NOTE

"GOBBLEDYGOOK" OR UNCONSTITUTIONAL REDISTRICTING?: FLOTERIAL DISTRICTS AND PARTISAN GERRYMANDERING

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ABSTRACT

In Gill v. Whitford, *the Supreme Court took up the question of when partisan gerrymandering is unconstitutional for the first time in more than a decade. The Court's decision in* Gill v. Whitford *did not strike down the challenged state legislative district map, and left open the question of what standard should be used to determine an unconstitutional partisan gerrymander. This Note suggests that the use of floterial districts, a unique redistricting device, may be used to draw a district map with an unconstitutional partisan advantage. The Note reviews the history of floterial districts; questions the claimed intent behind the use of floterials, compliance with* Reynolds*'s "one-person, one-vote" principle; and analyzes a New Hampshire floterial district to show how floterials can be used as a partisan gerrymandering tool. This Note argues that state legislatures should be hesitant to include floterial districts in future district maps, and calls for the Supreme Court to determine the standard for an unconstitutional partisan gerrymander and how to properly compute a map's deviation.*

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Mr. Smith: [G]errymanders now are not your father's gerrymander. These are going to be really serious incursions on democracy if this Court doesn't do something. And this is really the last opportunity before we see this huge festival of new extreme gerrymanders . . .

Justice Gorsuch: And where exactly do we get authority to revise state legislative lines? . . .

Justice Ginsburg: Where did one-person/one-vote come from?[1]

INTRODUCTION

At least every ten years, states redraw their district maps.[2] The next wave of redistricting will occur across the country after the 2020 election and release of the decennial census. In preparation for the next redistricting, individuals and organizations have attempted to shape redistricting restrictions by challenging state district maps in court.[3] For instance, in *Whitford v. Gill*,[4] retired law professor William Whitford, among other Wisconsin Democratic voters, challenged the constitutionality of Wisconsin's legislative map, claiming the state legislature's use of extreme partisan gerrymander diluted Democratic votes.[5] On June 19, 2017, the Supreme Court agreed to hear the case,[6] and as a result took up the question of partisan gerrymandering for the first time in more

[1] Transcript of Oral Argument at 57, 59-60, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

[2] *See* Reynolds v. Sims, 377 U.S. 533, 583-84 (1964) (explaining that Equal Protection Clause does not require "daily, monthly, annual or biennial reapportionment," and that while not required, redistricting every ten years would help states maintain "reasonably current scheme of legislative representation" and prevent state legislative districts from being "constitutionally suspect"); Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 ST. POL. & POL'Y Q. 371, 376 (2004) (explaining that following *Baker v. Carr*, states are required to redistrict following release of census).

[3] More than 240 cases have been filed since the last nationwide redistricting, which began in 2010. *See Litigation in the 2010 Cycle*, ALL ABOUT REDISTRICTING: PROFESSOR JUSTIN LEVITT'S GUIDE TO DRAWING THE ELECTORAL LINES, http://redistricting.lls.edu/cases.php [https://perma.cc/V3Z7-AR2Z] (last visited Nov. 19, 2018). The cases have included challenges to congressional and state legislative maps for violations of equal representation, racial discrimination, and partisan gerrymander. *Id.* This Note only focuses on partisan gerrymandering of state legislative maps.

[4] 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

[5] *Id.* at 854.

[6] Gill v. Whitford, 137 S. Ct. 2268 (2017) (mem.) (accepting appeal from United States District Court for Western District of Wisconsin); Gill v. Whitford, 137 S. Ct. 2289 (2017) (mem.) (granting stay). The Supreme Court also agreed to hear *Benisek v. Lamone*, 138 S. Ct. 543 (2017) (mem.), on December 8, 2017. *Benisek v. Lamone* is a partisan gerrymandering challenge to a congressional district in Maryland. Benisek v. Lamone, 266 F. Supp. 3d 799, 801 (D. Md. 2017).

than a decade.[7] In *Davis v. Bandemer*,[8] the Court held that partisan gerrymandering is a justiciable issue;[9] however, since that opinion, the Court has failed to provide the standard for determining if a map was drawn with partisan motives.[10] The Court's decision in *Gill v. Whitford*[11] outlined the standing required to bring a vote dilution claim in a partisan gerrymandering context, but failed to settle the question of what makes a map an unconstitutional partisan gerrymander.[12] As the lower courts review partisan gerrymander challenges in light of *Gill v. Whitford*, their rulings (and the possibility of the Supreme Court confronting the question again before 2020) could have significant repercussions on the next redistricting wave.

Gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes."[13] While district maps must comply with the "one-person, one-vote" principle, the Voting Rights Act, and traditional districting principles,[14] state legislatures often

[7] *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), was the most recent case in which the Supreme Court addressed the question of partisan gerrymander.

[8] 478 U.S. 109 (1986).

[9] *Id.* at 124, 127 (holding that to succeed on violation of Equal Protection Clause claim for partisan gerrymandering, plaintiffs must show "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group"). The terms partisan gerrymandering and political gerrymandering are used interchangeably throughout case law and the literature. This Note uses the term partisan gerrymandering for consistency.

[10] *See, e.g.*, *League of United Latin Am. Citizens*, 548 U.S. at 414 (2006) (declining to address standards of justiciability for partisan gerrymandering claims); Vieth v. Jubelirer, 541 U.S. 267, 278-80 (2004) (holding that *Bandemer* was decided incorrectly and partisan gerrymandering claims are "nonjusticiable").

[11] 138 S. Ct. 1916 (2018).

[12] *See infra* Section II.B (discussing *Gill v.Whitford* more fully).

[13] *Bandemer*, 478 U.S. at 164 (Powell, J., concurring) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969)). As noted in the concurring opinion of *Bandemer*, the term gerrymandering was named after Massachusetts Governor Elbridge Gerry, who drew an irregularly shaped district that looked like a salamander. *Id.* at 164 n.3. The concurring opinion further notes a definition of gerrymander that describes it as "an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." *Id.* (quoting *Gerrymander*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr. ed. 1961)).

[14] *See* Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 795 (2017) (identifying "traditional redistricting factors" as "compactness, contiguity of territory, and respect for communities of interest"); Shaw v. Reno, 509 U.S. 630, 647 (1993) (identifying other traditional redistricting principles as compactness, contiguity, and political subdivisions); Reynolds v. Sims, 377 U.S. 533, 558 (1964) ("And, finally, we concluded: 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.'" (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963))). The purpose of the Voting Rights Act of 1965, although potentially weakened by the rulings in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), *Georgia v. Ashcroft*, 539 U.S. 461 (2003),

undermine these requirements with partisan motives, such as ensuring protection for incumbents or increasing the number of seats for a particular political party.[15] In an effort to suppress partisan motives, some states have implemented non-partisan or advisory redistricting commissions.[16] For states without commissions, gerrymandering has been, and still is, a significant part of the redistricting process.[17] In preparation for the next redistricting wave, most state legislatures will likely look for new strategies and devices to help draw the maps with partisan motives in mind.[18]

Although most district maps are drawn using single-member, multi-member, or at-large districts, a map may also include floterial districts, an infrequently

Northwest Austin v. Holder, 557 U.S. 193 (2009), and *Shelby County v. Holder*, 570 U.S. 529 (2013), is to protect against abridging the right to vote based on race. *See* 52 U.S.C. § 10301(a) (2012) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."). This Note does not focus on racial redistricting.

[15] *See, e.g.*, McDonald, *supra* note 2, at 373-74 (noting how incumbents may redistrict in manners that exclude non-supporters or potential challengers, while political parties use "stacking" and "cracking" to waste "the votes of its opponent party" to successfully partisan gerrymander); *cf.* Harry Basehart & John Comer, *Partisan and Incumbent Effects in State Legislative Redistricting*, 16 LEGIS. STUD. Q. 65, 77 (1991) (reporting that incumbents seem to win elections regardless of redistricting schemes).

[16] Twenty-five states have commissions that draw the district maps, while the rest of the states use the state legislature. *See Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Apr. 14, 2017), https://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines [https://perma.cc/J5DJ-TZFD]. These commissions take different forms, including independent commissions, advisory commissions, and politician commissions. *See* McDonald, *supra* note 2, at 380-81 (explaining how states use commissions and that commissions generally either have sole redistricting authority or are used when legislative processes fail); *Who Draws the Maps? Legislative and Congressional Redistricting*, *supra*. However, commissions do not guarantee that partisanship is entirely taken out of the process. For instance, in 2000, Arizona decided to have an independent citizens redistricting commission; but, in 2011, the Republican Governor and Republican-controlled Senate removed the chairwoman because of a belief that she helped skew the process to create a Democratic advantage. *See* Marc Lacey, *Arizona Senate, at Governor's Urging, Ousts Chief of Redistricting Panel*, N.Y. TIMES, Nov. 3, 2011, at A20. Although there are interesting questions about the implications of a state legislature redrawing the map versus a non-partisan commission, this Note does not focus on this distinction. Instead, this Note only addresses redistricting in states where the state legislature draws the maps.

[17] *See* McDonald, *supra* note 2, at 388 (noting that when one political party controls redistricting process, that party generally produces partisan gerrymandered maps).

[18] Justice Kagan explained during oral argument for *Gill v. Whitford* that "when legislatures think about drawing these maps, they're not only thinking about the next election, they're thinking often—not always—but often about . . . methods in order to ensure that certain results will obtain not only in the next one but eight years down the road." Transcript, *supra* note 1, at 14-15.

used redistricting device.[19] A floterial is a legislative district "which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned."[20] Unlike the more commonly used district types, the Supreme Court has yet to directly rule on the constitutionality of floterials.[21] New Hampshire is the only state that currently uses floterial districts, although several other states have used this redistricting device in the past.[22]

[19] States may combine the use of single-member, multi-member, at-large, and floterial districts. *See* Chapman v. Meier, 420 U.S. 1, 19 (1975) (explaining that if court must draw state district maps, it may not use multi-member districts if that state has only ever used single-member districts); White v. Regester, 412 U.S. 755, 765 (1973) (explaining that multi-member districts are not per se unconstitutional and are able to be used in combination with single-member districts); Howard D. Hamilton, *Legislative Constituencies: Single-Member Districts, Multi-Member Districts, and Floterial Districts*, 20 WESTERN POL. Q. 321, 332 (1967) (describing at-large districts as multi-member districts "superimposed" on single-member districts); *see also* Whitcomb v. Chavis, 403 U.S. 124, 157-58 (1971) (explaining that while objections have been made to multi-member districts, this type of district has been part of system for a long time, and has yet to be determined per se unconstitutional); Burns v. Richardson, 384 U.S. 73, 88 (1966) (concluding that Equal Protection Clause does not require use of only single-member districts); Fortson v. Dorsey, 379 U.S. 433, 436 (1965) (addressing how states may maintain existing political subdivisions' integrity, and as concluded in *Reynolds*, may use any type of district, as long as states focus on "substantial equality of population"); *Reynolds*, 377 U.S. at 579 ("Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts . . . ."); Lucas v. Forty-Fourth Gen. Assembly of State of Colo., 377 U.S. 713, 731 n.21 (1964) (noting undesirable features of multi-member districts, but also recognizing that "apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective").

[20] Davis v. Mann, 377 U.S. 678, 686-87 n.2 (1964).

[21] *See* cases cited *supra* notes 19-20 and accompanying text (explaining that the Supreme Court has not yet ruled on constitutionality of floterials). In *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967), the Supreme Court found that the Texas redistricting plan including single-member, multi-member, and floterial districts was a "crazy quilt," and therefore unconstitutional. However, the Supreme Court did not deem the use of the floterial district itself unconstitutional. *Id.* at 122-23.

[22] *See* N.H. CONST. pt. II, art. 11 (amended 2006) (making use of floterials for excess numbers of inhabitants of any district constitutional); *see also* FLA. CONST. art. III, § 16(a) (allowing use of "overlapping" districts); Connor v. Johnson, 330 F. Supp. 506, 507 (S.D. Miss. 1971) (stating that "[f]loterial districts are permissible if they comply with the overriding objective of reapportionment"); Micah Altman & Michael P. McDonald, *Redistricting Principles for the Twenty-First Century*, 62 CASE WESTERN RES. L. REV. 1179, 1182 n.13 (2012) (noting New Hampshire is only state currently using floterial districts in 2012 state legislative district map); Hamilton, *supra* note 19, at 334 (noting that in 1967, when article was written, floterial districts had been used in Indiana for a century); Gary F. Moncrief, *Floterial Districts, Reapportionment, and the Puzzle of Representation*, 14 LEGIS.

While floterials are rarely used, this Note suggests that this redistricting device may be used as a tool to assist with partisan gerrymandering. In future redistricting efforts, majority members of the state legislature may consider using floterial districts as a way to maintain party control.

In light of increased concerns about partisan gerrymandering and the next wave of redistricting,[23] this Note draws attention to the inherent use of floterials for partisan gerrymandering efforts.[24] Because states rarely use floterials, the literature is limited. As a result, this Note adds to the understanding of how state legislatures can redistrict with a partisan advantage by including floterials in state legislative maps. This Note describes potential ways to challenge a floterial district as a partisan gerrymander, describes why a state legislature's defense of using floterials to comply with the "one-person, one-vote" principle would be unsuccessful, and cautions state legislatures from using floterials to redistrict future state district maps.

This Note analyzes the use of floterial districts as a tool for partisan gerrymandering in the redistricting of state legislative districts[25] and argues that legislatures should be hesitant about including floterials in future district maps. Part I explains the background of redistricting and its requirements under the United States Constitution and Supreme Court rulings. Part II explains the current state of the law around partisan gerrymandering, and discusses the outcome of *Gill v. Whitford*. Part III explains the history of, legal challenges to, and current use of floterials at the state level. It further discusses how the computational methods used to calculate the deviation of maps that include floterials call into question the original purpose of using floterials to help comply

STUD. Q. 251, 252-53 (1989) (explaining that Texas used floterial districts for about one hundred years, Indiana used floterials for most of that century, and Georgia, Mississippi, New Jersey, Oregon, Virginia, and Wyoming also used floterials, but at time of writing only Idaho and New Hampshire "resurrected the concept of the floterial district").

[23] Respondents' attorney in *Gill v. Whitford*, Paul Smith, argued that if the Supreme Court does not find partisan gerrymandering unconstitutional, it could pose a serious threat to democracy. Transcript, *supra* note 1, at 57, 59; *see* Devin Caughey, Chris Tausanovitch & Christopher Warshaw, *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. 453, 455 (2017) ("Overall, these results suggest that partisan gerrymandering has major consequences not only on who wins elections, but for the political process as a whole."); Nicholas O. Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 838 (2015) (alleging that "gerrymandering has never been worse in modern American history").

[24] *See* Hamilton, *supra* note 19, at 335 (mentioning briefly gerrymandering potential of floterial districts, but not discussing how floterials can be used for partisan gerrymandering or effects of this use).

[25] This Note only focuses on the use of state legislative districts, rather than Congressional districts. Floterial districts cannot be used for congressional districts. *See* 2 U.S.C. § 2c (2012) (prohibiting multi-member congressional districts). Additionally, this Note focuses on state legislative districts because "[t]he more districts in a legislative body, the greater the ability to group voters strategically. Thus, partisan gerrymandering can be more potent in state legislative than in congressional districting." McDonald, *supra* note 2, at 374.

with the "one-person, one-vote" principle. Lastly, Part IV explains how floterial districts can be used as a partisan gerrymandering tool. A discussion of a New Hampshire floterial district in the 2012 state house representative map demonstrates how floterials can be used for partisan gerrymander. In conclusion, this Note explains that to challenge a floterial district as a partisan gerrymander, the plaintiff must be a voter in the floterial and establish an injury in fact. Additionally, under a "one-person, one-vote" defense the state legislature must have a legitimate constitutional reason for using this district type beyond partisan advantage or trying to keep the map under the ten percent deviation.

I. BACKGROUND OF REDISTRICTING

The U.S. Constitution and Supreme Court rulings require states to redistrict at least every ten years, following the release of the census.[26] This required redistricting helps to ensure that state legislative districts have equal representation, as required by the "one-person, one-vote" principle from the Supreme Court's ruling in *Reynolds v. Sims*.[27] Prior to *Reynolds*, many states failed to redistrict even though populations were changing, and this resulted in highly malapportioned legislative districts.[28] While the Supreme Court has recognized the tradition of observing geographic lines as constitutional, the Court has also recognized other traditional redistricting principles including "compactness," "contiguity," and "community of interest" as constitutionally permissible, but not constitutionally required.[29] During the redistricting process, states are required to balance their own state traditions and other traditional redistricting principles with the required "one-person, one-vote" principle.

A. *"One-Person, One-Vote" Principle and Calculation of Equality*

The purpose of the "one-person, one-vote" principle is to ensure equal representation across state legislative districts.[30] As noted by the Supreme Court,

[26] *See supra* note 2 and accompanying text (demonstrating that states must redistrict following release of U.S. census).

[27] 377 U.S. 533, 558 (1964) ("And, finally, we concluded: 'The conception of political equality . . . can mean only one thing—one person, one vote.'" (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963))). Prior to the holding in *Reynolds* requiring equal representation across state legislative districts, the Supreme Court held that there must be equal representation across Congressional districts. Wesberry v. Sanders, 376 U.S. 1, 18 (1964) ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

[28] *See Reynolds*, 377 U.S. at 556 n.30, 567 n.43 (discussing how malapportioned state legislative districts in more than thirty-four states were challeneged on constitutional grounds and holding malapportionment unconstitutional under Equal Protection Clause).

[29] *See* cases cited *supra* note 14 and accompanying text.

[30] *See Reynolds*, 377 U.S. at 563-64 (expanding ideas of equal representation to state legislative districts).

the "one-person, one-vote" principle "originally was regarded as a means to prevent discriminatory gerrymandering since 'opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts.'"[31] The equal representation calculation is based on total population, not voting population, as the Court explained in *Evenwel v. Abbott*[32] that "districting based on total population serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation."[33]

Deviations between state legislative districts, however, is allowed, as "[m]athematical exactness or precision is hardly a workable constitutional requirement."[34] The amount of this deviation was determined on a case-by-case basis until the ruling in *Brown v. Thomson*,[35] when the Court held that the deviation should not exceed ten percent.[36] Even with a general rule of ten percent, the Court has upheld maps with greater deviations if the state provides a legitimate constitutional purpose.[37] While keeping the deviation below ten percent was seen as a "safe harbor," the Court has struck down maps with deviations less than ten percent[38] for a lack of a constitutional purpose or partisan

[31] Davis v. Bandemer, 478 U.S. 109, 168 n.5 (1986) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 534 n.4 (1969)).

[32] 136 S. Ct. 1120 (2016).

[33] *Id.* at 1131.

[34] *Reynolds*, 377 U.S. at 577.

[35] 462 U.S. 835 (1983).

[36] *See id.* at 842-43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."). Although the *Brown v. Thomson* decision upheld a deviation larger than ten percent, the Supreme Court explained that "this case presents an unusually strong example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy. This does not mean that population deviations of any magnitude necessarily are acceptable." *Id.* at 844-45. Similarly, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Supreme Court noted "population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable." *Id.* at 745. Further, the Supreme Court stated in *White v. Regester*, 412 U.S. 755 (1973), how "[v]ery likely, larger differences between districts would not be tolerable without justification." *Id.* at 764.

[37] *See* Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993) (noting that case law has allowed deviations greater than ten percent and citing to Mahan v. Howell, 410 U.S. 315 (1973), where Court allowed sixteen percent deviation because it was justified by rational objectives to preserve integrity of political subdivision lines).

[38] *See* Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) (noting that while, in general, ten percent is considered "safe harbor" for deviation, the Court takes into account other factors).

gerrymander.[39] In *Cox v. Larios*,[40] the Supreme Court summarily affirmed the three-judge lower court decision, which struck down a map with a 9.98% deviation because the State provided no justification for the deviation and the redistricting was not "free from any taint of arbitrariness or discrimination."[41] The lower court explained that the plan was intended to protect incumbents in a "blatantly partisan and discriminatory manner," and therefore the legislature provided no legitimate justification for having a deviation.[42] In contrast, the Supreme Court has upheld a map with an 8.8% deviation because the redistricting commission made a good-faith effort to comply with the Voting Rights Act and preclearance requirements.[43]

For single-member and multi-member districts, calculating the deviation is rather straightforward. The deviation between districts is calculated by comparing the ratio of total population to the number of elected representatives.[44] However, this calculation becomes more difficult when a map includes floterial districts.[45] The Supreme Court has yet to identify what type of computational method should be used to determine when there is equality across districts in a map that includes floterials.[46] As Section III.A discusses, floterial districts were implemented to help create equality across districts and comply with the "one-person, one-vote" principle.[47] Therefore, without a clearly defined method for calculating deviations, a tension exists between the original purpose

[39] *See, e.g.*, Connor v. Finch, 431 U.S. 407, 418 (1977) (explaining that even deviations below ten percent must be justified by "legitimate considerations incident to the effectuation of a rational state policy" (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)); Larios v. Cox, 300 F. Supp. 2d 1320, 1341 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004); Hulme v. Madison Cty., 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001) (striking down county board map with 9.3% deviation because, while primary goal was to keep deviation below ten percent, drafter disregarded practicality of achieving low deviation and intended to disadvantage Republicans).

[40] 542 U.S. 947 (2004).

[41] *Larios*, 300 F. Supp. 2d at 1341 (quoting Roman v. Sincock, 377 U.S. 695, 710 (1964), *aff'd*, 542 U.S. 947 (2004).

[42] *Id.* at 1347.

[43] Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1309 (2016).

[44] *See* Gary Moncrief & Robert Joula, *When the Courts Don't Compute: Mathematics and Floterial Districts in Legislative Reapportionment Cases*, 4 J.L. & POL. 737, 741 (1988) (explaining that courts have decided to treat single-member and multi-member districts similarly by calculating if "each voter casts a similar number of votes per elected representative").

[45] *See id.*; Moncrief, *supra* note 22, at 254 (noting confusion of how to calculate deviation from equal representation when floterials are used in district maps).

[46] *See* discussion *infra* Section III.B (explaining that Supreme Court jursidprudence came close to determining calculation method in *Baker v. Carr*, but even then, Supreme Court Justices did not come to agreement on what kind of calculation should be used).

[47] *See* discussion *infra* Section III.A (discussing historical use of floterial districts).

and current use of floterials, and compliance with the "one-person, one-vote" principle.[48]

B. *Traditional Redistricting Principles and State Laws*

In addition to the "one-person, one-vote" principle, the Supreme Court has also noted other traditional redistricting principles. These traditional redistricting principles include "compactness, continuity of territory"; "respect for communities of interest"; and "political subdivisions."[49] The origin of traditional redistricting principles for congressional districts is the Apportionment Act of 1842 and the additions made in subsequent apportionment acts.[50] The Apportionment Act of 1842 attempted to prevent gerrymandering of congressional districts by requiring single-member districts to be "composed of contiguous territory."[51] This same restriction was included in the Apportionment Act of 1862, and in 1872, Congress added that the districts should be as equal as "practicable."[52] In the 1901 Apportionment Act, Congress included a "compactness requirement."[53] As a result, the 1911 Apportionment Act required "contiguity, compactness, and equality of population."[54] In subsequent apportionment acts, Congress has not continued to impose these restrictions on district maps, except for the requirement of single-member congressional districts.[55] However, the Supreme Court has continued to recognize "compactness, continuity of territory"; "respect for communities of interest"; and "political subdivisions" as traditional redistricting principles.[56] While the apportionment acts did not impose restrictions on state legislative

[48] *See* Moncrief, *supra* note 22, at 254 (explaining different calculations used based upon type of district).

[49] *See* cases cited *supra* note 14 and accompanying text (identifying three main factors involved in redistricting, and how the Supreme Court has shed light on what states should focus on while constructing new districts).

[50] *See* Apportionment Act of 1842, ch. 50, 5 Stat. 491 (1842) ; Vieth v. Jubelirer, 541 U.S. 267, 276 (2004) ("In the Apportionment Act of 1842, Congress provided that Representatives must be elected from single-member districts 'composed of contiguous territory.'" (citation omitted)); John N. Friedman & Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 AM. ECON. REV. 113, 117 (2008) (explaining that requiring districts to be contiguous first appeared in Apportionment Act of 1842, although it had been standard long before).

[51] *Vieth*, 541 U.S. at 276; Friedman & Holden, *supra* note 50, at 117.

[52] Apportionment Act of 1862, ch. 170, 12 Stat. 572 (1862); Apportionment Act of 1872, ch. 11, 17 Stat. 28 (1872); *Vieth*, 541 U.S. at 276.

[53] 1901 Apportionment Act, ch. 93, 31 Stat. 733 (1901); *Vieth*, 541 U.S. at 276.

[54] 1911 Apportionment Act, ch. 5, 37 Stat. 13 (1911); *Vieth*, 541 U.S. at 276.

[55] *Id.*

[56] *See* cases cited *supra* note 14 and accompanying text (articulating that Supreme Court decisions have continued to follow these districting principles in subsequent case law).

districts, state traditions—including observing county, city, and town lines—have also shaped traditional redistricting principles.[57]

Traditional redistricting principles are not constitutionally required; however, the Supreme Court has allowed a greater deviation between districts when the Court found a compelling reason to observe a traditional redistricting principle.[58] Legislatures have used floterials to help observe a state's use of a traditional redistricting principle and compliance with the "one-person, one-vote" principle.[59] However, even if a map complies with a traditional redistricting principle, the state legislature may have still gerrymandered the district.[60] As Justice Kennedy stated in his concurrence in *Vieth v. Jubelirer*,[61] complying with a traditional redistricting principle "cannot promise political neutrality when used as the basis for relief."[62]

C. *Using Technology to Comply with Traditional Redistricting Principles*

With developments in technology, in theory, legislatures are able to more easily draw maps that comply with "one-person, one-vote" and other traditional redistricting principles. The Supreme Court in *Tennant v. Jefferson County Commission*[63] noted that improvements in technology have allowed for smaller deviations between districts.[64] Technological advances have increased the strictness of meeting the equality requirement,[65] but also, as Justice Powell

[57] State laws and state constitutions often include restrictions and procedures for redrawing the map. *See* Boyer v. Gardner, 540 F. Supp. 624, 630 n.10 (D.N.H. 1982) (explaining that in New Hampshire "state representatives of the districts of each county comprise the County Convention, which has the power to raise county taxes, make appropriations, and authorize the purchase or sale of county real estate"); Friedman & Holden, *supra* note 50, at 117 ("State law governs procedures for redrawing district boundaries."); Moncrief & Joula, *supra* note 44, at 740 ("Many state constitutions require that state legislative districts respect boundaries of local subdivisions, especially counties.").

[58] *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993) (explaining that courts have allowed greater than ten percent deviation).

[59] *See* discussion *infra* Part III (discussing historical and current implications of use of floterial districts).

[60] *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) (emphasizing that traditional redistricting principles "are objective factors that may serve to defeat a claim that a district has been gerrymandered"); Whitford v. Gill, 218 F. Supp. 3d 837, 888 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) ("Individual Justices also have noted that a map's compliance with traditional districting principles does not necessarily speak to whether a map constitutes a partisan gerrymander . . . .").

[61] 541 U.S. 267 (2004).

[62] *Id.* at 308.

[63] 567 U.S. 758 (2012).

[64] *Id.* at 763.

[65] *See id.* (noting that improved technology has meant "that the same variance must now be considered major"); Friedman & Holden, *supra* note 50, at 116 (explaining that "powerful

suggested in his concurrence in *Bandemer*, the advances "now enable[] gerrymanders to achieve their purpose while adhering perfectly to the requirement that districts be of equal population."[66] Although one of the original purposes of the "one-person, one-vote" principle was to deter gerrymandering, Justice Powell noted that advances in technology have "reduced [the principle's] deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters."[67] Thus, technology may allow for gerrymandered districts which comply with "one-person, one-vote."

In *Vieth*, Justice Kennedy, in his concurrence, explained:

> Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.[68]

The Wisconsin District Court in *Whitford v. Gill* discussed how redistricting software allows legislatures to draw maps where it may "to the naked eye" seem to comply with traditional redistricting principles, but in reality, the map can be a "highly effective partisan gerrymander."[69] While the Supreme Court's decision in *Gill v. Whitford* did not address technological advances, Justice Kagan opined in her concurrence:

> [T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like). Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan gerrymanders

computers to aid in the creation of districts" has made meeting equality requirement "extremely strict").

[66] Davis v. Bandemer, 478 U.S. 109, 174 (1986) (Powell, J., concurring in part and dissenting in part) (discussing how, with technology, "mapmakers . . . may design a distrcting plan that purposefully discriminates against political opponents as well as racial minorities").

[67] *Id.* at 168 n.5 ("For 'one person, one vote' to serve its intended purpose of implementing the constitutional mandate of fair and effective representation, therefore, consideration also must be given to other neutral factors.").

[68] Vieth v. Jubelirer, 541 U.S. 267, 312-13 (Kennedy, J., concurring).

[69] Whitford v. Gill, 218 F. Supp. 3d 837, 889 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

on record. The technology will only get better, so the 2020 cycle will only get worse.[70]

Although this Note does not analyze technological advances in depth, because technology can make partisan gerrymandering more readily accessible, especially when paired with floterials, this Note illuminates the imperative need for the Supreme Court to clarify what makes a map an unconstitutional partisan gerrymander.

II. PARTISAN GERRYMANDERING

A. *History of Gerrymandering and Partisan Gerrymandering*

Justice Scalia stated in *Vieth* that "[p]olitical gerrymanders are not new to the American scene."[71] While partisan gerrymandering existed before the notorious Massachusetts "salamander" district in 1812, this district became the namesake.[72] By "1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength."[73]

Scholars often describe partisan gerrymandering as using the strategies of "cracking" and "packing" a map for partisan advantage.[74] While other nuances and strategies for partisan gerrymandering exist, the main strategies of "cracking" and "packing" result in "one party wasting many more votes than its adversary."[75] Cracking is described as "splitting a party's supporters between districts so they fall shy of a majority in each one."[76] Packing is described as "stuffing remaining supporters in a small number of districts that they win handily."[77]

The Supreme Court has addressed the constitutionality of partisan gerrymandering, but has failed to provide a clear answer or standard as to what constitutes an unconstitutional partisan gerrymander.[78] In *Bandemer*, the

[70] Gill v. Whitford, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring) (citations omitted).

[71] *Vieth*, 541 U.S. at 274.

[72] *Id.*

[73] *Id.* at 274-75 (quoting ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 123 (1974)).

[74] *See* Stephanopoulos & McGhee, *supra* note 23, at 851.

[75] *Id.* at 850 ("[T]he efficiency gap indicates the magnitude of the divergence between the parties' respective wasted votes.").

[76] *Id.* at 851.

[77] *Id.*

[78] *See* cases cited *supra* notes 7-10 and accompanying text (discussing Supreme Court decisions in partisan gerrymandering cases).

Supreme Court held that partisan gerrymander is a justiciable issue.[79] The plurality in *Vieth*, however, held that *Bandemer* was decided incorrectly and that partisan gerrymander claims are nonjusticiable.[80] Partisan gerrymander came before the Supreme Court again in 2006 in *League of United Latin American Citizens v. Perry ("LULAC")*.[81] However, the Court declined to address what standard should be used to determine partisan gerrymander.[82] In 2016, the Court in *Harris v. Arizona Independent Redistricting Commission*[83] unanimously suggested that the constitutionality of partisan gerrymandering is an open question when stating, "even assuming, without deciding, that partisanship is an illegitimate redistricting factor."[84] As a result, partisan gerrymander is still considered a justiciable issue, and leading up to *Gill v. Whitford*, the Supreme Court still had not approved a standard to determine if a map was in fact drawn with a partisan advantage.

B. *Where We Are Now with Partisan Gerrymandering and the* Gill v. Whitford *Case*

The Supreme Court took up the question of partisan gerrymander in *Gill v. Whitford* for the first time since *LULAC*.[85] A few months after hearing oral arguments in *Gill v. Whitford*, the Supreme Court also agreed to hear another case on partisan gerrymander, *Benisek v. Lamone*.[86] *Benisek* concerned the partisan gerrymander of a congressional district in Maryland and the interaction between the First Amendment and partisan gerrymander.[87] In this case, the Court did not provide the framework for deciding partisan gerrymandering cases. Instead, it held that the lower court did not abuse its discretion by denying a preliminary injunction of the congressional map.[88] This is likely because the Court was also hearing *Gill v. Whitford*, which had the potential to "shed light" and "set forth a 'framework' by which plaintiffs' [partisan gerrymander] claims could be decided and, potentially, remedied."[89] This Note explores partisan

[79] *See* Davis v. Bandemer, 478 U.S. 109, 124 (1986).

[80] Vieth v. Jubelirer, 541 U.S. 267, 278-81 (2004) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

[81] 548 U.S. 399, 400 (2006).

[82] *Id.* at 414.

[83] 136 S. Ct. 1301 (2016).

[84] *Id.* at 1310.

[85] *See supra* note 7 and accompanying text (examining significance of *LULAC*).

[86] 138 S. Ct. 543 (2017) (mem.).

[87] Benisek v. Lamone, 266 F. Supp. 3d 799, 801 (D. Md. 2017).

[88] Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018).

[89] *Id.*

gerrymandering of state legislative districts, and therefore will focus on the *Gill v. Whitford* decision.

The Supreme Court agreed to address the question of the constitutionality of partisan gerrymandering in *Gill v. Whitford*.[90] The case was taken up from the United States District Court for the Western District of Wisconsin, in which a three-judge panel held that the map was an unconstitutional partisan gerrymander and was created with the intention to burden the rights of Democratic voters.[91] Plaintiffs alleged that the Wisconsin state legislative district map diluted Democratic voters' rights in violation of the First Amendment and Equal Protection Clause.[92] The lower court explained that the statewide district map prevented Wisconsin Democrats from "translat[ing] their votes into seats" and therefore the voters "suffered a personal injury to their Equal Protection rights."[93] Further, the lower court found that the map was drawn to "solidify[] Republican control of the legislature," and that adopting a different map would "remov[e] the state-imposed impediment on Democratic voters."[94] Following the ruling, the district court entered an injunction against the district map on January 27, 2017.[95] On June 19, 2017, the Supreme Court granted a stay and postponed "[f]urther consideration of the question of jurisdiction . . . to the hearing of the case on the merits."[96]

The Wisconsin District Court considered the plaintiff's proposed efficiency gap measurement.[97] Professor Nicholas Stephanopoulos and Eric McGhee created the efficiency gap, a proposed method of calculation, to determine if a

[90] Gill v. Whitford, 137 S. Ct. 2289, 2289 (2017) (mem.) (ordering judgment of United States District Court for Western District of Wisconsin stayed pending Supreme Court appeal); Gill v. Whitford, 137 S. Ct. 2268, 2268 (2017) (mem.) (postponing further consideration of jurisdictional question until hearing of case on merits).

[91] Whitford v. Gill, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). "A district court of three judges shall be convened when . . . an action is filed challenging the constitutionality of the apportionment of . . . any statewide legislative body." 28 U.S.C. § 2284 (2012). The Supreme Court is required to review the reapportionment decision. 28 U.S.C. § 1253 (2012) (codifying any party's right to appeal from order given in proceeding "required by any Act of Congress to be heard and determined by a district court of three judges"). Judge Kenneth Ripple of the Seventh Circuit Court of Appeals was sitting by designation and wrote the opinion for *Whitford v. Gill*, 218 F. Supp. 3d. at 843. Judge Ripple noted ample evidence before the court that the legislature had intended to create a Republican partisan advantage, including analyzing six statewide alternative district maps. *Id.* at 850-51.

[92] Whitford v. Gill, 218 F. Supp. 3d at 855.

[93] *Id.* at 928.

[94] *Id.*

[95] Whitford v. Gill, No. 15-CV-421-BBC, 2017 WL 383360, at *1 (W.D. Wis. Jan. 27, 2017), *amended*, No. 15-CV-421-BBC, 2017 WL 2623104 (W.D. Wis. Feb. 22, 2017).

[96] Gill v. Whitford, 137 S. Ct. 2268, 2268 (2017) (mem.).

[97] Whitford v. Gill, 218 F. Supp. 3d at 854.

map is drawn with partisan advantage.[98] Stephanopoulos and McGhee describe the efficiency gap as "simply the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election."[99] A wasted vote is one cast for either the losing candidate or for the winning candidate in excess of what is needed to win.[100] Thus, the strategy of gerrymandering is not to eliminate all of the wasted votes, but rather have fewer wasted votes than the opponent.[101] The Wisconsin District Court, however, held that the efficiency gap measurement did not "establish[] presumptive unconstitutionality," but rather was "corroborative evidence of an aggressive partisan gerrymander that was both intended *and likely* to persist for the life of the plan."[102] Instead of basing its ruling solely on the efficiency gap, the district court outlined a three-prong test for determining partisan gerrymandering, which requires the court to determine whether a redistricting scheme: "(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds."[103]

On October 3, 2017, the Supreme Court heard oral arguments on the following issues: (1) if the district court violated *Vieth* by hearing a statewide challenge to a district plan, holding Wisconsin's redistricting plan was an impermissible partisan gerrymander, and adopting a "watered-down version" of the test from the plurality in *Bandemer*; (2) if the defendants may present additional evidence to prove they would have prevailed under the district court's test; and (3) if partisan gerrymandering claims are justiciable.[104] Attorney for the respondents, Paul Smith, argued how critical this case was by stating "gerrymanders now are not your father's gerrymander. These are going to be really serious incursions on democracy if this Court doesn't do something. And this is really the last opportunity before we see this huge festival of new extreme

[98] Stephanopoulos & McGhee, *supra* note 23, at 851. The formula for the efficiency gap is: *Efficiency Gap = Seat Margin – (2 x Vote Margin)*. *Id.* at 853 (assuming that districts have equal populations and there are two parties in each election). Seat Margin is calculated by the "share of all seats held by a party, minus 50 percent." *Id.* Vote Margin is calculated by the share of votes "received by a party, minus 50 percent." *Id.* If the efficiency gap is positive, then a party has an advantage; if the efficiency gap is negative, then such party is disadvantaged; and if the efficiency gap is equal to zero, then there is no efficiency gap and no benefit. *Id.*

[99] *Id.* at 851 (emphasis omitted).

[100] *Id.* at 834.

[101] *Id.* at 851.

[102] Whitford v. Gill, 218 F. Supp. 3d at 910.

[103] *Id.* at 884 (concluding that redistricting scheme meeting all three prongs is prohibited under First Amendment and Equal Protection Clause).

[104] Jurisdictional Statement for Appellants at i, Gill v. Whitford, 137 S. Ct. 2289 (2017) (No. 16-1161), 2017 WL 1131500, at *i.

gerrymanders."[105] He also argued that the Supreme Court is "the only institution in the United States . . . that can solve this problem just as democracy is about to get worse because of the way gerrymandering is getting so much worse."[106] Smith spent a fair amount of time describing the efficiency gap to the Justices.[107] During oral arguments, Chief Justice Roberts described the efficiency gap and partisan gerrymandering as "sociological gobbledygook."[108]

In past opinions, Justice Kennedy expressed concerns about the threat of partisan gerrymandering to democracy. In *LULAC*, Justice Kennedy discussed proposed standards for determining partisan gerrymandering and stated that "asymmetry alone is not a reliable measure of unconstitutional partisanship."[109] In *Vieth*, Justice Kennedy argued that the use of traditional redistricting principles cannot be "used as the basis for relief" because they "cannot promise political neutrality."[110] He further argued:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.[111]

The respondents in *Gill v. Whitford* relied on that statement as their claim, although Justice Kagan in her concurrence argued that the respondents "did not sufficiently advance a First Amendment associational theory."[112] Justice Kennedy also expressed his concerns about technological advances and the Supreme Court failing to take partisan gerrymandering seriously, predicting "the temptation to use partisan favoritism in districting in an unconstitutional manner will grow."[113] However Justice Kennedy argued technological advances may also help courts "identify and remedy the burdens."[114] Justice Kennedy's interest in getting the Supreme Court involved in partisan gerrymandering identified him as the swing vote in the *Gill v. Whitford* case.[115]

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[105] Transcript, *supra* note 1, at 57.

[106] *Id.* at 62.

[107] *Id.* at 51-54.

[108] *Id.* at 40.

[109] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 420 (2006).

[110] Vieth v. Jubelirer, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring).

[111] *Id.* at 314.

[112] Gill v. Whitford, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring) (concluding that respondents tried case "as though it were about vote dilution alone"); *see also* Transcript, *supra* note 1, at 34-35.

[113] *Vieth*, 541 U.S. at 312.

[114] *Id.* at 313.

[115] *See, e.g.*, Adam Liptak, *Justices Take Up Gerrymandering Based on Party*, N.Y. TIMES, June 20, 2017, at A1.

The Supreme Court's holding in *Gill v. Whitford* failed to provide a clear answer as to what constitutes an unconstitutional partisan gerrymander. The Court unanimously held that the plaintiffs lacked standing to bring a challenge to a statewide map, and the Court, besides Justices Thomas and Gorsuch, agreed to remand the case to the lower court.[116] Chief Justice Roberts explained in the opinion for the Court, citing to *Reynolds* and *Baker v. Carr*,[117] that "a person's right to vote is 'individual and personal in nature'" and thus a plaintiff must "allege facts showing disadvantage to themselves as individuals" to establish Article III standing.[118] As a result, the alleged harm of vote dilution is a district specific injury, which requires that the plaintiff be a voter in the district and to sufficiently allege that the plaintiff: "(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."[119] The injury in fact element requires a plaintiff to allege a "concrete and particularized" injury.[120] The Court explained that the efficiency gap or other measures of partisan asymmetry, however, fail to identify harm to an individual plaintiff.[121] The Court did not answer what injury in fact a plaintiff must allege for a successful partisan gerrymander claim and instead "[left] for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims" because the Court "lack[ed] jurisdiction to decide this case."[122]

Justice Kagan, in a concurrence joined by Justices Ginsburg, Breyer, and Sotomayor, outlined what a plaintiff must allege for a successful vote dilution or First Amendment associational claim in the partisan gerrymander context.[123] For a vote dilution claim, Justice Kagan explained that the plaintiffs must be voters in an individual district and must show that the "district has been packed or cracked" to establish the injury in fact required for standing.[124] Justice Kagan suggested that the plaintiff may show "an alternative map or other evidence, that packing or cracking indeed occurred" in the district.[125] To prove "illicit partisan intent," Justice Kagan explained that "[t]he plaintiffs could then offer evidence

[116] Gill v. Whitford, 138 S. Ct. at 1923.

[117] 369 U.S. 186 (1962).

[118] Gill v. Whitford, 138 S. Ct. at 1929.

[119] *Id.* (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016)).

[120] *Id.* (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[121] *Id.* at 1933 ("The single statewide measure of partisan advantage delivered by the efficiency gap treats Whitford and Donohue as indistinguishable, even though their individual situations are quite different.").

[122] *Id.* at 1931.

[123] *Id.* at 1934 (Kagan, J., concurring) ("I write to address in more detail what kind of evidence the present plaintiffs (or any additional ones) must offer to support [a partisan gerrymander challenge].").

[124] *Id.* at 1936.

[125] *Id.* at 1937.

about the mapmakers' goals in formulating the entire statewide map," such as how the plaintiffs in the lower court "introduced proof that the mapmakers looked to partisan voting data when drawing districts throughout the State."[126] Justice Kagan argued that, because the Court recognizes "the relevance of such statewide evidence in addressing racial gerrymandering claims of a district-specific nature," the "same should be true for partisan gerrymandering."[127] Yet, as Justice Kagan noted, because the opinion for the Court did not explain "what elements make up a vote dilution claim in the partisan gerrymandering context," the lower courts will have to "debat[e], without guidance from this Court."[128]

Justice Kagan also advised on how to bring a First Amendment associational claim, which differs from a vote dilution claim.[129] She suggested that members of the same political party, party officials, or the party itself could bring a challenge, because partisan gerrymander may deprive the party of its "natural political strength," and make it difficult to fundraise, register voters, attract volunteers, generate support from independents, and recruit candidates to run for office.[130] Unlike vote dilution claims, which are district specific, Justice Kagan explained that an associational claim and injury are statewide.[131] However, Justice Kagan concluded that the plaintiffs failed to sufficiently allege a First Amendment associational claim and instead focused on vote dilution by "establishing the effects of rampant packing and cracking on the value of individual citizens' votes."[132]

As a result of the Supreme Court remanding *Gill v. Whitford*, as well as remanding *Benisek v. Lamone* and *Rucho v. Common Cause*[133] in consideration of the *Gill v. Whitford* decision, it appears that lower courts have been tasked with determining if plaintiffs have standing to bring partisan gerrymandering challenges and, if plaintiffs have standing, deciding if plaintiffs sufficiently alleged a partisan gerrymander challenge. On August 27, 2018 in *Common Cause v. Rucho*,[134] the United States District Court for the Middle District of North Carolina held on remand that the plaintiffs had standing and struck down the congressional map as an unconstitutional partisan gerrymander in violation of the Equal Protection Clause, First Amendment, and Article I.[135] The court

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1938.

[130] *Id.*

[131] *Id.* at 1939.

[132] *Id.*

[133] 138 S. Ct. 2679 (2018) (mem.).

[134] 318 F. Supp. 3d 777 (M.D.N.C. 2018).

[135] *Id.* at 835-36, 941. On January 9, 2018, in *Common Cause v. Rucho*, a federal court for the first time ordered a state legislature to redraw a congressional map due to partisan gerrymandering. Common Cause v. Rucho, 279 F. Supp. 3d 587, 690-91 (M.D.N.C. 2018) (ordering legislature to enact proposed remedial plan no later than January 29, 2018); Adam

asked the parties to comment on whether the remedy should include redrawing the map before the November midterm election, or wait until after the election.[136] Both parties agreed that the redrawing should wait until after the 2018 election.[137] The court accepted the parties' arguments.[138] On October 1, 2018, the State defendants filed an appeal with the Supreme Court.[139] The Court is required to review the district court's decision in *Common Cause v. Rucho*.[140]

As Justice Kagan indicated, the Supreme Court "will again be called on to redress extreme partisan gerrymanders."[141] The Supreme Court's composition, however, will be different the next time it sees a partisan gerrymander case as a result of Justice Kennedy resigning on June 27, 2018.[142] On October 6, 2018, Judge Brett Kavanaugh was confirmed and sworn in as an Associate Justice to the Supreme Court.[143] If and how the Supreme Court determines what

Liptak, *Supreme Court Won't Hear North Carolina Partisan Gerrymandering Case*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/25/us/politics/supreme-court-gerrymander-voting.html [https://perma.cc/QD9U-BN3P] (explaining that federal court for first time struck down a congressional map). The federal court explained that "partisan gerrymandering runs contrary to numerous fundamental democratic principles and individual rights enshrined in the Constitution." Common Cause v. Rucho, 279 F. Supp. 3d at 597. On January 18, 2018, the Supreme Court granted stay without providing an explanation and, as a result, stalled any redrawing of the North Carolina map. Rucho v. Common Cause, 138 S. Ct. 923 (2018) (mem.) (granting stay). In light of the *Gill v. Whitford* decision, the Supreme Court vacated and remanded the case on June 25, 2018. Rucho v. Common Cause, 138 S. Ct. 2679 (2018) (mem.).

[136] Common Cause v. Rucho, 318 F. Supp. 3d at 941.

[137] *See* Legislative Defendants' Memorandum in Support of Motion to Stay & in Response to the Court's Order of Aug. 27, 2018 at 13, Common Cause v. Rucho, No. 1:16-CV-1026-WO-JEP (M.D.N.C. Aug. 31, 2018) ("The only proper remedy in this case is to allow elections to proceed under the 2016 Plan and for this Court to set a deadline for the General Assembly to enact a new plan for the 2020 General Election."); Memorandum Regarding Remedies from the Common Cause & League of Women Voters Plaintiffs at 1, Common Cause v. Rucho, No. 1:16-CV-1026-WO-JEP (M.D.N.C. Aug. 31, 2018) ("After careful consultation . . . plaintiffs have reluctantly concluded that—on the unique facts presented here—attempting to impose a new redistricting plan in time for the 2018 election would be too disruptive and potentially counterproductive.").

[138] Common Cause v. Rucho, No. 1:16-CV-1026, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018) ("We conclude that there is insufficient time for this Court to approve a new districting plan and for the State to conduct an election using that plan prior to the seating of the new Congress in January 2019.").

[139] Jurisdictional Statement for Appellants, Rucho v. Common Cause, 138 S. Ct. 2679 (2018) (No. 18-422).

[140] *See* 28 U.S.C. §§ 1253, 2284(a) (2012) (requiring three-judge district courts to review reapportionment cases and requiring Supreme Court to review decision).

[141] Gill v. Whitford, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring).

[142] *See* Michael D. Shear, *Trump Set to Tilt Court as Kennedy Retires*, N.Y. TIMES, June 28, 2018, at A1.

[143] *See* Sheryl Gay Stolberg, *Senate Votes 50-48 to Put Kavanaugh on Supreme Court*, N.Y. TIMES, Oct. 7, 2018, at A1.

constitutes an unconstitutional partisan gerrymander is not only dependent on the composition of the Supreme Court, but also on how the plaintiffs present the claim and injury. As a result, partisan gerrymander is still a justiciable issue, but the Supreme Court has yet to provide guidance as to what constitutes an unconstitutional partisan gerrymander.

C. *What Is the Impact of Partisan Gerrymandering and Why Does It Matter?*

As argued by the respondents' attorney, Paul Smith, during oral arguments for *Gill v. Whitford*, partisan gerrymandering is a "serious incursion" on democracy.[144] Smith further argued that the Wisconsin district map was "so extreme that it effectively nullifies democracy," which means that an "extremely biased" map "effectively decides in advance who's going to control the legislative body for the entire decade."[145] Partisan gerrymandering, therefore, can impact not only who wins the election, but also the "political process as a whole."[146] By gaining an extra seat in a state legislature, especially if this allows a party to obtain a majority, the use of partisan gerrymander can have "massive effects on . . . state policies."[147] Because partisan gerrymandering can have an effect on policymaking, the implications of how a map is drawn are more than just who wins the election.

Several Justices expressed concerns during oral arguments for *Gill v.Whitford* that creating a standard would open the floodgates of litigation.[148] However, the respondents' attorney suggested that partisan gerrymandered maps are already being frequently challenged in courts.[149] The Supreme Court in *Gill v. Whitford* left answering the question of what constitutes an unconstitutional partisan gerrymander for another day.[150] However, as the respondents argued and Justice Kagan noted in her concurrence, the Supreme Court is the only institution able to answer this question.[151]

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[144] Transcript, *supra* note 1, at 57.

[145] *Id.* at 30.

[146] Caughey, Tausanovitch & Warshaw, *supra* note 23, at 455.

[147] *Id.* at 454 ("Consistent with previous research, we show that all else equal, an extra legislative seat for a given party—especially if that seat determines majority control of a chamber—has massive effects on the conservatism of roll-call votes in state assemblies and more modest but still substantial effects on the conservatism of state policies.").

[148] *See* Transcript, *supra* note 1, at 22, 36-37.

[149] *Id.* at 38 ("Partisan gerrymandered maps get challenged—they get challenged in other ways, under the one person, one vote doctrine, under the racial gerrymandering doctrine, under Section 2. And—and so you're getting those cases. Most of the—the statewide redistricting maps in this country are challenged every 10 years in some way or another."); *see also supra* note 3 (explaining that more than 240 cases have been challenged in state and federal court since last nationwide redistricting).

[150] Gill v. Whitford, 138 S. Ct. 1916, 1931 (2018).

[151] *Id.* at 1941 (Kagan, J., concurring); Transcript, *supra* note 1, at 61-62.

III. HISTORY AND CURRENT USE OF FLOTERIAL DISTRICTS

In light of *Reynolds*'s "one-person, one-vote" principle, states implemented floterial districts to help district maps comply with equal representation across state legislative districts.[152] By drawing an additional district on top of an existing district, a voter will end up voting for more than one representative in more than one district. As a result, calculating the deviation between districts becomes complicated when a map includes floterials.[153] This Note suggests that partisan gerrymandering is likely the real purpose for using floterials, instead of complying with the "one-person, one-vote" principle.

A. *Background of Floterial Districts*

Floterial districts have been in existence for at least one hundred and fifty years, although states used floterials inconsistently throughout that time period.[154] Other names for a floterial district include "flotorial," "floater," "shared," and "joint" district.[155] New Hampshire is the only state that currently uses floterial districts, but Georgia, Indiana, Mississippi, New Jersey, Oregon, Tennessee, Texas, Virginia, and Wyoming have all used floterials in the past.[156] In general, floterial districts were introduced to provide additional representation

[152] *See* Mahan v. Howell, 410 U.S. 315, 324, 329 (1973) (discussing how floterial districts were implemented to help with underrepresentation in Virginia's redistricting plan, while in general finding that district map did not violate Equal Protection Clause or Fourteenth Amendment because of legislature's objective of preserving integrity of political subdivision lines); Davis v. Mann, 377 U.S. 678, 686-87 (1964) (explaining that because of tradition of "respecting the integrity of the boundaries of cities and counties," floterial districts have been used to help yield the proper "population ratio"); Moncrief, *supra* note 22, at 251-53 (analyzing how floterial districts are "intended to provide additional representation," tension between complying with "one-person, one-vote" principle and observing integrity of political subdivisions, and inequality problems floterial districts pose).

[153] *See* Hamilton, *supra* note 19, at 332 (noting "application of the equal representation doctrine to floterial districts is a conundrum"); Moncrief, *supra* note 22, at 254 (explaining that calculating if there is equal representation when floterials are used causes confusion); Moncrief & Joula, *supra* note 44, at 748 (encouraging the Court to provide more guidance as to what method to calculate equality across districts when floterial districts are used).

[154] *See* sources cited *supra* note 22 (establishing evidence of states using floterial districts variously since 19th century).

[155] Hamilton, *supra* note 19, at 334 ("It is called a 'joint' district in Indiana and a 'floater' in Virginia."); Moncrief, *supra* note 22, at 251 n.1 ("Floterials have been called by other names. In Indiana, they were referred to as 'shared districts,' in Texas 'flotorials,' and in Virgina 'floaters.'").

[156] *See* sources cited *supra* note 22.

to help a map comply with equal representation across districts.[157] However, floterials may not actually provide equal representation.[158]

Congressional acts and Supreme Court opinions have shaped the original use of floterial districts. For instance, the Reapportionment Act of 1929 required states to reapportion the United States House of Representative districts following the decennial census.[159] If a state received an additional representative but did not redraw the maps, the additional representative was elected at-large, which essentially was a floterial district.[160] However, in 1967, Congress passed 2 U.S.C. § 2c, which required single-member districts and prohibited a district from electing more than one representative.[161] In *Branch v. Smith*,[162] Justice Scalia discussed in the opinion for the Court the historical context and forty-year understanding of § 2c.[163] Justice Scalia explained that § 2c was adopted in light of the Voting Rights Act of 1965 giving federal courts jurisdiction to be involved in elections and the "threat of judicially imposed at-large elections."[164] Although the language of § 2c reads "there shall be established by law," Justice Scalia explained that this should be interpreted as not only including legislative action, but judicial decisions as well.[165] As a result, § 2c should be interpreted to require state legislatures, as well as courts, to draw single-member districts for a congressional district.[166] The plurality in *Branch* argued that the "at-large" method of 2 U.S.C. § 2a(c) could not be used as long as it is feasible for the districts to be redrawn in accordance with § 2c.[167] Thus, floterial districts may only be used for state and local district maps.

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[157] *See supra* note 152 and accompanying text (discussing Supreme Court cases elaborating on floterial districts' purpose).

[158] *See supra* note 152 and accompanying text (explaining how floterial districts may actually complicate achieving equal representation).

[159] 2 U.S.C. § 2a(c) (2012).

[160] *See id.*; Altman & McDonald, *supra* note 22, at 1182 n.13 (explaining how, under 2 U.S.C. § 2a(c), floterial districts were used for congressional elections when states would gain additional representative and fail to redistrict).

[161] 2 U.S.C. § 2c (stating that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . ."); Michelle Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. BALT. L.F. 35, 50 n.142 (2012) ("Before passage of the single-member district requirement, states were free to elect some of its congressional representatives at-large under the Reapportionment Act of 1929.").

[162] 538 U.S. 254 (2003).

[163] *Id.* at 268.

[164] *Id.* at 268, 270.

[165] *Id.* at 271.

[166] *Id.* at 272.

[167] *Id.* at 275 ("Thus, § 2a(c) is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c.").

The Supreme Court has noted the use of floterial districts only a handful of times, but has not directly ruled on the constitutionality of the use of floterials. In fact, the Court briefly, and "perhaps too casually,"[168] mentioned the use of floterial districts in *Reynolds* by stating, "[s]ingle-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts."[169] The Court has repeatedly cited back to its discussion of floterials in *Davis v. Mann*,[170] where the Court provided a footnote with a definition of the district type.[171] This footnote states:

> The term "floterial district" is used to refer to a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned. As an example, the City of Lynchburg, with a 1960 population of 54,790, is itself allocated one seat in the Virginia House of Delegates under the 1962 apportionment plan. Amherst County, with a population of only 22,953, is not given any independent representation in the Virginia House. But the City of Lynchburg and Amherst County are combined in a floterial district with a total population of 77,743. Presumably, it was felt that Lynchburg was entitled to some additional representation in the Virginia House, since its population significantly exceeded the ideal House district size of 36,669. However, since Lynchburg's population did not approach twice that figure, it was apparently decided that Lynchburg was not entitled, by itself, to an added seat. Adjacent Amherst County, with a population substantially smaller than the ideal district size, was presumably felt not to be entitled to a separate House seat. The solution was the creation of a floterial district comprising the two political subdivisions, thereby according Lynchburg additional representation and giving Amherst County a voice in the Virginia House, without having to create separate additional districts for each of the two political subdivisions.[172]

A floterial district can cross geographical boundaries or county lines, while helping to ensure the "one-person, one-vote" principle.[173] As the District Court of New Hampshire noted, "[i]t must be borne in mind that the floterial district is

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[168] Hamilton, *supra* note 19, at 332 (arguing that Court "incidentally, and perhaps too casually, endorsed both multi-member districts and floterials").

[169] Reynolds v. Sims, 377 U.S. 533, 579 (1964).

[170] 377 U.S. 678 (1964).

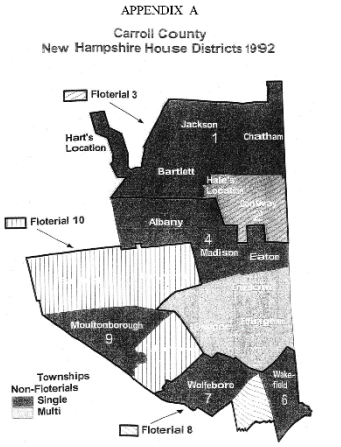
[171] *Id.* at 686 n.2.

[172] *Id.* (citations omitted).

[173] *See* Moncrief & Joula, *supra* note 44, at 742 ("The floterial district sometimes is used as a means of accommodating the two conflicting principles of one person, one vote and of respecting the boundaries of state political subdivisions.").

a concept devised to equalize representation while preserving political boundaries."[174]

Figure 1. An example of floterial districts used in a New Hampshire 1992 reapportionment plan.[175]



Floterials three, eight, and ten crossed over geographic boundaries of towns and cities. Because New Hampshire has a statutory requirement that districts may not cross county lines,[176] the floterials do not cross the Carroll County geographic boundary. Some have argued that without this statutory requirement there would be no need to use floterials.[177] However, no serious efforts have been made to eliminate the county convention or statutory requirement. Therefore, the state legislature will prioritize preserving county lines in drawing the district maps.

In *Davis v. Mann*, the Court also briefly explained the implementation and purpose behind the floterial district, stating:

> [B]ecause of a tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines, districts have been constructed

[174] Boyer v. Gardner, 540 F. Supp. 624, 629 (D.N.H. 1982).

[175] Burling v. Chandler, 804 A.2d 471, 487 (N.H. 2002).

[176] N.H. REV. STAT. ANN. § 24:1 (2018) ("The county convention consists of the state representatives of the representative districts of the county."). The county convention "has the power to raise county taxes, make appropriations, and authorize the purchase or sale of county real estate." *Boyer*, 540 F. Supp. at 630 n.10.

[177] *See, e.g.*, *Hearing on CACR 41 Before the S. Comm. on Internal Affairs*, 2006 Leg. 8 (N.H. 2006) (statement of Sen. Peter H. Burling), https://www.doj.nh.gov/election-law/documents/exhibit-22-redistricting-2012.pdf [https://perma.cc/RH5T-YFF3] (testifying that if House members did not serve as county delegation there would be no need for floterials).

> only of combinations of counties and cities and not by pieces of them. This has resulted in the periodic utilization of floterial districts where contiguous cities or counties cannot be combined to yield population totals reasonably close to a population ratio figure determined by dividing the State's total population by the number of seats in the particular legislative body.[178]

The Court made a similar statement about the use of a floterial district in *Mahan v. Howell*,[179] in which the floterial was used to help with "underrepresentation."[180] The closest the Supreme Court has been to ruling on the constitutionality of floterials was in *Kilgarlin v. Hill*,[181] where the Court found that the map made up of "single-member, multi-member and floterial districts . . . was an unconstitutional 'crazy quilt.'"[182] Without a direct rule on floterial districts, the Court's opinion on using this type of redistricting device is unclear.

B. *Challenges of Using Floterial Districts for Equal Representation*

While in theory floterial districts are meant to equalize representation, the use of floterials can actually confuse the calculation and make it more challenging to ensure equal representation.[183] As noted earlier, the Supreme Court has not addressed the proper method of computation for calculating deviations when the map includes floterials.[184] In fact, the Supreme Court stated in *Mahan v. Howell* that "[w]e decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the court and used to support its holding of unconstitutionality."[185]

The closest the Supreme Court has been to addressing the different types of computational methods was in *Baker*, in which Justice Clark and Justice Harlan

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[178] Davis v. Mann, 377 U.S. 678, 686-87 (1964).

[179] 410 U.S. 315 (1973).

[180] *Id.* at 324 ("The resulting underrepresentation was cured by providing a floterial district, the 42d, which also included portions of the cities of Chesapeake and Portsmouth.").

[181] 386 U.S. 120 (1967).

[182] *Id.* at 121.

[183] *See supra* note 153 and accompanying text (proclaiming that Supreme Court's lack of guidance as to which method is proper is confusing).

[184] *See* Moncrief, *supra* note 22, at 258 ("Apparently the U.S. Supreme Court does not recognize, or refuses to acknowledge, that the three computational methods stem from different working definitions of the concept of 'equal representation.'"); Moncrief & Joula, *supra* note 44, at 745 ("Although the question of the appropriate computational method has arisen in numerous cases, the Supreme Court has refused to address the issue. In each case, the Court has simply accepted lower court figures without regard to the computational method used to calculate those figures.").

[185] *Mahan*, 410 U.S. at 319 n.6.

described their conflicting viewpoints on the proper method.[186] Justice Harlan included an appendix to his opinion, titled "The Inadequacy of Arithmetical Formulas as Measures of the Rationality of Tennessee's Apportionment," in which he stated that an analysis that "rests on faulty mathematical foundations" is defective "because the approach taken wholly ignores all other factors justifying a legislative determination of the sort involved in devising a proper apportionment for a State Legislature."[187] Similarly, the New Hampshire Supreme Court explained that "when the towns within a floterial have vastly different populations, the use of the floterial can cause substantial deviations from the one person/one vote principle."[188] Thus, when it comes to a district map that includes floterials, determining whether the map complies with "one-person, one-vote" is a "conundrum."[189]

Two types of computational methods for calculating deviations are the aggregate method and the component method; however, the Supreme Court has yet to fully endorse one method over the other.[190] Without a uniform method of calculation, challenges arise when determining if a district map is actually in conformance with the "one-person, one-vote" principle. The aggregate method, also referred to as "the traditional house method,"[191] is an "equal population" computational method and views the representative "as a basic indivisible unit."[192] The aggregate method "measures representation as the ratio of representatives to total population in the floterial district."[193] On the other hand, the component method, also referred to as the "shared floater method" or "Du

[186] *See* Baker v. Carr, 369 U.S. 186, 254-55 (1962) (Clark, J. concurring); *id.* at 337 (Harlan, J. dissenting) (describing conflicting views on mathematical approaches to apportionment formulas).

[187] *Id.* app. c at 340-41.

[188] Burling v. Chandler, 804 A.2d 471, 480 (N.H. 2002).

[189] *See* Hamilton, *supra* note 19, at 321.

[190] *See supra* note 184 and accompanying text (reporting that Supreme Court has not declared which method of calculation is best).

[191] Moncrief & Joula, *supra* note 44, at 742 n.32 (describing alternate names for computational methods).

[192] *Id.* at 742, 744 (distinguishing relative characteristics of aggregate method).

[193] Moncrief, *supra* note 22, at 257. Moncrief suggests that the formula for calculating the aggregate method is: $D = IPR - \frac{a+b}{R}$. *Id.* at 255. "IPR" stands for the ideal population per representative, which is determined by the state population divided by the number of representatives. *Id.* The "a" is equal to the population in district *A*. *Id.* The "b" is equal to the population in district *B*. *Id.* at 256. "R" is the total number of representatives from district *A* and *B*. *Id.* "D" is the deviation from the ideal. *Id.* The ideal deviation would be what the court would accept as a deviation between districts. *Id.* at 255. If the IPR equals 10,000, district *A* has a population of 11,000, and district *B* has a population of 19,000, then there is a total excess population of 10,000 that can be combined in a floterial (1,000 from district *A* and 9,000 from district *B*). *Id.* With three total representatives, the deviation is:
$10{,}000 - \frac{11{,}000 + 19{,}000}{3} = 0$. *Id.* at 256.

Val method,"[194] is an "equal weight" computational method and "looks at how many votes are cast by the individual voter."[195] In other words, the component method calculates floterial districts as "representatives per subdistrict unit (county) population."[196] The aggregate and component methods provide different deviations for maps that include floterials.[197] Gary Moncrief suggested that the component method is more representative of the "one-person, one-vote" principle.[198] Yet, Moncrief also suggested that floterial districts should be calculated based on a third method, called the reciprocal method, which "measures representation as the voting weight of the individual in each subdistrict."[199] The Supreme Court, however, has yet to endorse Moncrief's proposed method, the aggregate method, or the component method.[200]

Instead of adopting a proper computational method, the Supreme Court has deferred to the lower courts, which have endorsed and adopted both the aggregate and component methods.[201] For instance, the United States District Court for the Southern District of Texas in *Kilgarlin v. Martin*[202] used the

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[194] Moncrief & Joula, *supra* note 44, at 742 n.32.

[195] *Id.* at 742, 744 (distinguishing relative characteristics of component method).

[196] Moncrief, *supra* note 22, at 257 (describing units of calculation result). Moncrief suggests that the formula for calculating the component method is:

$$D = \left|\frac{IPR - \frac{a}{1+\frac{a}{c}}}{IPR}\right| + \left|\frac{IPR - \frac{b}{1+\frac{b}{c}}}{IPR}\right|.$$ *Id.* at 256; *see supra* note 193 and accompanying text (defining "IPR," "a," "b," and "D"). "The "c" is equal to the total population of districts *A* and *B*. Moncrief, *supra* note 22, at 255. If the IPR equals 10,000, district *A* has a population of 11,000, and district *B* has a population of 19,000, then the total excess population of 10,000 can be combined in a floterial (1,000 from district *A* and 9,000 from district *B*). *Id.* The total population of districts *A* and *B* is 30,000. *Id.* Under the component method, the floterial district representative is proportioned between districts *A* and *B*, so that the people in the district are represented by one plus some proportion of the floterial representative. *Id.* Thus, district *A* is represented by 1.37 representatives $(1 + \frac{11,000}{30,000})$ and district *B* is represented by 1.63 representatives $(1 + \frac{19,000}{30,000})$. *Id.* at 256. The deviation under the component method is: $\left|\frac{10,000 - \frac{11,000}{1+\frac{11,000}{30,000}}}{10,000}\right| + \left|\frac{10,000 - \frac{19,000}{1+\frac{19,000}{30,000}}}{10,000}\right| = 36.27\%$. *Id.*

[197] *See supra* notes 193, 196 and accompanying text.

[198] *See* Moncrief, *supra* note 22, at 258 (acknowledging several lower courts' view of aggregate method as inappropriate).

[199] *Id.* at 255, 257. Moncrief suggests that the formula for calculating the reciprocal method is: $D = \left|\frac{\left(\frac{1}{a}+\frac{1}{c}\right) - \frac{1}{IPR}}{\frac{1}{IPR}}\right| + \left|\frac{\left(\frac{1}{b}+\frac{1}{c}\right) - \frac{1}{IPR}}{\frac{1}{IPR}}\right|$. *Id.* at 257.

[200] *Id.* at 255; *supra* note 184 and accompanying text.

[201] Moncrief, *supra* note 22, at 258.

[202] 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd in part*, *remanded sub nom*. Kilgarlin v. Hill, 386 U.S. 120 (1967).

component method.[203] The court held that the floterials violated the "one-person, one-vote" principle, and explained that the component method ensured "that each citizen's vote receive[d] its proper weight."[204] On appeal, the Supreme Court, however, did not address the computational method used by the district court.[205] In *Mahan v. Howell*, the Supreme Court adopted the deviation calculated by the lower court, which used the aggregate method, and stated, "[w]e decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the court and used to support its holding of unconstitutionality."[206]

In New Hampshire, the state uses a different computational method depending on which type of districts make up the map. In *Boyer v. Gardner*,[207] the United States District Court for the District of New Hampshire held that the aggregate method is the appropriate computational method.[208] However, in *Burling v. Chandler*,[209] the New Hampshire Supreme Court determined that "the aggregate method is appropriate for multi-member districts, but is not appropriate for the floterials in the parties' plans because it masks substantial deviation from the one person/one vote principle."[210] Thus, the court decided that after calculating the ideal population, the aggregate method should be used to calculate deviations of single-member and multi-member districts.[211] Although the court explained that the component method could be used to calculate deviations of floterial districts, the court did not officially adopt this method, and rather deemed floterials "an unsound redistricting device."[212]

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[203] *See id.* at 422 n.28 (indicating usage of component method by applying equal weight calculations); Moncrief & Joula, *supra* note 44, at 745.

[204] Kilgarlin v. Martin, 252 F. Supp. at 422 n.28.

[205] Moncrief & Joula, *supra* note 44, at 746; *see also* Kilgarlin v. Hill, 386 U.S. 120, 122-23 (1967) (deferring to lower court's calculated deviation).

[206] Mahan v. Howell, 410 U.S. 315, 319 n.6 (1973).

[207] 540 F. Supp. 624 (D.N.H. 1982).

[208] *Id.* at 628-29 (opining that aggregate method was most appropriate).

[209] 804 A.2d 471 (N.H. 2002).

[210] *Id.* at 482.

[211] *Id.* at 484 (explaining that single-member and multi-member districts utilized same traditional, aggregate method).

[212] *Id.* at 480-81, 485; *see also* City of Manchester v. Sec'y of State, 48 A.3d 864, 871-73 (N.H. 2012) (stating that component method is proper for floterial district calculations). In Appendix C of *Burling v. Chandler*, the New Hampshire Supreme Court includes an explanation of how to calculate the component method:

> To Calculate Ratio Share
>
> Divide the town population by the total population – this assigns each town their share of the floterial plus their dedicated seats – divide by total seats and convert to percentage
>
> 3,286 ÷ 27,640 = .1188 = 11.9%
>
> To Calculate Deviation
>
> Ratio Share + Other Seats in Town = Adjusted Number of Seats
>
> 1 + .119 = 1.119

The aggregate and component methods can produce different calculated deviations,[213] and without the Supreme Court providing a clear answer as to which computational method to use, states have the authority to choose. As a result, states are likely to opt for the method that produces a lower deviation, to avoid a map being deemed to violate the "one-person, one-vote" principle. Thus, whether floterials actually help a map comply with the "one-person, one-vote" principle or if maps including floterials "openly embrace political agendas" is an open question.[214]

C. *The Use of and Court Rulings on Floterial Districts in New Hampshire*

Leading up to the current use of floterials, there were several challenges brought in New Hampshire state and federal courts. For instance, following the introduction of floterials, a challenge to the constitutionality of this district type was brought in *Boyer*.[215] The 1982 district map used seventeen floterial districts and the challengers argued the deviation between districts was unconstitutional.[216] The United States District Court for the District of New Hampshire discussed the proper computational method for calculating deviations when a map includes floterial districts and held that the use of the component method might be proper in instances of "invidious or other otherwise impermissible discrimination in the drawing up of floterial districts."[217] The district court found that the 1982 district map was not a "product of bad faith or invidious design"[218] and the legislature followed "rational state polic[ies]"; therefore, the proper computational method was the aggregate method.[219] The district court held that the district map was constitutional, and as a result New Hampshire continued to use the map and use floterial districts for future redistricting.[220]

Town population ÷ Adjusted Seats = Component Population

3286 ÷ 1.119 = 2936.55

(Component Population – Ideal Population) ÷ Ideal Population =

2936.55 – 2773 = 163.55 ÷ 2773 = .0589 = 5.89%.

Burling, 804 A.2d app. c at 489.

The ideal population for a single member district is calculated by the "state population divided by the total number of state representatives." *Id.* at 480. For multi-member districts, the ideal population is a "multiple of the ideal population for a single-member district." *Id.* at 481.

[213] *See Boyer*, 540 F. Supp. at 627 n.5 (discussing how both computational methods produce different results).

[214] *Burling*, 804 A.2d at 483.

[215] *Boyer*, 540 F. Supp. at 625.

[216] *Id.* at 626-27.

[217] *Id.* at 627-29.

[218] *Id.* at 630.

[219] *Id.* at 629 (citing Reynolds v. Sims, 377 U.S. 533, 579 (1964)).

[220] *Id.* at 630.

The next challenge to the use of floterials in a New Hampshire district map was in *Burling*.[221] Because the legislature failed to pass a new district map, and the previous 1992 district map was unconstitutional as a result of population changes, the New Hampshire Supreme Court drew the district map.[222] The court created a map including eighty-eight districts, without any floterial districts, and with a deviation of 9.26%.[223] One of the reasons the court's plan did not include any floterials is that the court found that "[f]loterials, as constructed in New Hampshire, have led to unusual results and voting right inequities."[224] For instance, the court explained that the legislature used floterials incorrectly in the 1992 district map because floterials are meant to "float[] above" districts, and some towns were only part of a floterial district.[225] Lastly, the court held floterials are "an unsound redistricting device," because, as the court explained, the aggregate method, while appropriate for calculating the deviation for multi-member districts, "is not appropriate for the floterials."[226]

As a result of the court's holding in *Burling*, floterial districts were not a permissible redistricting device in New Hampshire until the passage of a 2006 constitutional amendment.[227] The 2006 constitutional amendment reintroduced floterials to the redistricting process, by allowing the "excess number of inhabitants of district . . . [to] be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable

[221] Burling v. Chandler, 804 A.2d 471, 474-75 (N.H. 2002).

[222] *Id.* at 475.

[223] *Id.* at 484.

[224] *Id.* at 479.

[225] *Id.*

[226] *Id.* at 482, 485.

[227] N.H. CONST. pt. II, art. 11 (amended 2006). In New Hampshire, a constitutional amendment is placed on the general election ballot and voted on by New Hampshire voters. N.H. CONST. pt. II, art. 100.

deviations."[228] In *Town of Canaan v. Secretary of State*,[229] the New Hampshire Supreme Court explained that the constitutional amendment was likely "a response to [the court's] decision in *Burling*," because the court "declined to employ 'floterial' redistricting schemes within the 2002 court-ordered reapportionment."[230]

Under the 2006 constitutional amendment, the legislature may use floterials in New Hampshire redistricting plans.[231] The state legislature used floterial districts in the 2012 district map, and in *City of Manchester v. Secretary of State*,[232] voters and municipalities challenged a floterial district that combined

[228] N.H. CONST. pt. II, art. 11 (amended 2006). In relevant part:

> [Art.] 11 [Small Towns; Representation by Districts.] When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in one non-floterial representative district. When any town, ward, or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. The legislature shall form the representative districts at the regular session following every decennial federal census.

Id.

[229] 959 A.2d 172 (N.H. 2008).

[230] *Id.* at 174 (holding that constitutional amendment did not require legislature to reapportion). A 2006 voters' guide explained:

> [If adopted, t]his amendment will allow the legislature to create districts in the same manner that districts were drawn prior to 2002. It will increase the total number of districts and therefore increase the probability that the people of a town will be represented by a member of their own community.
>
> Each town or ward having enough inhabitants to entitle it to one or more representative seats in the Legislature shall be guaranteed its own district for the purposes of electing one or more representatives, unless such action prevented a neighboring town from being included in a single-representative district before it is part of a floterial district. Where a town, ward or unincorporated place does not have enough inhabitants necessary for a representative seat, the Legislature shall form multi-town or multi-ward districts, to qualify for one or more representative seats. Excess population in one or more contiguous districts may be combined to allow for additional at-large or floterial representatives.

Id. at 174. However, Senator Burling, in testimony before the Senate Committee on Internal Affairs, argued that floterials are "a de facto violation of the concept of one person/one vote and that it is impossible to design a constitutional redistricting plan which uses" floterial districts. *Hearing on CACR 41 Before the S. Comm. on Internal Affairs*, *supra* note 177.

[231] N.H. CONST. pt. II, art. 11 (amended 2006).

[232] 48 A.3d 864 (N.H. 2012).

Manchester Wards Eight and Nine with the town of Litchfield.[233] The petitioners argued that the floterial district combined wards and a town that did not share a "community of interest."[234] The court held that while "community of interest" may be a "legitimate redistricting *goal*,"[235] the New Hampshire Constitution does not require the legislature to use "community of interest" for drawing the district map.[236] The New Hampshire Supreme Court held that the use of the floterial districts in the 2012 district map was constitutional.[237]

Although floterial districts are part of the New Hampshire Constitution, the U.S. Supreme Court has not addressed the constitutionality of floterial districts. As noted by the U.S. Supreme Court and New Hampshire state and federal courts, floterials were introduced to help provide equal representation.[238] However, without a clear answer from the Supreme Court on the constitutionality of floterials or what computational method should be used to calculate deviation, confusion still exists around whether the use of floterials actually helps to comply with the "one-person, one-vote" principle.

IV. FLOTERIAL DISTRICTS AND PARTISAN GERRYMANDERING

Justices on the Supreme Court have expressed concerns that technological advances have allowed state legislatures to become even more creative with redistricting, while complying with equality requirements.[239] This creativity may include strategically using floterials. In the past, the Supreme Court has allowed a state legislature to use different redistricting devices, as long as the map complied with the "one-person, one-vote" principle.[240] If a state legislative district map has a deviation, the legislature must provide a legitimate constitutional reason for that deviation, such as following a traditional redistricting principle.[241] Floterial districts, however, are not justifiedtraditional redistricting principles.[242] Thus, under a "one-person, one-vote" defense of a map that has a deviation and includes floterials, a legislature should be required

[233] *Id.* at 878.

[234] *Id.*

[235] *Id.* (citing Gorrell v. O'Malley, Civil No. WDQ-11-2975, 2012 WL 226919, at *3 (D. Md. Jan. 19, 2012)) .

[236] *Id.*

[237] *Id.* at 878-79.

[238] *See* cases cited *supra* notes 152, 178-83 and accompanying text.

[239] *See supra* Section I.C (describing how technology enhances cartographers' ability to draw districts that simultaneously serve partisan interests and satisfy "one-person, one-vote" principle).

[240] *See* Reynolds v. Sims, 377 U.S. 533, 579 (1964) ("Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts . . . .").

[241] *See* cases cited *supra* notes 19, 37-4039 and accompanying text.

[242] *See* Moncrief, *supra* note 22, at 251.

to provide a legitimate constitutional reason beyond drawing the map to keep the deviation below ten percent.

A. *New Hampshire Floterial Districts*

New Hampshire's use of floterials for state house representative districts reveals that this redistricting device can be used for partisan gerrymander. The 2012 state representative district plan replaced a map that did not include any floterials because of the holding in *Burling*, which deemed floterials "an unsound redistricting device."[243] Floterials were reintroduced as a result of the passage of a 2006 state constitutional amendment that made the use of floterials constitutional.[244] One of the more than forty floterial districts in the 2012 district map "floats" over Manchester Wards Eight and Nine and the town of Litchfield, to create Floterial District Forty-Four.[245] This particular floterial was one of the challenged districts in *City of Manchester*.[246] Petitioners argued that each district should have its own representative because the districts do not share a "community of interest"[247] and that the floterial was "unnecessary" and "unconstitutional,"[248] but did not bring a partisan gerrymander claim or challenge under the *Reynolds* "one-person, one-vote" principle.[249] The New Hampshire Supreme Court explained that preserving "communities of interest" can be a goal, but is not constitutionally required.[250] The court held that while there may be a question about "the wisdom of the plan," the map and use of floterials were constitutional.[251] Thus, whether a challenge to floterials as an

[243] *See* City of Manchester v. Sec'y of State, 48 A.3d 864, 868 (N.H. 2012); Burling v. Chandler, 804 A.2d 471, 485 (N.H. 2002) (rejecting floterials as "unsound redistricting device"). Following the court-drawn plan in *Burling*, the state legislature in 2004 replaced the court map with more districts, but no floterials. *See* Town of Canaan v. Sec'y of State, 959 A.2d 172, 172-73 (N.H. 2008). Following the constitutional amendment, which reintroduced floterials to the process, the state legislature was not allowed to reapportion until the release of the 2010 census. *See id.* at 175-76 ("We are not persuaded that CACR 41 [(the constitutional amendment)] was intended to compel an immediate reapportionment following its adopting by voters. . . . Article 11, as amended, is a clear mandate and a grant of authority which requires the legislature to form 'representative districts at the regular session following every decennial federal census.'" (citation omitted) (citing N.H. CONST. pt. II, art. 11)).

[244] N.H. CONST. pt. II, art. 11 (amended 2006) ("The excess number of inhabitants of a district may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations.").

[245] *See City of Manchester*, 48 A.3d at 878 ("[T]he Plan combines Manchester Wards 8 and 9 in a floterial district with Litchfield.").

[246] *Id.*

[247] *Id.* at 869.

[248] *Id.* at 878.

[249] *Id.* at 869, 878 ("We have also been asked whether the Plan is unconstitutional because it does not take into account 'community of interest' factors.").

[250] *See id.* at 878.

[251] *Id.*

unconstitutional partisan gerrymander or a violation of the "one-person, one-vote" principle will prevail is still an open question.

A Republican majority likely drew Floterial District Forty-Four with the intention to create a Republican partisan advantage.[252] In the 2012, 2014, 2016, and 2018 elections, the two representatives elected from Floterial District Forty-Four were Republicans.[253] Prior to the 2012 redistricting, Litchfield was in a multi-member district with Hudson and Pelham.[254] In Litchfield, the Republican candidates received significantly more votes than the Democratic candidates in the 2010 election.[255] Manchester Wards Eight and Nine were two separate multi-member districts.[256] In the 2010 election, Manchester Ward Eight elected two Republican representatives and one Democratic representative, while Manchester Ward Nine elected one Republican representative and two Democratic representatives.[257] As a result, before the 2012 plan, Litchfield was a heavily Republican district, Manchester Ward Eight was Republican-leaning,

[252] *See* Shira Schoenberg, *Republicans Unstoppable*, CONCORD MONITOR (Nov. 4, 2010), http://www.concordmonitor.com/Archive/2010/11/999776667-999776667-1011-CM?page=2 [https://perma.cc/5MSE-V9P8] (reporting on veto-proof majority in both New Hampshire House and Senate).

[253] *See State Representative – 2012 General Election*, N.H.: WILLIAM M. GARDNER SECRETARY ST., http://sos.nh.gov/2012RepGen.aspx?id=28284 [https://perma.cc/G4HH-4XZG] (last visited Nov. 19, 2018) (follow "Hillsborough" hyperlink); *State Representative – 2014 General Election*, N.H.: WILLIAM M. GARDNER SECRETARY ST., http://sos.nh.gov/Elections/Election_Information/2014_Elections/General_Election/State_Representative_-_2014_General_Election.aspx?id=8589941827 [https://perma.cc/L65G-ZCS4] (last visited Nov. 19, 2018) (follow "Hillsborough" hyperlink); *State Representative – 2016 General Election*, N.H.: WILLIAM M. GARDNER SECRETARY ST., http://sos.nh.gov/2016RepGen.aspx?id=8589964160 [https://perma.cc/8Z9Q-VJEX] (last visited Nov. 19, 2018) (follow "Hillsborough" hyperlink); *2018 General Election Information and Winners*, N.H.: WILLIAM M. GARDNER SECRETARY ST., http://sos.nh.gov/18GenResults.aspx [https://perma.cc/J79Y-WBSM] (last visited Nov. 23, 2018) (follow "Hillsborough County" hyperlink). In 2018, Republicans won Floterial District Forty-Four despite Democrats gaining "control of both chambers of the New Hampshire Legislature for the first time in nearly a decade." *2018 General Election Information and Winners*, N.H.: WILLIAM M. GARDNER SECRETARY ST., http://sos.nh.gov/18GenResults.aspx [https://perma.cc/J79Y-WBSM] (last visited Nov. 23, 2018) (follow "Hillsborough County" hyperlink) (listing results of 2018 election); Todd Bookman, *Democrats Retake Both bers of Hampshire Legislature*, N.H. PUB. RADIO (Nov. 7, 2018), http://www.nhpr.org/post/democrats-retake-both-chambers-new-hampshire-legislature#stream/0 [https://perma.cc/ZT49-MCCE].

[254] *New Hampshire – General Election, State Representatives*, N.H.: WILLIAM M. GARDNER SECRETARY ST., http://sos.nh.gov/2010RepGen.aspx?id=366 [https://perma.cc/8VKC-5TW4] (last visited Nov. 19, 2018) (follow "Hillsborough" hyperlink) (listing results of 2010 election).

[255] *Id.*

[256] *Id.*

[257] *Id.*

and Manchester Ward Nine was a more Democratic-leaning district. After the redistricting, a floterial was drawn over Litchfield, a multi-member district, and Manchester Wards Eight and Nine, also multi-member districts.[258] The floterial "packed" Republican voters by combining a heavily Republican district with a Republican-leaning district and Democratic-leaning district. The previous partisan makeup of the districts strongly suggests that Floterial District Forty-Four was designed to consistently produce a Republican win.

In *City of Manchester*, the petitioners argued that alternative maps were available, but the legislature chose a map that included floterials, such as Floterial District Forty-Four.[259] The New Hampshire Supreme Court found that the petitioners failed to show that there was an alternative map that had a deviation below ten percent, unlike the plan adopted by the legislature, which had a deviation below ten percent.[260] It also found that the petitioners failed to show that the "legislature lacked a rational or legitimate basis for adhering to the 10% rule."[261] The court concluded that the "petitioners have failed to persuade us that the '[t]rade-offs' the legislature made in enacting the Plan were unreasonable."[262]

The precedential value of the *City of Manchester* decision, however, may be limited. The New Hampshire Supreme Court's ruling is based on the fact that the parties agreed that the deviation should be calculated by using the aggregate method for single-member and multi-member districts, and the component method for floterial districts.[263] The court did not endorse or dispute these computational methods.[264] Instead, the court relied on the deviations provided by the petitioners for the alternative plans and the deviation provided by both parties for the adopted 2012 plan. Without confirmation of the proper computational method to use for calculating the deviation of a map with floterials, the court's finding that the alternative maps did not have a lower deviation than the adopted 2012 plan could easily be revisited. Further, the *City of Manchester* decision ignores recent U.S. Supreme Court cases that have indicated the "safe harbor" for deviations below ten percent no longer exists.[265] Given the limitations of the *City of Manchester* decision and the fact that the legislature chose the 2012 plan over alternative maps, the legislature's decision

[258] City of Manchester v. Sec'y of State, 48 A.3d 864, 878 (N.H. 2012).

[259] *Id.* at 873.

[260] *Id.* ("[T]he parties agree that the overall range of deviation for the Plan is 9.9%.").

[261] *Id.* at 874.

[262] *Id.* at 877 (citing Beaubien v. Ryan, 762 N.E.2d 501, 507 (Ill. 2001)).

[263] *Id.* at 873.

[264] *Id.*

[265] *See* cases cited *supra* notes 37-43 and accompanying text.

to draw Floterial District Forty-Four could still have been rooted in partisan motives.[266]

B. *Application of* Whitford v. Gill *Test to a New Hampshire Floterial*

The efficiency gap was one of the proposed standards before the Supreme Court in *Gill v. Whitford*, but even if the Court chose to adopt this measurement, it would not work well for testing if there were a partisan advantage of New Hampshire's floterial districts, as the equation is more suited for single-member districts.[267] Stephanopoulos and McGhee explain that the proposed efficiency gap equation assumes "that all districts are equal in population . . . and that there are only two parties."[268] Floterial districts do not necessarily have an equal population to other districts, as the purpose of the floterial is to provide additional representation to districts that would otherwise be underrepresented. Thus, the efficiency gap equation should not be applicable to maps that include floterials.[269]

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[266] *See* Whitford v. Gill, 218 F. Supp. 3d 837, 843, 850 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) (finding that legislature analysis of six statewide alternative district maps reflected that legislature chose map with intent to create Republican partisan advantage). In addition to the alternative maps, further evidence of partisan motives could be the roll call votes showing that all of the Democratic representatives voted in the negative for the redistricting plan and only nineteen Republican representatives also voted in the negative. *See* N.H. H. REC. 162-15, 2d Year (Mar. 28, 2012), http://www.gencourt.state.nh.us/house/caljourns/journals/2012/houjou2012_30.html [https://perma.cc/4DSP-AH84] (recording roll call vote for House Bill 592); *New Hampshire – General Election, State Representatives*, *supra* note 254 (providing political party affiliation of representatives). The majority of the nineteen Republican representatives voting against the redistricting plan represented Manchester and Litchfield and likely disapproved of Floterial District Forty-Four. *See id.* (providing city or town of Republican representatives political party of representatives voting against House Bill 592).

[267] *See* Stephanopoulos & McGhee, *supra* note 23, at 868 ("We also considered only single-member state house districts, because the efficiency gap is more difficult to compute for multimember districts."). Stephanopoulos and McGhee noted that states, such as New Hampshire, were omitted from calculating the efficiency gap because the state had too few single-member districts for the state legislature. *Id.* at 868 n.159. However, David Lieb authored a report that calculated the efficiency gap for all fifty states, including New Hampshire. *See* Peter Biello, *How Gerrymandering Skewed the 2016 Elections*, N.H. PUB. RADIO (June 27, 2017), http://nhpr.org/post/how-gerrymandering-skewed-2016-elections#stream/0 [https://perma.cc/5H2W-L5E9].

[268] Stephanopoulos & McGhee, *supra* note 23, at 853.

[269] Despite Stephanopoulos and McGhee limiting the efficiency gap to single-member districts, David Lieb reported that he found New Hampshire's 2012 state legislative district map, including the floterials, has a Republican partisan efficiency gap advantage. *See* Biello, *supra* note 267. His report showed that the advantage translated into twenty-three additional seats to the Republican party. *Id.* Thus, he concluded that if those twenty-three seats were won by Democratic candidates, this would be more representative of the makeup of political parties in New Hampshire. *Id.*

Applying the three-prong test proposed by the Wisconsin District Court in *Whitford v. Gill* to Floterial District Forty-Four suggests the district was drawn with partisan motives.[270] The first prong considers whether it was "intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation."[271] The district court in *Whitford v. Gill* looked at whether the "purpose behind the legislation was to entrench a political party in power,"[272] and found sufficient evidence that from "the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing."[273] The fact that Floterial District Forty-Four combines a heavily Republican district with a Republican-leaning district and Democratic-leaning district is good evidence that the floterial was meant to help produce a Republican party advantage. Additionally, the fact that the alternative maps the legislature considered did not require creation of Floterial District Forty-Four further evidences an intent to impede the effectiveness of Democratic votes.[274] The New Hampshire Supreme Court in *Burling*, although discussing a different map, indicated that alternate plans can "reflect political considerations."[275] Lastly, the manner in which the map became law is further evidence of political intent. The Republican veto-proof majority gave the Democrats and the public only twenty-four hours to review the plan.[276] Further, after the Democratic Governor vetoed the plan, the House Republicans held an override vote without following the House rules.[277]

The second prong considers whether the district "has [a partisan] effect."[278] Based on the election results from 2012 through 2018, the floterial does have the effect of producing a partisan advantage.[279] Lastly, the third prong considers whether the district can be "justified on other, legitimate legislative grounds."[280] As the court explains in *City of Manchester*, complying with the "one-person,

[270] *See* Whitford v. Gill, 218 F. Supp. 3d at 884.

[271] *Id.*

[272] *Id.* at 890.

[273] *Id.* at 895. The drafters used a partisan score and spreadsheets to get an accurate estimate of the partisan makeup of the map and alternative maps. *Id.* at 890-95.

[274] *See* City of Manchester v. Sec'y of State, 48 A.3d 864, 876 (N.H. 2012).

[275] Burling v. Chandler, 804 A.2d 471, 483 (N.H. 2002) (explaining how different plans treat same cities and towns is evidence that plans "openly embrace political agendas").

[276] *See, e.g.*, Garry Rayno, *House Committee Endorses Redistricting Plan*, UNION LEADER (Dec. 20, 2011), http://www.unionleader.com/article/20111221/NEWS06/712219961/0/SEARCH [https://perma.cc/H93Q-SBYN].

[277] *See, e.g.*, Garry Rayno, *Garry Rayno's State House Dome: O'Brien Scores with Veto Override Vote*, UNION LEADER (Mar. 31, 2012), http://www.unionleader.com/article/20120401/NEWS06/704019997/0/SEARCH [https://perma.cc/VRF2-8A43] (describing how Speaker called for vote without notice on House calendar).

[278] Whitford v. Gill, 218 F. Supp. 3d at 855.

[279] *See supra* note 253 and accompanying text.

[280] Whitford v. Gill, 218 F. Supp. 3d at 884.

one-vote" principle is a legitimate reason.[281] However, using a floterial district to help a map comply with "one-person, one-vote" cannot be confirmed without clarity on the proper computational method to use.[282] Furthermore, the "safe harbor" afforded by keeping the deviation below ten percent is no longer guaranteed.[283] As a result, even without clarity on the proper computational method, if the map includes any deviation then it could be subject to a "one-person, one-vote" challenge. Another reason provided for why the map includes floterials is the county line requirement.[284] However, as the 2002 court-drawn plan shows, a map that complies with the county line requirement may be drawn without floterials.[285] Further evidence that there is no other "legitimate legislative ground"[286] for drawing Floterial District Forty-Four is the holding in *Town of Canaan*, which explained that the state constitutional amendment did not constitutionally mandate floterials to be included in the map.[287] Without a constitutional mandate or confirmation that the floterial served the purpose of helping the map comply with "one-person, one-vote" principle, a likely purpose of Floterial District Forty-Four was to create a Republican partisan advantage. Under the three-prong test from *Whitford v. Gill*, Floterial District Forty-Four would likely be found to be an extreme partisan gerrymander.

The Supreme Court did not adopt the efficiency gap or three-prong test proposed by the district court.[288] Rather, the Supreme Court focused on whether the plaintiffs had standing to bring the challenge and vacated and remanded the case.[289] Thus, what standard to use to evaluate if a floterial is an unconstitutional extreme partisan gerrymander is yet to be determined.

C. *Application of the* Gill v. Whitford *Decision to a New Hampshire Floterial*

The Supreme Court's ruling in *Gill v. Whitford* indicates that if plaintiffs bring a vote dilution challenge to Floterial District Fourty-Four in the partisan gerrymander context, plaintiffs must be voters in the floterial. The voter in the

[281] City of Manchester v. Sec'y of State, 48 A.3d 864, 874 (N.H. 2012).

[282] *See supra* Section III.C (explaining that because neither party challenged proposed computational method, *City of Manchester*'s holding did not endorse nor dispute it).

[283] *See* cases cited *supra* notes 38-43 and accompanying text (detailing litigation history of courts' evolving approach to old "safe harbor" provision).

[284] *See supra* text accompanying notes 176-80 (explaining that New Hampshire has statutory requirements that districts may not cross county lines that creates need for floterials).

[285] *See* Burling v. Chandler, 804 A.2d 471, 474-75 (N.H. 2002) (creating map including eighty-eight districts, without any floterial districts, and with deviation of 9.26%).

[286] Whitford v. Gill, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

[287] *See* Town of Canaan v. Sec'y of State, 959 A.2d 172, 174-76 (N.H. 2008).

[288] *See supra* Section II.B.

[289] *See* Gill v. Whitford, 138 S. Ct. at 1929.

floterial district must allege a "concrete and particularized" injury.[290] However, it is at least unclear what specifically would be a sufficiently alleged "concrete and particularized" injury according to *Whitford*. In a concurring opinion, Justice Kagan suggests that the voter should show evidence of "cracking" and "packing," alterative maps, and the goals of the legislature when drawing the map.[291] As evidence of "cracking" and "packing," plaintiffs could point to election results showing the Republican advantage created by drawing Floterial District Forty-Four.[292] Plaintiffs could also present alternative maps that do not include the floterial. Lastly, plaintiffs could show an "illicit partisan intent" by pointing to the manner in which the Republican-majority legislature implemented the map, such as giving Democrats little time to review the map and overriding the Governor's veto without following the House Rules.[293] However, without an answer from the Supreme Court, it is unclear if this evidence would be sufficient to show an unconstitutional partisan gerrymander.

Justice Kagan indicated that a First Amendment associational theory may be another way to challenge a partisan gerrymander.[294] For Floterial District Forty-Four, the Democratic Party could try to bring a First Amendment challenge to the 2012 state representative district map.[295] The Democratic Party would need to show that the district map was drawn in a way that deprives the party of its "natural political strength" by showing evidence of difficulty fundraising, registering voters, attracting volunteers, generating support from independents, or recruiting candidates to run for office.[296] The First Amendment associational theory for partisan gerrymander claims was only supported by four Justices, and therefore it is unclear whether the Supreme Court would adopt this reasoning.

Although the Supreme Court did not provide an answer as to what plaintiffs must allege to successfully establish an unconstitutional partisan gerrymander, the Court did clarify the standing requirement for vote dilution claims. Further,

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[290] *Id.*

[291] *Id.* at 1937 (Kagan, J., concurring).

[292] *See supra* note 253 and accompanying text; *see also* 253City of Manchester v. Sec'y of State, 48 A.3d 864, 878 (N.H. 2012)258 (explaining that by combining heavily Republican district with one Republican-leaning district and one Democratic-leaning district to make Floterial District Fourty-Four suggests its design favors Republican victories).

[293] *See supra* notes 276-82 and accompanying text (noting methods employed by Republican majority to push through redistricting plan).

[294] *See supra* notes 129-33 and accompanying text (suggesting members of same political party, party officials, or the party itself could bring associational claims distinct from vote dilution claims).

[295] *See* Gill v. Whitford, 138 S. Ct. at 1939 (Kagan, J., concurring) (explaining that First Amendment associational claims and injury are statewide).

[296] *Id.* at 1938 ("By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.").

the Court did not hold that partisan gerrymander claims are nonjusticiable.[297] As a result, the Court has invited lower courts to continue to hear cases to determine the standard for an unconstitutional partisan gerrymander. Therefore, legislatures should be hesitant about implementing floterial districts into their state district maps.

D. *Application of a One-Person, One-Vote Defense to a New Hampshire Floterial*

In response to a partisan gerrymander challenge, a legislature is likely to argue that a map was drawn not with partisan motives, but to comply with the "one-person, one-vote" principle. For example, the legislature in *City of Manchester* argued that the 2012 New Hampshire state representative district map was drawn to keep the deviation below ten percent.[298] As seen in *Cox v. Larios*, however, the Supreme Court summarily affirmed striking down a map with a deviation below ten percent.[299] Accordingly, legislatures no longer have the "safe harbor" of keeping the deviation below ten percent, and therefore must provide a pervasive reason or legitimate constitutional purpose for why the map was drawn with the deviation.[300] A pervasive reason or legitimate constitutional purpose may be traditional redistricting principles, such as respecting municipal boundaries, but the reason or purpose cannot be discriminatory.[301] Thus, a reason for the deviation may not be "blatantly partisan."[302]

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[297] Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1310 (2016) (suggesting unanimously that constitutionality of partisan gerrymandering is open question).

[298] City of Manchester v. Sec'y of State, 48 A.3d 864, 874 (N.H. 2012) (explaining legislature's choice to adhere to "10% rule"); *see* N.H. H. REC. 162-34, 2d Year (Jan. 13, 2012), http://www.gencourt.state.nh.us/house/caljourns/calendars/2012/houcal2012_3.html [https://perma.cc/5KZX-LE2F] (noting majority's Special Committee on Redistricting statement that "plan falls within the deviation parameters established in federal case law establishing the rules for complying with the 14th Amendment's proportionality requirements").

[299] *See* Cox v. Larios, 300 F. Supp. 2d 1320, 1341 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (noting Supreme Court summarily affirmed lower court decision stricking down map with 9.98% deviation because state provided no justification for deviation and redistricting was arbitrary).

[300] *See* Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567-69 (2004) ("*Cox v. Larios* restores an opportunity for second-order judicial review of political gerrymanders: if a plan contains any population deviations, a court may decide that the deviations are caused by impermissible partisanship and strike the plan down as a formal matter for failure to comply with one person, one vote.").

[301] Karcher v. Daggett, 462 U.S. 725, 740 (1983) (explaining that justifications for minor deviations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory").

[302] *See Larios*, 300 F. Supp. 2d at 1347.

The New Hampshire legislature has argued that the 2012 state legislative map was the only plan that would keep the deviation below ten percent to comply with "one-person, one-vote."[303] The 2012 New Hampshire state legislative district map, including Floterial District Forty-Four, has a deviation below ten percent based on the state legislature's calculation.[304] However, keeping a map below ten percent is no longer a legitimate constitutional purpose.[305] Furthermore, there is no confirmation that the use of floterials, or Floterial District Forty-Four, actually helps keep the deviation below ten percent because the Supreme Court has yet to provide guidance on the proper computational method to use when a map includes floterials.[306] As a result, the New Hampshire legislature would need to point to other reasons for why the map had the deviation and included the floterial district. The legislature would likely point to the county line requirement, but as the 2002 court-drawn map shows, a map can be drawn without floterials.[307] If a court is presented with either evidence of drawing the map with partisan motives or alternative maps that have lower deviations, the county line requirement may not be enough to uphold the map.[308] To truly understand if the map adopted has the lowest deviation, how to properly compute deviations when a map includes floterials should be confirmed by the Supreme Court. Therefore, when alternative map options exist that do not use floterials, legislatures should be hesitant to include floterials in the district map to bolster potential "one-person, one-vote" defenses.

CONCLUSION

Floterial districts were originally implemented to help a district map comply with the "one-person, one-vote" principle; however, this purpose seems to have been pushed aside for the goal of creating a partisan advantage, which has permeated the redistricting process. Without a specific computational method to determine if floterials are helping a map comply with "one-person, one-vote," the main purpose of floterials may not be to ensure equality across districts. Determining whether a map including floterials has been drawn with a partisan

[303] *See supra* note 298 and accompanying text.

[304] *See* City of Manchester v. Sec'y of State, 48 A.3d 864, 878 (N.H. 2012) (noting plan adopted by legislature had deviation of 9.9% and petitioners failed to show alternative map had deviation below ten percent).

[305] *See supra* notes 38-43 and accompanying text (noting Court has struck down maps with deviations less than ten percent for lacking constitutional purpose or for maps that were seen as partisan gerrymander).

[306] *See supra* Sections III.B, III.C.

[307] *See supra* notes 176-177, 223 and accompanying text (stating court created map including eighty-eight districts, without any floterial districts, and with deviation of 9.26%).

[308] Alternative maps were available. *See City of Manchester*, 48 A.3d at 873 (noting petitioners argued for availability of alternative maps). However, the deviations of the alternative maps were found to not be below ten percent. *See id.* at 878 (stating New Hampshire Supreme Court rejected alternative maps because deviations were not below ten percent while legislature map did have deviation below ten percent).

advantage is critical. The Supreme Court, however, has yet to provide a standard for determining extreme partisan gerrymandering, and rather addressed only the standing requirement in *Gill v. Whitford*. This Note calls into question whether floterials actually help a map comply with the "one-person, one-vote" principle, and argues that floterials may be found to be an unconstitutional partisan gerrymander under a future extreme partisan gerrymander standard and should not withstand a "one-person, one-vote" defense. Therefore, legislatures should be hesitant to include floterials in future district maps.