ELECTION LAW — PARTISAN GERRYMANDERING — DISTRICT COURT OFFERS NEW STANDARD TO HOLD WISCONSIN REDISTRICTING SCHEME UNCONSTITUTIONAL. — *Whitford v. Gill*, No. 15-cv-421-bbc, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016).

Political gerrymanders predate the founding of the United States.[1] However, the judicial branch has yet to develop a coherent approach to delineating the constitutional limits of partisan gerrymanders. In fact, in 2004, a plurality of Justices in *Vieth v. Jubelirer*[2] resigned themselves to the idea that partisan gerrymandering claims are nonjusticiable because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."[3] However, in his concurrence, Justice Kennedy held out hope for judicial review, challenging lower courts to search for the kind of standard that the plurality had given up on finding.[4] Recently, in *Whitford v. Gill*,[5] a three-judge panel of the U.S. District Court for the Western District of Wisconsin outlined a method for evaluating claims of partisan gerrymandering and struck down a state redistricting scheme as unconstitutionally partisan.[6] By narrowly defining the degree and duration of partisan advantage that would rise to the level of invidiousness and employing an innovative measure of voting power, the majority put forth a discernible and manageable standard for assessing claims of partisan gerrymandering.

When population changes reported in the 2010 census prompted the redrawing of state legislative district lines in Wisconsin, Republicans held a majority in both houses of the state legislature, and a Republican was governor.[7] Reapportionment schemes must ensure

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[1] In the early 1700s, "counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives." Vieth v. Jubelirer, 541 U.S. 267, 274 (2004) (plurality opinion) (citing ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 26–28 (1974)).

[2] 541 U.S. 267 (2004).

[3] *Id.* at 281 (plurality opinion). Four Justices dissented, offering various standards for adjudicating such cases. *See id.* at 319–20 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355–56 (Breyer, J., dissenting).

[4] *Id.* at 311–13 (Kennedy, J., concurring in the judgment) ("That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution." *Id.* at 311.).

[5] No. 15-cv-421-bbc, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016), *appeal docketed*, No. 16-1161 (U.S. Mar. 24, 2017).

[6] *Id.* at *1. On January 27, 2017, the court ordered the defendants to enact a new districting plan by November 1, 2017. Whitford v. Gill, No. 15-cv-421-bbc, 2017 WL 383360, at *3 (W.D. Wis. Jan. 27, 2017), *appeal docketed*, No. 16-1161 (U.S. Mar. 24, 2017).

[7] *Whitford*, 2016 WL 6837229, at *3. In Wisconsin, the state legislature is responsible for drafting new district lines. WIS. CONST. art. IV, § 3.

districts maintain roughly equal populations to satisfy the Fourteenth Amendment's one-person, one-vote requirement.[8] District lines must also comply with traditional criteria like contiguity and compactness[9] and with requirements of the Voting Rights Act.[10]

Over the course of several months, staff members of Republican legislative leaders[11] drafted district maps that achieved varying levels of partisan advantage.[12] The team used redistricting software that provided data on population demographics and current political boundaries to help them make decisions and to keep an eye on adherence to state and federal requirements.[13] The drafters also used the software to create a metric to assess the partisan composition of new districts, confirming with a political science professor that their score was an accurate proxy for an area's political makeup.[14] That same professor provided the drafters with visuals depicting "the partisan performance of a particular map under all likely electoral scenarios."[15]

Republican leadership reviewed several drafts of regional maps with the relevant partisan scores and chose drafts for each region.[16] The drafters combined these selections to create the final map and performed additional partisan evaluations.[17] The political science professor determined "that Republicans would maintain a majority under any likely voting scenario."[18] The final map and information about the partisan makeup of the voters in the relevant districts was presented to Republican legislators.[19] The redistricting plan was passed by

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[8] *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016); Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

[9] For example, the Wisconsin Constitution requires that new district lines create contiguous and compact areas and reflect, to the extent possible, the borders of other political subdivisions. WIS. CONST. art. IV, § 4. Relevant political subdivisions include "county, precinct, town or ward lines." *Id.* Districts must also be drawn so that "no assembly district shall be divided in the formation of a senate district." *Id.* § 5. These considerations mirror the "traditional criteria" used to evaluate gerrymandering under federal law. Miller v. Johnson, 515 U.S. 900, 916 (1995).

[10] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

[11] *Whitford*, 2016 WL 6837229, at *3.

[12] Versions of maps were even labeled according to whether the advantage secured by the particular map was "Assertive" or "Aggressive." *Id.* at *6.

[13] *Id.* at *4–5.

[14] *Id.*

[15] *Id.* at *7.

[16] *Id.*

[17] *Id.* at *7–8.

[18] *Id.* at *8; *see also id.* ("[I]ndeed, [Republicans] would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority.").

[19] *Id.* Notes from one of the drafters included the statements: "'The maps we pass will determine who's here 10 years from now,' and '[w]e have an opportunity and an obligation to draw

the state legislature, signed by the Governor, and published as Act 43 on August 23, 2011.[20] In the 2012 election, Republicans won 60.6% of the assembly seats with just 48.6% of the statewide vote and, in the 2014 election, won 63.6% of the assembly seats with 52% of the vote.[21]

After these elections, plaintiffs — registered Wisconsin voters who "almost always vote for Democratic candidates" — alleged that Act 43 purposely and discriminatorily diluted Democrats' votes statewide.[22] In particular, they accused the state of employing gerrymandering techniques that "wasted"[23] Democrats' votes — both by spreading them out so they could not achieve a district majority ("cracking") and by concentrating voters in a small number of districts to limit the number of seats their party could win ("packing").[24] This strategy, they claimed, constituted an unconstitutional gerrymander.[25]

A three-judge panel of the U.S. District Court for the Western District of Wisconsin agreed.[26] Writing for the majority, Judge Ripple[27] first engaged in a lengthy exegesis of Supreme Court precedent on gerrymandering,[28] maintaining that precedent still held that "an excessive injection of politics is unlawful."[29] To identify excessive partisanship, the majority adopted the plaintiffs' three-prong standard: a districting plan violates the Constitution if it "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds."[30]

The majority then applied each prong of the test to Act 43. First, recognizing that precedent allows for some political considerations in redistricting and the political reality that partisan considerations will inevitably play some role,[31] the majority needed to define intent in a

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these maps that Republicans haven't had in decades.'" *Id.* (alteration in original) (citation omitted).

20 2011 Wis. Sess. Laws 708.

21 *Whitford*, 2016 WL 6837229, at *9.

22 *Id.* The majority addressed standing at the end of the opinion, finding that the plaintiffs suffered a cognizable harm caused by Act 43 and that a favorable decision could redress the harm. *Id.* at *67–70.

23 Per the majority: "'Wasted' is merely a term of art used to describe votes cast for losing candidates and votes cast for winning candidates in excess of 50% plus one . . . ." *Id.* at *9 n.79.

24 Complaint at 14–15, *Whitford*, 2016 WL 6837229 (No. 15-cv-421-bbc), 2015 WL 4651084.

25 *Id.* at 3–5. The plaintiffs claimed First and Fourteenth Amendment violations. *Id.* at 1.

26 *Whitford*, 2016 WL 6837229, at *1.

27 Judge Ripple, a judge on the on the U.S. Court of Appeals for the Seventh Circuit, was sitting by designation. He was joined by Judge Crabbe.

28 *Whitford*, 2016 WL 6837229, at *17–35.

29 *Id.* at *18 (quoting Vieth v. Jubelirer, 541 U.S. 267, 293 (2004) (plurality opinion) (emphasis omitted)).

30 *Id.* at *35; *see also* Complaint, *supra* note 24, at 9–24. The majority did not provide distinct standards for First and Fourteenth Amendment claims but offered this test for evaluating both.

31 *Whitford*, 2016 WL 6837229, at *36.

way that created a rational dividing line between legal partisan considerations and invidious partisan gerrymandering. To accomplish this objective, the majority focused on a clear definition of the harm associated with unconstitutional partisan gerrymanders: entrenchment of power.[32] The majority adopted a narrow definition of entrenchment as "making that party — and therefore the state government — impervious to the interests of citizens affiliated with other political parties."[33] The majority inferred the intent to entrench from the kinds of maps that were generated and the analysis that was undertaken.[34]

This anti-entrenchment principle guided the rest of the majority's analysis as well. In assessing the effects prong, the majority reviewed election results from 2012 and 2014, as well as statistical analyses offered by expert witnesses, determining that the districting map had achieved its intended effect.[35] The majority also employed a new measure called the Efficiency Gap (EG) to corroborate these findings. The EG evaluates the effect of a political gerrymander by comparing the number of wasted votes for each party: "Because the party with a favorable EG wasted fewer votes than its opponent, it was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats."[36] The majority determined that Wisconsin's pro-Republican EG of 13% for the 2012 elections and 10% for the 2014 elections demonstrated invidious partisan gerrymandering.[37] Additional analysis demonstrated that an EG over 7% in the first election under a given plan would allow for partisan advantage to extend through the life of the districting scheme.[38]

With the first two prongs satisfied, the majority turned to the third prong, discussing possible justifications for the entrenchment caused by Act 43.[39] In particular, the majority noted that Democrats' tendency to live in more concentrated areas created a natural Republican advantage.[40] But the majority found this justification insufficient: it did not "explain the magnitude of Act 43's partisan effect, and . . . why the plan's drafters created and passed on several less burdensome plans that would have achieved their lawful objectives in equal measure."[41]

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[32] *Id.* at *38 ("[A]n intent to entrench a political party in power signals an excessive injection of politics into the redistricting process . . . .").

[33] *Id.*

[34] *Id.* at *41.

[35] *Id.* at *46–48.

[36] *Id.* at *9.

[37] *See id.* at *51–52. The majority cited two versions of the EG calculation: full and simplified. Because the full method was not used to perform durational analysis, the simple method is primarily cited here.

[38] *Id.* at *51.

[39] *Id.* at *56–67.

[40] *Id.* at *62.

[41] *Id.* at *65.

Judge Griesbach dissented.[42] First, he took issue with the majority's inclusion of intent in the test for partisan gerrymandering, noting that the Constitution should address political intent, if it needed to be addressed at all, by making a different body responsible for redistricting — an action outside the scope of the court's authority.[43] He also argued against the use of entrenchment as a touchstone for unconstitutionality, maintaining instead that a standard based on deviation from traditional districting criteria would be more acceptable to the Supreme Court.[44]

Finally, the dissent decried the majority's "elevat[ion of] the efficiency gap theory from the annals of a single, non-peer-reviewed law review article to the linchpin of constitutional elections jurisprudence."[45] Judge Griesbach pointed to a series of shortcomings that rendered the EG measure unreliable. For example, on the theoretical side, the EG measure conceived of proportional representation as a right[46] and mischaracterizes losing votes as wasted, even though "they shape the larger political debate."[47] Judge Griesbach also pointed to practical issues, including the EG measure's volatile nature — created by the high number of wasted votes inherent in close races — and the fact that it can be significantly reduced by controlling for political geography.[48]

The *Whitford* majority effectively addressed key justiciability issues raised by the Supreme Court in *Vieth*, answering the Court's call for a discernible and manageable standard for assessing constitutional claims of partisan gerrymandering. The majority confined its definition of entrenchment to the egregious facts at issue in this case and kept its standard grounded in clear and long-standing equal protection principles.[49] In this way, the majority identified a dividing line between the inevitable and the invidious use of partisanship in the redistricting process. Furthermore, this definition and the assessment that the majority undertook — supported by the EG measure — evinces the standard's manageability.

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[42] *Id.* at *71 (Griesbach, J., dissenting).

[43] *Id.* at *73.

[44] *See id.* at *79–80. Judge Griesbach also noted that, of the five Justices who accepted the justiciability of partisan gerrymandering, three put forward standards that consider deviation from traditional standards of districting. *Id.* at *79.

[45] *Id.* at *84 (referring to Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015)).

[46] *Id.* at *84–88.

[47] *Id.* at *90.

[48] *Id.* at *92–98.

[49] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 565 (1964) (emphasizing the need for "each citizen [to] have an equally effective voice in" state elections).

First, the anti-entrenchment principle at the foundation of the majority's test offers a discernible dividing line between inherent and invidious gerrymandering. Even the *Vieth* plurality acknowledged that some level of partisan consideration is unconstitutional.[50] Thus, the challenge left for lower courts was not establishing *whether* high levels of partisan consideration ever violated equal protection, but *when* the line was crossed. For decades, equal protection jurisprudence has focused on protecting against vote dilution.[51] By its very nature, an anti-entrenchment principle — which looks for districting schemes that curtail the impact of shifts in voting — allows courts to identify and thus prevent the degradation of voting rights by partisan gerrymanders.[52] By tying its standard to this cognizable constitutional harm, the majority established a discernible test.[53]

Additionally, given the degree and likely duration of the electoral advantage attained by the Republicans in this case, the majority was able to rely on a narrow definition of entrenchment and thus provide a more easily discernible standard than tests previously rejected by the Supreme Court.[54] While acknowledging that less egregious or enduring schemes than those reached by its test might violate equal protection standards,[55] the majority wisely avoided answering that broader question. Instead, the majority focused on the duration of voter disenfranchisement to establish definable bounds.[56] While it chose not to identify an exact numerical threshold,[57] the majority drew the line at the point when partisan advantage — intended and effectuated

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[50] *See* Vieth v. Jubelirer, 541 U.S. 267, 293 (2004) (plurality opinion).

[51] *See* Fortson v. Dorsey, 379 U.S. 433, 439 (1965); *Reynolds*, 377 U.S. at 555 ("And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

[52] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 506–07 (1997) ("[E]ntrenching efforts by current majorities . . . are inconsistent with a future majority's right to control its own destiny." *Id.* at 506.); *see also* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 544 n.17 (2004) ("[O]ne person, one vote's individualistic rhetoric may have come to obscure its original purposes of combating entrenchment and safeguarding majority rule.").

[53] With this test, the majority addresses the concern that the "Court may not willy-nilly apply standards — even manageable standards — having no relation to constitutional harms." *Vieth*, 541 U.S. at 295 (plurality opinion).

[54] This factor also speaks to the standard's manageability. However, because some level of partisanship can exist in redistricting processes, *Whitford*, 2016 WL 6837229, at *36, it is important to discuss here that courts could identify unconstitutional partisan influence under this standard when it exists.

[55] *Id.* at *38 (noting that "gray may span the area between acceptable and excessive").

[56] For example, a districting scheme that renders it unlikely that the opposing party would ever attain majority power even with majority votes would be unconstitutional, whereas a scheme that is responsive to changes in parties' vote shares over time would be permissible.

[57] *See Whitford*, 2016 WL 6837229, at *55 n.311 (noting that, because the EG in the current case far exceeded the 7% threshold put forward by the plaintiffs, it was not necessary to "reach the propriety of the 7% number").

through a particular redistricting plan — *will persist* despite reasonable swings in parties' vote shares.[58] In establishing this line, the majority sidestepped a potential pitfall to which other proposed standards have fallen prey: indeterminacy.[59] *Whitford*'s standard does not rely on "some indeterminate period."[60] Instead, it bases its assessment on likely outcomes for the duration of the district map at issue — that is, through the next decennial period.[61]

Furthermore, the anti-entrenchment principle does not demand proportional outcomes, which the *Vieth* plurality dismissed as not protected by the Constitution.[62] While the dissent criticized the majority's anti-entrenchment principle as requiring proportional representation,[63] the question at the core of the anti-entrenchment principle is not whether outcomes are precisely proportional. Instead, it is whether *dis*proportional outcomes are more or less fixed because one vote is more effective than another.[64]

Second, defining entrenchment by the durability of the districting scheme, the majority provided a standard that is manageable. Though the Court has not adopted clear criteria for assessing manageability,[65] intelligibility is paramount.[66] By providing a narrow understanding of entrenchment as a party maintaining control "under *any* likely future electoral scenario for the *remainder* of the decade,"[67] the majority drew one line against which the constitutionality of districting schemes can

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[58] *See id.* at *52. Including consideration of a "future majority" addresses the dissent's argument that entrenchment must be carried out by a current minority, *id.* at *76 (Griesbach, J., dissenting).

[59] *See* Vieth v. Jubelirer, 541 U.S. 267, 281–84 (2004) (plurality opinion) (criticizing the *Davis v. Bandemer*, 478 U.S. 109 (1986), effects prong, which required an analysis of voter influence on the election, as being nebulous, indeterminate, and unenforceable).

[60] *Id.* at 300.

[61] *See Whitford*, 2016 WL 6837229, at *44; *see also id.* at *51–52 ("[N]early all [redistricting] plans that resulted in a 7% efficiency gap favoring one party in the first election year will retain an efficiency gap that favors that same party, even when one adjusts a party's statewide vote share by five points." *Id.* at *51.).

[62] *Vieth*, 541 U.S. at 288 (plurality opinion).

[63] *Whitford*, 2016 WL 6837229, at *85–86 (Griesbach, J., dissenting).

[64] As the majority explains: "To say that the Constitution does not require proportional representation is not to say that highly *dis* proportional representation may not be evidence of a discriminatory effect." *Id.* at *53 (majority opinion).

[65] In fact, Professor Richard Fallon accuses the Court of "mak[ing] its judgments about whether proposed standards count as judicially manageable under criteria that would themselves fail to qualify as judicially manageable." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1278 (2006).

[66] *See id.* at 1285; *see also* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 813 (2005) ("Without a clearer definition of excessive partisanship, we cannot know whether [a] test does a tolerable job of separating excessive partisanship from permissible partisanship."); *cf. Vieth*, 541 U.S. at 291 (plurality opinion) (looking for "[s]ome criterion more solid and more demonstrably met than" a fairness standard).

[67] *Whitford*, 2016 WL 6837229, at *44 (emphasis added).

be assessed.[68] Even though this standard will not provide a clear answer to all partisan gerrymandering claims, this characteristic does not undermine the manageability of the test. Courts, drafters, and voters alike will still be able to identify "precisely what [courts are] testing for, [and] precisely what fails [this] test."[69]

While the majority does not rely on the EG to find entrenchment,[70] the measure shores up the standard's viability by showing it to be susceptible to quantification and thus replication. In dismissing specific tests proposed in dissenting opinions, the *Vieth* plurality criticized Justice Souter's test for not actually evaluating the level of vote dilution[71] and Justice Breyer's test for "provid[ing] no real guidance for the journey"[72] to demonstrating "unjustified entrenchment."[73] A majority in *Vieth* also found that the *Davis v. Bandemer*[74] effects test — which was the accepted standard for assessing partisan gerrymandering until *Vieth* — created an uncertain threshold focused on a group's "chance to effectively influence the political process."[75] The standard did not identify the level at which lack of influence becomes unconstitutional.[76] The EG measure helps the *Whitford* test avoid the ambiguity of these other tests by outlining the statistics to assess: the wasted votes of one party, the wasted votes of the other party, and the durability of partisan advantage over time.[77]

The *Whitford* majority established that there is a discernible distinction between the inevitable and the invidious use of partisanship in the redistricting process by adopting a narrow definition of entrenchment. With the support of the EG, the majority demonstrated the manageability of this standard. As a result, the majority successfully navigated the ambiguous and uncertain precedents currently governing partisan gerrymandering claims and showed that Justice Kennedy's patience was justified.

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[68] *See* Fallon, *supra* note 65, at 1285 (defining intelligibility as "capability of being understood" (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 954 (2d ed. unabr. 1979))).

[69] *Vieth*, 541 U.S. at 300 (plurality opinion) (criticizing a test proposed by Justice Breyer as identifying neither).

[70] The court did not seem to foreclose the use of additional measures.

[71] *Vieth*, 541 U.S. at 297 (plurality opinion) ("[N]o element of his test looks to the effect of the gerrymander on the electoral success, the electoral opportunity, or even the political influence, of the plaintiff's group.").

[72] *Id.* at 299.

[73] *Id.* (emphasis omitted) (quoting *id.* at 360 (Breyer, J., dissenting)).

[74] 478 U.S. 109 (1986).

[75] *Vieth*, 541 U.S. at 282 (plurality opinion) (quoting *Bandemer*, 478 U.S. at 133); *see also id.* at 308 (Kennedy, J., concurring in the judgment) (agreeing that the *Bandemer* standard is inadequate); *id.* at 345–46 (Souter, J., dissenting) (same).

[76] *See id.* at 282–83 (plurality opinion).

[77] *See Whitford*, 2016 WL 6837229, at *51–52.