

STATE COURT LITIGATION: THE NEW FRONT IN THE WAR AGAINST PARTISAN GERRYMANDERING

Charlie Stewart*

INTRODUCTION

Partisan gerrymandering is the process of drafting state and congressional districts in a manner that gives one political party an advantage over another.¹ The end goal is simple: help your party win more seats or protect existing ones.² The tactic is as old as the United States.³ In 1788, Patrick Henry convinced the Virginia state legislature to draw the 5th Congressional District to pit his rival James Madison against James Monroe.⁴ The term “gerrymander” itself is a hybrid: in 1810, democratic Governor *Gerry* signed a partisan redistricting plan into law—one that contained a district that infamously looked like a *salamander*.⁵

The opposition Federalist party and the press seized on the oddly shaped district and Governor Gerry was defeated in 1812, although the Democrats ultimately retained control of the state legislature.⁶ Despite governor Gerry’s

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1. Christopher Ingraham, *This is the Best Explanation of Gerrymandering You Will Ever See*, WASH. POST: WONKBLOG (Mar. 1, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/01/this-is-the-best-explanation-of-gerrymandering-you-will-ever-see/?utm_term=.fb58852415ca [https://perma.cc/T2J8-F7AY].

2. Andrew Prokop, *Gerrymandering, Explained: What is Gerrymandering?*, VOX.COM (May 15, 2015, 2:57 PM), <https://www.vox.com/cards/gerrymandering-explained/what-is-gerrymandering> [https://perma.cc/AR8P-YE4S].

3. Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <https://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/> [https://perma.cc/6YSP-8JTP].

4. *Id.*

5. Prokop, *supra* note 2.

6. *Id.* Although the Federalists won an overwhelming majority of the popular vote in the next election and took control. *Id.*

other impressive achievements (including signing the Declaration of Independence), “gerrymandering” is his enduring claim to fame.⁷

But it was not until 1842 that gerrymandering took full effect. Due to the Apportionment Act of 1842, states were *required* to apportion themselves into congressional districts based on population and number of representatives.⁸ Previously, states were permitted (and many did) elect their representatives on an at-large basis—a system that allowed the winning party in a statewide election to elect all of their representatives *without* districts.⁹ This change placed incredible importance on the redistricting process, one traditionally controlled by the state legislature.¹⁰

Through this long history of partisan gerrymandering in the United States, the Supreme Court rarely intervened.¹¹ The political nature of districting¹² and the lack of a judicially manageable solution (how much gerrymandering is *too* much?) has made the Court wary of imposing strict guidelines or overturning a map drawn by a democratically elected legislature.¹³ As long as a district conforms to a few basic criteria, it will likely survive a constitutional challenge.¹⁴ Congressional districts must be continuous (i.e. cannot be split into multiple parts), must contain around the same number of people, and must not be drawn because of racial animus (violating the Voting Rights Act). If voting maps satisfy those criteria, history tells us a partisan gerrymander will likely pass Supreme Court scrutiny.¹⁵

The most common types of partisan gerrymandering are packing and cracking.¹⁶ *Packing* is a technique to “pack” as many voters of an opposition party into as few districts as possible.¹⁷ This limits the influence of the opposition party, as many of their voters are confined to a few safe districts.¹⁸ The other party then spreads its own voters out enough to achieve a safe majority in as many districts as possible.¹⁹ By contrast, *cracking* involves breaking the supporters of a rival party into as many districts as possible.²⁰ This dilutes their voting strength and makes it easier for the party in power to

7. *Id.*

8. Barasch, *supra* note 3.

9. *Id.*

10. *See* Prokop, *supra* note 2.

11. Carrie Arnold, *The Mathematicians Who Want to Save Democracy*, SCI. AM. (June 7, 2017), <https://www.scientificamerican.com/article/the-mathematicians-who-want-to-save-democracy/> [<https://perma.cc/D94D-F5HZ>].

12. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

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

14. Arnold, *supra* note 11.

15. *See* Vieth, 541 U.S. at 267; *see also* Karcher v. Daggett, 462 U.S. 725, 740–41 (1983).

16. *See* Arnold, *supra* note 11.

17. *Id.*

18. *See id.*

19. *See id.*

20. *Id.*

remain in power.²¹ Although these techniques are almost as old as the country itself, the problem has been exacerbated by the use of computers.²² While previous gerrymanders required drawing the maps by hand, computer programs can now mathematically optimize districting maps to maximize the effects of a partisan gerrymander.²³

Parties on both sides of the political spectrum commit acts of partisan gerrymandering.²⁴ For example, Maryland, a Democratic stronghold, has one of the most gerrymandered congressional districts in the country.²⁵ Drawn by state Democrats in 2012, the map was designed to achieve two goals: eliminate the two Republican districts and ensure Democrat incumbents victory in the next five elections.²⁶ Although the end goal of incumbency protection prevented Democrats from achieving their goal of an 8–0 seat advantage, they still achieved incumbent protection and a 7–1 advantage (a pick-up of one seat from the previous map).²⁷ The resulting map contains some of the ugliest and most gerrymandered districts in America today.²⁸

For example, prior to the 2012 redistricting, Maryland's sixth congressional district contained 208,024 registered Republicans and 159,715 Democrats.²⁹ But after the 2012 redistricting plan, the sixth contained 145,620 Republicans to 192,820 Democrats.³⁰ The 10-term Republican incumbent lost by over 20% in the 2012 election.³¹ Another district, Maryland's third, is often described as a praying mantis.³²

21. *Id.*

22. *See id.*

23. *See* Nina Totenberg, *Partisan Gerrymandering: How Much Is Too Much?*, NPR (Oct. 3, 2017, 4:50 PM), <https://www.npr.org/2017/10/03/555425809/supreme-court-set-to-consider-partisan-gerrymandering> (on file with the *Michigan Law Review*).

24. Christopher Ingraham, *America's Most Gerrymandered Congressional Districts*, WASH. POST: WONKBLOG (May 15, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/?utm_term=.1cd75f04b202 [<https://perma.cc/NM2P-5YU7>]; *see also* Dave Daley, *How Democrats Gerrymandered Their Way to Victory in Maryland*, ATLANTIC (June 25, 2017), <https://www.theatlantic.com/politics/archive/2017/06/how-deep-blue-maryland-shows-redistricting-is-broken/531492/> [<https://perma.cc/S66G-5URW>]. Although it currently appears Republicans are committing the most egregious and damaging examples of partisan gerrymandering. Stephen Wolf, *No, Maryland is Not the Most Gerrymandered State, There is More to Gerrymandering than Ugly Shapes*, DAILY KOS (June 1, 2016, 10:00 AM), <https://www.dailykos.com/stories/2016/6/1/1532608/-No-Maryland-is-not-the-most-gerrymandered-state-There-is-more-to-gerrymandering-than-ugly-shapes> [<https://perma.cc/RTG9-TXWV>].

25. Ingraham, *supra* note 24; *see also* Daley, *supra* note 24. *But see* Wolf, *supra* note 24.

26. Daley, *supra* note 24. Districts are drawn every ten years. *Id.*

27. *Id.*

28. *See* Ingraham, *supra* note 24.

29. Daley, *supra* note 24.

30. *Id.*

31. *Id.*

32. Ingraham, *supra* note 24.

A myriad of challenges to partisan gerrymandering have emerged in recent years. These range from grassroots campaigns for an independent redistricting to constitutional challenges in federal court. A recent case from Pennsylvania, however, presents a new solution to this problem. The plaintiffs in *League of Women Voters of Pennsylvania v. Pennsylvania General Assembly*³³ brought a *state* constitutional challenge, instead of a federal one, thus allowing them to bypass unfavorable precedent in the federal system³⁴ and gain relief under state law³⁵ that is unreviewable by the Supreme Court.³⁶ By doing so, the plaintiffs created a new method of attack against partisan gerrymandering.

This Essay evaluates the Pennsylvania Supreme Court's decision in *League of Women Voters* and concludes it creates a new, effective front in the war against partisan gerrymandering—one that is insulated from Supreme Court review. Part I examines methods already tried to combat partisan gerrymandering and concludes another option is sorely needed due to deficiencies in those methods. Part II evaluates the strategy behind *League of Women Voters*, discusses the advantage of insulation from Supreme Court review, and argues it represents a new, broadly applicable strategy for fighting partisan gerrymandering. This Essay concludes by discussing how this approach is applicable to other gerrymandered states.

I. CURRENT TACTICS AND THEIR DEFICIENCIES

Activists around the country have tried a variety of methods to combat partisan gerrymandering. These methods range from traditional litigation in federal courts to passing a state constitutional amendment mandating fair districts. Some of these methods have been relatively successful, while others are effectively unusable, at least for the time being. But even the successful methods have limitations. This Part briefly examines these already-deployed tactics, and concludes a new strategy is needed to continue the war on partisan gerrymandering.

A. Federal Litigation

The current outlook in federal court for partisan gerrymandering activists is bleak.³⁷ Although federal litigation gets the most attention from the media

33. *League of Women Voters v. Commonwealth of Pa.*, 175 A.3d 282, 282 (Pa. 2018) (mem.).

34. *See infra* Part I.A.

35. The decision is notable because the plaintiffs did not allege a violation of an equal districting amendment, but instead alleged violations of existing Pennsylvania state law.

36. *See infra* Part II.

37. There are several other cases involving gerrymandering percolating around the federal system, but they are mostly racial gerrymandering cases (as opposed to partisan gerrymandering) or involve the Voting Rights Act. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Abbott v. Perez*, 138 S. Ct. 49 (2017) (mem.).

and legal scholarship,³⁸ recent case law effectively precludes a federal challenge.³⁹ In *Vieth v. Jubelirer*, a plurality of the Supreme Court held partisan gerrymandering to not be justiciable.⁴⁰ The plurality believed the Court could never agree on one single magic “formula” or standard for determining and eliminating gerrymandered districts.⁴¹ Indeed, and to the plurality’s credit, four dissenting justices advocated for the use of three different tests.⁴² Justice Scalia believed party affiliation, unlike race, was not an immutable characteristic.⁴³ *Vieth* effectively precludes most federal litigation challenging a partisan gerrymander.⁴⁴

One major partisan gerrymandering case, *Gill v. Whitford*, is currently pending before the Supreme Court.⁴⁵ The plaintiffs in *Gill* presented a repeatable mathematical formula for determining the severity of partisan gerrymandering for a given electoral map. But the likely outcome is murky.⁴⁶ It is unclear whether the respondents’ proposed formula is justiciable enough for Justice Kennedy. As this Essay goes to publication, the Court is still deliberating *Gill*. Since Justice Gorsuch and Chief Justice Roberts are the only two justices who have not yet written an opinion from the October term (when *Gill* was argued), it is believed one of them is authoring the majority opinion.⁴⁷ Regardless, federal litigation is currently an unlikely route to success.

38. See Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 2 (2016).

39. *Gill v. Whitford* has the potential to change this, but it’s unclear how the Court will decide. *Whitford v. Gill*, 218 F. Supp. 3d 837 (2016), *cert. granted*, 137 S. Ct. 2289 (2017) (mem.).

40. 541 U.S. 267, 306 (2004).

41. *Id.* at 296–97.

42. *Id.* at 292.

43. *Id.* at 287.

44. Racial gerrymandering is still unconstitutional, however. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

45. 218 F. Supp. 3d 837 (2016), *cert. granted*, 137 S. Ct. 2289 (2017).

46. *Id.* at 845. There is one other partisan gerrymandering case the Court heard during the current term, further complicating the issue: *Benisek v. Lamone*, 138 S. Ct. 543 (2017) (mem.). During oral argument for *Benisek*, the justices on the Court seemed as perplexed as ever, with Justice Breyer even suggesting the Court should combine *Gill* with *Benisek* and a third partisan gerrymandering case to be heard next term. Adam Liptak, *Supreme Court, Again Weighing Map Warped by Politics, Shows No Consensus*, N.Y. TIMES (March 28, 2018), <https://www.nytimes.com/2018/03/28/us/politics/supreme-court-elections-gerrymander.html> (on file with the *Michigan Law Review*).

47. Kimberly Robinson (@KimberlyRobinson), TWITTER (May 21, 2018, 6:23 AM), <https://twitter.com/KimberlyRobinson/status/998554897569210368> [<https://perma.cc/NU4C-3AF4>]. It is unclear what this means for the Court’s opinion.

B. State Constitutional Amendments

Another method of combatting partisan gerrymandering is a grassroots campaign to pass a state constitutional amendment by referendum.⁴⁸ These amendments typically forbid legislatures from using partisan motivations when redistricting or vest redistricting power in a bipartisan or independent commission.⁴⁹ The Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission* narrowly held such amendments to be constitutional.⁵⁰ These amendments also appear to work. States with independent and bipartisan commissions have significantly fewer gerrymandered congressional districts.⁵¹ For example, Arizona and Iowa, which have either a bipartisan or independent redistricting committees ranked 14th and 11th respectively for most compact districts in a recent study.⁵²

But these tactics also have downsides. State legislatures rarely want to voluntarily relinquish power. For example, despite the passage of the Fair Districts Amendment to the Florida Constitution (which forbade redistricting with any partisan intent) the Florida legislature still committed a partisan gerrymander in the 2012 redistricting.⁵³ It took until 2015—after significant litigation—for the Florida Supreme Court to declare aspects of the 2012 redistricting unconstitutional under Florida law.⁵⁴ The Florida Supreme Court in *League of Women Voters of Florida v. Detzner*, however, only found specific districts to be in violation—not the entire map.⁵⁵ The Court also refused to draw a new map on its own, instead sending the problem back to the legislature for further consideration, adding more delays to an already arduous process.⁵⁶

48. See Richard L. Hasen, Essay, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1628–29 (2016). This allows activists to avoid the recalcitrant state legislature. *Id.*

49. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015); see also Jordan Lewis, Note, *Fair Districts Florida: A Meaningful Redistricting Reform?*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 189, 192 (2015) (“[S]ix [states] use wholly independent commissions consisting of individuals who are not public servants, and five states implement the commission model only if the legislature fails to produce a constitutionally adequate map in time.”). California, Washington, and Florida have constitutional amendments limiting partisan motivations in redistricting. *Id.* at 202 n.26.

50. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2659.

51. See Arnold, *supra* note 11.

52. *Id.*; AZAVEA, REDRAWING THE MAP ON REDISTRICTING 2012 (2012), https://s3.amazonaws.com/s3.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf [<https://perma.cc/N6D3-UX5W>].

53. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 370 (Fla. 2015).

54. See *id.*

55. See *id.* at 370–72 (finding violations of the Fair District Amendment and not broader constitutional violations (either federal or state)).

56. *Id.* at 413–15.

The grassroots process is also slow, often requiring a referendum,⁵⁷ which involves gathering hundreds of thousands of signatures before even appearing on a ballot. Even if the amendment passes, it may still be years before the next redistricting—allowing the party that committed the partisan gerrymander to continue to reap the fruits of their misdeeds.⁵⁸

II. STATE LITIGATION—A NEW TACTIC

All of the methods described in Part I have deficiencies. They are either currently precluded or slow and unpredictable. These limitations create a need for an additional method to attack partisan gerrymandering. This Part argues that state court litigation is that new additional method. This Part examines the recent Pennsylvania Supreme Court case, *League of Women Voters*, and concludes it creates an effective new strategy in the war against partisan gerrymandering due to the potentially positive results, the speed with which it takes place, broad applicability,⁵⁹ and its insulation from Supreme Court review. This Part also discusses the various advantages of state court litigation that are available activists in other states plagued by partisan gerrymandering.

A. *League of Women Voters*

The plaintiffs in *League of Women Voters*⁶⁰ took an unconventional approach to combatting partisan gerrymandering. Rather than alleging violations of the federal constitution⁶¹ or trying to pass a state constitutional amendment, the plaintiffs instead argued the partisan gerrymander violated current provisions of the *state* constitution. Specifically, they alleged violation of the Free Expression and Association Clause (Art. I §§ 7, 20), Equal Protection Guarantees (Art. I, §§ 1, 26), and the Free and Equal Clause (Art. I, § 5) of the Pennsylvania state constitution.⁶² The complaint also asked for

57. See Jackie Borchardt, *Ohio Redistricting Advocates Oppose Republican Lawmakers' Plan*, CLEVELAND.COM (Jan. 22, 2018, 3:20 PM), http://www.cleveland.com/metro/index.ssf/2018/01/ohio_redistricting_advocates_o.html [https://perma.cc/TSZ7-LUPX]. For example, Ohio's new, theoretically less gerrymandered electoral map will not go into effect until 2022. See *Ohio House Districts 2012-2022*, The Ohio House of Representatives, <http://www.ohiohouse.gov/members/district-map> [https://perma.cc/V9QL-CWYZ].

58. See Borchardt, *supra* note 57.

59. As many states have similar provisions of their constitutions. See Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN ST. L. REV. 1035, 1037–38 (2011).

60. *League of Women Voters of Pa. v. Commonwealth*, 174 A.3d 282 (Pa. 2018).

61. Different plaintiffs in Pennsylvania tried this tactic, but a district court panel upheld the map 2-1. Cristiano Lima, *Supreme Court to Hear Texas Case on Racial Gerrymandering*, POLITICO (Jan. 12, 2018, 4:18 PM), <https://www.politico.com/story/2018/01/12/supreme-court-texas-racial-gerrymandering-338733> [https://perma.cc/D42W-GEV2].

62. *League of Women Voters of Pennsylvania v. Pennsylvania General Assembly*, BRENNAN CTR. FOR JUST. (Mar. 19, 2018), <https://www.brennancenter.org/legal-work/league-women-voters-v-pennsylvania> [https://perma.cc/5GA3-HKPN] [hereinafter BRENNAN CTR.].

an injunction preventing the Pennsylvania legislature from considering political data when redistricting.⁶³ Unlike *Detzner*, the case from Florida detailed in Part I, the plaintiffs in *League of Women Voters* argued the gerrymandered districts violated state constitutional provisions similar to ones in the federal Constitution—rather than a specific amendment that prohibited partisan gerrymandering like Florida’s Fair District Amendment.⁶⁴

After an expedited and contentious litigation process,⁶⁵ the Pennsylvania Supreme Court handed down an unsigned order on January 22, 2018 striking down the Republican drawn map.⁶⁶ A lengthy opinion followed on February 7, 2018.⁶⁷ The Court’s opinion created a template for future state courts to craft a similar standard and proceeded in four steps. First, the Court held a claim under the Pennsylvania Constitution’s free and clear elections clause⁶⁸ should be adjudicated under a different standard than the federal equal protection clause.⁶⁹ This clever move freed the Pennsylvania Supreme Court to escape unfavorable federal precedent, such as *Vieth*.⁷⁰ It also, as discussed below in Section II.C, further insulated the decision from Supreme Court review.

Second, the Court found that a partisan gerrymander claim provides a legally cognizable basis for challenging redistricting under the free and clear elections clause.⁷¹ These two moves—severing the interpretation of the state constitution from the federal one and recognizing a partisan gerrymandering claim under state law—created a new standard to evaluate a partisan gerrymandering claim. The Pennsylvania Supreme Court essentially wrote with a clean slate.

Third, the Court applied the facts of *League of Women Voters* to their articulated standard. The Court found the Republican created map “deprive[d] [voters] of their state constitutional right to free and equal elections.”⁷² In making this determination, the Court relied on expert testimony and statistical analysis.⁷³ The 2011 Republican map was a classic example of “packing” as it “effectively serve[d] to establish a few overwhelmingly Democratic districts and a large majority of less strong, but

63. *Id.*

64. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d at 370 (Fla. 2015).

65. BRENNAN CTR., *supra* note 62.

66. *League of Women Voters of Pa. v. Commonwealth*, 174 A.3d 282, 284 (Pa. 2018).

67. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

68. PENN. CONST. art. I, § 5.

69. Previous precedent in Pennsylvania indicated that the Pennsylvania Free and Equal Elections Clause should be interpreted in the same manner as the federal Equal Protection Clause. *League of Women Voters*, 178 A.3d at 813 (“disavowing” *Erfer v. Com.*, 794 A.2d 325 (Pa. 2002)).

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

71. *League of Women Voters*, 178 A.3d at 814.

72. *Id.* at 818.

73. *Id.* at 818–19.

nevertheless likely Republican districts.”⁷⁴ The opinion also specifically pointed to the “tortuously drawn districts that cause plainly unnecessary political-subdivision splits.”⁷⁵

Fourth and finally, the Court held “[w]hen . . . the legislature is unable [to draw a fair map] or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.”⁷⁶ This last move applied pressure on the Republican (and any future) legislature. Instead of allowing the Republicans to filibuster by drawing constitutionally unacceptable maps, the Court instead placed itself as a neutral arbiter that would step in if the legislature failed to act properly.

After some initial opposition by the Republicans (including threatening to impeach some of the justices),⁷⁷ they submitted a proposed new map to the governor on February 9th.⁷⁸ But the new map, at least according to a mathematician employed by the governor, was the second most gerrymandered redistricting plan that still fit within the constitutional requirements.⁷⁹ The original 2011 Republican plan was first.⁸⁰ After this apparent bad-faith attempt at redistricting, the Pennsylvania Supreme Court assumed control and issued a nonpartisan map (designed by an independent professor from Stanford) on February 19, 2018.⁸¹

The ramifications of this case are legion. First, the Court’s proposed map more closely approximates the politics of the state, which is solidly purple between Republicans and Democrats.⁸² This could result in a pickup of three

74. *Id.* at 820.

75. *Id.* at 819.

76. *Id.* at 822.

77. See John Bowden, *Toomey Calls for ‘Conversation’ about Impeaching State Supreme Court Justices*, HILL (Feb. 21, 2018, 11:56 AM), <http://thehill.com/homenews/state-watch/374858-toomey-calls-for-conversation-about-impeaching-pennsylvania-supreme> [<https://perma.cc/ZNR3-9H8D>].

78. Christopher Ingraham, *Pennsylvania Republicans Have Drawn A New Congressional Map that is Just as Gerrymandered as the Old One*, WASH. POST: WONKBLOG (Feb. 11, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/02/11/pennsylvania-republicans-have-drawn-a-new-congressional-map-that-is-just-as-gerrymandered-as-the-old-one/?utm_term=.f7341d536338 [<https://perma.cc/VU9T-G7D6>].

79. In other words, the Republican legislature’s new map was second to only the previously drawn map in the intensity of its partisan gerrymander. Professor M. Duchin, *Summary of Conclusions of Joint Submission Plan* (2018), <https://www.governor.pa.gov/wp-content/uploads/2018/02/20180213-Summary-of-conclusions-of-joint-submission-plan-M.-Duchin-021318.pdf> [<https://perma.cc/9TEQ-NGTC>].

80. *Id.*

81. Stephen Wolf, *Pennsylvania’s Groundbreaking New Congressional Map Isn’t Just Nonpartisan—It’s Fair*, DAILY KOS (Feb. 19, 2018 9:15 PM), <https://www.dailykos.com/stories/1742930> [<https://perma.cc/JW5W-7NS3>].

82. Christopher Ingraham, *Pennsylvania Supreme Court Draws ‘Much More Competitive’ District Map to Overturn Republican Gerrymander*, WASH. POST: WONKBLOG (Feb. 20, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/02/19/pennsylvania->

to four seats for the Democrats in the House of Representatives⁸³—a crucial number considering control of the House hinges on 24 seats.⁸⁴ The new map is also much more competitive, compact, and splits fewer counties and municipal areas.⁸⁵ In the view of election experts, this map is nonpartisan and fair and could serve as an example for other states.⁸⁶

Second, the court's decision presents a new, viable solution to the scourge of partisan gerrymandering. The decision is an alternative to litigation in federal courts or the slow (and not always successful) grassroots method of a constitutional amendment. A sympathetic state supreme court, if it followed the Pennsylvania model, could strike down partisan gerrymanders and restore voting fairness in a relatively short amount of time.⁸⁷ Further, if the Supreme Court rules against the plaintiffs in *Gill*, litigation in federal courts may become even more difficult.⁸⁸ Indeed, even if the Court in *Gill* finds a judicially manageable solution to partisan gerrymandering, litigation in state courts is nevertheless a useful tool to attack partisan gerrymandering.

B. Advantages of State Litigation

One of the most attractive features about the decision in *League of Women Voters* is that it is final and unreviewable by the U.S. Supreme Court.⁸⁹ The Supreme Court's decision rendering partisan gerrymandering cases nonjusticiable in *Vieth* is not binding on state courts interpreting state law. This allows creative plaintiffs in gerrymandered states to craft arguments similar to the one in *League of Women Voters* and get favorable results in a more expedited fashion.

Whether the Supreme Court could ever review a partisan gerrymandering case based in state law is a question of federalism and state sovereignty. This question is determined by four relevant principles to the question of review of state law decisions by the Supreme Court: (1) The Supreme Court has the final say with respect to questions of federal law;⁹⁰ (2) the Supreme Court will not review questions of state law;⁹¹ (3) if it appears both federal and state law

supreme-court-draws-a-much-more-competitive-district-map-to-overturn-republican-gerrymander/?utm_term=.21d98177a972 [https://perma.cc/LH98-FJCG].

83. *Id.*

84. Jasmine C. Lee, *To Reclaim the House, Democrats Need to Flip 24 G.O.P. Seats. 25 are in Clinton Territory*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/interactive/2018/03/26/us/elections/house-races-midterms.html> (on file with the *Michigan Law Review*).

85. Ingraham, *supra* note 82.

86. *See* Wolf, *supra* note 81.

87. *See infra* Section II.B.

88. *See infra* Section II.B.

89. *See infra* text accompanying note 108. Justice Alito refused to refer the case to do the full Court for consideration without explanation. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Pa. 2018) (mem.), *stay denied*, 138 S. Ct 1323 (2018) (mem.).

90. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

91. *Murdock v. City of Memphis*, 87 U.S. 590, 635 (1874).

decision are present, the Supreme Court will not review the case if there is an adequate and independent state law ground;⁹² and (4) if the basis for the state court's decision is ambiguous, the Supreme Court will assume the basis is federal, permitting review.⁹³

Applying these principles to the decision in *League of Women Voters* demonstrates how a similar decision in the future would also be insulated from review. *League of Women Voters* is a state court decision about state law.⁹⁴ Thus, the first principle is inapposite and we should instead apply the second principle—state courts get the final say on issues of purely state law.⁹⁵ Consequently, the decision in *League of Women Voters* and any similar state partisan gerrymandering decision are unreviewable by the Supreme Court.

To be further insulated from Supreme Court review, the state court must also unambiguously base their decision solely in state law. Any ambiguity in the state court's decision opens to the door to review. In *League of Women Voters*, the Pennsylvania Supreme Court relied unambiguously on state law and only state law.⁹⁶ The Court stated: “[T]he Court finds as a matter of law that the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, *on that sole basis*, we hereby strike it as unconstitutional.”⁹⁷ This satisfies the fourth principle. It is a clear and unambiguous statement that the decision reached is *solely* one of state law. It seems likely that the justices on the Pennsylvania Supreme Court knowingly added this language to insulate their decision from Supreme Court review. Any future state court should make the same explicit reference to state law to replicate the same effect.

But state partisan gerrymandering cases also raise a few questions that may push certain pressure points of the doctrine. First, there is the concern for undermining federal law and federal rights.⁹⁸ Although the Supreme Court defers to state courts to decide state law, partisan gerrymandering presents a special case. The Pennsylvania state court decided an issue under state law because federal law is convoluted and inhospitable to partisan gerrymandering claims.⁹⁹ These types of decisions, for all of their merit, are in many ways a runaround of federal law due to the holding in *Vieth*, which held

92. Fox Film Corp. v. Muller, 296 U.S. 207, 210–11 (1935).

93. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

94. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018).

95. Murdock, 87 U.S. at 635.

96. League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282, 283 (Pa. 2018) (mem.).

97. *Id.* (emphasis added).

98. Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1062–63 (1999).

99. *League of Women Voters*, 178 A.3d at 741 (“[F]ederal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution.”).

partisan gerrymandering claims to be non-justiciable.¹⁰⁰ The Court could view this tactic as a sham to escape federal jurisdiction. *League of Women Voters* involved *federal* redistricting¹⁰¹ and essentially achieved a result unavailable in federal court for an almost identical claim.¹⁰² If enough plaintiffs took the state law route, the Supreme Court could determine federal interests override federalism and other concerns, like Chief Justice Rehnquist's concurrence in *Bush v. Gore*.¹⁰³ But this would be a significant and nearly unprecedented invasion of state sovereignty and a slap in the face to the Pennsylvania Supreme Court. It is highly unlikely the Court would take such a drastic step.

Second, there is the possibility that state constitutions are not independent enough under the third principle of Supreme Court review of state court decisions, which requires the state law grounds to be both adequate and independent of federal law to avoid Supreme Court review.¹⁰⁴ For example, although there are numerous differences between the federal and Pennsylvania constitutions, there are also substantial similarities as well. Indeed, the first Pennsylvania constitution dates back to 1776.¹⁰⁵ And the Pennsylvania state bar lists only 46 significant differences between the two documents.¹⁰⁶

But considering the wide range of case law divergent between the two built up over the last two centuries, it seems unlikely that the Supreme Court would consider the Pennsylvania's or other states' constitution to be parasitic on the equal protection clause for voting rights. It would be another substantial encroachment by the Supreme Court into areas of state sovereignty. And the current composition of the Supreme Court is very deferential to the states.¹⁰⁷ Further, state courts are not bound by the interpretations of similar federal constitutional provisions on state ones.¹⁰⁸ State supreme courts are within their rights in the federalist system to interpret their own constitutions. Even considering the wide-ranging impact of partisan gerrymandering, such encroachment would again be an extraordinarily intrusive step by the Supreme Court. This is likely why Justice

100. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

101. *League of Women Voters*, 178 A.3d at 742.

102. *E.g.*, *Vieth*, 541 U.S. at 272.

103. 531 U.S. 98 (2000) (Rehnquist, C.J., concurring) (finding that the Florida Supreme Court misinterpreted Florida election law enacted by the state legislature).

104. "Adequate and Independent State (law) Grounds" (AISG) for the decision. See *Fox Film Corp., v. Muller*, 296 U.S. 207, 210 (1935).

105. *Constitution of Pennsylvania – September 28, 1776*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/pa08.asp [<https://perma.cc/A6ZG-CCE4>].

106. PA. STATE BAR, THE PENNSYLVANIA CONSTITUTION AS COMPARED TO THE UNITED STATES CONSTITUTION, <http://www.pabar.org/public/lre/rlpa/PaCompareUS.pdf> [<https://perma.cc/EK59-LR7L>].

107. Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 246 (2005) ("In the late or modern era, the Court has shown more than the usual regard for state autonomy, immunity, and other 'rights' in its federalism doctrine.")

108. Although many states do follow a "lock-step" method of interpretation, they are not bound to do so. Blocher, *supra* note 59, at 1037.

Alito simply denied the Republican's petition for review without explanation.¹⁰⁹

Insulation from Supreme Court review allows plaintiffs to avoid unfavorable precedent in *Vieth* and to litigate in potentially friendlier state courts. Regardless of the outcome in *Gill*, litigation in state courts represents a new and effective method of fighting partisan gerrymandering.

CONCLUSION

State court constitutional litigation on partisan gerrymandering is an exciting new strategy. The strategy is broadly applicable. A state court may also be more open to novel or new arguments based on esoteric constitutional provisions that are unavailable in federal litigation. Litigation in state court also has the potential to speed up the agonizingly slow process of passing a constitutional amendment and waiting for the next redistricting cycle.¹¹⁰ Furthermore, two strategies—seeking a state constitutional guarantee and state court litigation—could be used in tandem. One group of activists could work on the slower, but permanent process of seeking an amendment while another group pursues a claim in state court to get more immediate relief.

There are, of course, limitations to this method. Not all state supreme courts will be as open to the idea of overturning districts crafted by the legislature. State justices themselves may be swayed by partisan forces from their own political parties.¹¹¹ Indeed, some may even be hostile to the idea. Even judges not ideologically opposed to reforming partisan gerrymandering may still be wary of usurping a map designed by a (somewhat) democratically elected branch of government.

Regardless of these limitations, *League of Women Voters* provides a repeatable template for activists in other states to fight partisan gerrymandering. Depending on the composition of the state court and their respectability of the claim, state court litigation could significantly and positively alter redistricting to be less partisan and more fair.

109. See *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 283 (Pa. 2018) (mem.), *stay denied*, 138 S. Ct 1323 (2018) (mem.).

110. For example, as the map of Ohio House Districts demonstrates, without legislation it would take ten years to change the map in the next redistricting cycle. *Ohio House Districts 2012-2022*, *supra* note 57.

111. 21 states (including Pennsylvania) have some sort of partisan process for electing state supreme court justices. AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf [https://perma.cc/NQ49-PJMT].