

Partisan Gerrymandering: Re-Establishing the Political Question Doctrine in *Gill v. Whitford*

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ABSTRACT

American politics is more divided and more contentious than ever, and the Supreme Court recently published a decision that will define the nation's political landscape. In Gill v. Whitford, the Wisconsin Elections Commission asked the Supreme Court to overturn a divided three-judge district court decision striking down a Wisconsin voter redistricting plan as an unconstitutional partisan gerrymander. But the court has yet to clearly define the constitutional boundaries of partisan gerrymandering, having provided contradictory holdings and reasoning for decades. In its June 2018 decision, the court held that the plaintiffs lacked standing to sue, but never reached the merits of partisan gerrymandering, leaving the justiciability of that issue unresolved. This paper finds that partisan gerrymandering is correctly viewed as a non-justiciable political question, due to a lack of judicially-manageable standards, the proper role of the judiciary, and judicial hyperpartisanship. Furthermore, alternatives under the First and Fourteenth Amendments carry implications that inevitably circle back to the rationale for invoking the political question doctrine in the first place. While the court is not bound by ethical rules, general ethical principles should guide the Justices' own moral compass towards the political question doctrine.

INTRODUCTION

American politics is more divided and more contentious than ever, and the Supreme Court recently published a decision that will define the nation's political landscape.¹ The Wisconsin Elections Commission petitioned the Supreme Court to overturn a divided three-judge district court decision striking down a voter redistricting plan for the Wisconsin state assembly as an unconstitutional partisan gerrymander.² However, the Supreme Court has not clearly defined the constitutional boundaries of partisan gerrymandering. In *Gill v. Whitford* in 2018, the Supreme Court held

1 *Gill v. Whitford*, No. 16-1161 (U.S. July 2017): (“Gill isn’t being overhyped: a ruling against extreme gerrymanders could re-jig American politics at the state and national levels for the coming decade and beyond.”); S.M., “Justice Kennedy Will Take Centre Stage during the Supreme Court’s Upcoming Term,” *The Economist*, August 15, 2017, <https://www.economist.com/democracy-in-america/2017/08/15/justice-kennedy-will-take-centre-stage-during-the-supreme-courts-upcoming-term>.

2 See Brief for Appellants, *Gill v. Whitford*, No. 16-1161 (U.S. July 2017).

that the plaintiffs lacked standing—that is, the ability to even bring the lawsuit in court.³ The court did not decide the merits of the case, and the court made the unusual decision to remand the case back to the district court to afford the plaintiffs an opportunity to properly bring their claim and litigate its merits in the future.⁴ Notably, the court did not decide whether partisan gerrymandering is justiciable, leaving the issue unresolved.⁵ This piece analyzes the judicial process of deciding the politically-charged *Gill v. Whitford* case, a decision which will inevitably shift the balance of the nation’s political power towards either the Republican or Democratic party.

“Gerrymandering” is a pejorative term, referring to “the dividing of a state, county, etc., into election districts so as to give one political party a majority in many districts while concentrating the voting strength of the other party into as few districts as possible.”⁶ It comes from former Massachusetts Governor Elbridge Gerry, who, in 1812, designed convoluted voting districts resembling the shape of a salamander.⁷ More than two hundred years later, gerrymandering continues in Wisconsin and throughout the nation.⁸

However, the judiciary is not the appropriate forum to address partisan gerrymandering grievances. This piece argues that the plaintiff’s partisan gerrymandering claims in *Gill v. Whitford* presents a non-justiciable political question, due to a lack of judicially-manageable standards for resolving the claim, the proper role of the judiciary within the government, and judicial hyper-partisanship that renders adjudication on the merits inappropriate.

Part I of this piece provides background on the *Gill v. Whitford* case. Part II outlines the law of partisan gerrymandering leading up to *Gill*, demonstrating that the time was ripe for clarification from the court. Part III explains why the partisan gerrymandering claim in *Gill* presents a non-justiciable political question. Part IV considers alternative resolutions on the merits of First and Fourteenth Amendment claims, but finds that they inevitably circle back to the rationale for invoking the

3 Gill, 138 S. Ct. 1916.

4 Gill, 138 S. Ct. 1916.

5 Gill, 138 S. Ct. 1916.

6 “Gerrymander,” [Www.Dictionary.Com](https://www.dictionary.com/browse/gerrymander), accessed January 5, 2019, <https://www.dictionary.com/browse/gerrymander>.

7 Erick Trickey, “Where Did the Term ‘Gerrymander’ Come From?,” [Smithsonian](https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/), accessed January 5, 2019, <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/>.

8 See Thomas Wolf, “What the Briefs Say About Extreme Gerrymandering | Brennan Center for Justice,” [Brennan Center for Justice](https://www.brennancenter.org/blog/what-briefs-say-about-extreme-gerrymandering), September 6, 2017, <https://www.brennancenter.org/blog/what-briefs-say-about-extreme-gerrymandering>.

political question doctrine in the first place. Finally, part V explores whether judicial ethics provide any useful guidance for the court, finding persuasive support for invoking the political question doctrine.

I. GILL V. WHITFORD

Gill v. Whitford, a group of Democratic voters sued members of the Wisconsin Elections Commission, claiming that invidious and “aggressive partisan gerrymandering” violates their Fourteenth and First Amendment rights.⁹ The Fourteenth Amendment claim alleges that Wisconsin’s redistricting “purposely distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats, while purposely distributing the Democratic vote share with less efficiency so that it would translate into fewer seats.”¹⁰ The argument is supported by seemingly irreconcilable statistics of voters’ current partisan allegiances and the corresponding election results. Specifically, Republicans received 48.6 percent of the two-party statewide vote in 2012 but won 61 percent of the assembly seats; they also received 53 percent of the statewide vote in 2014 but won 64 percent of the assembly seats.¹¹ Plaintiffs believe a new mathematical test called the “efficiency gap” provides a judicially-manageable standard for the court to determine unconstitutional partisan gerrymandering by measuring the proportion of votes “wasted” by gerrymandering.¹² The First Amendment claim further alleges these wasted votes suffocate voters’ freedom of association with the political party of their choosing, as well as the freedom of expression for their political views.¹³

The Western District of Wisconsin agreed with the plaintiffs, holding that partisan gerrymandering was unconstitutional.¹⁴ The Wisconsin Elections Commission then appealed, but the Supreme Court vacated the district court’s decision and remanded it, “so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence...that would tend to demonstrate a burden on their individual votes.” The court’s determination and adjudication of partisan gerrymandering claims significantly impacts the American political

9 Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016).

10 Whitford, 218 F. Supp. 3d at 854.

11 Whitford, 218 F. Supp. 3d at 853. See also Michael Li and Thomas Wolf, “5 Things to Know About the Wisconsin Partisan Gerrymandering Case,” Brennan Center for Justice, June 19, 2017, <https://www.brennancenter.org/blog/5-things-know-about-wisconsin-partisan-gerrymandering-case>.

12 Complaint, 14–16, Whitford, 218 F. Supp. 3d 837.

13 Complaint, p. 27–28, Whitford, 218 F. Supp. 3d 837.

14 Whitford, 218 F. Supp. 3d at 910; as amended by Amended Judgment, Whitford v. Gill, No. 15-cv-421-bbc (W.D. Wis. Feb. 22, 2017).

landscape.¹⁵ Partisan gerrymandering is a widespread issue not limited to Wisconsin,¹⁶ and a Supreme Court decision striking down electoral maps for partisan gerrymandering can open the floodgates for challenges to district maps across the country.¹⁷ Make no mistake, “Gill isn’t being overhyped: a ruling against extreme gerrymanders could re-jig American politics at the state and national levels for the coming decade and beyond.”¹⁸

II. THE TIME REMAINS RIPE FOR THE SUPREME COURT TO CLARIFY WHETHER PARTISAN GERRYMANDERING IS JUSTICIABLE

For decades, American jurisprudence has debated whether gerrymandering involves a “non-justiciable political question”—which is, broadly, an issue inappropriate for resolution in the judiciary.¹⁹ Currently there is no clear answer, even after the Supreme Court’s 2018 decision in *Gill*.

The political question doctrine can be traced as far back as 1803 in *Marbury v. Madison*,²⁰ but the modern doctrine has its roots in the 1960s, when gerrymandering claims fought against discrimination and racial redistricting. In 1962, *Baker v. Carr* held that racial gerrymandering claims are justiciable, reasoning that “if ‘discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.’”²¹

However, *Gill v. Whitford* is about partisan gerrymandering rather than racial gerrymandering, a concept first alluded to in *Gaffney v. Cummings* (1973). *Gaffney* suggested that political gerrymandering might be unconstitutional if it correlates strongly enough to racial demographics as to constitute racial discrimination.²² The court reasoned that:

What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment...For example,

15 Erwin Chemerinsky discussed *Gill v. Whitford* at a Federalist Society event the author attended in Los Angeles. See also Azam Nizamuddin, John Pcolinski, and Tim Klein, eds., “Supreme Court Review,” DCBA Brief | The Journal of The DuPage County Bar Association 30 (October 2017), <https://www.dcba.org/mpage/vol301017art3>. (“According to Erwin Chemerinsky...‘There is really no issue more important than whether partisan gerrymandering should continue.’”).

16 Nizamuddin et al, “Supreme Court Review.” (“*Gill v. Whitford* is a case which may have implications far beyond Wisconsin.”).

17 See, e.g., Wolf, “What the Briefs Say About Extreme Gerrymandering”; *Gill*, 138 S. Ct. at 1934.

18 S.M., “Justice Kennedy Will Take Centre Stage”; *Gill*, 138 S. Ct. 1916.

19 See Gwynne Skinner, “Misunderstood, Misconstrued, and Now Clearly Dead: The ‘Political Question Doctrine’ as a Justiciability Doctrine,” *Journal of Law and Politics* 29 (May 28, 2014): 427.

20 See *Marbury v. Madison*, 5 U.S. 137 (1803).

21 *Baker v. Carr*, 369 U.S. 186, 209–10 (1962).

22 *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.²³

The court still limited its reasoning to racial discrimination though, noting the “impossible task of extirpating politics from what are the essentially political processes of the sovereign States.”²⁴

In 1986, the court directly addressed partisan gerrymandering for the first time in *Davis v. Bandemer*. A plurality held that “political gerrymandering cases are properly justiciable under the Equal Protection Clause.”²⁵ The court generally analogized the rationale prohibiting racial gerrymandering to political gerrymandering, explaining “that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma...[does] not justify a refusal to entertain such a case.”²⁶ Dissenting, Justice O’Connor instead felt that “members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties are the dominant groups, and the court has offered no reason to believe that they are incapable of fending for themselves through the political process.”²⁷

In 2004, the court changed course when a plurality held political gerrymandering is a non-justiciable political question in *Vieth v. Jubelirer*. The court reasoned that “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged (since *Davis*). Lacking them, we must conclude that political gerrymandering claims are non-justiciable and that *Davis* was wrongly decided.”²⁸ But this justiciability holding failed to achieve majority agreement.²⁹

In 2006, the court failed to clarify the conflicting *Davis* and *Vieth* pluralities. Then, in *League of United Latin Am. Citizens v. Perry* (2006), the court merely noted that “disagreement persists” as to whether political gerrymandering is justiciable and analyzed the merits because justiciability was not disputed by

23 *Gaffney v. Cummings*, 412 U.S. at 754 (emphasis added).

24 *Gaffney v. Cummings*, 412 U.S. at 754.

25 *Davis v. Bandemer*, 478 U.S. 109, 143 (1986).

26 *Davis v. Bandemer*, 478 U.S. at 125.

27 *Davis v. Bandemer*, 478 U.S. at 152 (1986). (O’Connor, J., concurring).

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

29 See *Vieth v. Jubelirer*, 541 U.S. at 306 (Kennedy, J., concurring); at 317 (Stevens, J., dissenting); at 343 (Souter, J., dissenting); at 355 (Breyer, J., dissenting).

the parties.³⁰ The court held that “[they] do not revisit the justiciability holding but do proceed to examine whether appellants’ claims offer the court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”³¹ The court reasoned that partisan gerrymandering was inconsistent with both the Fourteenth Amendment’s prohibition against invidious discrimination and the First Amendment’s protection from retaliation based on political affiliation.³²

Ostensibly, League of United Latin Am. Citizens (LULAC) left Davis intact, but only because the parties did not dispute justiciability. The Davis and Vieth pluralities provide conflicting answers for whether partisan gerrymandering is justiciable. The Supreme Court’s considerable efforts in Gaffney, Bandemer, Vieth, and LULAC do not resolve whether such claims may be brought in cases involving allegations of partisan gerrymandering.³³ Gill thus presented the court with an opportunity to finally clarify the irreconcilable case law, but it remanded the case back to the district court on standing grounds before it could reach the merits.³⁴ Currently, the justiciability of partisan gerrymandering claims remains unclear.

III. THE POLITICAL QUESTION DOCTRINE MUST APPLY TO PARTISAN GERRYMANDERING CLAIMS

As a threshold issue in any partisan gerrymandering claim, the court must decide whether partisan gerrymandering is a non-justiciable political question before it proceeds with the rest of the case. The contours of the political question doctrine are poorly defined,³⁵ but the Supreme Court has explained that “sometimes...the law is that the judicial department has no business entertaining [a] claim...[where] the question is entrusted to one of the political branches or involves no judicially enforceable rights...Such questions are said to be ‘nonjusticiable,’ or ‘political

30 League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 414–15 (2006).

31 League of United Latin Am. Citizens v. Perry, 548 U.S. at 414.

32 League of United Latin Am. Citizens v. Perry, 548 U.S. at 461. (Stevens, J., concurring in part and dissenting in part).

33 Gill, 138 S. Ct. at 1929.

34 Gill, 138 S. Ct. at 1931. (“We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies.”)

35 See generally Chris Michel, “There’s No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton,” *The Yale Law Journal* 123, no. 1 (October 2013), <https://www.yalelawjournal.org/comment/theres-no-such-thing-as-a-political-question-of-statutory-interpretation-the-implications-of-zivotofsky-v-clinton>; Louis Michael Seidman, “‘The Secret Life of the Political Question Doctrine’ by Louis Michael Seidman,” 37 *J. Marshall L. Rev.* 441–480 (2004), accessed January 5, 2019, <https://scholarship.law.georgetown.edu/facpub/563/>.

questions.”³⁶ The court has outlined six non-exhaustive, independent factors to identify such non-justiciable political questions:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The doctrine is rooted in both “constitutional and prudential considerations,”³⁷ as well as “respect for the separation of powers, including the ‘proper—and properly limited—role of the courts in a democratic society.’”³⁸ Case law has also proscribed a nuanced distinction between non-justiciable political questions and cases with political ramifications, the latter of which remains justiciable.³⁹

As an initial matter, most cases are not decided by political ideology, but as a matter of law. Justices of different ideologies routinely agree with each other irrespective of political agenda. But this paper explores the “5 percent of cases that are truly difficult,”⁴⁰ rather than the 95 percent of run-of-the-mill decisions. Gerrymandering claims are often among those difficult cases because they necessarily involve issues that impact the balance of partisan power in the legislature.

36 *Vieth v. Jubelirer*, 541 U.S. 267, at 277. (Internal citations omitted).

37 Though unclear, some argue the political question doctrine has evolved to “eliminate judicial consideration of the prudential aspects of the political question doctrine or severely limit the application of Baker’s second factor—a lack of judicial standards.” Jared Cole, “The Political Question Doctrine: Justiciability and the Separation of Powers,” CRS Report (Congressional Research Service, December 23, 2014), <https://fas.org/sgp/crs/misc/R43834.pdf>, 24.

38 Cole, “The Political Question Doctrine,” 1. See also Charles A. Wright and Arthur M. Miller et al., “§ 3534.1 Political Questions—Political Issues and Separation of Powers,” in *Federal Practice and Procedure*, 3rd ed., vol. 13C, 2015. (The political question doctrine is derived from “the conclusion that in the separation of federal powers, certain matters are confined to the political branches”).

39 *Baker v. Carr*, 369 U.S. 186, at 217. (“The doctrine of which we treat is one of ‘political questions,’ not one of ‘political cases.’”). See also Cole, “The Political Question Doctrine”; Gill, 138 S. Ct. at 1931. (“It is important to distinguish the political question doctrine from cases presenting political issues. Courts adjudicate controversies with political ramifications on a regular basis...The political question doctrine applies to issues that courts determine are best resolved within the politically accountable branches of government—Congress or the executive branch.”).

40 Neal Devins and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” *Supreme Court Review* 2016 (January 30, 2017), <https://papers.ssrn.com/abstract=2432111>. (Citing Nomination of John Roberts, 109th Cong, 1st Sess. (Sept 22, 2005), in 151 Cong. Rec. 21032 (remarks of Senator Obama)).

It has been said that for federal judges, “political elections are the devil’s domain,” and the court should remain cautious when deciding partisan gerrymandering claims.⁴¹ The court should have held in *Gill*—or should hold in the future—that partisan gerrymandering is a non-justiciable political question due to (1) a lack of judicially-manageable standards for resolving the claim, (2) the proper role of the judiciary within the government, and (3) judicial hyperpartisanship that renders adjudication on the merits inappropriate.

A. Partisan Gerrymandering Claims Lack Judicially-Manageable Standards

The partisan gerrymandering claim in *Gill* presents a non-justiciable political question because the claim satisfies Baker’s second factor of “a lack of judicially discoverable and manageable standards for resolving it,”⁴² and because there are “no judicially enforceable rights.”⁴³

First, the proposed “efficiency gap” solution is not a judicially-manageable standard. It fails to clearly identify the impact of partisan gerrymandering and is a rough approximation at best—Chief Justice Roberts calls it “sociological gobbledygook.”⁴⁴ Most notably, it fails to distinguish between so-called wasted votes caused by gerrymandering and natural causes.⁴⁵ For example, geography is a major cause of wasted votes.⁴⁶ Many urban districts overwhelmingly vote Democrat, causing wasted votes that are not the result of partisan gerrymandering.⁴⁷ Another problem is that “the efficiency gap is very noisy. It can shift back and forth from cycle to cycle” because voters can simply change their minds and side with a different political party.⁴⁸ In *Gill*, Judge Greisbach’s district court dissent pointed out that efficiency gaps measure “change every election based on a number of factors, including the issues raised, quality of local candidates, [waves], turnout, and other natural phenomena such as shifts in demographics.”⁴⁹ It is not hard to imagine a

41 Ronald K.L. Collins and David K. Skover, *The Judge: 26 Machiavellian Lessons* (Oxford, New York: Oxford University Press, 2017), 94.

42 *Baker v. Carr*, 369 U.S. 186, at 217.

43 *Vieth v. Jubelirer*, 541 U.S. 267, at 277.

44 Oral Argument Tr. at 40, *Gill v. Whitford*, No. 16-1161. (Questioning by Chief Justice Roberts).

45 Nate Cohn and Quoc Trung Bui, “How the New Math of Gerrymandering Works,” *The New York Times*, October 3, 2017, sec. The Upshot, <https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html>, <https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html>.

46 Cohn and Bui, “How the New Math of Gerrymandering Works.”

47 Cohn and Bui, “How the New Math of Gerrymandering Works.”

48 Cohn and Bui, “How the New Math of Gerrymandering Works.”

49 See *Whitford v. Gill*, 218 F. Supp. 3d at 964. (Greisbach, J., dissenting).

scenario in which voters' partisan preferences change day-to-day if, say, a candidate receives negative publicity. Such a district might then fail the efficiency gap test because of that publicity, not the map.

Second, the claim in *Gill* does not involve judicially-enforceable rights. Plaintiff-Appellees claim violations of the First and Fourteenth Amendments, which guarantee the rights of an individual, but the district court incorrectly focused on injuries to the Democratic Party as a group.⁵⁰ The Supreme Court correctly explained that “the associational harm of a partisan gerrymander is distinct from vote dilution.”⁵¹ In one amicus brief, several states⁵² pointed out that “the district court’s reliance on vote-dilution cases fundamentally misunderstands the difference between those claims regarding individual rights versus the novel group-based right recognized here.”⁵³ Justice Burger also pointed out in *Davis* that those who believe partisan gerrymandering is justiciable improperly “focus...not on access to the political process as a whole, but entirely on statewide electoral success...[and] whether the complaining political party could be expected to regain control of the state legislature.”⁵⁴ Many commentators and amici seem to transparently view *Gill* as a tool for political ends, even advocating to erode Republican power and “regain” Democratic control.⁵⁵ The logic has drifted quite far from claims about individual rights. The district court committed a logical leap from protecting individual rights to granting the Democratic party rights as a group and as a result, allowed for judicial manipulation of the balance of political power in the Wisconsin state legislature.

On the other hand, the district court, Plaintiff-Appellees, and some commentators agree that judicially-manageable standards exist. The “efficiency gap” at least provides some sort of metric for courts to apply,⁵⁶ unlike previous partisan gerrymandering cases. This test also reduces the analysis to a narrow set of analytical factors, which courts should be able to handle.⁵⁷ And big-data computing can provide cutting-edge measurements that did not exist when *Vieth* suggested

50 *Whitford v. Gill*, 218 F. Supp. 3d at 853.

51 *Gill*, 138 S. Ct. at 1938.

52 Note that all of these states except Nevada voted Republican in the 2017 presidential election. See Brief for the States of Texas, Arizona, Arkansas, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Oklahoma, South Carolina, and Utah as Amici Curiae in Support of Appellants, *Gill v. Whitford*, No. 16-1161, 3.

53 Brief for the States of Texas et al., *Gill v. Whitford*, No. 16-1161, 2.

54 *Davis v. Bandemer*, 478 U.S. at 158. (Burger, J., concurring).

55 Michael Li and Thomas P. Wolf, “Supreme Court Has Historic Chance to End Extreme Gerrymandering,” *The American Prospect*, June 21, 2017, <https://prospect.org/article/supreme-court-has-historic-chance-end-extreme-gerrymandering>. (“Extreme [political gerrymandering] maps...account for at least 16 and maybe 17 seats in the Republican majority in the House of Representatives. That’s a sizeable chunk of the 24 seats Democrats would need to regain control of the House in 2018.”).

56 *Whitford v. Gill*, 218 F. Supp. 3d at 944.

57 Wolf, “What the Briefs Say About Extreme Gerrymandering.”

that partisan gerrymandering claims lack judicially-manageable standards.⁵⁸ Other commentators believe there are numerous alternatives that are also judicially-manageable.⁵⁹

Although the “efficiency gap” is better than any other test to date, its flaws still render it insufficient. Even if the measurement is considered reliable, the logical solution to eliminate “wasted votes” is a political system of proportional representation.⁶⁰ But the court held there is no constitutional requirement for proportional representation, and “equating a party’s statewide share of the vote with its portion of the congressional delegation is a rough measure at best.”⁶¹ In *Davis*, the court held that a lack of proportional representation is not enough to prove unconstitutional discrimination.⁶² Moreover, hyperefficient “partisan symmetry” erodes the concept of voting districts altogether. The district court in *Gill* keenly foresaw this criticism by acknowledging the potential extremes of partisan gerrymandering, explaining that “to say that the Constitution does not require proportional representation is not to say that highly disproportional representation may not be evidence of a discriminatory effect.”⁶³ Appellees instead claim they argue for “partisan symmetry” rather than proportional representation.⁶⁴ However, Chief Justice Roberts quipped that it “[sounded] exactly like proportional representation to [him].”⁶⁵ While Justice Kennedy expressed a more open mind, asking whether the most egregious instance of partisan gerrymandering might be unconstitutional,⁶⁶ the court would still be required to enforce—or at least approach—a system of proportional representation under the “efficiency gap” standard. This leads to another reason for holding that partisan gerrymandering is a non-justiciable political question: it is not the court’s place to make such structural changes to the government.

B. The Supreme Court Should Not Overstep Its Proper Role

Prudential considerations also suggest that court should have invoked the political question doctrine in *Gill* or should invoke it for future partisan gerrymandering

58 See Wolf, “What the Briefs Say About Extreme Gerrymandering.” (Stating there are “two factors [that] would narrow down the range of potentially unconstitutional maps to just a handful this cycle”).

59 Wolf, “What the Briefs Say About Extreme Gerrymandering.”

60 *Whitford v. Gill*, 218 F. Supp. 3d at 904. (“In a purely proportional representation system, a party would be expected to pick up votes and seats at a one-to-one ratio.”).

61 See Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161. (Questioning by Chief Justice Roberts) (“Proportional representation . . . has never been accepted as a political principle in the history of this country.”). See also *League of United Latin Am. Citizens v. Perry*, 548 U.S. at 419.

62 *Davis v. Bandemer*, 478 U.S. at 132.

63 *Whitford v. Gill*, 218 F. Supp. 3d at 906.

64 Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161.

65 Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161.

66 Oral Argument Tr. at 26, *Gill v. Whitford*, No. 16-1161.

claims. Satisfying Baker’s fourth element, it would be impossible to reach an “independent resolution without expressing lack of the respect [towards other] branches of government.”⁶⁷ The political question doctrine defines the court’s proper role within the federal government.⁶⁸ The framers of the United States Constitution did not design the judiciary as a political body;⁶⁹ they intended the court to be “insulated from the chaotic politics that consume the executive and legislative branches of government.”⁷⁰ Congress, not the court, should maintain “complete control over the amendment process,” and court decisions should not function as constitutional amendments.⁷¹

Deciding *Gill* on its merits would fall outside of the court’s appropriate place within the government structure. Thirteen of the fifteen states with voting districts that fail the “efficiency gap” standard in 2018 are Republican states.⁷² Implementing that standard thus reflects a willingness for the judiciary to actively reshape the nation’s balance of political power towards one party in particular. This plainly falls beyond the proper role of the judiciary—even the district court, which felt it had standing to hear the case, acknowledged that “state legislative apportionment is the prerogative and therefore a duty of the state government.”⁷³ Instead, the legislature is the proper forum to address partisan gerrymandering. By answering political questions such as partisan gerrymandering claims, the court would discourage the proper legislative process, almost enabling legislative dysfunction. In addition, adjudicating partisan gerrymandering claims falls outside of the framers’ designed role for the court. In the American two-party political system, partisan gerrymandering claims are inherently political, because revoking political power from one party automatically shifts power to the other party. In this respect, affirming the district court would be an undemocratic fix to a democratic problem, where judges determine the outcome of politically-divided elections—therefore creating “appointed” or “unelected” congressmembers. In *Gill*, the Supreme Court said it must apply a standard that “ensures that [they] act as judges, and do not engage in policymaking properly left to elected representatives.”⁷⁴ Then, in *Davis*, Justice Burger said “the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making

67 See *Baker v. Carr*, 369 U.S. at 217.

68 See *Baker v. Carr*, 369 U.S. at 278.

69 See, e.g., Alexander Hamilton, “Federalist No. 78: The Judiciary Department,” May 28, 1788, http://avalon.law.yale.edu/18th_century/fed78.asp.

70 Lucas Rodriguez, “The Troubling Partisanship of the Supreme Court,” *Stanford Politics* (blog), January 7, 2016, <https://stanfordpolitics.org/2016/01/07/troubling-partisanship-supreme-court/>.

71 Wright and Miller et al., “§ 3534.1 Political Questions—Political Issues and Separation of Powers.”

72 Cohn and Bui, “How the New Math of Gerrymandering Works.”

73 *Whitford v. Gill*, 218 F. Supp. 3d at 883.

74 *Gill v. Whitford*, 138 S. Ct. at 1923. (Emphasis in original).

of such fundamental choices about how this Nation is to be governed.”⁷⁵ To the contrary, Alexander Hamilton in Federalist No. 78 wanted the judiciary to be the “least dangerous” political branch, whereby judges would act with “neither force nor will.”⁷⁶ And James Madison in Federalist No. 51 explained that “legislative authority necessarily predominates” the judiciary,⁷⁷ suggesting that legislative resolution to partisan gerrymandering is more appropriate than judicial resolution. But there is another possibility: maybe the court is the perfect place to address partisan gerrymandering. It’s not hard to imagine that voters and the legislature cannot properly fix the issue themselves. Citizens may not be able to vote the gerrymandering party out of office if the maps are too heavily skewed.⁷⁸ Their votes cannot fix partisan gerrymandering; their votes are defined by partisan gerrymandering. In that sense, court intervention seems appropriate because although the issue falls outside of the court’s role, the other branches either cannot or will not fix the problem. Political gerrymandering may also exacerbate partisan gridlock throughout the nation,⁷⁹ so court intervention appears appropriate to surpass a paralyzed legislature. Others are also concerned that the negative effects of partisan gerrymandering will worsen if not reversed, given the precision and influence of big data technology.⁸⁰

Although these are important considerations, they operate on the assumption that the Constitution grants a right to protection from another political party, and, even if it does, the court is able to proscribe manageable standards to protect that right. In *Gill*, the Supreme Court explained that its “power as judges to ‘say what the law is’...rests not on the default of politically accountable officers.”⁸¹ On balance, it is simply improper and unworkable “to inject the courts into the most heated partisan issues.”⁸²

75 *Davis v. Bandemer*, 478 U.S. at 145. (Burger, J., concurring).

76 Hamilton, Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161. (“The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”). See also Collins & Skover, *The Judge*.

77 James Madison, “The Federalist #51,” February 6, 1788, <http://constitution.org/fed/federa51.htm>.

78 Li & Wolf, “5 Things to Know About the Wisconsin Partisan Gerrymandering Case.”

79 A bipartisan group of 36 members of Congress, “have decried partisan gerrymandering as ‘a substantial cause of the dysfunction of contemporary politics.’” “Bipartisan Support for Whitford | Brennan Center for Justice,” Brennan Center for Justice, accessed January 6, 2019, <https://www.brennancenter.org/bipartisan-support-whitford>.

80 Wolf, “What the Briefs Say About Extreme Gerrymandering.”

81 *Gill v. Whitford*, 138 S. Ct. at 1929.

82 *Davis v. Bandemer*, 478 U.S. at 145. (O’Connor, J., dissenting), (emphasis added).

C. Judicial Hyper Partisanship Renders Adjudication on the Merits Inappropriate

There are legitimate concerns that the court cannot prevent its own bias and achieve an “independent resolution,” again satisfying Baker’s fourth factor.⁸³ Failing to invoke the political question doctrine would demonstrate a “lack of respect” for the Wisconsin state legislature, because the Justices could not redesign Wisconsin’s legislature without imposing their own ideologies.

Alternatively, this piece proposes that “judicial hyper-partisanship rendering adjudication inappropriate” functions as a new factor for determining non-justiciable political questions. This proposed factor would (1) be consistent with the Baker factors, (2) function as a “prudential consideration” which is one aspect of the political question doctrine⁸⁴, and (3) fit seamlessly into the political question doctrine’s overall purpose to ensure the proper role of the court. While this proposition deserves full discussion at another time, it highlights the fact that the court could proffer an entirely new justification for invoking the political question doctrine, since the six Baker factors are non-exhaustive.⁸⁵

Irrespective of which “factor” applies, partisan polarization is increasing at all levels of government.⁸⁶ A highly-politicized Supreme Court is relatively new, though: “before 2010, the Court never had clear ideological blocs that coincided with party lines.”⁸⁷ Authorities like Richard Posner now believe “the Supreme Court is not an ordinary court but a political court...strongly influenced in making its decisions by the political beliefs of the judges.”⁸⁸ And empirical evidence proves this. Justices now vote along party lines more frequently in politically-charged cases. Less than two percent of the court’s decisions were 5-4 between 1801 and 1940, but in 2005, this rate topped 20 percent⁸⁹ and even spiked to 30 percent in 2006 and 2008.⁹⁰ The Senate’s Supreme Court confirmation process is another indicator: the four most senior Justices on the court received less than 21 negative votes on average, while the five newest Justices received more than 40 negative

83 Baker v. Carr, 369 U.S. at 217.

84 See Zachary Baron Shemtob, “The Political Question Doctrines: Zivotofsky v. Clinton and Getting Beyond the Textual-Prudential Paradigm,” *The Georgetown Law Journal* 4 (2016): 1013-7.

85 See Baker v. Carr, 369 U.S. at 217.

86 Rodriguez, “The Troubling Partisanship of the Supreme Court.”

87 Devins and Baum, “Split Definitive,” 301.

88 Richard Posner, “The Supreme Court Is a Political Court. Republicans’ Actions Are Proof.,” *Washington Post*, March 9, 2016, https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html. (Discussing Republican senators’ decision to not consider President Obama’s nominations to the Supreme Court).

89 Rodriguez, “The Troubling Partisanship of the Supreme Court”; David Paul Kuhn, “The Incredible Polarization and Politicization of the Supreme Court,” *The Atlantic*, June 29, 2012, <https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.

90 Kuhn, “The Incredible Polarization and Politicization of the Supreme Court.”

votes on average.⁹¹ The recent cases of Judge Garland, Justice Gorsuch, and Justice Kavanaugh likewise illustrate how judicial office now seems defined by partisanship from the start.⁹²

Hyperpartisan judicial decisions are detrimental to a well-functioning judiciary. Chief Justice Roberts has expressed concern that the increase in 5-4 decisions erodes the public's confidence in the court "as a partisan institution," threatening its credibility and legitimacy.⁹³ Lawyers have also started preying on the Justices' partisanship, as "more and more appellate litigators have come to appreciate that the federal 'courts are a sort of untapped resource for pursuing [a political party's] agenda.'"⁹⁴

On the other hand, maybe the court could have decided *Gill* on the merits without the bias seen in recent decades.⁹⁵ For example, the National Association for the Advancement of Colored People (NAACP) asserts that "gerrymandering isn't just a political fight between the parties... 'both Democratic and Republican legislatures have used the power of the state to enact extreme partisan gerrymanders.'"⁹⁶ At least one poll shows bipartisan voter consensus against partisan gerrymandering.⁹⁷ And several Republicans—not just Democrats—publicly advocate against it.⁹⁸ For example, a group of Republicans including Arnold Schwarzenegger, John Kasich, and Bob Dole filed an amicus brief asserting that if the "Court does not stop partisan gerrymanders, partisan politicians will be emboldened to enact ever more egregious gerrymanders... That result would be devastating for our democracy."⁹⁹

Alternatively, maybe adjudicating the merits would not have displayed a lack of respect for Wisconsin's legislature because the current Justices are not

91 Rodriguez, "The Troubling Partisanship of the Supreme Court."

92 Jessica Yarvin and Daniel Bush, "Is the Hyper-Partisan Supreme Court Confirmation Process 'the New Normal'?" PBS NewsHour, September 13, 2018, <https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal>.

93 Jeffrey Rosen, "The Supreme Court Has a Legitimacy Crisis, But Not For the Reason You Think I," New Republic, June 11, 2012, <https://newrepublic.com/article/103987/the-supreme-court-has-legitimacy-crisis-not-the-reason-you-think>. But other studies suggest Justice Roberts may be wrong on this point, because most Americans don't know or understand the political allegiances of the Justices.

94 Collins & Skover, *The Judge*, xiii.

95 See Devins & Baum, Devins and Baum, "Split Definitive," 314.

96 Wolf, "What the Briefs Say About Extreme Gerrymandering." Note also, this is not completely correct. See Cohn & Bui, "How the New Math of Gerrymandering Works," (showing that nearly all maps violating the "efficiency gap" are Republican districts).

97 Li & Wolf, "Supreme Court has Historic Chance to End Extreme Gerrymandering." ("The most recent Harris poll shows that 74 percent of Republicans, 73 percent of Democrats, and 71 percent of independents believe that politicians shouldn't have a hand in drawing lines that benefit them.")

98 See generally Brief of Republican Statewide Officials as Amici Curiae in Support of Appellees, *Gill v. Whitford*, No. 16-1161. See also Wolf, "What the Briefs Say About Extreme Gerrymandering."

99 Brief of Republican Statewide Officials as Amici Curiae in Support of Appellees, *Gill v. Whitford*, No. 16-1161. See also Wolf, "What the Briefs Say About Extreme Gerrymandering."

to blame for hyper-partisanship. Decades ago, the court said that “politics and political considerations are inseparable from districting and apportionment...The reality is that districting inevitably has and is intended to have substantial political consequences.”¹⁰⁰ Others assert that judicial impartiality is a myth¹⁰¹ and that law is unavoidably political.¹⁰² Yet more argue that “judges are inevitably political actors, and hence their decisions are ultimately based on their ideological convictions.”¹⁰³ If partisanship is unavoidable, maybe the court should have decided *Gill* on its merits anyway.

It is also unclear that invoking the political question doctrine actually eliminates the negative effects of a political decision. Just as adjudication on the merits favors the plaintiff’s political party and disfavors the defendant’s party, not ruling on the merits favors the defendant’s party and disfavors the plaintiff’s party. In other words, evading the merits of *Gill*—perhaps under the guise of the political question doctrine—is still a political maneuver.¹⁰⁴ Some case law demonstrates that declining to rule still yields a victor and shapes policy.¹⁰⁵ Nevertheless, passive political maneuvers are at least more palatable than active political maneuvers. Even if the political question doctrine is invoked as a political tool, it cannot be completely arbitrary, because Justices are constrained to provide coherent legal reasoning behind their decisions.¹⁰⁶

On balance, the court should have held in *Gill*, or should hold in the future, that partisan gerrymandering is a non-justiciable political question, because judicial hyperpartisanship renders the issue inappropriate for judicial resolution—even though there is bipartisan support, hyperpartisanship is not the court’s fault, and the political question doctrine itself resembles a political maneuver. The best advice comes from Justice O’Connor, who, looking back on *Bush v. Gore*, expressed regret for not invoking the political question doctrine, explaining that “maybe the Court should have said, ‘We’re not going to take it, goodbye’” and that the case “‘stirred up the public’ and ‘gave the Court a less than perfect reputation.’”¹⁰⁷

100 *Gaffney v. Cummings*, 412 U.S. at 753.

101 Collins & Skover, *The Judge*, 15.

102 Collins & Skover, *The Judge*, xii–xiii. (“Law is political. . . . Whatever the political stripes, the charge is always the same: Judge-made law has become politicized.”).

103 Cass R. Sunstein, “Moneyball for Judges,” *The New Republic*, April 10, 2013, <https://newrepublic.com/article/112683/moneyball-judges>.

104 See Shemtob, “The Political Question Doctrines”; Madison, “The Federalist #51.”

105 Collins & Skover, *The Judge*, 33.

106 Shemtob, “The Political Question Doctrines,” 1027.

107 Jeffrey Toobin, “Justice O’Connor Regrets,” *The New Yorker*, May 6, 2013, <https://www.newyorker.com/news/daily-comment/justice-oconnor-regrets>.

IV. REFUTING THE ALTERNATIVE OF RULING ON THE MERITS

Two rationales might support the decision to ignore the political question doctrine and address the merits in *Gill*, neither of which were reached because the court remanded the case on standing grounds.¹⁰⁸ First, *Gill* might not involve a political question at all. The court could have held that the “efficiency gap” analysis provides a judicially manageable standard, prudential considerations are irrelevant, and hyperpartisanship will not affect the outcome. Some even argue the political question doctrine does not exist at all.¹⁰⁹ Second, *Gill* might involve a political question that the court should have addressed anyway—akin to a “justiciable political question.” The court has confronted contentious political questions before.¹¹⁰ *Bush v. Gore* (2000) is perhaps most analogous, because it determined the outcome of a political election under the Equal Protection and Due Process clauses. There, the court ignored the political question doctrine, even though the case had high-profile and partisan implications.¹¹¹ Others argue this case taught judges the art of political manipulation under the guise of apolitical judiciousness.¹¹² Thus, cases like *Bush v. Gore* may have set precedent for the court to ignore the political question doctrine in *Gill*.

Regardless of the rationale for ignoring the political question doctrine, the merits of *Gill* implicate the Fourteenth and First Amendments.

A. The Fourteenth Amendment Claim

Plaintiff-Appellants claimed that partisan gerrymandering violates their Fourteenth Amendment rights.¹¹³ The Equal Protection Clause of the Fourteenth Amendment¹¹⁴ “guarantees the opportunity for equal participation by all voters in the election of state legislators.”¹¹⁵ In the context of voting districts, it requires that “seats in both houses of a bicameral state legislature must be apportioned on a

108 *Gill v. Whitford*, 138 S. Ct. at 1937–38.

109 See Michel, “There’s No Such Thing as a Political Question of Statutory Interpretation,” 143–44.

110 See *D.C. v. Heller*, 554 U.S. 570, 603 (2008). See also Collins & Skover, *The Judge*, 71: (“Originalism, textualism, historicism—they were all isms perfectly suited to Justice Scalia’s conservative constitutional jurisprudence.”).

111 Collins & Skover, *The Judge*; Cole, “The Political Question Doctrine,” 94.

112 Collins & Skover, *The Judge*, 102.

113 Complaint, p. 24–27, *Whitford v. Gill*, 218 F. Supp. 3d 837.

114 “Constitution of the United States - Amendment XIV” (United States Senate), accessed January 6, 2019, https://www.senate.gov/civics/constitution_item/constitution.htm#amendments.

115 *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964).

population basis.”¹¹⁶ This protects the “one-person, one-vote” principle enshrined in the Equal Protection Clause.¹¹⁷ More specifically, partisan gerrymandering “may” create unconstitutional districts if political groups (1) have been “fenced out of the political process,” and (2) have had their voting strength “invidiously minimized.”¹¹⁸ The purpose is to achieve “fair and effective representation” for all citizens.¹¹⁹

First, there are credible arguments that voters have been fenced out of the political process, and the alleged “wasted votes” seem to violate the “one-person, one-vote” standard. At oral argument, Justice Ginsburg focused on partisan gerrymandering’s effect of denying individuals of “the precious right to vote,” expressing concern that “if you can stack a legislature in this way, what incentive is there for a voter to exercise his vote?...The result is preordained in most of the districts. Isn’t that -- what becomes of the precious right to vote?”¹²⁰ On the other hand, it is more persuasive that partisan gerrymandering does not violate the “one person, one vote” principle, because Plaintiff-Appellants unavoidably seek damages to the Democratic party as a whole,¹²¹ not to “one person.” Unlike the constitutional right to protection from racial gerrymandering, which specifically targets and harms individuals based on their human identity, regardless of who they vote for, partisan gerrymandering is inextricably intertwined with the outcome of a political party rather than individuals who can change their voting preference at any time.

Second, Wisconsin’s map seems to satisfy Gaffney’s “invidious” requirement, because it was designed to fix future elections and “the goal of the map...was to ‘determine who’s here 10 years from now.’”¹²² This “invidious” trend seems to occur in districts nationwide too, generally hurting Democrats more than Republicans.¹²³ Commentators note that “the Supreme Court has also picked up on the widespread agreement and has often assumed, at least implicitly, that the drawing of majority-minority districts comes at a cost for the Democratic Party.”¹²⁴

Even if partisan gerrymandering seems “invidious” towards Democrats, it is not unconstitutional unless shown to have fenced voters out of the political process. As discussed in Section III, these claims present a lack of judicially-manage-

116 *Reynolds v. Sims*, 377 U.S. at 568.

117 *Whitford v. Gill*, 218 F. Supp. 3d at 844. See also *Reynolds v. Sims*, 377 U.S. at 558.

118 *Gaffney v. Cummings*, 412 U.S. at 754 (emphasis added).

119 *Reynolds v. Sims*, 377 U.S. at 565–66.

120 Oral Argument Tr. at 24, *Gill v. Whitford*, No. 16-1161. (Questioning by Justice Ginsburg).

121 See, e.g., Complaint, p. 2, *Whitford v. Gill*, 218 F. Supp. 3d 837. (“Extreme partisan gerrymandering is also contrary to core democratic values because it enables a political party to win more legislative districts.”) (emphasis added).

122 *Whitford v. Gill*, 218 F. Supp. 3d at 853.

123 See Cohn & Bui, “How the New Math of Gerrymandering Works.”

124 Adam B. Cox and Richard T. Holden, “Reconsidering Racial and Partisan Gerrymandering,” *The University of Chicago Law Review* 78, no. 2 (2011): 560.

able standards to make such a determination. Even if such measurements like the “efficiency gap” are accepted, their use falls outside of the court’s proper role in the government, and even if it falls within the court’s proper role, judicial hyperpartisanship makes such a determination inappropriate. Thus, adjudicating *Gill* under the Fourteenth Amendment inevitably circles back to the rationale for invoking the political question doctrine in the first place.

The First Amendment Claim

The plaintiffs also argued that partisan gerrymandering caused “wasted votes” and diluted voting power, “unreasonably burden[ing] their First Amendment rights of association and free speech.”¹²⁵ The First Amendment states that “Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble,”¹²⁶ and protects individuals from infringement by the states.¹²⁷ The court has held that “in the context of partisan gerrymandering...First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters’ representational rights,”¹²⁸ bearing resemblance to the Fourteenth Amendment’s “invidious” and “fencing out” elements.

A First Amendment analysis at least semantically alleviates problems associated with the Fourteenth Amendment analysis—particularly with respect to prudential considerations and judicial hyperpartisanship. Under a First Amendment analysis, the court would ensure the voting process is fair for all voters, rather than directly comparing the “equality” of two political parties at large. Thus, the court would not have purported to analyze or manipulate the balance of partisan power in Wisconsin’s legislature. By extension, risks associated with judicial hyperpartisanship seem to disappear as well.

However, the outcome would have remained the same under the First Amendment—one party wins and one party loses. Justices who wish to manipulate the balance of partisan power could still do so, just under the guise of another constitutional provision. Still, the First Amendment analysis is more appealing than the Fourteenth, because even if the court alters the balance of power, at least it will not be blatant, mitigating concerns about the court’s public reputation and the appearance of bias.¹²⁹

Most significantly, the First Amendment would not alleviate the lack of judicially-manageable standards. Measuring the effect of partisan gerrymandering under the First Amendment still requires calculations like the “efficiency gap.”

125 Complaint, p. 2, *Whitford v. Gill*, 218 F. Supp. 3d 837.

126 “Constitution of the United States - Amendment I” (United States Senate), accessed January 6, 2019, https://www.senate.gov/civics/constitution_item/constitution.htm#amendments.

127 *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968).

128 *Vieth v. Jubelirer*, 541 U.S. at 314.

129 See Kuhn, “The Incredible Polarization and Politicization of the Supreme Court.”

Like the Fourteenth Amendment analysis, the First Amendment analysis inevitably circles back to the rationale for holding that partisan gerrymandering is a non-justiciable political question.

VI. THE SUPREME COURT'S ETHICAL OBLIGATIONS IN *GILL V. WHITFORD*

There aren't any—at least, not prescribed by law.

All federal judges, except Supreme Court Justices, are bound by the Code of Conduct for United States Judges,¹³⁰ which provides pertinent guidance in *Gill*: Canon 1 states “[a] Judge Should Uphold the Integrity and Independence of the Judiciary,” Canon 2 states “[a] Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities...A judge should not allow...political...relationships to influence judicial conduct or judgment,” and Canon 5 states “[a] Judge Should Refrain from Political Activity.”¹³¹ The Code is further buttressed by sections of the non-binding American Bar Association (ABA) Model Code of Judicial Conduct, such as Rule 2.3, which provides that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice...including but not limited to...political affiliation.”¹³² And Rule 2.4 further complements that “[a] judge shall not permit...political...interests or relationships to influence the judge’s judicial conduct or judgment.”¹³³

The ABA Code of Judicial Conduct does not apply to the Supreme Court, however.¹³⁴ Several Justices have stated they follow it regardless,¹³⁵ and all Justices take the Judicial Oath of Office, swearing to “faithfully and impartially discharge and perform all the duties incumbent upon [them].”¹³⁶ But the Code remains non-binding and the Oath of Office does not create an enforcement mechanism once Justices take office.

The Code thus provides persuasive support for invoking the political question doctrine in *Gill*. Manipulating the balance of political power in a state legislature would erode the integrity and independence of the judiciary,¹³⁷ violating Canon 1. Adjudicating the merits of the claims to propel political agendas would be neither independent nor impartial, violating Canons 2 and 5. Allowing such

130 The Code omits the Supreme Court from coverage. See “Code of Conduct for United States Judges | 69 F.R.D. 273,” United States Courts, 1973, <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>. (“This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.”).

131 “Code of Conduct for United States Judges | 69 F.R.D. 273,” United States Courts.

132 American Bar Association, “Model Code of Judicial Conduct,” August 16, 2018, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

133 American Bar Association, “Model Code of Judicial Conduct.”

134 See “Code of Conduct for United States Judges | 69 F.R.D. 273,” United States Courts.

135 “Supreme Court Justices and the Code of Conduct,” *Judicature* 95, no. 4 (2011).

136 “Text of the Oaths of Office for Supreme Court Justices,” [supremecourt.gov](https://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx), accessed January 6, 2019, <https://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx>.

137 See discussion *supra* Part III.C.

political bias to influence the decision-making process also stands in the face of ABA Rules 2.3 and 2.4. And under Canon 5, this all would apply whether or not political agendas are the underlying motivation, simply because it would appear improper.

Although the Code does not apply to the Supreme Court, the existence of scribed rules isn't the point of ethics. As Judge Alex Kozinski puts it, "we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself."¹³⁸ Justices should be held to the highest moral and ethical standards, guided by their own moral compass, even if not required by rule. It's true that if determined to do so, the Justices can find a way to apply or not apply the political question doctrine to further their political agenda in partisan gerrymandering cases—if that is their goal.¹³⁹ But if they wish to invoke the political question doctrine, ethical principles support them.

CONCLUSION

After decades of debate and contradictory Supreme Court decisions, *Gill v. Whitford* presented an opportunity for the Supreme Court to clarify whether partisan gerrymandering is justiciable. The court should have held that partisan gerrymandering is a non-justiciable political question, due to a lack of judicially-manageable standards, the proper role of the judiciary, and judicial hyper-partisanship. Furthermore, alternatives under the First and Fourteenth Amendments carry implications that inevitably circle back to the rationale for invoking the political question doctrine in the first place. While the court is not bound by ethical rules, general ethical principles should have guided the Justices' own moral compass towards the political question doctrine.

Partisan gerrymandering claims, like those presented in *Gill v. Whitford*, can be analyzed under both the political question doctrine or the First and Fourteenth Amendments. Those analyses lead to drastically different consequences for American politics: adopting the political question analysis would ultimately favor the Republican party, while adopting the First Amendment analysis would ultimately favor the Democratic party. The prevailing analysis has the power to permanently alter the American political landscape.

138 Alex Kozinski, "The Real Issues of Judicial Ethics," Hofstra Law Review 32, no. 4 (January 1, 2004), <https://scholarlycommons.law.hofstra.edu/hlr/vol32/iss4/1>, 1106.

139 Kozinski, "The Real Issues of Judicial Ethics," 1105. ("A judge can appear to act ethically and still betray his responsibility in essential respects, and in ways that no one will ever know about.").

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