

# Political Fairness in Redistricting: What Wisconsin’s Experience Teaches

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## I. INTRODUCTION

Partisan gerrymandering undermines democracy by diluting the votes of people who vote for candidates of the party that is not in power. It thereby creates legislative districts that enable a party to govern even though it receives only a minority of votes across the state. For example, in *Gill v. Whitford*, the Wisconsin case that in 2018 the Supreme Court remanded on the ground that the plaintiffs lacked standing to sue,<sup>1</sup> the gerrymander was so extreme that it allowed Republicans to control the state legislature with only 48% of the statewide vote while

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1. 138 S. Ct. 1916, 1923 (2018).

Democrats needed 54% to gain such control.<sup>2</sup> Thus, it is fair to say that partisan gerrymandering is one of the most significant “Barriers at the Ballot Box” that *The University of Memphis Law Review*’s March symposium seeks to explore.

Justice Kagan ended her concurrence in *Gill*, which Justices Ginsburg, Breyer, and Sotomayor joined, by stating:

Courts have a critical role to play in curbing partisan gerrymandering. Over fifty years ago, we committed to providing judicial review in the redistricting arena, because we understood that “a denial of constitutionally protected rights demands judicial protection.” Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.<sup>3</sup>

It is not at all clear, however, that any members of the Court’s conservative majority agree with Justice Kagan. In 2004, in *Vieth v. Jubelirer*,<sup>4</sup> a plurality of the Court held that partisan gerrymandering was a nonjusticiable political question that was off-limits to courts.<sup>5</sup> This was so, said the Court, because “no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged.”<sup>6</sup> And in his majority opinion in *Gill*, Chief Justice Roberts left open the issue of partisan gerrymandering claims’ justiciability.<sup>7</sup> Further, in *Vieth*, Justice Thomas supported nonjusticiability,<sup>8</sup> and in *Gill*, he and Justice Gorsuch opined that because of the Court’s ruling on standing, the case should be dismissed.<sup>9</sup>

I agree that the Court needs to find the issue of partisan gerrymandering justiciable and strike down the remap at issue in *Gill*. In

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2. Whitford v. Gill, 218 F. Supp. 3d 837, 852 (W.D. Wis. 2016).

3. 138 S. Ct. at 1941 (Kagan, J., concurring) (internal citation omitted).

4. 541 U.S. 267 (2004).

5. *Id.* at 281.

6. *Id.*

7. *See* 138 S. Ct. at 1934 (stating the gerrymandering claim at issue “concern[ed] an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved”).

8. 541 U.S. at 270, 281 (joining the majority).

9. 138 S. Ct. at 1941 (Thomas, J., concurring).

addition, however, I argue in this Essay that the law and practice of redistricting generally must address the question of political fairness. In support of this argument, I present a different sort of evidence than that found in most discussions of redistricting. Specifically, I explore the history of redistricting in Wisconsin prior to *Gill* and argue that it unequivocally establishes that, even without partisan gerrymandering, redistrictings are often unfair to voters of one party or the other. I further argue that all entities involved in redistricting, including state legislatures, lower federal courts, state courts, and independent commissions, should be aware of the problem of political fairness and take steps to address it.

Political fairness hasn't been addressed in Wisconsin or anywhere else that I know of. Despite a number of non-partisan redistrictings that turned out to have had unfair political consequences, the Wisconsin legislature has not addressed the issue. Further, courts that have been involved in redistricting in Wisconsin either declined to consider the question of political fairness or addressed it in a perfunctory and ineffective way.<sup>10</sup> What is necessary is that state legislatures establish a standard of political fairness with which redistricting plans must comply. In the absence of such legislation, entities that engage in redistricting, such as courts and commissions, should on their own initiative attempt to create plans that are politically fair and should utilize all available tools including modern computer technology to assist them. In this way, legislatures, courts, and commissions can better protect the right of individuals to cast a meaningful vote.

Wisconsin is an interesting state to study in connection with the question of political fairness in redistricting.<sup>11</sup> It has long been a purple state, and during most of the period from the 1950s until 2010, when

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10. See *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, at \*6–\*31 (E.D. Wis. May 30, 2002) (redrawing legislative districts after finding “unredeemable flaws” in plans submitted by the parties); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 869–71 (W.D. Wis. 1992) (combining two redistricting plans to preserve strengths and avoid weaknesses in each plan); *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (E.D. Wis. 1982) (“[W]e recognize the possibility that arithmetic and/or inclusion-exclusion error could slip into the [map redrawn by the court].”).

11. In the interest of full disclosure, my interest in redistricting stems in part from the fact that before being appointed to the bench, I served in the Wisconsin State Senate for twenty years and was personally affected by several redistrictings.

Republicans implemented the gerrymander at issue in *Gill*, it had a divided government.<sup>12</sup> Moreover, until recently, Wisconsin had a well-deserved reputation as a progressive, innovative, good government state.<sup>13</sup>

The federal constitutional and statutory requirements that govern redistricting are that legislative districts be equal in population and that minority voting rights be protected.<sup>14</sup> In Wisconsin, as elsewhere, the state constitution requires the legislature to redraw legislative districts every ten years based on the results of the decennial federal census.<sup>15</sup> The state constitutional requirements are that districts be reasonably “compact” and consist of “contiguous territory.”<sup>16</sup> A number of states have constitutional or statutory provisions that preclude redistricting entities from favoring or disfavoring a political party.<sup>17</sup> Many observers believe that entities involved in redistricting should not consider political factors,<sup>18</sup> but I know of no state that bars consideration of such factors to establish a fair plan.

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12. See WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2011–2012, at 848 (Lynn Lemanski et al. eds., 2011), [https://docs.legis.wisconsin.gov/misc/lrb/blue\\_book/2011\\_2012](https://docs.legis.wisconsin.gov/misc/lrb/blue_book/2011_2012) [hereinafter 2011–2012 BLUE BOOK] (detailing in “Chapter 9—Political Parties” the history of party control in Wisconsin’s legislative assembly).

13. Dan Kaufman, *The Undoing of Progressive Wisconsin*, THE PROGRESSIVE (Aug. 1, 2018), <https://progressive.org/magazine/the-undoing-of-progressive-wisconsin/>.

14. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.) (addressing rights of racial minorities); *Reynolds v. Sims*, 377 U.S. 533 (1964) (reviewing population inequality).

15. WIS. CONST. art. IV, § 3; see also *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 549–51, 558 (Wis. 1964).

16. WIS. CONST. art. IV, § 4.

17. See, e.g., OHIO CONST. art. XIX, § 1; WASH. CONST. art. II, § 43; N.Y. LEGIS. LAW § 93 (McKinney 2013).

18. See, e.g., *Create a Nonpartisan Redistricting Process*, COMMON CAUSE, <https://www.commoncause.org/wisconsin/our-work/gerrymandering-representation/create-a-nonpartisan-redistricting-process/> (last visited Mar. 21, 2019) (calling for a “nonpartisan system” to handle redistricting in Wisconsin based on Iowa’s nonpartisan system); *Time for Nonpartisan Redistricting in Wisconsin*, LEAGUE OF WOMEN VOTERS OF WIS., <https://my.lwv.org/wisconsin/action-alert/time-nonpartisan-redistricting-wisconsin> (last visited Mar. 21, 2019) (supporting “nonpartisan redistricting since the 1970s”); Sam Wang & Brian Remlinger, *Slaying the Partisan*

Even though redistricting is a legislative responsibility, in every Wisconsin redistricting since the 1950s, lawsuits were started, and courts became involved.<sup>19</sup> In each instance, this happened because legislators failed to resolve partisan disagreements.<sup>20</sup> The repeated failures of experienced politicians to work out compromises of the sort that they commonly do with respect to other issues makes clear that redistricting is different. Lawmakers and political parties have a greater stake in the outcome of redistrictings that often makes compromise impossible.<sup>21</sup> Also, except for the most sophisticated voters, few citizens are aware of the details of redistricting disputes.<sup>22</sup> Thus, unlike most high stakes political fights, the feelings of voters have no impact on how politicians handle redistricting. Politicians are not subject to the usual constraints and operate more or less as free agents.

## II. REDISTRICTING IN WISCONSIN

### A. 1950–1980

A brief chronology of redistricting in Wisconsin goes something like this: following the 1950 Census, the legislature established a reapportionment committee chaired by a former chief justice of the state supreme court, and the committee's recommendations became the basis for the plan adopted by the 1951 legislature.<sup>23</sup> This was the first full statewide reapportionment since 1921, and it was based on the premise

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*Gerrymander*, AM. PROSPECT (Sept. 25, 2017), <https://prospect.org/article/slaying-partisan-gerrymander> (arguing to implement “neutral statistical tools” for analyzing partisan gerrymanders).

19. WIS. LEGISLATIVE REFERENCE BUREAU, INFORMATIONAL MEMORANDUM 10-4: WISCONSIN REDISTRICTING CHRONOLOGY, 1950–2002, at 1–2 (2010) [hereinafter WISCONSIN REDISTRICTING CHRONOLOGY].

20. *Id.*

21. See generally Brett Neely & Sean McMinn, *Voters Rejected Gerrymandering in 2018, but Some Lawmakers Try to Hold Power*, NPR (Dec. 28, 2018, 5:00 AM), <https://www.npr.org/2018/12/28/675763553/voters-rejected-gerrymandering-in-2018-but-some-lawmakers-try-to-hold-power> (discussing the impending redistricting after the 2020 Census is taken).

22. Costas Panagopoulos, *Public Awareness and Attitudes About Redistricting Institutions*, 6 J. POL. & L. 45, 45 (2013) (citations omitted).

23. WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 1.

that legislative districts should be “as equal in population as possible.”<sup>24</sup> Basing redistricting on population shifted legislative power from north to south and from rural areas to cities, and this undoubtedly shocked many people. In response, voters approved a referendum that called for basing 30% of the state senate’s apportionment on land area instead of population.<sup>25</sup> The result of the referendum was challenged, and the state supreme court struck it down.<sup>26</sup> The dispute about whether apportionment should be based on population or land was part of the long-standing struggle between rural and urban America that continues to this day.

“Following the 1960 census, [the] Republican-controlled legislature” was unable to agree on a plan with Wisconsin’s Democratic governors.<sup>27</sup> The Democratic attorney general brought a lawsuit in federal court to stop elections under the existing apportionment act. He brought the suit in federal court because he considered it a more favorable forum. The suit was ultimately dismissed although not until after the court appointed a special master.<sup>28</sup> The legislature tried to enact a plan without the agreement of the governor, but the state supreme court ruled that the governor had to be part of the process.<sup>29</sup> At that point, the state supreme court, which was dominated by justices with Republican backgrounds, directed the head of a legislative service agency to draft a plan that the court would promulgate.<sup>30</sup> Although the plan was touted as non-partisan and may well have been drafted without partisan intent, in fact, it had a strong Republican bias.<sup>31</sup> As we will see, this was only the first of a number of so-called “neutral” plans that had such

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24. *Id.*

25. See J. Res. 59, 1951 Leg., 70th Sess. (Wis. 1951); see also MICHAEL KEANE, WIS. LEGISLATIVE REFERENCE BUREAU, REDISTRICTING IN WISCONSIN 8 (2016), [https://docs.legis.wisconsin.gov/misc/lrb/redistricting\\_information/redistricting\\_2016.pdf](https://docs.legis.wisconsin.gov/misc/lrb/redistricting_information/redistricting_2016.pdf).

26. State *ex rel.* Thomson v. Zimmerman, 60 N.W.2d 416, 423 (Wis. 1953).

27. WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 1.

28. Wisconsin v. Zimmerman, 209 F. Supp. 183, 188–89 (W.D. Wis. 1962).

29. WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

30. See State *ex rel.* Reynolds v. Zimmerman, 128 N.W.2d 16, 17 (Wis. 1964).

31. See generally WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 1–2 (discussing how the 1964 court reapportionment served as the actual legislative reapportionment plan through the 1960s and then reporting after the 1970 Census, divided government returned, with Republican control of both the state senate and assembly).

a bias. The plan also deviated considerably from the equal population concept, and it relied on erroneous population estimates in African American wards in the City of Milwaukee.<sup>32</sup> In all these respects, the plan was deeply flawed. Moreover, it was supposed to be “temporary,” used only for the 1964 elections, but it wound up serving for the “remainder of the decade.”<sup>33</sup>

Probably the most striking thing about the dispute was the sheer volume of government time, energy, and resources devoted to it. Legislators, a federal judge and his appointee, the governor, the attorney general, and the state supreme court cumulatively spent an enormous amount of time on the subject.<sup>34</sup> All this work was required solely because both parties’ legislators sought a partisan advantage and because there was no constitutional, statutory, or common law mechanism or standard for resolving that dispute.

As the 1970s approached, the Supreme Court and Congress ushered in a new world of redistricting driven largely by decisions such as *Baker v. Carr*<sup>35</sup> and legislation such as the Voting Rights Act.<sup>36</sup> *Baker v. Carr* dealt with the issue of population equality,<sup>37</sup> and the Voting Rights Act dealt with the rights of racial minorities.<sup>38</sup> These changes brought the federal courts into redistricting to a greater extent. After the 1970 Census, political control in Wisconsin was again divided.

32. Interview with Fred Kessler, Wis. State Representative, in Milwaukee, Wis. (Nov. 3, 2018).

33. WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

34. *See id.* at 1–2 (noting that the process began with the 1961 Legislative Session, and the court issued its order in May 1964). In 1962 alone, legislators introduced four congressional redistricting bills, five legislative reapportionment bills, and eight joint resolutions calling for amendments to the Wisconsin Constitution. *Id.* The legislature passed two congressional redistricting bills and one legislative reapportionment bill, but the governor vetoed them. *Id.* at 2. In 1963, the governor vetoed another legislative plan. *Id.* The Wisconsin Supreme Court issued two opinions on redistricting. *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551 (Wis. 1964); *State ex rel. Reynolds v. Zimmerman*, 128 N.W.2d 16 (Wis. 1964).

35. *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that legislative apportionment is justiciable).

36. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.) (addressing rights of racial minorities).

37. *Baker*, 369 U.S. at 187–89.

38. Voting Rights Act of 1965 § 2.

Democrats controlled the assembly, and Republicans controlled the state senate.<sup>39</sup> When the legislature failed to adopt a plan, the Democrats filed suit in a federal court asking the court to reapportion the legislature.<sup>40</sup> Meanwhile, the Republican attorney general asked the state supreme court for the same relief.<sup>41</sup> Thus, politicians filed redistricting suits in the forum they viewed as most sympathetic to their partisan interests and did so as early as possible in the hope of winning the race to the courthouse. The state supreme court established a deadline and threatened to redraw the map itself.<sup>42</sup> As Fred Kessler explains, “incumbents of both parties saw a risk in having the court draw the map.”<sup>43</sup> Thus, the legislators agreed to negotiate, and the negotiations ultimately produced a plan.<sup>44</sup>

The plan was the product of protracted meetings between the assembly’s Democratic negotiator and the senate’s Republican negotiator.<sup>45</sup> It was historically notable because the level of population equality achieved surpassed that of any previous plan. From the standpoint of partisan competitiveness, the Democratic negotiator had deeper knowledge of the political geography of Wisconsin and a better feel for the demographic trends than his Republican counterpart.<sup>46</sup> Also, the Democratic leadership gave its negotiator more freedom to maneuver than did the Republican leaders.<sup>47</sup> Thus, the plan favored the Democrats and laid the groundwork for their takeover of the legislature in the 1970s.<sup>48</sup>

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39. WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

40. *Id.*

41. *Id.*

42. *Id.*

43. Interview with Fred Kessler, *supra* note 32.

44. *Id.*; see also WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

45. Interview with Fred Kessler, *supra* note 32. These meetings between negotiators took place in the basement of the state-owned mansion where the governor lives.

46. *Id.*

47. *Id.*

48. The Democrats won seats in both houses of the legislature in 1972, 1974, and 1976. For elections results, compare WIS. LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOK 1971, at 315–22 (1971), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1971>, with WIS. LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOK 1973, at 821–33 (H. Rupert Theobald

### B. The Evans Map

The plan enacted after the 1980 Census was the product of an even more contentious process. The Democrats controlled both the senate and assembly, but in 1978 Wisconsin elected a Republican governor.<sup>49</sup> In the spring of 1982, the legislature enacted a plan, but the governor vetoed it because Republican legislators wanted to go to court.<sup>50</sup> They wanted to be in the majority and knew that Democrats would not negotiate themselves into the minority. The matter went to a three-judge federal panel led by District Judge Terence Evans.<sup>51</sup> Evans was appointed by a Democratic president<sup>52</sup> but cared a lot about being perceived as independent.<sup>53</sup> Thus, he stated that he was not going to look at or consider anything related to politics or partisan advantage.<sup>54</sup> He then rejected all the plans submitted by legislators and instead came up with his own plan (the “Evans map”), although it

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& Patricia V. Robbins eds., 1973), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1973>, and WIS. LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOK 1975, at 823–34 (H. Rupert Theobald & Patricia V. Robbins eds., 1975), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1975>, and WIS. LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOK 1977, at 909–20 (H. Rupert Theobald & Patricia V. Robbins eds., 1977), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1977>.

49. See WIS. LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOK 1979–1980, at 914–15 (H. Rupert Theobald & Patricia V. Robbins eds., 1979), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1979> [hereinafter 1979–1980 BLUE BOOK] (reporting election results from the 1978 gubernatorial election indicating Lee S. Dreyfus, a Republican, winning a majority of votes by county); see also WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

50. See WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

51. *Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982).

52. Judge Evans was nominated by President Carter on July 21, 1979. *Evans, Terence Thomas*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/evans-terence-thomas> (last visited Mar. 27, 2019).

53. John Flynn Rooney, *He’d Give—and Does Take—Some Liberties*, CHI. DAILY L. BULL., Nov. 6, 1996 (noting that Judge Evans does not see himself as a conservative or a liberal).

54. *Wis. State AFL-CIO*, 543 F. Supp. at 638 (“At no time in the drafting of this plan did we consider . . . whether our plan would inure to the political benefit of any one person or party.”).

turned out to have been based on a map drawn by a Republican-leaning law professor.<sup>55</sup>

In every respect, the plan was a disaster. It violated standard redistricting principles that municipalities should not be divided unnecessarily and that districts should be reasonably compact.<sup>56</sup> Although the judge probably did not intend that his plan have a partisan political bias, the map heavily favored Republicans.<sup>57</sup> That the presumably independent Evans map favored Republicans illustrates that all redistricting plans have a partisan political impact whether it is intended.

It is impossible to draw a redistricting map that does not have partisan political implications. A particular problem with the Evans map's Republican tilt was that, as stated, Republicans were in the minority in the legislature.<sup>58</sup> The Evans map thus raised the question of the propriety of a presumably neutral redistricting entity, in this case a judge, creating a redistricting plan that changed the partisan composition of the legislature contrary to the expressed preference of the voters.<sup>59</sup>

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55. Interview with Fred Kessler, *supra* note 32.

56. *Wis. State AFL-CIO*, 543 F. Supp. at 635 (“We were able to succeed only to the extent of keeping 31 counties intact.”).

57. Interview with David Travis, former Wis. State Representative (Jan. 15, 2019).

58. See WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2 (stating that the Democrats controlled the legislature).

59. This problem again foregrounds the deficiency in the law of reapportionment: the law's failure to address the issue of political fairness. The reason redistricting consumes so much time and energy is because it involves politics, yet redistricting law, like an ostrich, utterly ignores politics. See, e.g., *Wis. State AFL-CIO*, 543 F. Supp. at 638. But ignoring the issue doesn't make it go away. The problem with the Evans map is, in fact, related to the problem of partisan gerrymandering at issue in *Gill*. See *Gill v. Whitford*, 138 S. Ct. 1916 (2018). In both instances, the choices of voters were disrespected. In the case of the Evans map, this was done by a court, likely unintentionally and based on ignorance of Wisconsin's political geography. Regarding Wisconsin political geography, see Malia Jones & Kristian Knutsen, *The Political Geography of Wisconsin: Partisanship and Population Density*, WISCONTEXT (Nov. 7, 2016, 7:05 PM), <https://www.wiscontext.org/political-geography-wisconsin-partisanship-and-population-density>. In the case of the gerrymander at issue in *Gill*, it was done by a legislative body intentionally and based on an enormous amount of sophisticated data about the voting habits of Wisconsin citizens. See generally Andrew Prokop, *The Supreme Court Still Won't Crack Down on Partisan Gerrymandering—Yet, at Least*, VOX (June 18, 2018, 12:50 PM),

Despite the Evans map's Republican bias, the court promulgated it so close to the candidate filing deadline for the 1982 elections that Republicans had little time to recruit candidates to challenge incumbents in the newly drawn districts. As a result, Democrats maintained their majorities in both houses.<sup>60</sup> And a Democratic governor, Tony Earl, was elected to succeed Republican Lee Dreyfus.<sup>61</sup> In the first legislative session after the 1982 elections, State Representative David Travis introduced an amendment to the state budget bill that contained a redistricting map designed to replace the worst features of the Evans map.<sup>62</sup>

Travis wryly entitled the amendment a "state cartography program."<sup>63</sup> Editorial writers were predictably outraged, but Democratic legislators strongly believed that the Evans map was unfair, and the amendment remained in the budget bill enacted by the legislature.<sup>64</sup> Torn between his desire to accommodate Democratic legislators and appease the press, Governor Earl came up with a compromise that involved using his line item veto power to excise the amendment from the budget but agreeing to sign redistricting legislation if passed as a separate bill.<sup>65</sup> The legislature then enacted a new redistricting law that

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<https://www.vox.com/2018/6/18/17474912/supreme-court-gerrymandering-gill-whitford-wisconsin> ("Republicans redrew Wisconsin's state legislature maps and heavily gerrymandered them to benefit their own party. To do so, they used a time-tested technique known as packing and cracking."). But both remappings produced unfair and undemocratic results. Just as a judge should not be able to draw a map that turns a minority party into a majority, neither should a majority party be permitted to draw a map that increases its numbers beyond those conferred by the voters.

60. WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1983–1984, at 235 (H. Rupert Theobald & Patricia V. Robbins eds., 1984), <http://digi-coll.library.wisc.edu/cgi-bin/WI/WI-idx?id=WI.WIBlueBk1983> [hereinafter 1983–1984 BLUE BOOK].

61. *Id.* at 689.

62. Interview with David Travis, *supra* note 57.

63. *Id.* For reference to the specific redistricting amendment, see Act of July 1, 1983, 1983 Wis. Sess. Laws 55, 55–74 (indicating a veto in part by Governor Earl).

64. Interview with David Travis, *supra* note 57; *see also* Republican Party v. Elections Bd., 585 F. Supp. 603, 604 (E.D. Wis. 1984), *vacated*, 469 U.S. 1081 (1984).

65. *See Republican Party*, 585 F. Supp. at 604; *see also* Interview with David Travis, *supra* note 57.

on the whole made relatively modest changes, and the governor signed it.<sup>66</sup>

The saga, however, was by no means over. Republican legislators returned to the Evans court asking it to reinstate the Evans map.<sup>67</sup> And in May 1984, the court stated that because state senators had staggered four-year terms and an election had been held under the Evans map, permitting the legislative plan to take effect would mean that some voters would not be able to vote for a state senator in the normal four-year cycle, and this made the plan unconstitutional.<sup>68</sup> To say the least, this was a novel theory on which to strike down a duly enacted legislative redistricting plan that complied with the requirements regarding equal population and protection of minorities.

Thus, it appeared likely that the fast approaching 1984 legislative elections would be held based on the Evans map. I mentioned previously that I had been affected by some of the Wisconsin redistrictings, and this was one of them.<sup>69</sup> I was a Democrat holding a state senate seat in the Milwaukee suburbs that were about 54% Republican. Also, I was up for re-election in 1984. The Evans map increased the Republican percentage in my district to about 58%,<sup>70</sup> and I knew that under it, I had no chance of being re-elected. The legislative plan returned my senate district to its 54% Republican status, still no bargain from a partisan standpoint, but a district in which I had a fighting chance. Appeals in redistricting cases go directly to the United States Supreme Court,<sup>71</sup> and my only hope was that the Court would reverse the Evans court's decision as the state attorney general, who was representing the legislature, had requested. And then on June 7, 1984, the Supreme Court issued a three-line order stating that "the application for stay . . . presented to Justice Stevens and by him referred to the Court is granted."<sup>72</sup> The Court rejected the decision of the Evans court.

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66. Act of July 15, 1983, 1983 Wis. Sess. Laws 633.

67. *Republican Party*, 585 F. Supp. at 604–05.

68. *Id.* at 605–06.

69. *See supra* note 11.

70. Interview with Fred Kessler, *supra* note 32.

71. 28 U.S.C. § 1253 (2012).

72. *Wis. Elections Bd. v. Republican Party*, 467 U.S. 1232 (1984).

The Court's decision had many consequences. The Democrats continued to hold their relatively slim majorities in the legislature.<sup>73</sup> Many individual political careers were also affected. Russ Feingold, for example, who subsequently became a three-term United States Senator, could never have run for the U.S. Senate under the Evans map. This was so because the Evans map placed him in a heavily Republican state senate district that would have required a huge effort on his part just to hold.<sup>74</sup> On the other hand, the legislative map put him in a relatively safe Democratic district,<sup>75</sup> which allowed him to travel freely through the state. Also, as indicated, the decision made it realistic for me to seek re-election, which I did successfully.<sup>76</sup> If there is a lesson in all this drama, it is, once again, that the way in which we deal with the issue of political fairness in redistricting needs to be improved.

### C. The Posner Map

Neither the redistrictings of the 1990s or the 2000s had the drama of the events of the 1980s, but both provide additional evidence of the inadequacy of the present system. The 1991 round of redistricting arrived to a familiar political alignment. The Democrats controlled both houses of the legislature, and the governor's office was occupied by Republican Tommy Thompson.<sup>77</sup> The legislature passed a redistricting plan, but unsurprisingly, the governor vetoed it.<sup>78</sup> Once again,

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73. WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1989–1990, at 348 (Lawrence S. Barish & H. Rupert Theobald eds., 1989), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1989> [hereinafter 1989–1990 BLUE BOOK].

74. Feingold represented the 27th Senate District. 1983–1984 BLUE BOOK, *supra* note 60, at 74. Under the Evans plan, the 27th District included Sauk County, a Republican stronghold and other Republican areas. *See generally id.* (describing the geographical makeup of the 27th Senate District).

75. Under the legislative map, this district included much of Madison and surrounding suburbs and was safely Democratic. *See generally* WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1985–1986, at 74 (H. Rupert Theobald & Patricia V. Robbins eds., 1986), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1985> [hereinafter 1985–1986 BLUE BOOK] (describing the makeup of the legislative district).

76. *Id.* at 76 (noting reelection in 1984).

77. WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

78. *Id.*

the matter went to a three-judge federal court, this time presided over by the well-known Seventh Circuit Judge Richard Posner.<sup>79</sup> Posner approached the issue of political fairness somewhat differently than Evans. Unlike Evans, Posner did not disavow consideration of political factors.<sup>80</sup> Rather, he stated that the court had consciously attempted to draft a politically fair map.<sup>81</sup> However, he made no mention of how the court had gone about doing so.

Despite Posner's statement, whatever attempts the court made to be politically fair failed. It is hard to fault the court for this because, as Posner acknowledged, the court had little time to explore the issue in depth, none of the judges were experts on the political geography of Wisconsin, the litigants failed to supply the court with adequate information on the subject, and the task itself was difficult.<sup>82</sup> Nevertheless, the 1992 Posner reapportionment created the basis for the Republican takeover of both houses of the legislature.<sup>83</sup> In fact, it is only a slight exaggeration to say that there is a direct line between the 1992 Posner reapportionment and the partisan gerrymander at issue in *Gill*. Although slightly oversimplified, the problem was that the Posner court's attempt to be politically fair involved a "compromise" in which the court used the map proposed by the Republicans to create the districts in southeastern Wisconsin, the state's population center, and the map proposed by the Democrats to create the districts in rural Wisconsin.<sup>84</sup> As the years went by, it became increasingly clear that this purported compromise was almost the antithesis of fairness.

This was mostly because of the political demographics of Wisconsin and, to a lesser extent, subsequent political developments. The areas in Wisconsin where Republican support is broadest and deepest are the highly populated suburban and exurban areas surrounding the

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79. *Prosser v. Elections Bd.*, 793 F. Supp. 859, 861 (W.D. Wis. 1992).

80. *See id.* at 870–71 (detailing the racial and partisan effects of the new legislative districts but not considering the partisan makeup of districts prior to redrawing the map).

81. *Id.* at 871 (“[T]he court plan . . . creates the least perturbation in the political balance of the [S]tate.”).

82. *See generally id.* at 867–68 (discussing the maps submitted by the parties, the non-Wisconsin experts used to make the maps, and the fact that judges should not seek a plan that favors one party over another, something almost impossible to do).

83. Interview with Fred Kessler, *supra* note 32.

84. *Prosser*, 793 F. Supp. at 870–71.

City of Milwaukee.<sup>85</sup> Many of the suburbs within Milwaukee County are heavily Republican, and three counties bordering Milwaukee County—Waukesha, Ozaukee, and Washington—known colloquially as the “WOW” counties, are among the most Republican in the country.<sup>86</sup> Other nearby counties are almost as Republican.<sup>87</sup> By relying on the Republican plan for southeastern Wisconsin, the Posner court created a configuration of districts that gave Republicans a virtually impregnable base in that part of the state.<sup>88</sup> The partisan loyalties of voters in the more rural parts of the state were, at that time, far more malleable.<sup>89</sup> Voters in some of these areas voted Democratic but did not come close to providing a Democratic stronghold comparable to the Republican stronghold in suburban and exurban Milwaukee.<sup>90</sup> And as rural voters increasingly moved towards the Republicans, Democrats found themselves with few places to find votes beyond their base in the cities of Milwaukee and Madison and several college towns.<sup>91</sup> Thus,

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85. *Whitford v. Gill*, 218 F. Supp. 3d 837, 962 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

86. *See id.*; *see also* Alec MacGillis, *Base Politics*, SLATE (Feb. 23, 2015, 6:18 PM), <https://slate.com/news-and-politics/2015/02/scott-walker-has-always-played-to-his-political-base-the-wisconsin-governors-current-troubles-were-entirely-predictable.html> (discussing the impact that these three counties had on recent elections and political outcomes in Wisconsin).

87. *See, e.g.*, 2011–2012 BLUE BOOK, *supra* note 12, at 889–902 (displaying election results, heavily favoring Republican candidates, for the 2010 State primary, general, and special elections for Dodge, Jefferson and Walworth counties).

88. Between 1991 and 1994, the 5th and 8th Senate districts switched to Republican representation. *Compare* WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1991–1992, at 30, 36 (Lawrence S. Barish & H. Rupert Theobald eds., 1992), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1991> [hereinafter 1991–1992 BLUE BOOK], *with* WIS. LEGIS. REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1995–1996, at 30, 36 (Lawrence S. Barish ed., 1996), <http://digital.library.wisc.edu/1711.dl/WI.WIBlueBk1995> [hereinafter 1995–1996 BLUE BOOK]. Suburban and exurban Senate districts of 18, 19, 20, and 33 were redrawn to favor Republicans and displaced one Democratic assembly person. *Compare* 1991–1992 BLUE BOOK, *supra*, at 56–60, 86, *with* 1995–1996 BLUE BOOK, *supra*, at 56–60, 86.

89. Interview with Fred Kessler, *supra* note 32.

90. *Id.*

91. *See Whitford*, 218 F. Supp. 3d at 912 (noting that because Democratic voters reside mostly in urban cities, Wisconsin’s political geography naturally favors Republicans).

another so-called non-partisan map turned out to have dramatic political effects.

The impact of the Posner plan on the composition of legislative districts can be seen by looking at how the plan affected the senate district that I represented, the 28th,<sup>92</sup> and an adjacent district, the 8th, that was also held by a Democrat.<sup>93</sup> The plan eliminated the adjacent district and moved it into Republican territory thereby forcing the incumbent to retire.<sup>94</sup> The district that I represented was made slightly more Republican, but as stated, it was a 54% Republican district in the first place.<sup>95</sup> I managed to survive two more elections largely because of incumbency and weak opponents.<sup>96</sup> But five years after the plan took effect I was appointed to the bench,<sup>97</sup> and the Republicans easily won the seat and have held it ever since, sometimes without any Democratic opposition.<sup>98</sup> In this way, the plan caused the replacement of two Democratic state senators in Southeastern Wisconsin by two Republicans.

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92. 1991–1992 BLUE BOOK, *supra* note 88, at 76.

93. *Id.* at 36.

94. In the 1980s, the 8th District was a Democratic district located in Milwaukee County. The Posner map shifted it westward into Waukesha and Washington Counties, both heavily Republican. Compare WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1997–1998, at 36 (Lawrence S. Barish ed., 1997), <http://digital.library.wisc.edu/1711.dl/WI.WIBBlueBk1997> [hereinafter 1997–1998 BLUE BOOK], with 1991–1992 BLUE BOOK, *supra* note 88, at 36.

95. See *supra* Section II.B.

96. 1989–1990 BLUE BOOK, *supra* note 73, at 907; WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1993–1994, at 900 (Lawrence S. Barish & H. Rupert Theobald eds., 1993), <http://digioll.library.wisc.edu/cgi-bin/WI/WI-idx?type=header&id=WI.WIBBlueBk1993>.

97. *Adelman, Lynn S.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/adelman-lynn-s> (last visited Mar. 28, 2019) (indicating confirmation and receipt of commission in 1997).

98. For election results prior to 2000, see WIS. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 1999–2000, at 76 (Lawrence S. Barish & Patricia E. Meloy eds., 1999), <http://digital.library.wisc.edu/1711.dl/WI.WIBBlueBk1999> [hereinafter 1999–2000 BLUE BOOK]. For election results after 2000, see *More Wisconsin Elections Results*, WIS. ELECTIONS COMMISSION, <https://elections.wi.gov/elections-voting/results-all> (last visited Mar. 28, 2019). The 2008 and 2016 races were uncontested. See *id.*

#### D. The Easterbrook Map

As the 2001 round of redistricting began, Republicans had taken control of the assembly while Democrats hung on to a thin majority in the senate.<sup>99</sup> Thus, once again, the matter went to a three-judge federal court that drew yet another map.<sup>100</sup> The judge presiding over this court was another well-known Seventh Circuit figure, Frank Easterbrook.<sup>101</sup> Like the Posner court, the Easterbrook court stated that it had attempted to be politically fair.<sup>102</sup> Like the Posner court, its effort failed. This was so because its attempt to be fair involved “taking the 1992 reapportionment plan as a template and adjusting it for population deviations.”<sup>103</sup> And, as we have seen, the 1992 plan wasn’t fair at all.<sup>104</sup> If the 2002 Easterbrook court had made a serious effort to explore the political fairness question, it could easily have discovered this unfairness. Unfortunately, it made no such effort. Thus, the 2002 map wound up magnifying the partisan bias of the 1992 map; subsequently, the Republicans won substantial majorities in both houses of the legislature.<sup>105</sup>

Republicans might argue that the reason that all of these court-created plans had a Republican bias was because of the effect of residential geography, i.e., the fact that Republicans tend to be spread out more evenly across the state while Democrats are concentrated in urban areas.<sup>106</sup> To a certain extent, this is a valid point, although Republicans sometimes overstate it as they did in *Gill*.<sup>107</sup> Also, it is now possible to

99. See WISCONSIN REDISTRICTING CHRONOLOGY, *supra* note 19, at 2.

100. Baumgart v. Wendelberger, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002).

101. *Id.*

102. *Id.* at \*7 (“The court undertook its redistricting endeavor in the most neutral way it could conceive . . .”).

103. *Id.*

104. See generally Prosser v. Elections Bd., 793 F. Supp. 859 (W.D. Wis. 1982). See also *supra* text accompanying notes 82–98.

105. See 2011–2012 BLUE BOOK, *supra* note 12, at 848 (indicating that the Republicans won control over both the state senate and assembly from 2003 until 2006).

106. Jamelle Bouie, *The GOP Sees Rural Voters as More Legitimate Than Urban Voters*, SLATE (Dec. 7, 2018, 6:07 PM), <https://slate.com/news-and-politics/2018/12/wisconsin-power-grab-gop-urban-vs-rural-voters.html>.

107. Whitford v. Gill, 218 F. Supp. 3d 837, 963 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

measure the effect precisely by using a computer to draw hundreds or thousands of neutral maps and averaging the geographical bias they produce.<sup>108</sup> In any case, under the standard of political fairness that I propose in this Essay, which is based on the preferences rather than the residences of voters, residential geography would not matter.

### E. The Gill Gerrymander

This brings us to the 2010 redistricting that resulted in the partisan gerrymander at issue in *Gill*.<sup>109</sup> The Republicans held majorities in both houses, and Republican Scott Walker held the governor's office.<sup>110</sup> The plan that the Republicans produced was so extreme that for the first time in history a three-judge federal court held that it systematically and unconstitutionally diluted the voting strength of Democratic voters and intentionally burdened their representational rights "by impeding their ability to translate their votes into legislative seats."<sup>111</sup>

In developing their gerrymander, Republican leaders spent a significant amount of taxpayer funds on lawyers, consultants, and sophisticated computer technology.<sup>112</sup> For months, Republican staffers worked in secret creating a plan that would maximize the number of Republican districts and entrench Republican majorities for decades to come.<sup>113</sup> Republicans used the two basic techniques of partisan gerrymandering, *packing* Democratic votes into a handful of districts where Democrats would win in landslides, and *cracking* them among multiple

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108. See generally Bruce E. Cain et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 WM. & MARY L. REV. 1521 (2018) (exemplifying how the Parallel Evolutionary Algorithm for Redistricting can be utilized); Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351 (2016) (presenting a computational model to determine the fairness of a redistricting).

109. *Whitford*, 218 F. Supp. 3d. at 843.

110. *Id.* at 846.

111. *Id.* at 843.

112. *Id.* at 938 (Griesbach, J., dissenting) ("The Republicans spent a quarter million dollars on a research firm, which used the latest computer equipment, while the Democrats had no such support.") (citations omitted).

113. See *id.* at 846–53.

districts where Democrats would lose by slim margins.<sup>114</sup> The results were that, in 2012, Republicans received 48.6% of the statewide vote but won 60% of the seats in the assembly,<sup>115</sup> and, in 2014, Republicans received 52% of the statewide vote and won 63% of the seats in the assembly.<sup>116</sup>

### III. THE SOLUTION: A POLITICAL FAIRNESS STANDARD

Thus, in terms of creating redistricting plans that are politically fair, Wisconsin's history rather dramatically indicates that the present system doesn't work. If one party controls both the legislature and the governor's office, the outcome may well be, as it was in 2010, an extreme partisan gerrymander.<sup>117</sup> And if the government is divided, the matter goes to court and the result is likely to be a non-partisan but politically unfair redistricting.<sup>118</sup> As we have seen, every court that ever drew a Wisconsin redistricting map made a mess of things.<sup>119</sup> None of the presumably neutral court-drawn maps even came close to being politically fair. This is true both of the maps drawn by courts that refused to look at political factors and those that did. The inadequacy of the present law of redistricting, thus, leads not only to the consumption of an enormous amount of government resources but also to the dilution of a large number of votes.

It is, therefore, not only essential to prohibit partisan gerrymandering but also what might be characterized as non-partisan gerrymandering.<sup>120</sup> It would be a step forward in this regard if, assuming *Gill* returns to the Supreme Court, the Court were to find the gerrymander unconstitutional.<sup>121</sup> Even if the Court were only to prohibit extreme

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114. *Id.* at 854.

115. *Id.* at 853.

116. *Id.*

117. *See id.* at 890–91.

118. *See* discussion *supra* Section II.

119. *See* discussion *supra* Section II.

120. Nonpartisan gerrymandering might be defined as the unintentional creation of politically unfair maps by presumably neutral entities such as courts. Without considering the factor of political fairness, the use of “neutral” criteria such as political subdivisions can lead to unfair results.

121. In *Gill*, the Supreme Court ducked the merits and decided that the plaintiffs lacked standing and remanded. *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018). The standing doctrine requires plaintiffs complaining of unlawful conduct to show

gerrymanders, it would necessarily be making a statement that political fairness in redistricting matters. But, as stated, whatever the Court does in *Gill*, state legislatures are free to require that redistrictings be politically fair. And courts and commissions are free to pursue fairness on their own, and by doing so, could make political fairness an element of the common law of redistricting.

What then is political fairness in redistricting? Clearly, if the concept is to have meaning, it must be defined with a certain degree of precision. I would suggest that political fairness in redistricting means that the map drawn should reflect the political complexion of the state. In other words, the composition of legislative districts should be based on the preferences of the state's voters. Thus, if a state is 53% Republican, then 53% of its legislative districts should at least lean Republican. Similarly, if Wisconsin is a 51% Democratic State, then 51% of the legislative districts in the State should, at a minimum, lean Democratic.

Therefore, the first step in developing a redistricting plan that respects the state's voters by being politically fair is to determine whether the state is Republican or Democratic and to what extent. In

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that they have a legally protected interest that has been invaded; i.e., that they have been harmed. *See id.* at 1923 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Court opined that voting rights are "individual" and that, therefore, the plaintiffs had to show their votes had been diluted as to their own assembly representatives. *See id.* at 1929–30. They could not frame the harm they suffered as resulting from the gerrymandered composition of the entire legislature. *See id.* at 1930. The Court's decision on this point seems highly questionable. As legal scholar Guy-Uriel Charles and others have explained, the distinction between individual and group rights in the voting rights domain is incoherent. *See, e.g.*, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666–67 (2001). This is particularly true in the redistricting context where legislatures engaged in partisan gerrymandering do not move individual voters in and out of legislative districts but groups of voters. Redistricting has nothing to do with individual voters and everything to do with group identities, political, ethnic, and other. Moreover, the Court's assertion that voters can only be harmed by the effect of a gerrymander on their own assembly district is ludicrous. It rests on the assumption that voters care only about who represents them in the assembly. But voters of both parties care passionately about which party controls the legislature (probably more than about the identity of their representative in the assembly), and they are harmed if their party has been wrongfully denied the opportunity to gain such control. What the Court should have held is that every citizen whose party has been disadvantaged by a legislative gerrymander has suffered individual harm and, therefore, has standing to sue.

answering this question, it is critical to use accurate information. The determination must be based on the results of a sufficient number of elections held over a sufficient period of time. The elections considered must also be contests that indicate the generic partisan leanings of voters rather than factors that are overly candidate specific. The elections that best fit these requirements are presidential and gubernatorial elections.<sup>122</sup> And going back five elections provides a sufficient period of time to establish an overall picture of the state. Of course, a redistricting entity could consider more than five elections, but in my view five elections are sufficient to reduce the effect of anomalous elections (e.g., high turnout midterms) while not going overly far back in time.

Thus, to determine the political complexion of the state with precision, I would suggest that the redistricting entity take the last five presidential or gubernatorial elections, calculate the percentage of votes received by candidates of both major parties in these elections and average them. Comparing the Republican and Democratic averages will provide a very accurate political profile of the state. This process will enable the redistricting entity to establish a standard of political fairness that will govern drawing the map. Under the standard, each party is entitled to a percentage of legislative districts equal to the average percentage of votes it received in the five elections. As stated, if the five elections show that Wisconsin is a 51% Democratic State, the Democrats would be entitled to have 51% of the legislative districts at least lean Democratic. Thus, in addition to creating a plan that complies with equal population requirements and protects minorities, the redistricting entity would have to comply with this standard of political fairness.

The standard advocated here would address what the Supreme Court has identified as the central evil of gerrymandering, the entrenchment in power of a political party that would be a minority party but for the gerrymander.<sup>123</sup> The most commonly cited examples of redistricting evils are cases in which a party receives what may be considerably less than 50% of the statewide vote but, nevertheless, retains a

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122. See generally Drew Desilver, *Voter Turnout Always Drops Off for Midterm Elections, but Why?*, PEW RES. CTR. (July 24, 2014), <http://www.pewresearch.org/fact-tank/2014/07/24/voter-turnout-always-drops-off-for-midterm-elections-but-why/> (discussing voter turnout in midterm elections versus gubernatorial and presidential elections).

123. *Vieth v. Jubelirer*, 541 U.S. 267, 365 (2004) (Breyer, J., dissenting).

majority of the seats in the legislature, thus depriving a majority of the voters of the power that they presumably attained at the ballot box.<sup>124</sup> If that indeed is the most egregious of gerrymandering's ills, then the political fairness standard provides a sound solution: it gives the majority party its due by recognizing it as the majority while at the same time prohibiting it from depriving the minority party of any of the seats that voters gave it.

Some might object that imposing a political fairness standard would require the redistricting entity to use some of the same gerrymandering techniques, such as drawing maps based on the political affiliations of the voters, that offend some observers in the first place. But political fairness cannot be achieved without using such techniques. Another possible objection is that a political fairness standard would undermine traditional redistricting principles such as compactness and contiguity. Yet advances in computer technology, as seen in *Gill*<sup>125</sup> and elsewhere, are such that a computer program can generate thousands of maps based on any number of criteria, including political history.<sup>126</sup> Thus, a redistricting entity would be unlikely to have any difficulty in satisfying a political fairness standard while at the same time complying with the one person/one vote rule requiring legislative districts to include an equal number of people,<sup>127</sup> protecting minorities, and adhering to traditional redistricting principles.

Numerous benefits would accrue from adopting a political fairness standard. Most importantly, voter preferences would be honored.

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124. Emily Lawler, *Michigan Democrats Remain Legislative Minority, Despite Winning Majority of Votes*, MLIVE (Nov. 8, 2018), [https://www.mlive.com/news/index.ssf/2018/11/michigan\\_democrats\\_remain\\_legi.html](https://www.mlive.com/news/index.ssf/2018/11/michigan_democrats_remain_legi.html) (noting that Democrats won 51% of the vote but maintained only 16 of the 38 state Senate seats); Damon Linker, *The GOP's Minority Rule*, THE WEEK (July 20, 2018), <https://theweek.com/articles/785710> (noting in 2012 Democrats received nearly 1.5 million more votes, but Republicans won 234 of 435 seats); Michael Taffe, *Democrats Win Majority of Statewide Votes, but a Minority of Seats*, THE DAILY TAR HEEL (Nov. 18, 2018, 10:14 PM), <https://www.dailytarheel.com/article/2018/11/gerrymandering-election-nc-1118> (noting Republicans won 51.2% of the vote but 76.9% of seats in North Carolina).

125. See generally *Whitford v. Gill*, 218 F. Supp. 3d 837, 847–48 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) (discussing how the computer software was used).

126. Cho & Liu, *supra* note 108, at 353–54.

127. *Baker v. Carr*, 369 U.S. 186, 207–08 (1962).

A redistricting entity would be unable to create a map, as the Evans court did, which disrespects the choices of voters. Also, a political fairness standard would provide redistricting entities with clear direction concerning how to proceed. As we have seen, some of the courts that handled redistricting in Wisconsin expressed an interest in drafting politically fair plans but had no idea how to go about doing so. The Posner court tried to accomplish this by relying partly on maps proposed by Democrats and partly on maps proposed by Republicans, and the Easterbrook court tried to do it by relying on the previous decade's plan. Unfortunately, as we have seen, neither of these strategies worked.

Creating a political fairness standard would also help lay to rest the widely believed but, nevertheless, wrong-headed notion that the way to address the problem of politics in redistricting is to ignore all political factors. Unsurprisingly, this approach inevitably fails.<sup>128</sup> In addition, the existence of a political fairness standard would substantially reduce the amount of government time and money expended on redistricting. Neither the majority nor minority parties would need to be so preoccupied with the subject. Of course, not all redistricting issues would be resolved, but the process would be dramatically simplified. Finally, at least in politically competitive states like Wisconsin, a political fairness standard would likely cause an increase in the number of competitive legislative districts. And competition in politics is a good thing because it causes legislators to be more accountable and more willing to entertain a range of perspectives.

Making any serious legislative changes in the redistricting process, of course, is not easy. This is so for the same reason that redistricting, itself, is so difficult. Any proposed change is evaluated by legislators through the lens of partisan advantage. However, as stated, entities such as courts and commissions could adopt a political fairness standard without enabling legislation. In any case, the issue of political fairness in redistricting is sufficiently important that continued discussion of it is critical. Hopefully, this Essay provides a constructive first step.

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128. See discussion *supra* Section II.