



# Partisan Gerrymandering: Supreme Court Provides Guidance on Standing and Maintains Legal Status Quo

**L. Paige Whitaker**

Legislative Attorney

July 2, 2018

In a redistricting case that some predicted could have resulted in a “blockbuster” ruling, *Gill v. Whitford*, the Supreme Court issued a more limited, yet still consequential decision. On June 18, 2018 the Supreme Court ruled that in order to establish standing to sue upon a claim of unconstitutional partisan gerrymandering on the basis of vote dilution, challengers must allege injuries to their interests as voters in *individual* districts. (Vote dilution arises when district boundaries devalue one citizen’s vote as compared to others and is accomplished by “packing” certain voters into a few districts, so that they win elections by large margins, and “cracking” certain voters among several districts, so that they fail to achieve a voting majority.) Because the challengers in *Gill* alleged statewide harm to voters of a particular political party—that is, to voters throughout the state who support the Democratic Party—without establishing proof of injury to specific voters within a particular district, the Supreme Court ruled that they failed to establish standing, and in an atypical move, remanded the case to the district court for reargument. On the same day the Court issued *Gill*, the Court also decided *Benisek v. Lamone*, holding that a district court did not abuse its discretion by denying a preliminary injunction to challengers claiming that a Maryland congressional district was an unconstitutional partisan gerrymander.

Although *Gill* and *Benisek* were decided on procedural grounds, these rulings have the effect of preserving the Supreme Court’s jurisprudential status quo on claims of unconstitutional partisan gerrymandering. In other words, as was the case prior to these rulings, in the wake of *Gill* and *Benisek*, the possibility remains that the Court may hold partisan gerrymandering claims to be judicially reviewable in some future case, under a yet to be determined standard. In addition, as a result of these rulings, the challenged redistricting maps in [Wisconsin](#) and [Maryland](#) will be in effect for the upcoming November 2018 elections.

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

LSB10164

## Supreme Court Precedent

Although the Supreme Court has invalidated redistricting maps as unconstitutional *racial gerrymanders*, the Court has not overturned a map because of *partisan gerrymandering*. As defined by the Court, *partisan gerrymandering* is “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” In prior cases presenting a claim of unconstitutional partisan gerrymandering, the Court has left open the possibility that such claims could be judicially reviewable, but has been unable to determine a manageable standard for adjudicating such claims. For example, in a 2004 decision, *Vieth v. Jubelirer*, a plurality of four Justices determined that a claim of unconstitutional partisan gerrymandering presented a nonjusticiable political question, while four other Justices concluded that such claims are justiciable, but could not agree upon a standard for courts to use in assessing such claims. The deciding vote in *Vieth*, Justice Kennedy, concluded that the claims presented in *Vieth* were not justiciable because neither comprehensive, neutral principles for drawing electoral boundaries, nor rules limiting judicial intervention, exist. Nonetheless, Justice Kennedy “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”

## *Gill v. Whitford*: Case Background

### Lower Court Ruling

As CRS discusses in further detail [here](#), *Gill* is an [appeal](#) from a federal district court panel [decision](#) holding, by a 2-to-1 vote, that a Wisconsin state legislative redistricting map is an unconstitutional partisan gerrymander. (A provision of federal law provides for [direct appeals](#) to the Supreme Court in cases involving constitutional challenges to redistricting maps.) According to the district court, the Equal Protection Clause of the Fourteenth Amendment and the guarantees of free speech and association under the First Amendment prohibit a redistricting map that is drawn with the purpose, and has the effect, of placing a “severe impediment” on the effectiveness of a citizen’s vote that is based on political affiliation and cannot be justified on other, legitimate legislative grounds. Although the redistricting map complied with [traditional redistricting principles](#)—which include contiguity and compactness—based on the record in the case, the court held that the map nonetheless had a purpose and effect of entrenching one party in its control of the legislature without justification.

### Arguments Before the Supreme Court

The challengers in this case—12 registered Wisconsin voters who are members of the Democratic Party—had [argued](#) that they had standing to bring a statewide challenge to the redistricting map because, unlike racial gerrymandering claims that are district-specific, partisan gerrymandering claims involve the “completely different harms” of subjecting voters to vote dilution and viewpoint discrimination on a statewide basis. Furthermore, they maintained that partisan gerrymandering claims are justiciable under the test articulated by the lower court requiring a finding of discriminatory intent and effect without legitimate justification by the legislature. The challengers had also argued that the map harmed the Democratic Party’s ability to translate votes by Democrats into seats in the legislature held by Democrats by drawing district lines that “cracked” some voters among several districts, so that they failed to achieve a voting majority, and “packed” some voters into a few districts, so that they won elections by large margins. The degree to which such packing and cracking provided one political party with an advantage could be measured by an “efficiency gap,” the challengers argued, comparing each party’s respective “wasted votes”—those votes cast for a losing candidate in excess of the number needed to win. According to the challengers, the excess wasted votes generated by the map violated their right of

association under the First Amendment and their right to equal protection under the Fourteenth Amendment.

In response, the members of the [Wisconsin Elections Commission](#) had argued that the district court lacked jurisdiction because statewide claims of partisan gerrymandering are nonjusticiable. Further, the Elections Commission had asserted that the appellees had failed to state a claim upon which relief can be granted by not articulating a limited and precise legal standard. Finally, the Election Commission had argued that the challenged map should be upheld because it comports with traditional redistricting principles, emphasizing that Justice Kennedy stated in *Vieth* that any standard for adjudicating partisan gerrymandering claims would need to establish that the legislature drew districts “in a way *unrelated* to any legitimate legislative objective.”

### ***Gill v. Whitford*: Supreme Court Ruling**

By a unanimous vote, in *Gill v. Whitford*, the Supreme Court ruled that the challengers failed to establish standing in order to bring suit challenging the state’s legislative redistricting map as an unconstitutional partisan gerrymander on the basis of vote dilution. Writing for the Court, Chief Justice Roberts explained that a plaintiff cannot invoke jurisdiction in federal court under Article III of the Constitution without satisfying a [three part-test](#), demonstrating that she “(1) suffered an injury-in-fact; (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” The most prominent among these requirements, according to the Court, is that a plaintiff show “a personal stake in the outcome of the controversy.” This requires a plaintiff to demonstrate an “injury in fact,” in which she has “suffered the ‘[invasion of a legally protected interest](#)’ that is ‘concrete and particularized,’” affecting the plaintiff in “a personal and individual way,” and not a generalized grievance about government actions.

In *Gill*, the Supreme Court rejected the challengers’ [argument](#) that they had standing to bring a statewide challenge to the redistricting map because, unlike racial gerrymandering claims that are district-specific, partisan gerrymandering claims allege the “completely different harms” of subjecting voters to vote dilution and viewpoint discrimination on a statewide basis. In support of its conclusion, the Court determined first, that when a challenger alleges vote dilution, injury is dependent on how a given legislative district is drawn. This is true, the Court reasoned, because the composition of a particular district determines the extent to which a voter’s vote is packed or cracked, resulting in that vote having less weight than it would otherwise in a different, hypothetical district. Therefore, the Court concluded, the appropriate remedy does not require redrawing an *entire* statewide redistricting map, but merely revising only those specific districts as are necessary to ameliorate the cracking and packing.

Second, refuting the challengers’ assertion to the contrary, the Court highlighted the similarities between claims of partisan gerrymandering and racial gerrymandering. In both contexts, the Court announced, if a challenger does not live in the alleged gerrymandered district, she “assert[s] only a [generalized grievance](#) against governmental conduct of which he or she does not approve.” Hence, the Court held that, just as a plaintiff claiming racial gerrymandering is limited to challenging only the particular gerrymandered district in which she resides, a plaintiff claiming partisan gerrymandering is likewise limited.

Next, the Court rejected the challengers’ argument that their claim of a statewide injury is similar to claims presented in earlier Supreme [Court cases](#) involving challenges to redistricting maps based on [population inequality](#). Although the challengers characterized those cases as “statewide in nature,” because they were based on allegations that “districts *throughout a state* [had] been malapportioned,” the Court disagreed. The challengers’ argument, the Court found, failed to distinguish an injury from a remedy. In prior cases alleging population inequality, the Court explained, the challengers met the Article III requirements for standing by alleging injuries that were “individual and personal in nature,” while the appropriate remedy in such cases required redrawing the state’s redistricting map in its entirety. In

contrast, according to the Court, a claim of unconstitutional partisan gerrymandering based on vote dilution, while also requiring an allegation of injury that is personal and individual in order to establish standing, is remedied by redrawing only those districts necessary to ameliorate the vote dilution.

Finally, in response to the challengers' claim that their legal injury extends to "the statewide harm to their interest 'in their collective representation in the legislature,'" the Court determined that such a claim puts forth an "undifferentiated, generalized grievance" that is not the type of personal and individual injury required to achieve standing under Article III. In addition, responding to a concurrence written by Justice Kagan discussed below, the Court mentioned the possibility, without providing examples, of other theories of injury involving statewide claims that might meet the requirements for standing under Article III. Nevertheless, the Court declined to consider the justiciability of theories not presented in this case. Specifically, in reference to the concurrence written by Justice Kagan, which the Court characterized as addressing other types of constitutional harm not presented in this case and perhaps other types of plaintiffs, the Court refused to "draw speculative and advisory conclusions."

While recognizing that dismissal is the typical response in cases where the challengers have failed to demonstrate Article III standing, the Court emphasized that this case is atypical because it involves the unresolved contours and justiciability of partisan gerrymandering. Accordingly, by a vote of 7 to 2, the Court remanded the case to the district court in order to provide the challengers with an opportunity to present evidence of "concrete and particularized injuries" that demonstrate a burden on their individual rights. Further, the Court underscored that if the challengers pursue this opportunity, they would need to tailor the remedy sought to the particular injury alleged. In a concurrence, Justice Thomas, joined by Justice Gorsuch, took issue with the Court's characterization of this case as unusual, and argued that, in accordance with long established principles of law, he would have remanded with instructions to dismiss. Despite having "a more-than-ample opportunity," the concurrence maintained that the challengers failed to establish standing and should not be given another opportunity to do so on remand.

A concurrence written by Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, addressed, among other things, the type of evidence that a challenger seeking to establish standing would need to present in order to prove that she lives in a packed or cracked district in support a claim of partisan gerrymandering on the basis of vote dilution. According to the concurrence, a challenger could prove packing and cracking, for example, by producing alternative redistricting maps in which the challenger's vote would carry more weight. Furthermore, assuming that the challengers are able to establish standing, the concurrence argued that, based on the allegations of statewide packing and cracking, the challengers could successfully seek a statewide remedy. Referencing Justice Kennedy's concurrence in *Vieth*, the concurrence also suggested the possibility that claims of partisan gerrymandering may infringe on the First Amendment rights of association held by political parties by burdening their representational rights, based on their participation in the electoral process, their voting history, or their expression of political views. While conceding that the challengers in this case did not advance a sufficient First Amendment associational theory to avoid the Court's ruling on standing, the concurrence suggested that the challengers could put forth such a claim on remand. The harm alleged in such a claim, the concurrence maintained, is not district specific, and therefore the proof needed for standing would likewise not need to be district specific.

As with *Gill*, the Court also did not reach the merits in *Benisek v. Lamone*. The Court unanimously held that a district court had not abused its discretion in denying a preliminary injunction to challengers claiming that a Maryland congressional district was an unconstitutional partisan gerrymander. The district court had held that challengers had failed to show a likelihood of success on the merits sufficient to warrant a preliminary injunction. Relying on *Purcell v. Gonzalez*, the Court observed that the lower court's decision was informed by a respect for the public interest in orderly elections.

## Looking Ahead

With *Gill*, the Supreme Court declined to decide whether partisan gerrymandering is unconstitutional or whether a standard can be found for adjudicating such claims, but provided guidance on how to demonstrate standing in a claim of unconstitutional partisan gerrymandering on the basis of vote dilution to not only the challengers in this case, but also to potential plaintiffs in other cases. Furthermore, by remanding the case to the district court for reargument, the challengers in this case have another opportunity to establish standing to sue, should they so choose. According to the Court, in contrast to most of the evidence presented thus far in this case, in a future proceeding, the challengers will need “to prove concrete and particularized injuries” by demonstrating a burden on their individual votes.

Following its decision in *Gill*, during the last week of the term, the Supreme Court ruled in two related cases. First, on June 25, 2018, the Supreme Court [vacated](#) a lower court [ruling](#), in *Rucho v. Common Cause*, holding that a North Carolina congressional redistricting map is an unconstitutional partisan gerrymander under various provisions of the U.S. Constitution. (Although the lower court had required that a new map be drawn for the 2018 congressional midterm elections, in January, the Supreme Court [stayed](#) that ruling and, in February, [denied](#) a motion to expedite consideration of the case.) The Court remanded *Rucho* to the district court for further consideration of the issue of standing in light of *Gill*. Second, on June 28, 2018, the Supreme Court [summarily affirmed](#) a federal district court ruling in *Harris v. Cooper*, rejecting a claim that a North Carolina redistricting map is an unconstitutional partisan gerrymander. (A summary affirmance means that the Court agrees with the result of the lower court ruling, but not necessarily the reasoning behind it.)

It remains to be seen whether *Gill*, *Benisek*, or *Rucho* will return to the Court, or whether the Court will consider another claim of unconstitutional partisan gerrymandering in the future. Notably, Justice Kennedy, the deciding vote in *Veith*, announced his retirement from the Court on June 27, 2018.