Despots Defining Democracy

TABLE OF CONTENTS:

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§ 1. INTRODUCTION:

As of late, the issue of redistricting has been in the news due since *Gill v. Whiteford*[1] is on the docket of the Supreme Court and as midterm elections approach. The issue of redistricting has always been a volatile issue, because it begs the question of whether a group democratically elected officials should have complete autonomy when deciding over a voter reapportionment plan. The Supreme Court should not make a decision in this case because it would disregard current precedent in cases dealing with political questions. Additionally, the principle of democracy--upon which this country was founded--would be eroded in the hands of nine robe wearing unelected despots. This case would not just change the political landscape of Wisconsin, but it would also infringe on the Tenth Amendment power[2] delegated to the states. *Gill v. Whiteford*[3] would be an unwarranted act of judicial activism by answering an inherently political question and unconstitutionally stripping state legislatures of their autonomy.

§ 2. WHAT IS GERRYMANDERING?

Gerrymandering is when the legislature redraws district lines with the intent to manipulate the resulting votes. Redistricting is the practice by which legislatures redraw their voting lines in accordance with the newest census data. The act of redistricting becomes gerrymandering when the legislature redraws districts to either "crack" the party or "pack" all of one party/racial group into one district. This term was first established in the news when a redistricting map signed by Governor Elbridge Gerry gave the state senate election towards his party (Griffith, 18)[4]. Democracy is founded on the idea of a fair and free election. Gerrymandering garners negative connotation because it implies that the legislature is manipulating the people's vote to keep their office. This led to federal regulations such as the Reapportionment Act of 1842[5] that required district lines to be drawn in one line (contiguous) and for the constitutionality of gerrymandering to be questioned.

§ 3. IS GERRYMANDERING CONSTITUTIONAL?

Paramount cases like *Baker v. Carr*[6] allowed for gerrymandering to be brought before the Supreme Court of the United States because the Court went off the basis that the gerrymandering presented a justiciable issue under the Fourteenth Amendment Equal Protections Clause; this

[1] SCOTUS 2018 Docket no. 16-1161
[2] https://www.law.cornell.edu/constitution/tenth_amendment
[3] SCOTUS 2018 Docket no. 16-1161
[4] The Rise and Development of the Gerrymander
[5] The Rise and Development of the Gerrymander
[6] 369 U.S. 186 (1962)

means that the reapportionment plan are to be held to strict scrutiny because fundamental rights were allegedly being taken away. Previously, gerrymandering cases were considered "purely political in nature," a characteristic that traditionally indicates that the judiciary should refrain from answering these issues that ought to be left to the executive and legislative branches. Political officials need to solve from these issues themselves, otherwise the judiciary would be too political and lose its credibility as an impartial adjudicator. Therefore, the main criteria for a gerrymandering case to have standing and for the court to have jurisdiction is for the victim to have their voting rights "egregiously infringed upon." Following this precedent, the Court has to balance between staying away from political questions and protecting individual/group voting rights. Moreover, a case like *Gill v. Whiteford*[7] distinguishes itself from the holding in *Baker* in the fact that it is a question that is inherently political. Specifically, in *Gill*, the voters do not allege racial biases; they do not allege population dilution or compacting; they do not even allege that the reapportionment plan violates any traditional redistricting principles. The Supreme Court entertaining this standard of evaluation and allowing the case to move forward diverges from these judicial norms and alters the precedent pertaining to partisan gerrymandering.

§ 4. WHAT IS THE RULE OF LAW FOR GERRYMANDERING?

The rule of law is based off of the balancing element that comes with deciding whether the Court has jurisdiction over it and if the challenger has standing in it. For the Court to get involved in a "purely political issue", the reapportionment plan must egregiously affect the voters' rights per the Fourteenth Amendment. As the states have interpreted their own laws regarding redistricting and courts have set varying standards, the requirements listed below are the current redistricting rules governing Tennessee State Senate redistricting.

Determining whether the redistricting plan does not violate the Fourteenth Amendment or the state constitution is decided by: whether the population in each district "egregiously" exceeds the threshold variance, whether the redistricting plan substantially takes race into consideration and therefore results in "bizarre" district shapes, or whether the redistricting plan splits more districts than necessary without a legitimate reason under the Fourteenth Amendment.

§ 5. POLITICAL QUESTION V. JURISDICTION

Colegrove v. Green[8] (*Colegrove*) sets the tone of what law the Courts should be allowed to answer and what they do not have jurisdiction over. This case is about how Illinois had not redrawn its congressional or state legislative districts since 1901. Kenneth W. Colegrove sued Illinois officials, because the congressional districts "lacked compactness of territory and approximate equality of population." It had been more than four decades since the state had redrawn its districts, even though there had been significant population shifts during that time.

[7] SCOTUS 2018 Docket no. 16-1161
[8] 328 US 549 (1946)

The Court held that it cannot make a decision on this case due to the issue of the "political thicket" and how it presented a nonjusticiable political question. Explaining its logic, the Court elaborated that since no existing law that required "compactness, contiguity and equality in population of districts,"[9] there was no way for the plaintiff to recover for damage. The Court advised Illinois to change its redistricting requirement law like in past examples of *Giles v. Harris*[10]. The conclusion was that "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in redistricting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress"[11].

The idea of not entering the "political thicket" is again addressed in *Baker v. Carr* (*Baker*)[12] which is seen as a landmark case. Though *Baker* overturned *Colegrove, it still* echoed the *Colegrove* logic, which advocated for legislative authority and judicial restraint. Baker itself was decided based off of the Fourteenth Amendment Equal Protections Clause. In *Baker*, the Tennessee 1901 law designed to apportion the seats for the state's General Assembly was virtually ignored--since Tennessee's reapportionment efforts ignored significant economic growth and population shifts within the state. The issue brought before the Court argues that this 1901 Act violates Equal Protections Clause of the Fourteenth Amendment--for the law allegedly did not reflect the current population distribution of Tennessee. Instead the law randomly assigns representatives since the passage of the Act, based on an apportionment act from over 60 years prior. The General Assembly had not apportioned itself once since that 1901 Act. However, the Federal District Court dismissed this case for a lack of subject matter jurisdiction since the court could not provide relief on the stated claims. Ultimately, the Supreme Court decided that the district court had erred in dismissing the case on a lack of jurisdiction and held that the 1901 Act was in violation of the Equal Protections Clause.

§ 6. 14TH AMENDMENT EQUAL PROTECTION CLAUSE = "ONE PERSON, ONE VOTE"

Baker[13]began a precedent of granting standing to voter groups by applying the Fourteenth Amendment to reapportionment law. *Wesberry v. Sanders*[14] interpreted the meaning of *Baker* to the phrase "one person, one vote." This means not only does a person's ability to vote that matters, but their vote should hold the same weight as their neighbors. The *Wesberry*[15] case regards how the Fifth Congressional District in Georgia had a population that was two to three times larger than that of other districts in the state. In essence, the individual voted in that

[9] 328 US 549 (1946)
[10] 189 U. S. 475
[11] 328 US 549 (1946)
[12] 369 U.S. 186 (1962)
[13] 369 U.S. 186 (1962)
[14] 376 US 1 (1964)
[15] 376 US 1 (1964)

particular district held only ½ to a ⅓ of the weight of votes in other districts. Therefore, the Court held that Georgia's new Districts were unconstitutional, because it diluted the weight of the citizens' votes in the Fifth District--an action which violated the principle of "one person, one vote."

This issue arises in state law as well. The Tennessee Supreme Court case known as *State ex. Rel. Lockert v. Crowell (Lockert)*[16] affirms this principle. The Court held that the number one rule in the creation of a reapportionment plan is whether equality of population among districts is upheld because it is the most practicable. Similarly in *Moore v. State*[17], the Tennessee state courts have been much more lenient in giving the legislative "flexibility" with redistricting, because of the underlying argument that a court ought to restrain itself--as an undemocratically elected body--from intervening in an otherwise democratic process of legislation.

§ 7. ONE PERSON, ONE VOTE HAS TO APPLY TO RACE:

Racial gerrymandering is when a community that is primarily one race is gerrymandered to break up or compact. In essence, race is a factor that the legislature is taking into consideration when redrawing district lines. Race historically has been an indicator of party affiliation. African-Americans are known for predominantly voting for Democratic candidates so Republican state legislatures could try to ebb that vote by either "packing" or "cracking" the community. *Baker*[18] and *Wesberry*[19] factor into this concept of racial gerrymandering because these cases establish the new standard of the equality of voting. Moreover, if racial gerrymandering occurs, the affected minority vote becomes less powerful than the majority vote. This distinction violates the Equal Protections Clause and would give the minority group standing to challenge the redistricting plan in a federal court. Racial gerrymandering has been displayed in *Shaw v. Reno (Shaw)*[20]. The case deals specifically the segregation of African-American voters in a single majority-minority district in North Carolina. The court used the reasoning found in *Wesberry*[21], which applies for the Fourteenth Amendment to the Fifteenth Amendment. This is highly important in consideration because it prohibits the deprivation of rights on the basis of race. This was the very amendment that first gave African-Americans an equal weighted vote compared to the white majority. It is important to note that in *Shaw* the importance in giving the Court jurisdiction is the fact that it was a racial gerrymander--not a partisan one.

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[16] 631 S.W 2d 702 (Tenn. 1982)
[17] *436 S.W.3d 775 (2014)*
[18] 369 U.S. 186 (1962)
[19] 376 US 1 (1964)
[20] 509 US 630 (1993)
[21] 376 US 1 (1964)

The argument that the precedent in *Shaw*[22] applies to the controversy in *Gill v. Whiteford*[23] fails in the the most fundamental distinction of the type of gerrymander alleged. In *Gill*, the challengers of the Wisconsin redistricting statute do not even allege that the redistricting plan violates traditional norms. As such the judiciary intervening in this case would be going against the standard view of judicial restraint. But more than just going against traditional norms of judicial restraint, the imposition of the judicial laws on the democratic process of legislation would be a violation of the separation of powers. The judiciary has no business interfering in inherently political questions, since the federal courts are appointed, unelected officials. But in the most practical sense, the court has yet to yield what a proper relief would be in the case of a gerrymander. Though it may seem that the norm is just a redrawing of lines, the courts are indeterminate about what constitutes a proper relief. Just in this past year, 2017, the Supreme Court had to vacate a District Court's order because it could not find with "confidence that the court adequately grappled with the interests on both sides" (*North Carolina v. Covington*[24]). More importantly, this was an alleged racial gerrymander of 28 African-American districts, an action which should have been an otherwise simple decision for the court had they adopted the logic of these advocates. So as the proponents of judicial intervention would have it, unelected officials who cannot even decide on a proper solution should not be intervening in the democratic institutions of a state legislature.

§ 8. CROSSING COUNTY BOUNDARY LINES V. EQUALITY OF VOTES

Because the Tenth Amendment[25] gives the state the right to dictate how it conducts itself with voting procedure, reapportionment law uses the basic federal guideline in addition to the state law. The Supremacy Clause (Article 4, section 2 of the Constitution)[26] means that federal law and guidelines supercede state law. This application is important when looking at whether crossing county boundary lines has to be adhered to if the reapportionment plan meets the federal criteria. This issue is one of the main problems addressed by the Tennessee Supreme Court in *State ex. Rel. Lockert V. Crowell*[27].

State ex. Rel. Lockert v. Crowell is one of the most integral redistricting cases in Tennessee. The case addresses whether the redistricting plan is constitutional since it did not meet the requirement of "not crossing county boundary lines" found in Article 2, Section 6 of the Tennessee Constitution. However, the plan did meet the face value of the federal guidelines of the "one person, one vote" principle. The Court ultimately ruled that equality of population among districts is the most empirical and consistent principle to follow, but the legislature should

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[22] 509 US 630 (1993)
[23] SCOTUS 2018 Docket no. 16-1161
[24] *581 US _ (2017)*
[25] https://www.law.cornell.edu/constitution/tenth_amendment
[26] https://www.law.cornell.edu/wex/supremacy_clause
[27] 631 S.W 2d 702 (Tenn. 1982)

refrain from crossing county lines when possible--if it can still meet the creation of equal populations within districts. Furthermore, the court found that evidence of minorities being discriminated against by any of the apportionment plans should be held before the Court. This underscores the overarching scrutiny that the federal courts have applied to redistricting cases that take race into consideration. Finally, the court decided that the population variance for a given district can change past the 1.65% in order to preserve county boundaries and meet other constitutional standards, but it cannot exceed 22%. The main point the Court makes is the main distinction that if crossing county boundary lines causes the variance to succeed the 22% threshold then it is highly unlikely to stand. From this case one can note that, the most important consideration of the court in determining whether or not a certain redistricting plan is constitutional or not is the principle of equality of population within districts.

Lincoln County v. Crowell[28] is a Tennessee Supreme Court case that is a paradigm case to the *State ex. Rel. Lockert v. Crowell*[29]. In this case, Plaintiffs of Lincoln and Marshall County felt that their congressional lines were "unnecessarily drawn and divided to form the 62nd and 65th districts for the House of Representatives so they "sought a declaration of §2 (d) of the Act for being unconstitutional". The Court decided that the case was an improper case for the Court to hear and reversed the decision made by the Chancellor. The main takeaway is that it keeps the same general federal guideline of "one person, one vote" from the *Baker*[30]. In addition, it reasoned by example that by showing how it is a paradigm case to *State ex. Rel. Lockert v. Crowell*[31]. An important distinction this case makes is that 'From these cases, a "rule of thumb" appears to have developed, whereunder variances of 10% or less need not be justified absent a showing of invidious discrimination; and greater variances will be constitutional if the state has a rational policy in support thereof. Virginia's 16.4% variance is the greatest which, to our knowledge, has been found constitutional, and the court in Mahan speculated that this approached the limit of constitutional variance.' This underscores how potent the equality in population is to redistricting.

§ 9. CONCLUSION:

The main danger that *Gill v. Whitford*[32] poses is whether to allow such a violation of separation of powers. Thus, if this passes, it not only forces a brand new federal policy in Wisconsin, but also changes the rule of law on redistricting. It minimizes the power of the state in favor of a broad federal guideline that would erode the power of states' rights and undermine the courts in states like Tennessee. What makes the United States unique is how the government is set up as a federalist structure. This allows for states to have flexibility in determining policies

[28] 701 S.W. 2d 602 (TENN 1985)
[29] 631 S.W 2d 702 (Tenn. 1982)
[30] 369 U.S. 186 (1962)
[31] 631 S.W 2d 702 (Tenn. 1982)
[32] SCOTUS 2018 Docket no. 16-1161

of their constituents. The federal judiciary is not subject to this election process and as such, stands to diminish the fundamentals of this country with such brazen judicial activism. Additionally, this would not only change the way federalism is viewed, but also it would make a partisan political issue into a constitutional one. The entire creation of the Court was made to be separate from the legislative and executive branch, and a ruling in *Gill v. Whitford*[33] would force the judiciary branch to answer such questions that ought to be left to the legislature and executive. To sum up, the case not only goes against separation of powers, but ruling gerrymandering as a partisan issue goes against the rule of law previously held by the states and also the court itself. It would cause the Court to begin to wade in the "political thicket," and ultimately degrade the legitimacy of the courts as an independent adjudication body. Furthermore, this case does not even have any federal standing under the Equal Protection Clause, because it is not a race issue but a political one. Simply put, partisan gerrymandering is outside the scope of the Supreme Court, and thus the High Court should not make a ruling in *Gill v. Whitford.*

[33] SCOTUS 2018 Docket no. 16-1161