AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Voting

**Gill v. Whitford, \_\_ U.S. \_\_** (2018)

*William Whitford is a retired professor a law and a Wisconsin resident who regularly votes for Democrats. In 2011, the Republican controlled state legislature adopted an apportionment plan that enabled Republicans in 2012 to win 60 of the 99 seats in the State Assembly with only 48.2% of the two party vote, and in 2014 to win 63 seats with only 52% of the two party vote. The next year, Whitford and other Democrats filed a lawsuit against Beverly Gill, a member of the Wisconsin Elections Commission charging that the state apportion was an unconstitutional gerrymander under the equal protection clause of the Fourteenth Amendment. In particular, Whitford claimed that the Wisconsin legislature packed some districts so that they would have overwhelming Democratic majorities and cracked other districts so by so dividing Democrats they would also be in the majority. The local federal district court ruled in favor of Whitford. Gill and Wisconsin appealed to the Supreme Court of the United States.*

 *The Supreme Court by a unanimous vote ruled that Whitford and his allies had not demonstrated the standing necessary to bring the lawsuit and by an 8-1 vote remanded the case back to the federal district court to provide Whitford and others with an opportunity to establish standing. Chief Justice Roberts’s majority opinion maintained the parties lacked standing because they had failed to prove that any of them had had their individual votes diluted. Why do all the justices in this case place so much emphasis on standing? What values do they claim standing serves? Does the standing doctrine serve any of these values in this case (do we really worry that legal arguments may not have been fully developed)? Why does Roberts and Justice Elana Kagan put so much emphasis on individual votes being diluted? Kagan suggests other grounds for standing. What are they? Do you think they are adequate? Is Kagan providing Whitford and others will a roadmap to obtain standing or merely a roadmap to obtain four votes for standing?*

CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Ic98f990b72dd11e89d59c04243316042&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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To ensure that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society,” a plaintiff may not invoke federal-court jurisdiction unless he can show “a personal stake in the outcome of the controversy.” A federal court is not “a forum for generalized grievances,” and the requirement of such a personal stake “ensures that courts exercise power that is judicial in nature.” We enforce that requirement by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: that he “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the “invasion of a legally protected interest” that is “concrete and particularized,” i.e., which “affect[s] the plaintiff in a personal and individual way.”

We have long recognized that a person's right to vote is “individual and personal in nature.” Thus, “voters who allege facts showing disadvantage to themselves as individuals have standing to sue” to remedy that disadvantage. The plaintiffs in this case alleged that they suffered such injury from partisan gerrymandering, which works through “packing” and “cracking” voters of one party to disadvantage those voters. That is, the plaintiffs claim a constitutional right not to be placed in legislative districts deliberately designed to “waste” their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking).

To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. . . . The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This “disadvantage to [the voter] as [an] individual[ ],” therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be “limited to the inadequacy that produced [his] injury in fact.” In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

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The plaintiffs argue that their claim of statewide injury is analogous to the claims presented in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964), which they assert were “statewide in nature” because they rested on allegations that “districts throughout a state [had] been malapportioned.” But, as we have already noted, the holdings in Baker and Reynolds were expressly premised on the understanding that the injuries giving rise to those claims were “individual and personal in nature,” because the claims were brought by voters who alleged “facts showing disadvantage to themselves as individuals.”

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Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be. . . .

The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest “in their collective representation in the legislature,” and in influencing the legislature's overall “composition and policymaking.” But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts of this case, the plaintiffs may not rely on “the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable “general interest common to all members of the public.”

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. . . .

. . . . In the District Court, the plaintiffs' case rested largely on a particular measure of partisan asymmetry—the “efficiency gap” of wasted votes. . . . The plaintiffs and their amici curiae promise us that the efficiency gap and similar measures of partisan asymmetry will allow the federal courts—armed with just “a pencil and paper or a hand calculator”—to finally solve the problem of partisan gerrymandering that has confounded the Court for decades. We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else entirely: the effect that a gerrymander has on the fortunes of political parties.

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In cases where a plaintiff fails to demonstrate Article III standing, we usually direct the dismissal of the plaintiff's claims. This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that Donohue, Johnson, Mitchell, and Wallace live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal.

We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring.

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I agree . . . with the Court's decision to remand this case to allow the plaintiffs to prove that they live in packed or cracked districts. I write to address in more detail what kind of evidence the present plaintiffs (or any additional ones) must offer to support that allegation. And I write to make some observations about what would happen if they succeed in proving standing—that is, about how their vote dilution case could then proceed on the merits. . . . Given the charges of statewide packing and cracking, affecting a slew of districts and residents, the challengers could make use of statewide evidence and seek a statewide remedy.

I also write separately because I think the plaintiffs may have wanted to do more than present a vote dilution theory. Partisan gerrymandering no doubt burdens individual votes, but it also causes other harms. And at some points in this litigation, the plaintiffs complained of a different injury—an infringement of their First Amendment right of association. The Court rightly does not address that alternative argument: The plaintiffs did not advance it with sufficient clarity or concreteness to make it a real part of the case. . . .

Partisan gerrymandering, as this Court has recognized, is “incompatible with democratic principles.” More effectively every day, that practice enables politicians to entrench themselves in power against the people's will. And only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches. . . . [P]artisan gerrymandering injures enough individuals and organizations in enough concrete ways to ensure that standing requirements, properly applied, will not often or long prevent courts from reaching the merits of cases like this one. Or from insisting, when they do, that partisan officials stop degrading the nation's democracy.

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To have standing to bring a partisan gerrymandering claim based on vote dilution, then, a plaintiff must prove that the value of her own vote has been “contract[ed].” And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked. . . . In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight. For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50–50 district. . . .

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. . . . The Court properly remands this case to the District Court “so that the plaintiffs may have an opportunity” to “demonstrate a burden on their individual votes.” That means the plaintiffs—both the four who initially made those assertions and any others (current or newly joined)—now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. Recall that the plaintiffs here alleged . . . that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. . . . And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies.

When the court addresses those merits questions, it can consider statewide (as well as local) evidence. . . . [A]ssume that the plaintiffs must prove illicit partisan intent—a purpose to dilute Democrats' votes in drawing district lines. The plaintiffs could then offer evidence about the mapmakers' goals in formulating the entire statewide map (which would predictably carry down to individual districting decisions). . . . This Court has explicitly recognized the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature. . . . The same should be true for partisan gerrymandering.

Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury “requires revising only such districts as are necessary to reshape [that plaintiff's] district—so that the [plaintiff] may be unpacked or uncracked, as the case may be.” But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. . . .

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Justice KENNEDY explained the First Amendment associational injury deriving from a partisan gerrymander in his concurring opinion in *Vieth v. Jubelirer* (2004). “Representative democracy,” Justice KENNEDY pointed out, is today “unimaginable without the ability of citizens to band together” to advance their political beliefs. That means significant “First Amendment concerns arise” when a State purposely “subject[s] a group of voters or their party to disfavored treatment.” Such action “burden[s] a group of voters' representational rights.” And it does so because of their “political association,” “participation in the electoral process,” “voting history,” or “expression of political views.”

As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. . . . . Members of the “disfavored party” in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives. . .

And if that is the essence of the harm alleged, then the standing analysis should differ from the one the Court applies. . . . [W]hen the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. . . .

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Partisan gerrymandering jeopardizes “[t]he ordered working of our Republic, and of the democratic process.” It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. . . . And the evils of gerrymandering seep into the legislative process itself. Among the amicus briefs in this case are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences. The congressional brief describes a “cascade of negative results” from excessive partisan gerrymandering: indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems. . . .

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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. Of course, their dire need provides no warrant for courts to disregard Article III. Because of the way this suit was litigated, I agree that the plaintiffs have so far failed to establish their standing to sue, and I fully concur in the Court's opinion. But of one thing we may unfortunately be sure. Courts—and in particular this Court—will again be called on to redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

 . . . I agree that the plaintiffs have failed to prove Article III standing. . . . When a plaintiff lacks standing, our ordinary practice is to remand the case with instructions to dismiss for lack of jurisdiction. The Court departs from our usual practice because this is supposedly “not the usual case.” But there is nothing unusual about it. As the Court explains, the plaintiffs' lack of standing follows from long-established principles of law. After a year and a half of litigation in the District Court, including a 4–day trial, the plaintiffs had a more-than-ample opportunity to prove their standing under these principles. They failed to do so. . . .