

DRAWING THE LINE: *WHITFORD V. GILL* AND THE SEARCH  
FOR MANAGEABLE PARTISAN GERRYMANDERING  
STANDARDS

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I. INTRODUCTION

The constitution grants legislatures the authority to create voting districts and apportion representatives among them.<sup>1</sup> This grant of power to bodies imbued with political interests inevitably presents the possibility that politics and partisan interests will enter the districting equation. However, deciding claims that are unfairly influenced by partisan politics presents a difficult problem for the Supreme Court. As such, the federal courts have largely refused to hear issues of malapportionment and gerrymandering.<sup>2</sup> Malapportionment is defined as an unequal population distribution across voting districts so that the votes of people in lower population districts have greater influence on electoral outcomes than those in more densely populated districts.<sup>3</sup> Gerrymandered districts can have populations of equal sizes but the manner in which the district is drawn affects the weight of a person's vote.<sup>4</sup>

In the 1960's, the Supreme Court addressed the issue of malapportionment and the measure of constitutional representation required in districting,<sup>5</sup> and in the 1980's the Court first addressed the issue of partisan gerrymandering.<sup>6</sup> However, ever since entering this fray, the Court's articulations regarding partisan gerrymandering have been confused at best, and at worst an implicit license for district drafters to freely engage in extensive partisan gerrymandering.

In *Whitford v. Gill*,<sup>7</sup> a three-judge district court for the Western District of Wisconsin addressed claims of partisan gerrymandering by

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1. U.S. CONST. art. I, § 2, cl. 3.; U.S. CONST. art. I, § 4, cl. 1.

2. See *infra* notes 13-18 and accompanying text.

3. Mitchell Berman, *Managing Gerrymandering*, 83 *Tex. L. Rev.* 781, 785 (2004-2005); "Malapportionment involves the creation or preservation of electoral districts of different population sizes, so that the ration of representatives to voters varies across districts. Gerrymanders can involve districts of roughly equivalent, even equal population, sizes." *Id.* at 785 n.20.

4. *Id.* at 785.

5. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (holding that district malapportionment was a justiciable issue); *Reynolds v. Sims* 377 U.S. 533, 561 (1964) (establishing that the Constitution required that each person's vote carries the same weight).

6. *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

7. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016).

the Republican controlled state legislature.<sup>8</sup> The Wisconsin district court utilized a three-part test briefed by the plaintiffs as an appropriate measure of impermissible partisan gerrymandering of the state's voting districts.<sup>9</sup>

In light of the *Whitford* decision, this case note addresses why the three-part test applied in that case promises an appropriate measure for determining impermissible partisan gerrymandering. Section II of this note explores the history of partisan gerrymandering in subsection (a) and then addresses the circumstances and facts of *Whitford* in subsection (b). Section III addresses why the standard applied in *Whitford* presents a judicially manageable standard that should be adopted for evaluation of partisan gerrymandering claims. Section III first examines the important need to address claims of partisan gerrymanders, subsection (a), and then addresses the advantages of the *Whitford* test as compared with possible standards the Court has expressed a desire for in the past, in subsection (b). Finally, Section III concludes by addressing the added advantage of the *Whitford* standard in dealing with partisan gerrymandering and technologic advances in district drawing.

## II. BACKGROUND

This section first explores the history of gerrymandering, as well as the facts of *Whitford v. Gill*. Subsection (a) of this section defines and explains the origins of gerrymandering and the rise of the justiciability of district malapportionment. Additionally, subsection (a) seeks to provide some context regarding partisan gerrymandering and the Court's recent jurisprudence in this area. Part (b) of this section addresses the case of *Whitford v. Gill*, what the Wisconsin court decided in that matter and its relevance to partisan gerrymandering.

### A. What Is Gerrymandering?

The term gerrymandering originated in 1812 when, the then Massachusetts Governor, Elbridge Gerry, drew a voting district resembling a salamander for the benefit of his own political party.<sup>10</sup> Thus, gerrymandering is the process of dividing districts within a state or territory, but in such a way that achieves a political or personal gain.<sup>11</sup> Gerrymandering can, and has been, employed over time to achieve a

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8. *See id.* at 853-56.

9. *Id.* at 854-855.

10. Whitney M. Eaton, *Where Do We Draw the Line? Partisan Gerrymandering and the State of Texas*, 40 U. RICH. L. REV. 1193, 1193 (2006.)

11. *Id.*

variety of nefarious goals. Not only have voting districts been challenged as attempts to achieve certain political majorities in legislative bodies,<sup>12</sup> but also for impermissibly employing racial considerations in districting.<sup>13</sup>

### 1. The Rise of Challenges to District Apportionment

For more than 174 years<sup>14</sup> the Supreme Court treated cases challenging district apportionments as non-justiciable “political questions”<sup>15</sup> and would not adjudicate them.<sup>16</sup> From the end of the industrial revolution and through World War II, large population disparities developed between voting districts, exacerbating the problem of district malapportionment.<sup>17</sup> Left unchecked, politicians had little incentive to redistrict, as failure to change districts would maintain the status quo.<sup>18</sup> The Court’s approach to malapportionment claims during this period was best characterized by Justice Frankfurter, who warned that the Court “ought not to enter this political thicket.”<sup>19</sup>

Not until *Baker v. Carr*<sup>20</sup> did the Supreme Court find that claims regarding the unconstitutionality of legislative apportionment presented a justiciable question.<sup>21</sup> The outcome of *Baker* led to a string of cases alleging vote dilution due to district apportionment that violated the equal protection guaranteed by the Constitution.<sup>22</sup>

In subsequent cases, the Court elaborated on the *Baker* standard by finding that the notion of equality of votes among voters was to be embodied in the one person, one vote standard.<sup>23</sup> One person, one vote reflects the notion that equal representation means that each person’s vote carries equal weight and is rooted in the idea that voting is a

12. *See Vieth v. Jublirer*, 541 U.S. 267 (2004).

13. *See. e.g., Shaw v. Reno*, 509 U.S. 630 (1993).

14. Eaton, *supra* note 10, at 1196.

15. A political question arises when a case presents a matter that under the Constitution is committed to another branch of the government which the Court adjudicating would impinge on the separation of powers. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

16. *E.g., Colegrove v. Green*, 328 U.S. 549 (1946).

17. Stephen Ansolabehere & James M. Snyder Jr. THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND TRANSFORMATION OF AMERICAN POLITICS, 39-40 (2008); *See also* William F. Swindler, *Reapportionment: Revisionism or Revolution*, 43 N.C. L. REV. 55, 60-61 (1964-1965) (discussing how the 1930 decennial census confirmed the shifting population trends in the years leading up to World War I from rural to urban populations).

18. Ansolabehere, *supra* note 17, at 40.

19. *Colegrove*, 328 U.S. at 556.

20. 369 U.S. 186 (1962).

21. *Id.* at 237.

22. *See Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Karcher v. Daggett*, 462 U.S. 725 (1983).

23. *Gray*, 372 U.S. at 381.

fundamental right that enables the preservation of other rights,<sup>24</sup> and that the weight of a citizen's vote cannot be dependent on where that person happens to live.<sup>25</sup> In addition to requiring that voting redistricting standards adhere to the one person, one vote standard, other permissible traditional redistricting criteria have been recognized as evidence of permissible district apportionment.<sup>26</sup> Such criteria include geographic continuity and compactness of districts, preserving communities of interest, and nesting.<sup>27</sup>

## 2. Issues with Partisan Gerrymandering in Particular

As its name alludes, the concept of partisan gerrymandering springs from the idea that district lines were drawn in such a way so as to favor a certain political party over another by ensuring victories in those districts. Thus, "partisan gerrymandering is gaining through discretionary districting an unjustifiable advantage for one political party as opposed to the others."<sup>28</sup>

There are two methods generally used to achieve partisan gerrymandering when drawing districting lines: district drawers may either "pack" or "crack" districts.<sup>29</sup> Packing a district allows for concentration of one party's supporters in only a few districts; thus, while the party wins an overwhelming majority in those districts, the districts are few.<sup>30</sup> Conversely, cracking requires district lines to be drawn in such a way that the opposing party's voters are split into large minorities across various districts and are unable to achieve a majority of the votes in any district.<sup>31</sup> District drawers wishing to achieve partisan gerrymandering will often employ both of these techniques to achieve their aims.<sup>32</sup>

Partisan gerrymandering often leads to litigation because it undermines the notion of equality amongst voters.<sup>33</sup> In the United States, representation is divided among geographic regions, with elections in

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24. Christopher M. Burke, *THE APPEARANCE OF EQUALITY: RACIAL GERRYMANDERING, REDISTRICTING, AND THE SUPREME COURT* 60 (1999); *Reynolds*, 377 U.S. at 560.

25. *See Reynolds*, 377 U.S. at 567.

26. Ethan Weiss, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 697 (2013).

27. *Id.*

28. Charles Backstrom, et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1129 (1977-78).

29. Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 406 (1993).

30. *Id.*

31. *Id.*

32. *Id.*

33. *See supra* notes 5-11 and accompanying text.

these geographic regions typically based on a winner-take-all system.<sup>34</sup> Thus, if partisan gerrymandering occurred in the drawing of district lines, then a party can exploit the winner-take-all system to achieve a majority of votes in each district, while still representing a minority of the popular vote.<sup>35</sup> This outcome is problematic for members of a political group that fall victim to partisan gerrymandering, who attempt to bring claims based on this disadvantage. Unfortunately, the history of these claims in the Court has resulted in a string of plurality opinions that articulated confused and divided views of the issue.

### 3. Troubles Adjudicating Partisan Gerrymandering

For many years after the pronouncement of *Baker*, the Court did not address the question of partisan gerrymandering, instead finding many cases that presented questions of pure partisan gerrymandering as not justiciable.<sup>36</sup> However, during this time the Court in *Gaffney v. Cummings*<sup>37</sup> noted that, even though a districting plan might be acceptable under the one person, one vote equal population distribution standards, it could still be unconstitutional because the districts were created in such a way so as to dilute the voting strength of certain racial or political groups.<sup>38</sup>

When the Court finally directly addressed the issue of partisan gerrymandering, it did so in the case of *Davis v. Bandemer*.<sup>39</sup> *Bandemer* involved claims that a 1981 state apportionment diluted votes of Indiana Democrats in violation of the Equal Protection Clause.<sup>40</sup> The district court invalidated the districting statute, finding that the plan had a discriminatory effect on Democratic voters by adversely affecting their proportional voting influence and that such a discriminatory plan could not be tolerated.<sup>41</sup> Upon review, the Supreme Court declined to say that claims based on partisan gerrymandering were never justiciable.<sup>42</sup> Instead, while justiciable under the Equal Protection Clause, such claims must, as a threshold matter, demonstrate discriminatory vote dilution in order to establish a *prima facie* case under that clause.<sup>43</sup> The Court then

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34. Weiss, *supra* note 26, at 696.

35. *See id.*

36. *Davis v. Bandemer*, 478 U.S. 109, 121 (1986).

37. 412 U.S. 735 (1973).

38. *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (quoting *Forston v. Dorsey*, 379 U.S. 433, 439 (1965)).

39. 478 U.S. 109 (1986).

40. *Id.* at 113.

41. *Id.* at 117.

42. *Id.* at 113, 124.

43. *Id.* at 143.

reversed the district court ruling, finding that the showing of an adverse effect in *Bandemer* did not meet the threshold requirement for establishing a prima facie case.<sup>44</sup>

However, eighteen years later, the Court changed course on this issue in *Vieth v. Jubelirer*.<sup>45</sup> In *Vieth*, a four-justice plurality, led by Justice Scalia, announced that the issue of partisan gerrymandering was in fact not justiciable, and that *Bandemer* was wrongly decided.<sup>46</sup> The Court criticized the ruling enunciated by the plurality in *Bandemer* on the grounds that it had only lead to years of confusion in lower courts, and that it presented a judicially unmanageable standard.<sup>47</sup> Justice Kennedy provided the needed fifth vote to create a majority in *Vieth*, but not because he believed partisan gerrymanders to be non-justiciable (like the plurality) but because he did not believe a manageable standard had been present in *Vieth*.<sup>48</sup> Kennedy noted the unfairness of categorically deciding that partisan gerrymandering cases cannot be heard, while still addressing other types of apportionment cases.<sup>49</sup> He concluded that because “no such standard [had] emerged in [*Vieth*] should not be taken to prove that none will emerge in the future.”<sup>50</sup>

Only two months after *Vieth* was decided in 2004, the Supreme Court decided *Cox. v. Larios*<sup>51</sup> in 2005 and then *League of United Latin American Citizens (LULAC) v. Perry*<sup>52</sup> in 2006. The collective effect of the decisions in these cases only muddied the waters further regarding partisan gerrymandering. In *Cox*, the Court affirmed a Georgia district court’s ruling that the legislative apportionment plan for both the Georgia’s House of Representatives and Senate violated the one person, one vote principle.<sup>53</sup> However, Stevens, in his concurrence, emphasized the notion that the present lack of judicially manageable standards to address the issue of partisan gerrymandering did not “justify a refusal ‘to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.’”<sup>54</sup>

In *LULAC*, claims were brought forth alleging that the Texas mid-decennial redistricting plan constituted a partisan gerrymander as well as

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44. *Id.* at 113, 143.

45. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

46. *Id.* at 281.

47. *Id.* at 281-83.

48. *Id.* at 310.

49. *Id.*

50. *Id.* at 311.

51. 542 U.S. 947 (2004).

52. 548 U.S. 399 (2006).

53. *Cox*, 542 U.S. at 947.

54. *Id.* at 950-51 (J. Stevens, concurring (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 341 (2004))).

a violation the protections of the Voting Rights Act of 1965.<sup>55</sup> In regard to the partisan gerrymandering claim, the appellants argued that the mid-decennial redistricting plan enacted by the Texas legislature was only motivated by partisan objectives, violating the Equal Protection Clause and the First Amendment.<sup>56</sup> The Court produced yet another confusing discussion on partisan gerrymandering. Justice Stevens dissented and suggested a new approach for managing partisan gerrymandering, while Ginsburg and Breyer continued to assert that such claims were justiciable.<sup>57</sup>

Thus, while the Supreme Court has attempted to stay out of fights regarding partisan gerrymandering claims, “[t]he Justices have maintained they have authority over these matters, but have failed to establish a simple standard analogous to one person, one vote that would clear up the controversies.”<sup>58</sup> Rather than clarifying the issue of partisan gerrymandering, the Court’s recent jurisprudence on the issue since *Bandemer* has only created confusion. With no clear statement on the issue, due to the Court’s ability to produce only a string of plurality opinions on the matter, lower courts were left to question what standards should be applied.

### *B. The Case of Whitford v. Gill*<sup>59</sup>

#### 1. Voting and Apportionment in Wisconsin

In the state of Wisconsin, voting districts are apportioned by the legislature after each decennial census.<sup>60</sup> From about 1980 until 2010, reapportionment in Wisconsin was marked by periodic court intervention and court-implemented districting plans.<sup>61</sup> However, in 2010 Wisconsin Republicans controlled both bodies of the Wisconsin legislature and the governorship, leading them to believe that a new legislatively enacted redistricting plan was possible.<sup>62</sup>

The Republican leaders in the legislature appointed staff to work on this new apportionment plan with local attorneys and Professor Michael Keith Gaddie from the University of Oklahoma.<sup>63</sup> Using redistricting

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55. *League of United Latin American Citizens*, 548 U.S. at 408.

56. *Id.* at 416-17.

57. *See Weiss*, *supra* note 26, at 705.

58. *Ansolabehere*, *supra* note 17, at 247.

59. 218 F. Supp. 3d 837 (W.D. Wis. 2016).

60. *Id.* at 844.

61. *Id.* at 845-46.

62. *Id.* at 846.

63. *Id.* at 846-47.

software and the help of Professor Gaddie, a new district map was created, the “Team Map.”<sup>64</sup> Professor Gaddie’s analysis of the Team Map revealed that under this plan, Republicans would maintain majority control of Wisconsin in any possible voting scenario.<sup>65</sup> This plan was subsequently introduced as a bill and was passed by the Senate and Assembly and signed into law by the Governor as Wisconsin Act 43.<sup>66</sup>

## 2. The Claim Against Act 43

The plaintiffs in *Whitford* resided in various counties throughout Wisconsin, all of them supporters of the Democratic Party in Wisconsin, as well as almost always voting for Democratic candidates during elections.<sup>67</sup> The defendants were all members of the Wisconsin Election Committee.<sup>68</sup>

The plaintiffs claimed that Act 43 violated their First and Fourteenth Amendment rights because Act 43 discriminated against Democratic voters by diluting their votes as compared with Republican voters.<sup>69</sup> In evaluating the validity of the plaintiffs’ claim, the court engaged in a detailed analysis of case law addressing both malapportionment and partisan gerrymandering claims.<sup>70</sup> The court concluded that, while still developing and in a state of flux, the case law did reveal that the First Amendment and the Equal Protection Clause protected a citizen from discrimination in regard to the weight of the vote based on the citizen’s political preferences.<sup>71</sup>

The district court then stated, “the First Amendment and the Equal Protection Clause prohibit a redistricting scheme which (1) 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.”<sup>72</sup> The court then applied this standard to the facts of the case.

## 3. Discriminatory Intent or Purpose in Redistricting

The first prong of the test, as announced in *Whitford*, requires that there be a showing that discriminatory intent or purpose motivated the

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64. *Id.* at 851.

65. *Id.* at 852.

66. *Id.* at 853.

67. *Id.* at 853-54.

68. *Id.*

69. *Id.* at 863.

70. *Id.* at 864-83.

71. *Id.* at 883-84.

72. *Id.*

redistricting plan in question.<sup>73</sup> At the same time the court in *Whitford* recognized that some partisanship was permissible in the drawing of district lines but analyzed when the influence of this partisanship crossed from acceptable into excessive and discriminatory.<sup>74</sup>

The defendants argued that because Act 43 complied with traditional principles of apportionment that there was no discriminatory intent as a matter of law.<sup>75</sup> The court rejected this assertion and instead focused on the events leading up to the enactment of Act 43 for indications that the drafters had employed impermissible discriminatory intent when creating the new districting map.<sup>76</sup> Evidence from the trial indicated that the drafters worked with Professor Gaddie and his regression models in order to generate a map that would ensure Republican Party control of the state legislature for the next decennial period.<sup>77</sup> The court rejected the defendants' claims that the evidence was inadequate to establish discriminatory intent,<sup>78</sup> and instead found that the focal point of the drafters, when creating the new districting map, was to ensure Republican control in the legislature.<sup>79</sup> The court then concluded that Act 43 "had as one of its objectives entrenching the Republicans' control of the Assembly."<sup>80</sup>

#### 4. Discriminatory Effect of the Redistricting

The court found that the discriminatory effect of Act 43's apportionment was evidenced through the election results of the Wisconsin elections of 2012 and 2014.<sup>81</sup> In the 2012 election, the Republicans won sixty seats in the Assembly, but only 48.6 percent of the statewide vote; and in the 2014 election they won sixty-three seats with 52 percent of the vote.<sup>82</sup> Moreover, in the 2012 election, Democrats won 51.4 percent of the statewide vote while only winning thirty-nine Assembly seats; and in 2014, they won forty-eight percent of the vote, which garnered them just thirty-six seats.<sup>83</sup>

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73. *Id.* at 884-85.

74. *Id.* at 885-87.

75. *Id.* at 887.

76. *Id.* at 890.

77. *Id.* at 891.

78. The defendants alleged that the evidence was inadequate because (1) there were errors in the models making them unreliable, (2) the models were merely analysis of the averages of past elections applied to new districts, and (3) that the partisan intent in this case was not invidious because the districts complied with traditional districting principles. *Id.* at 895-897.

79. *Id.* at 897-98.

80. *Id.*

81. *Id.*

82. *Id.* at 898-99.

83. *Id.* at 901.

The court also found the plaintiffs' use of the efficiency gap ("EG") as intriguing evidence that the Democrat's voting rights were burdened under Act 43.<sup>84</sup> The plaintiffs demonstrated at trial that, based on the EG, the Republican Party won thirteen and ten Assembly seats in excess of what they likely would have won based on the percentage of the vote garnered in the 2012 and 2014 elections, respectively.<sup>85</sup> The court concluded that the plaintiffs established that Act 43 burdened Democratic voters for two election cycles by impeding their ability to translate votes into seats.<sup>86</sup>

### 5. Justification

Finally, under the third prong, the court evaluated whether the partisan effects of Act 43 were justified under "legitimate state prerogatives and neutral factors that are implicated in the districting process."<sup>87</sup> To this end, the defendants established that Wisconsin's geography did give the Republican party a natural, but slight, advantage in districting, as Democratic voters were concentrated in mostly urban areas.<sup>88</sup> However, the court rejected the defendants' explanation as an adequate justification for the partisan effect produced by Act 43.<sup>89</sup> The court noted that the plan's drafters generated multiple district reports that met legitimate districting criteria and did not create the same partisan advantage as the map that ultimately became Act 43.<sup>90</sup> Based on this evidence, the court concluded that the burden for Democratic voters created by Act 43 was not justifiable under the circumstances.<sup>91</sup>

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84. The EG measures the amount of "packing" and "cracking" of a given party's voters in any a district. It compares the number of "wasted votes" for each party by looking at the number of votes cast for a losing candidate in each district and the number of votes cast for the winning candidate in each district over the fifty percent needed to win. The EG is the difference between the number of "wasted" votes for each party divided by the overall all number of votes cast in the election. Therefore, the more favorable a party's EG is the less votes that party "wasted" in the election, meaning fewer votes were cast in excess of what was needed to win a district. Thus, the votes were used more efficiently by one party and allowed that party greater ease in translating votes cast into legislative seats. *Id.* at 903-04; see also Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

85. *Whitford*, 218 F. Supp. 3d at 905-06.

86. *Id.* at 910.

87. *Id.* at 911.

88. *Id.* at 911-19.

89. *Id.* at 926-27.

90. *Id.* at 923-24.

91. *Id.*

### 6. Outcome and Remedies of *Whitford*

The court deferred on granting remedies, and instead ordered briefings on the appropriate remedy and evidence thereof.<sup>92</sup> After receiving and reviewing the parties' responses to this order, the court then made a ruling on the appropriate remedy for the case.<sup>93</sup> While both parties agreed that an injunction against further use of Act 43 districting was appropriate, they disagreed as to who would redraw the district map.<sup>94</sup> The plaintiffs urged the court to redistrict in this case; however, the court deferred to the legislature to redistrict the map.<sup>95</sup> Balancing the harm already suffered by the people of Wisconsin under this apportionment plan with the defendants' right to appeal before the Supreme Court, the district court set November 1, 2017, as the date for enactment of a contingent replacement districting plan.<sup>96</sup> Finally, based on considerations of harm to the plaintiffs and the defendants, the court declined to stay its judgment pending appeal of the case to the Supreme Court.<sup>97</sup>

### III. DISCUSSION

With the *Whitford* standard now established in Wisconsin, the next stop for the parties will be the Supreme Court.<sup>98</sup> However, with the general sense of confusion surrounding the Court's jurisprudence on partisan gerrymandering, the outcome of any such appeal is uncertain. Therefore, the object of this section will be to evaluate how the test articulated in *Whitford* presents a manageable standard that the Court should adopt to adjudicate claims of partisan gerrymandering. Therefore, subsection (a) first addresses the importance of adjudicating partisan gerrymandering claims; and subsection (b) discusses some important factors to have in a judicially manageable standard for adjudicating partisan gerrymanders claims and why the *Whitford* test presents a standard that the Court should adopt.

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92. *Id.* at 930.

93. *Whitford v. Gill*, 15-cv-421-bbc 2017 U.S. Dist. Lexis 11380, at \*2 (W.D. Wis. 2017).

94. *Whitford v. Gill*, No. 15-cv-421-bbc, 2017 U.S. Dist. Lexis 11380, at \*1 (W.D. Wis. Jan. 27, 2017).

95. *Id.* at \*1-4.

96. *Id.* at \*6.

97. *Id.* at \*5-6.

98. *Gill v. Whitford*, No. 16-1161, 2017 U.S. S.Ct. Briefs Lexis 1111 (2017); District courts of three judges are required to be convened when challenges are made to the constitutionality of apportionment of either congressional districts or statewide legislative bodies. 28 U.S.C. § 2284 (1984). Decisions from a three-judge district court decision are appealable directly to the Supreme Court. 28 U.S.C. § 1253 (1948).

A. *The Dangers of Continued Inaction and Confusion*

Critics argue that the problem of partisan gerrymandering is not likely to self-perpetuate and, therefore, the lack of judicially manageable standards is unproblematic.<sup>99</sup> Difficulties such as achieving and maintaining control of both state congressional bodies and the governorship, as well as shifting demographics and risk-avoidance of legislators are arguable checks on partisan gerrymandering.<sup>100</sup> However, the continuous litigation in this area points to a different conclusion, one in which the problems of partisan gerrymandering will continue to affect electoral processes, and the continued presence of partisan gerrymandering in our electoral system should not be confused with normalcy or benignity.

1. Partisan Gerrymandering Is a Continuous Harm to the Democratic Process

The Court's continuous schism over issues of partisan gerrymandering likely allows the practice to flourish and continue indefinitely as it remains unchecked. The Court's inability to address the issue of partisan gerrymandering has sent the message that "as long as a plan was based on 'political behavior,' virtually anything was constitutionally permissible."<sup>101</sup> This is because cases have demonstrated that such gerrymanders can be perpetrated in districting with no threat of invalidation by the Court.<sup>102</sup>

This trend is particularly troublesome when considering that elected officials are meant to be the representatives of the people, and that "[g]errymandered districts create less responsive members of Congress."<sup>103</sup> Partisan gerrymandering gives elected officials little incentive to work towards majority values or work with other members of the legislature, because reelection is assured due to the district gerrymandering protecting them.<sup>104</sup> This situation also exacerbates the evermore-polarized ideological positions of representatives who need not compete to maintain their seats, and it reduces the incentive to

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99. Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV. 1, 65-66 (1985).

100. *See Id.*

101. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and other reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 253 (2009).

102. *See supra* notes 29-48 and accompanying text.

103. Joshua Butera, *Partisan Gerrymandering and Qualifications Clause*, 95 B.U. L. REV. 303, 310 (2015).

104. *Id.*

compromise with other political viewpoints.<sup>105</sup> Moreover, partisan gerrymandering leads to “the loss of democratic legitimacy that presumably follows from free and fair elections because people feel their votes no longer effect the outcomes of elections.”<sup>106</sup>

## 2. Technological Advancements Continue to Enable Partisan Gerrymandering

The continuing development of technologies such as computers may greatly facilitate the ability of political parties to conduct partisan gerrymandering for their benefit. For example, sophisticated computer software was heavily employed in *Whitford* in the drafting of the district maps.<sup>107</sup> In the past, the use of computers in partisan gerrymandering was dismissed as simply “exaggerated fears of what unscrupulous politicians can do with powerful computers.”<sup>108</sup> Even the dissent in *Whitford* argued that “[t]he idea of some kind of high-tech stealth gerrymander is nothing more than a bugaboo.”<sup>109</sup>

However, *Whitford* demonstrates that such technologies can present particularly invidious partisan gerrymandering because they allow for the creation of gerrymandered districts that still conform to traditional criteria that typically indicates the presence of permissible voting districts.<sup>110</sup> Even the popular media has commented on the pervasive use of computers in creating very effective partisan gerrymandering and the lasting effects of such practices.<sup>111</sup>

### *B. What a Judicially Manageable Standard Should Look Like: Indicia from the Court*

Over the years, various members of the Court have tried to articulate what a judicially manageable standard for partisan gerrymandering should look like. This section compiles some of the salient concerns that emerged over the course of the Court’s thirty-year struggle with partisan gerrymandering since *Bandemer*. These factors will then be measured

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105. *Id.* at 310-11.

106. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 611 (2002-2003).

107. *See supra* notes 52-56 and accompanying text.

108. Lowenstein, *supra* note 99, at 67.

109. *Whitford v. Gill*, 218 F. Supp. 3d 837, 943 (W.D. Wis. 2016).

110. *Supra* note 66-68 and accompanying text.

111. Bernard Grofman, *The Supreme Court Will Examine Partisan Gerrymandering in 2017*, WASH. POST, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/31/the-supreme-court-will-examine-partisan-gerrymandering-in-2017-that-could-change-the-voting-map/?utm\\_term=.5c05b11a132e](https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/31/the-supreme-court-will-examine-partisan-gerrymandering-in-2017-that-could-change-the-voting-map/?utm_term=.5c05b11a132e), (last visited Feb. 26, 2017).

against the actions of the district court in *Whitford*. This section articulates why *Whitford* represents a desirable combination of previously articulated standards for measuring partisan gerrymanders, but also addresses the issue of how the Court should deal with the influence of technology in the area of partisan gerrymandering. Part (i) of this section walks through how *Whitford* compares with the Court's previous articulation for partisan gerrymandering standards, and part (ii) addresses some of the advantages that *Whitford* brings to bear in its test for partisan gerrymandering regarding technology.

### 1. Partisan Gerrymandering Standards as Compared to *Whitford*

#### *a. Looking to the First Amendment in Addition to Equal Protection Clause for Support*

An alternative basis for approaching partisan gerrymandering claims has been to evaluate such claims under the First Amendment.<sup>112</sup> Justice Stevens articulated this in both *Vieth* and *LULAC*. In his dissent in *Vieth*, Stevens suggested that the plurality erred when it said that strict scrutiny should never be applied when evaluating a claim of partisan gerrymandering, and instead noted that political association can be subject to strict scrutiny on First Amendment grounds.<sup>113</sup> For Stevens, “political belief and association constitute the core of those activities protected by the First Amendment.”<sup>114</sup> Stevens reiterated this claim in *LULAC*, noting that the protections of both the Equal Protection Clause of the Fourteenth Amendment and the freedom of political belief and association guaranteed by the First Amendment “reflect the fundamental duty of the sovereign to govern impartially.”<sup>115</sup>

While criticisms have been levied against a First Amendment approach<sup>116</sup> support also arises for the approach because of its preference for a “commitment to neutrality as embodied in the content-based viewpoint discrimination analysis.”<sup>117</sup> Moreover, as the Court has expressed such an approach, “[a]t worst would produce results no worse than presently yielded with Equal Protection Clause and at best it would

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112. “Congress shall make no law . . . abridging the freedom of speech . . . or the right of people to peacefully assemble.” U.S. CONST. amend. I.

113. *Vieth v. Jublirer*, 541 U.S. 267, 324 (2004) (Stevens, J., dissenting).

114. *Id.* at 324 (quoting *Elrod v. Burns*, 427 U.S. 347, 356 (1976)).

115. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 462 (2006) (Stevens, J., concurring in part and dissenting in part).

116. David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 22-26 (2007) (surveying various critical responses to the suggestion that the First Amendment could be used as a supportive basis for partisan gerrymander claims).

117. *Id.* at 53.

resolve a vexing problem that the Court has sought to resolve since *Bandemer*.<sup>118</sup>

The plaintiffs in *Whitford* brought their partisan gerrymandering claim, not only under the guarantee of equal protection of the Fourteenth Amendment, but also under claims that Act 43 burdened their rights under the First Amendment.<sup>119</sup> The plaintiffs claimed that the unconstitutional partisan gerrymandering “unreasonably [burdened] their First Amendment rights of association and free speech.”<sup>120</sup>

Bringing partisan gerrymandering claims under the First Amendment, allows the Court to apply a strict scrutiny analysis because of the protections granted for view-point based discrimination.<sup>121</sup> Partisan claims brought under First Amendment grounds may be more apt to receive a strict scrutiny review and, thus, more protection.

The First Amendment basis in *Whitford* also addresses one of the complaints of Judge Griesbach’s dissent in *Whitford*. The dissent took issue with the fact that the partisan gerrymandering in *Whitford* did not “entrench” the Republican Party, a typical indicator of possible partisan gerrymandering for the Supreme Court in the past and also an indicator of gerrymandering that violates the protections of the Equal Protection Clause.<sup>122</sup> Traditionally, the Court considered entrenchment to be when a party with only a minority of voter support committed gerrymandering in a way so as to maintain control of a legislature.<sup>123</sup> Thus, the Court looked for the situation in which “a majority of voters in a state are consistently deprived of the opportunity to control a branch of government.”<sup>124</sup> Therefore, under a First Amendment claim the presence of entrenchment may not be necessary to support a finding of partisan gerrymandering.

*b. Partisan Gerrymandering Should be Examined at the District Court Level*

In *Vieth*, Justice Stevens argued that cases for partisan gerrymandering should be examined at the district court level and on a district-by-district basis.<sup>125</sup> Stevens favored a district-by-district approach because he believed the harm of gerrymandering to be more

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118. *Id.* at 26.

119. *Whitford v. Gill*, 218 F. Supp. 3d 837, 855 (W.D. Wis. 2016).

120. *Id.*

121. *Supra* notes 112-118 and accompanying text.

122. *See Whitford*, 218 F. Supp. 3d at 937-38.

123. *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006).

124. *Whitford*, 218 F. Supp. 3d at 937.

125. *Vieth*, 541 U.S. 267 at 328-29. (Stevens, J., dissenting).

cognizable when affecting members of a specific district.<sup>126</sup> Stevens asserted, “the injury is only cognizable when stated by voters who reside in that particular district, otherwise the ‘plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.’”<sup>127</sup>

The dissent in *Whitford* seized upon the fact that, at the district court level, the plaintiffs could not point to individual district gerrymandering, but instead relied on data from the entire state to make their case.<sup>128</sup> The dissent found this lack of gerrymandering in districts to be an important factor for denying the plaintiffs’ claims.<sup>129</sup> However, the Court’s past reliance on irregularly shaped districts or the offending of traditional districting criteria can no longer be the sole criteria for evaluating such claims. Simply put, “the commonly held view that reliance on formal criteria such as compactness or equal population can prevent gerrymandering is simply wrong.”<sup>130</sup>

Part of the reason the gerrymandering in *Whitford* was so invidious is because the drafters went to such great lengths using computers to purposefully draw districts that would not raise any red flags but that would still achieve maximum Republican Party control in the legislature of Wisconsin. As one scholar noted, “[g]errymandering may take place even though districts are perfectly regular in appearance.”<sup>131</sup> As technology improves, so must the standards used to evaluate partisan gerrymandering claims, as this problem will likely only become worse, especially if the Court cannot articulate a standard for how to deal with partisan gerrymandering. Therefore, looking to individual districts as indicators of gerrymandering may be insufficient and partisan gerrymandering will be better evaluated in the full context of the history of the districting plan, as was the case in *Whitford*.

*c. Partisan Gerrymandering Claims Should Demonstrate a Discriminatory Intent or Purpose on the Part of the Drafters*

The justices have articulated one common theme: the need for plaintiffs to demonstrate that the intent or purpose of the challenged redistricting plan was for a discriminatory purpose.<sup>132</sup> A showing of

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126. *Id.* at 330-31.

127. *Id.* at 330.

128. *Whitford*, 218 F. Supp. 3d at 939-40.

129. *See id.*

130. Bernad Grofman, *Criteria for Districting a Social Science Perspective*, 33 UCLA L. REV. 77, 88 (1985-1986).

131. *Id.* at 91.

132. *Vieth v. Jublirer*, 541 U.S. 267, 333-36 (2004) (Stevens, J., dissenting); *Id.* at 346 (Souter, J., dissenting); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 475, 76 (2006) (Stevens,

discriminatory intent or purpose has always been important to the Court as proper means to demarcate the line between permissible and impermissible partisan favoritism.<sup>133</sup> In his concurrence in *LULAC*, Stevens attempted to clarify this intent standard from *Vieth* to a predominant purpose standard in *LULAC*;<sup>134</sup> specifically, he wrote, “when a plaintiff can prove that a legislature’s predominant motive in drawing a particular district was to disadvantage a politically salient group, and that the decision has the intended effect, the plaintiff’s constitutional rights have been violated.”<sup>135</sup>

Additionally, in *Vieth*, Souter articulated a five-part test of which the first four factors established evidence of intent of the party conducting the partisan gerrymandering.<sup>136</sup> The first four parts of this test would require a plaintiff to demonstrate he or she was a member of a politically cohesive group; that the district of which he was a member disregarded traditional districting criteria (contiguity, compactness, conformity with geographic features, and respect for political subdivisions); and that there was a specific correlation between the deviations from traditional districting criteria and the distribution of the population of this group. Once demonstrating those three requirements, the plaintiff would then need to present the Court with a hypothetical district of which his residence was a part that adhered to the traditional districting principles.<sup>137</sup> Finally, the fifth part of the test would require that the plaintiff demonstrate that “the defendants acted intentionally to manipulate the shape of the district in order to pack or crack [the plaintiff’s] group.”<sup>138</sup> Though as one criticism points out these factors fail to pinpoint what type of harm they are meant to detect.<sup>139</sup> The main takeaway here is that the element of discriminatory intent should be a part of any standard meant to manage the problem of partisan gerrymandering.

The three-part test presented in *Whitford* incorporates a consideration for discriminatory intent or purpose. The proof of discriminatory intent in *Whitford* was especially important as the defendants claimed that such intent did not matter if the districts still adhered to traditional districting principles, as they did under Act 43.<sup>140</sup> The district court noted that

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J., concurring in part and dissenting in part).

133. See *Whitford v. Gill*, 218 F. Supp. 3d 837, 884-91 (W.D. Wis. 2016).

134. Weiss, *supra* note 26, at 714; *LULAC*, 548 U.S. at 474 (Stevens, J., concurring in part and dissenting in part).

135. *LULAC*, 548 U.S. at 474 (Stevens, J., concurring in part and dissenting in part).

136. *Vieth*, 541 U.S. 267 at 346-48 (Souter, J., dissenting).

137. *Id.* at 346-50.

138. *Id.* at 350.

139. Weiss, *supra* note 26, at 715.

140. *Whitford v. Gill*, 218 F. Supp. 3d 837, 888 (W.D. Wis. 2016).

simple reliance on traditional districting principles was insufficient when evaluating discriminatory intent.<sup>141</sup> Instead, the court in *Whitford* focused on the mapmakers' intent to create a map that entrenched Republican Party control by drawing the districting map in such a way that ensured continued Republican control of the Wisconsin legislature.<sup>142</sup> Even the dissent in *Whitford* admitted that “[i]t is almost beyond question that the Republican staff members who drew the Act 43 maps intended to benefit Republican candidates.”<sup>143</sup> The discriminatory intent in *Whitford* was most certainly demonstrated by the plaintiffs' evidence, under the circumstances presented in which sophisticated software was used to draw the districts; and it was more appropriate than relying on traditional districting principles, as the test Souter articulated in *Vieth* would require.<sup>144</sup>

*d. Judicially Manageable Standards Should Measure a Discriminatory Effect or Burden*

A showing of discriminatory effect or burden placed on the plaintiff bringing a partisan gerrymandering claim has also been a salient feature of proposed standards for partisan gerrymandering articulated by the Court. For example, in *LULAC*, Justice Stevens proposed that to establish the effects of partisan gerrymandering the plaintiff would need to demonstrate three factors being met:<sup>145</sup> (1) the plaintiff's candidate would have won the election under the previous districting plan; (2) the plaintiff's residence is now in a district that is a “safe seat” for the other party's member; and (3) the new district is less compact than the previous one.<sup>146</sup>

The second factor of the test applied in *Whitford* went to the issue of discriminatory effects of Act 43. An important factor in evaluating discriminatory effect for the court in *Whitford* was that two elections had taken place since the districts in Act 43 were put in place.<sup>147</sup> In both the 2012 and 2014 elections, Democrats garnered a much higher percentage of the vote as compared to the seats that they actually won based on that voting percentage.<sup>148</sup> As Justice Kennedy articulated in *LULAC*, a districting plan “that more closely reflects the distribution of

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141. *Id.* at 888-89.

142. *See id.* at 894-96.

143. *Id.* at 934.

144. *Supra* notes 136-139 and accompanying text.

145. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 476 (2006) (Stevens, J., concurring in part and dissenting in part).

146. *Id.*

147. *Whitford*, 218 F. Supp. 3d at 902.

148. *Supra* notes 73-77 and accompanying text.

state party power seems a less likely vehicle for partisan discrimination.”<sup>149</sup> The court in *Whitford* correctly observed that the strong deviation from the statewide distribution of power demonstrated the opposite to be true and that Act 43 was a vehicle for partisan gerrymandering.<sup>150</sup>

Moreover, the district court also emphasized that, because the election results were present in this case, the issue of basing the discriminatory effect on hypotheticals was not present, which had troubled members of the Court in the past.<sup>151</sup> Finally, use of EG by the plaintiffs as a significant factor to support the claim that their representational rights were burdened under Act 43 also demonstrated a significant and reliable measure for effect not previously employed in such claims.<sup>152</sup>

*e. Inclusion of the Efficiency Gap versus the Symmetry Standard*

In the past, the Court hinted that a symmetry standard might be acceptable for measuring partisan gerrymandering.<sup>153</sup> The symmetry standard measures partisan bias, and requires that similarly situated political parties be treated the same by the electoral system.<sup>154</sup> This standard is satisfied when “a district plan does not discriminate between the parties with respect to the conversion of votes to seats and vice versa.”<sup>155</sup>

In *LULAC*, members of the Court expressed interest in the idea of a symmetry standard.<sup>156</sup> Justice Stevens was enthusiastic in his support of the symmetry standard<sup>157</sup> and Justice Souter also indicated that the standard bore some usefulness and that further exploration was warranted.<sup>158</sup> Additionally, Justice Kennedy, though with a few reservations, also showed openness to partisan symmetry as a measure of partisan gerrymandering.<sup>159</sup> However, after *LULAC*, the symmetry standard was not asserted for partisan gerrymandering claims, despite the Court’s seeming receptiveness to such a standard.<sup>160</sup>

The plaintiffs in *Whitford* did not rely on a symmetry standard, but

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149. *LULAC*, 548 U.S. at 419.

150. *Whitford*, 218 F. Supp. 3d at 902.

151. *Id.* at 903.

152. *Supra* notes 75-77 and accompanying text; *Whitford*, 218 F. Supp. 3d at 903.

153. *See generally LULAC*, 548 U.S. at 419-20.

154. *Id.* at 466 (J. Stevens concurring in part and dissenting in part).

155. Stephanopoulos, *supra* note 85, at 843.

156. *Id.* at 842.

157. *LULAC*, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part).

158. *Id.* at 483-84 (Souter, J., concurring in part and dissenting in part).

159. Stephanopoulos, *supra* note 84, at 844-45.

160. *Id.* at 846.

instead on the EG as an indicator of partisan gerrymandering.<sup>161</sup> While the Supreme Court has expressed interest in the symmetry standard,<sup>162</sup> the EG is superior to the symmetry standard as a measure of partisan gerrymandering.<sup>163</sup> Instead of requiring hypothetical election results, the EG uses actual election results to calculate wasted votes.<sup>164</sup> Proponents of the EG argue that “[t]he efficiency gap provides exactly what litigants and courts have long been missing: a reliable assessment of plans’ partisan implications.”<sup>165</sup> Thus, the EG fixes the exact apprehension expressed by Kennedy in *LULAC* as to the adoption of a partisan symmetry standard; the danger of relying on hypothetical results to determine if district gerrymandering took place.<sup>166</sup>

## 2. Why Traditional Tests for Partisan Gerrymandering May No Longer Be Functional: Addressing the Pervasive Use of Technology in Partisan Gerrymandering

Another advantage of the *Whitford* test is that it addresses the issue of technology, specifically computers and computer software in the drawing of redistricting maps. As previously mentioned, the defendants in *Whitford* worked extensively with computer software and computer generated models to create not only the most advantageous map, but one that would also not offend traditionally acceptable districting criteria.<sup>167</sup> One problem that the dissent in *Whitford* pointed out to the majority opinion was that the plaintiffs failed to demonstrate how any of the district lines created under Act 43 offended traditional redistricting principles, such as compactness, continuity, and respect for political boundaries.<sup>168</sup> In fact, this was a defense that the defendants presented for Act 43, “a redistricting plan that ‘is consistent with, and not a radical departure from, prior plans with respect to traditional districting principles’ cannot as a matter of law, evince an unconstitutional intent.”<sup>169</sup>

However, the dissent in *Whitford* missed the important point that part of the drafters’ intent behind Act 43 was specifically to avoid offending traditional principles of districting and yet to enact a districting scheme that would ensure the Republicans won any possible election scenario in

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161. *Whitford*, 218 F. Supp. 3d at 903.

162. See *supra* notes 155-156 and accompanying text.

163. Stephanopoulos, *supra* note 84, at 896.

164. *Id.*

165. *Id.* at 868.

166. *Id.* at 896-97.

167. *Supra* notes 53-57 and accompanying text; *supra* notes 69-74 and accompanying text.

168. *Whitford v. Gill*, 218 F. Supp. 3d 837, 940 (W.D. Wis. 2016).

169. *Id.* at 888.

the state.<sup>170</sup> A takeaway from *Whitford* is that, in the computer age, traditional districting criteria may be insufficient to identify when discriminatory gerrymandering has taken place. Therefore, while traditional indicators of permissible districts should not be disregarded, physical indicators of gerrymandering can no longer be solely relied upon as indicators of an intent to create partisan gerrymandering.

#### IV. CONCLUSION

Claims of partisan gerrymandering are unlikely to disappear on their own and courts will likely continue to attempt resolution of such claims. Finding a manageable standard is essential for the Court to deal with these claims and the Court must deal with these claims. A continued failure to articulate what is permissible in this area will allow further exploitation of the Court's contradicting articulations. Continued inaction undermines the power of voters and the legitimacy of the electoral system. As one news report noted, the real rigged voting system is gerrymandering.<sup>171</sup>

The *Whitford* test presents a workable standard for which the Court has been searching, and it even offers more. *Whitford* also addresses the issue of computer districting and the failures of traditional districting criteria, and it presents a standard for districting in the twenty-first century that the Court can manage.

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170. *Supra* notes 53-57 and accompanying text.

171. Despite tremendous dissatisfaction which Congress, ninety-seven percent of incumbents were reelected to the House of Representative in the 2016 election, which critics cite as the results of systematic gerrymandering. Sarah McCammon, *Redistricting Reform Advocates Say the Real 'Rigged System' is Gerrymandering*, NPR, [http://www.npr.org/2017/03/18/520551499/redistricting-reform-advocates-say-the-real-rigged-system-is-gerrymandering?utm\\_source=npr\\_newsletter&utm\\_medium=email&utm\\_content=20170318&utm\\_campaign=npr\\_email\\_a\\_friend&utm\\_term=storyshare](http://www.npr.org/2017/03/18/520551499/redistricting-reform-advocates-say-the-real-rigged-system-is-gerrymandering?utm_source=npr_newsletter&utm_medium=email&utm_content=20170318&utm_campaign=npr_email_a_friend&utm_term=storyshare) (Mar. 18, 2017, 6:00 PM).