David Lewis, the lawmaker in charge of the redistricting process, openly proclaimed, in fact, that the map was a "political gerrymander" and that the Republicans' goal was to "draw [it] to give a partisan advantage to ten Republicans and three Democrats."

The resulting map has performed exactly as intended, even in the wave election of 2018. Although Democrats won roughly half of the votes cast statewide for congressional candidates in 2018, North Carolina's congressional delegation retained its 10-3 split (pending resolution of election controversies in the race for the Ninth District).

The Maryland case (*Benisek v. Lamone*), meanwhile, challenges a Democratic gerrymander of a map that gives Democrats a 7-1 advantage in Maryland's congressional delegation. As in North Carolina, the skew favoring the party that drew the map is no accident.

Like North Carolina Republicans, Maryland Democrats had unilateral control over the redistricting process and used it to transform a map that more fairly represented both parties into one that has created a dependable and substantial Democratic majority. The Democrats' mapmakers secured this majority by packing and cracking Republican voters around the state. Most critically, Democrats successfully flipped the formerly Republican 6th District by removing large numbers of Republican voters and replacing them with heavily Democratic precincts from the Washington, D.C. area. They also packed Republican voters into the other reliably Republican district, the 1st. The resulting Democratic advantage has been very durable: Democrats have held seven of Maryland's eight congressional seats through all four elections under the current map.

The plaintiffs' successes before the trial courts

The plaintiffs in both North Carolina and Maryland won their cases at the trial court level, continuing a recent streak of successes for voters in the federal trial courts.

A trial court initially struck down the North Carolina map in January 2018, and the justices had an opportunity to take up that decision this past summer. Instead, they asked the lower court to review its decision in light of their opinion in *Gill v. Whitford,* last term's partisan gerrymandering case out of Wisconsin. Back in North Carolina, the trial court issued a new opinion again striking down the plan, ruling that 12 out of the plan's 13 districts were unconstitutional partisan gerrymanders. The defendants quickly appealed.

The Maryland plaintiffs won their case without even going to trial. The panel of three federal judges that heard the case unanimously agreed that the Maryland map violated voters' rights under the First Amendment based on the evidence that the plaintiffs had assembled ahead of trial. The court's decision was a long-awaited victory for the Republican voters who brought the case. They have been fighting the Democratic gerrymander for five years, first filing their suit in 2013 and twice appearing before the Supreme Court on other issues related to their case.

The issues on appeal

The North Carolina and Maryland appeals together present several questions. The most important, however, are whether the courts can decide partisan gerrymandering cases at all, and — if the courts do have that power — whether either map is an unconstitutional partisan gerrymander. If the justices uphold any of the trial

courts' decisions, it will be the first time that the Supreme Court will have struck down a map on partisan gerrymandering grounds.

What's next for the cases

The Court has announced that oral argument will be held during its March argument session, which falls in the latter half of the month. Under the Court's order, the defendants' briefs are due by February 8 and the plaintiffs' briefs are due on March 4. Amicus briefs in support of the defendants or neither party are due by February 12, and those supporting the plaintiffs must file their briefs by March 8. On this timeline, the Court will be in position to issue its opinions by the end of its term in June 2019.

Judicial Intervention as Judicial Restraint

Comment by Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer

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The full text of this Comment may be found by clicking the PDF link to the left.

In *Gill v. Whitford*,[1]*1. 138 S. Ct. 1916 (2018).* the Supreme Court turned aside the most promising vehicle for adjudicating partisan gerrymandering claims since the Court first fully addressed the issue more than thirty years ago in *Davis v. Bandemer*.[2]*2. 478 U.S. 109 (1986).* Though the Court has long been deeply divided on the constitutionality of partisan gerrymandering, especially on the threshold question of justiciability, Justice Kennedy, the decisive fifth vote and the Court's then-resident super median,[3]*3. Lee Epstein & Tonja Jacobi, Super Medians, 61 STAN. L. REV. 37, 41 (2008).* previously signaled, explicitly and strongly, his willingness to adjudicate these claims if putative plaintiffs would present him with judicially manageable standards.[4]*4. See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment). Justice Kennedy described the necessity of a workable standard for measuring the burden of gerrymandering on representational rights for justiciability. Id. at 307–08.* *Show More* The plaintiffs in *Gill* took up that challenge. The *Gill* plaintiffs filed suit against a redistricting plan from the State of Wisconsin that, by almost all measures, constituted a successful attempt by the Republican Party to minimize the ability of Democrats to translate their electoral votes into legislative seats.[5]*5. See Gill, 138 S. Ct. at 1923–24.* The plaintiffs, armed with a new test — the efficiency gap[6]*6. The "efficiency gap" is a measure of partisan symmetry. "The efficiency gap assumes that the strategy of the dominant party, the party in control of the districting, is to group its voters as efficiently as possible and to group the voters of the out party as inefficiently as possible." JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 309 (2d ed. 2018). The efficiency gap was introduced by a political scientist, Eric McGhee, see Eric McGhee, Measuring Partisan Bias in Single-Member District Electoral Systems, 39 LEGIS. STUD. Q. 55, 68 (2014), and extended into law by McGhee and Professor Nicholas Stephanopoulos, see Nicholas O. Stephanopoulos & Eric M. McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. CHI. L. REV. 831, 834 (2015); see also Nicholas O. Stephanopoulos & Eric M. McGhee, Essay, The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering, 70 STAN. L. REV. 1503, 1505–06 (2018).* *Show More* — prevailed in the lower court.[7]*7. See Whitford v. Gill, 218 F. Supp. 3d 837, 843, 854–55 (W.D. Wis. 2016).* Moreover, the issue of partisan gerrymandering appeared to have finally galvanized broad popular opposition.[8]*8. Supermajority of Americans Want Supreme Court to Limit Partisan Gerrymandering, CAMPAIGN LEGAL CTR. (Sept. 11, 2017), https://campaignlegal.org/press-releases/supermajority-americans-want-supreme-court-limit-partisan-gerrymandering [https://perma.cc/M5XQ-2XW2].* *Show More*

Gill looked like the perfect opportunity for the Court to address the political gerrymandering question once and for all. As further evidence of what seemed to be the Court's intention to strike down egregious political gerrymanders, the Supreme Court agreed to hear a political gerrymandering case from Maryland, *Benisek v. Lamone*.[9]*9. 138 S. Ct. 1942 (2018) (per curiam).* The Court also had a third case pending from North Carolina, *Rucho v. Common Cause*,[10]*10. 138 S. Ct. 2679 (2018) (mem.).* in which a three-judge court concluded that North Carolina's 2016 redistricting plan, to which plaintiffs raised statewide and district-by-district gerrymandering challenges, was a partisan gerrymander in violation of the Equal Protection Clause, the First Amendment, and the Elections Clause.[11]*11. Common Cause v. Rucho, 279 F. Supp. 3d 587, 597–98, 608–09 (M.D.N.C. 2018); see also U.S. CONST. amend. XIV, § 1; id. amend. I; id. art. I, § 4.* *Show More* The Maryland case was particularly noteworthy because the plaintiffs challenged a district gerrymandered by the Maryland Democratic Party.[12]*12. Benisek v. Lamone, 266 F. Supp. 3d 799, 809–10 (D. Md. 2017).* Taken together, *Gill* and *Benisek* presented the Court with gerrymandering claims by both major political parties and would have provided cover from cries of partisan favoritism. The cases also presented the Court with two gerrymandering claims of different scale. The *Gill* plaintiffs focused on how their state's plan affected political power throughout the state,[13]*13. Gill, 138 S. Ct. at 1922–23.* and the *Benisek* plaintiffs focused on how the composition of a particular district affected their right to vote.[14]*14. Benisek, 138 S. Ct. at 1943.* In addition, the

two cases presented the Court with two different constitutional theories of the problem, one based upon the Equal Protection Clause and First Amendment associational rights[15]*15. Gill, 138 S. Ct. at 1924.* and the other focused on a First Amendment retaliation claim.[16]*16. Benisek, 266 F. Supp. 3d at 801.* Between them, *Gill* and *Benisek* provided the Court a range of options for a narrow or broad intervention. And if the Court wanted to strengthen its justifications for intervention and further expand its options, it had an ace in the hole with *Rucho*, which combined all of the issues presented in *Gill* and *Benisek* in a single case.[17]*17. Common Cause v. Rucho, 279 F. Supp. 3d 587, 597 (M.D.N.C. 2018).* It seemed plausible and even ineluctable that the Court was about to subject the increasingly despised partisan gerrymander to meaningful judicial review.

To the surprise of many, the Court did not rule on the constitutionality of political gerrymandering claims. The Court anticlimactically resolved *Gill* on standing grounds. Writing for a unanimous Court,[18]*18. Justices Thomas and Gorsuch joined all but the last part of Chief Justice Roberts's opinion, which remanded the case and gave the plaintiffs another opportunity on remand to demonstrate standing. See Gill, 138 S. Ct. at 1933–34. Justices Thomas and Gorsuch would have dismissed the plaintiffs' claims. See id. at 1941 (Thomas, J., concurring in part and concurring in the judgment).* *Show More* Chief Justice Roberts explained that according to the plaintiffs' theory of their constitutional injury — that they were "placed in legislative districts deliberately designed to 'waste' their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking)" — they must allege and prove their constitutional injury at the district level.[19]*19. Gill, 138 S. Ct. at 1930 (majority opinion) ("To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific.").* *Show More* The Court remanded the case to allow plaintiffs to show standing.[20]*20. Id. at 1934.* The Court's decision in *Benisek* was even more prosaic. The Court simply affirmed the lower court's decision to deny the plaintiffs' motion for an injunction.[21]*21. Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (per curiam).* Furthermore, in *Rucho*, the Court vacated the lower court's decision and remanded the case for reconsideration in light of its decision in *Gill*.[22]*22. Rucho v. Common Cause, 138 S. Ct. 2679 (2018) (mem.) (vacating and remanding to district court).* *Show More* Bubbles burst.

As if the Court's decisions in *Gill*, *Benisek*, and *Rucho* were not enough to cast a pall on the festive parade expected to accompany the resolution of the cases, Justice Kennedy announced his retirement from the Court at the end of the Term. Justice Kennedy's departure, and the unlikely prospect that his replacement will join the Court's liberal bloc on this issue, seem to signal the end of the road for political gerrymandering claims for the foreseeable future.

To us, however, it is too premature to write off judicial supervision of political gerrymandering claims. There are clearly some Justices who do not believe that political gerrymandering claims are justiciable, particularly Justices Thomas and Gorsuch.[23]*23. See Gill, 138 S. Ct. at 1941 (Thomas, J., concurring in part and concurring in the judgment).* *Show More* There are also clearly some Justices who believe that these cases are justiciable, particularly Justices Ginsburg, Breyer, Sotomayor, and Kagan.[24]*24. See id. at 1945 (Kagan, J., concurring).* As importantly, there is no doubt that Chief Justice Roberts is not yet convinced that the Court bears an institutional responsibility to address the problem of partisan gerrymandering. Indeed, he seemed disdainful of the proposition, which he attributed to the plaintiffs, that "[t]he Court should exercise its power here because it is the 'only institution in the United States' capable of 'solv[ing] this problem.'"[25]*25. Id. at 1929 (majority opinion) (second alteration in original) (quoting Transcript of Oral Argument at 62, Gill, 138 S. Ct. 1916 (No. 16-1161), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf [https://perma.cc/JBL5-TRVA]).* *Show More* We presume that this is one of the reasons why Justice Kagan spent part of her concurring opinion in *Gill* articulating the harms caused by partisan gerrymandering and making the case in favor of judicial intervention.[26]*26. See id. at 1940–41 (Kagan, J., concurring). The dialogue seems to have taken a step backward. Instead of arguing about whether political gerrymandering claims are best adjudicated under the First or Fourteenth Amendments, or whether the efficiency gap adequately captures the harm of political gerrymandering, we are debating whether political gerrymandering claims cause constitutional harms at all and whether those harms are sufficient to compel the Court to intervene.* *Show More*

Nevertheless, notwithstanding Chief Justice Roberts's, and perhaps Justice Alito's, skepticism about the utility of judicial supervision of partisan gerrymandering claims, it is also significant that they did not vote in *Gill* to hold partisan gerrymandering claims nonjusticiable. Rather than dismiss the case, as Justices Thomas and Gorsuch urged, they joined the liberal Justices and agreed to send the litigants back to the lower court to resolve the standing issues.[27]*27. See id. at 1934 (majority opinion); id. at 1941 (Thomas, J., concurring in part and concurring in the judgment).* *Show More* The fact that the Court decided the case on standing grounds and provided political gerrymandering plaintiffs another opportunity to make their case is indicative that some of the

Justices who are skeptical of judicial supervision are nevertheless worried, and rightly so, about the implications of nonintervention. They are not yet persuaded that there is a problem to which the Court ought to provide a solution; but they also have an intuition that nonintervention is a significant abdication of judicial responsibility. They need more time to further contemplate a justification for engagement on what they clearly view as a consequential decision. Deciding *Gill* on standing grounds and remanding the case is a holding-pattern maneuver.

We join a growing consensus among an impressive group of election law scholars who argue that partisanship is a problem in districting and that the Court is authorized by the Constitution to intervene.[28]×*28. See, e.g., Christopher S. Elmendorf, From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders, 59 WM. & MARY L. REV. 1601, 1605–07 (2018); Michael S. Kang, Gerrymandering and the Constitutional Norm Against Government Partisanship, 116 MICH. L. REV. 351, 353–56 (2017); Justin Levitt, Intent Is Enough: Invidious Partisanship in Redistricting, 59 WM. & MARY L. REV. 1993, 2024–31 (2018) [hereinafter Levitt, Intent Is Enough]; Justin Levitt, The Partisanship Spectrum, 55 WM. & MARY L. REV. 1787, 1816–19 (2014); Nicholas O. Stephanopoulos, The Causes and Consequences of Gerrymandering, 59 WM. & MARY L. REV. 2115, 2118–20 (2018); Daniel P. Tokaji, Gerrymandering and Association, 59 WM. & MARY L. REV. 2159, 2162–64 (2018). There are some important dissenting voices. For one of the most creative and compelling, see Franita Tolson, Benign Partisanship, 88 NOTRE DAME L. REV. 395, 397–99 (2012); and Franita Tolson, Partisan Gerrymandering as a Safeguard of Federalism, 2010 UTAH L. REV. 859, 888–90.**Show More** We advance two novel claims. First, in Part I, we provide a comprehensive account of the Court's skepticism of judicial supervision of democratic politics, an account that we call the narrative of nonintervention. We situate *Gill v. Whitford* and the Court's recent political gerrymandering cases within this narrative and argue that the debate over standing, jurisdiction, and judicially manageable standards is a red herring. The Court has previously offered the same set of objections in analogous contexts: specifically, when it refused to intervene to protect African Americans against widespread racial discrimination in the political process[29]×*29. See Giles v. Harris, 189 U.S. 475, 486–88 (1903).* and when it refused to intervene to address the problem of grossly malapportioned districts.[30]×*30. See Colegrove v. Green, 328 U.S. 549, 552 (1946).* Neither standing doctrine, nor the absence or presence of judicially manageable standards, nor jurisdiction determined judicial intervention in those prior moments. Rather, the Court's reluctance to intervene was a function of the Court's institutional calculus that it ought to protect its stature and institutional capital when it engages in what look like political fights. The lesson of Part I is that the Court's refusal to intervene to address the problems of racial disenfranchisement and malapportionment — its narrative of nonintervention in those contexts — yielded to the current conditions of governance. In both the race and malapportionment contexts, the Court overcame its initial skepticism and responded to the needs of the time.

In Part II, we argue that the Court's posture of nonintervention in the political gerrymandering cases should yield as a consequence of the political reality of our moment, a political environment characterized by extreme partisan polarization. Though the justiciability of partisan gerrymandering claims is often supported by strong normative claims, we argue, on utilitarian grounds, that the Court ought to occasionally make strategic interventions in the domain of law and politics, such as limiting partisan gerrymandering, where doing so is reasonably likely to avoid future problems that would lead to greater interventions. Thus, the Court ought to articulate a principle against partisanship in the construction of electoral structures because curbing partisan gerrymandering would have the benefit of curtailing a lot of other kinds of manipulations in the electoral system that are driven by the same type of partisan impulse that motivates partisan gerrymandering claims. The other kinds of manipulations we have in mind include voter identification rules, voter registration rules, voter purge practices, racial gerrymandering, election administration practices, disputes about the location of polling places, and the like. For ease of exposition, we refer to these types of claims as secondary claims or secondary disputes.[31]×*31. Justice Kagan astutely noted her concerns with the secondary effects of partisan gerrymandering in Gill. As she stated, "the evils of gerrymandering seep into the legislative process itself," which makes it harder for political actors to "negotiat[e] and compromise" and to "reach[] pragmatic, bipartisan solutions to the nation's problems." Gill, 138 S. Ct. at 1940 (Kagan, J., concurring). Among the "evils of gerrymandering" is the desire to manipulate electoral rules, not just electoral districts, to maintain political power at all costs.**Show More** Ironically, and contra the narrative of nonintervention, judicial intervention in this context is an act of judicial restraint because it obviates the need for the Court to take sides later on substantive partisan disputes that would arguably arise as a result of unconstrained state actors' partisan manipulation of electoral rules. Counterintuitively, this argument advances a utilitarian or instrumental conception of judicial restraint. The Court can do a little now — rein in partisan gerrymandering — so it can do a lot less later — by deterring some forms of bad behavior it would otherwise have to deal with on the merits.