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New Tools to Challenge Partisan Redistricting in New York State?

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This term, the Supreme Court will hear the case of *Gill v. Whitford*, a Wisconsin partisan gerrymandering challenge.[1] While *Whitford* has understandably captured the attention of those interested in redistricting issues nationwide,[2] a potential route to bring partisan gerrymandering challenges closer to home has gone largely undiscussed. In 2014, New York voters amended the state constitution to enact a host of redistricting reforms — including language prohibiting drawing lines on the basis of partisanship. This amendment may prove to be a powerful tool to bring state court challenges to New York's lines.

I. Past Obstacles to New York Partisan Gerrymandering Challenges

Any state or federal partisan gerrymandering challenge exists in the shadow of *Vieth v. Jubelirer*,[3] a 2004 case in which the U.S. Supreme Court sharply divided over the justiciability of partisan gerrymandering claims.[4] The plurality opinion in *Vieth*, written by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, concluded that because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged" since the Court's decision in *Davis v. Bandemer*[5] eighteen years previously, partisan gerrymandering claims should be treated as nonjusticiable.[6] Justice Kennedy's concurrence — the crucial fifth vote — concluded that even though he did not find the standard proposed in *Vieth* to be judicially discernible and manageable, he was not prepared to conclude that no standard could ever be.[7]

While New York's federal courts have occasionally been receptive to racial gerrymandering challenges to congressional lines in recent decades,[8] they have not been receptive to partisan gerrymandering challenges, emphasizing that bipartisan gerrymandering is presumptively constitutional.[9] In a 1992 redistricting challenge to state legislative district lines, the Northern District of New York concluded that "the evidence show[ed] that the Assembly apportionment plan [at issue] was a result of a political compromise that allowed the Republicans to craft the Senate apportionment plan while the Democrats fashioned the Assembly plan," and, as such, the plaintiffs could not convincingly argue that the Assembly plan would "consistently degrade Republicans' ability to influence New York's political process."[10] In a later case, the Southern District of New York highlighted the significance of New York's bipartisan redistricting process,[11] though it noted that it was not entertaining a partisan gerrymandering challenge to the 2002 lines.[12] Most recently, the Eastern District of New York once again rejected a partisan gerrymandering challenge to New York's state legislative lines; while it did not reference the bipartisan nature of the redistricting process, the court rejected the plaintiffs' allegations of a partisan effect.[13]

Nor have New York's state courts been receptive to partisan gerrymandering challenges. In 1972, the Court of Appeals rejected partisan gerrymandering challenges to state legislative lines because even if it assumed such challenges were justiciable, the record in the case was insufficient.[14] The court further added that the requirements of compactness, contiguity, and convenience were "adopted for the salutary purpose of averting the political gerrymander and at present are the only means available to the courts for containing that pernicious practice."[15] The Appellate Division has followed

federal courts in its treatment of the justiciability of state-law political gerrymandering claims.[16]

More recently, the Court of Appeals has been willing to find alternative motives underlying redistricting decisions, even where evidence may suggest partisan intent. In *Wolpoff v. Cuomo*, the Court of Appeals found no reason to hold that the 1992 lines were the product of anything but a "good faith effort" to comply with federal and state constitutional requirements, rather than "partisan political reasons."[17] The court resoundingly endorsed the Legislature's decision to balance conflicting federal and state requirements[18]: "It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard."[19]

II. New State Constitutional Challenges

Despite this unpromising history, the New York Constitution now provides a significant vehicle to challenge future lines. In 2014, New York voters amended the state constitution's provisions concerning redistricting.[20] The 2014 amendments were made without a constitutional convention, through its approval by two consecutive legislatures and by the voters of the state. Codified throughout Article III, the amendment sets forth a number of significant adjustments to the state's redistricting process.

One of the most-discussed changes was the creation of a ten-member redistricting commission to draw both state and congressional lines beginning in 2020.[21] The commission must consist of two members selected by the temporary president of the Senate, by the speaker of the Assembly, and by each of the minority leaders of the Senate and the Assembly.[22] Those eight appointed members must then select the remaining two commission members. At least seven of its members must vote to approve a redistricting plan, with additional requirements that any plan must receive support from commission members nominated by both political parties.[23] Once approved by the commission, the plan goes to the legislature for approval. Each chamber must vote on the commission's plan without amendment. If the first plan approved by the commission fails in the legislature, the commission must develop and approve a second plan for approval by each chamber without amendment. If the second plan fails in the legislature, the legislature can amend it only at that point.

Most importantly, the constitution now requires that any amendments made by the legislature must comply with the substantive requirements discussed below, including the prohibition against partisan gerrymandering. In addition, in the chapter bill enacted with the constitutional amendment (L. 2012, c. 17), an additional restriction on the legislature was added: "Any amendments by the senate or assembly to a redistricting plan submitted by the independent redistricting commission, shall not affect more than two percent of the population of any district contained in such plan." In other words, if the legislature rejects the first two commission plans, it can approve its own plan only by amending one of those plans on the margins.

If the commission cannot obtain the requisite votes for a redistricting plan, it is required to submit the redistricting plan or plans and implementing legislation that obtained the *most* votes to the legislature,[24] which may then approve the plan.[25] The

amendment further imposes supermajority vote requirements on the legislature for the approval process, which vary depending on whether the commission was able to approve a plan or whether it merely submitted the best (but unapproved) option.[26]

Most importantly for future partisan gerrymandering challenges, the 2014 amendment imposed further limitations on what factors may be considered in drawing lines. Among other restrictions, the constitution now requires that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."[27] Based in part upon similar language in Florida's Constitution,[28] the provision was drafted to provide a concrete basis for a potential future[29] court challenge to district lines drawn for partisan advantage.

Any such challenge would likely mirror a suit challenging Florida's 2012 redistricting plan, brought under the Florida Constitution's similar provision. In *League of Women Voters of Florida v. Detzner*,[30] the Florida Supreme Court considered various forms of smoking-gun evidence, including persistent efforts by state legislators to keep political operatives "in the loop" during the state's redistricting process.[31] Emphasizing its prior holding that the Florida Constitution's text sets "no acceptable level of improper intent,"[32] in contrast to the Supreme Court's requirement of "invidious" discrimination,[33] the court concluded that the direct evidence of unconstitutional intent merited redrawing certain districts shown to be drawn for political reasons.[34]

Here too, plaintiffs may raise a challenge to New York's districts based on evidence of partisan intent during the redistricting process. Negotiations between legislative leaders, and with their own party conferences within each chamber of the legislature, over specific district lines — as well as draft statistical analyses to help craft districts to protect or undermine a party's hold on a legislative seat — are now likely to become constitutionally relevant. Similar analysis should apply to the workings of the redistricting commission, in order to ensure that it fulfills its mandate. While nothing in the constitution requires those involved to preserve their documents created during the redistricting process, the near certainty of a litigation challenging the district lines should support an argument that such an obligation exists from the start of that process under existing federal and state case law governing document preservation. Because the language of the 2014 amendment unqualifiedly prohibits the drawing of districts to further partisan goals, courts should now have a constitutional basis to curb partisan gerrymandering in ways they previously could not. Plaintiffs may seek to challenge any demonstrable partisan intent, relying on reasoning similar to the Florida Supreme Court's in arguing that there is no need to set an "acceptable level of improper intent."[35]

Moreover, future challenges to New York lines under this provision of the state constitution may be bolstered by use of an "efficiency gap" analysis. The "efficiency gap" (EG) is one potential metric for assessing the partisan effects of a redistricting plan, and has recently been used in redistricting challenges.[36] The plaintiffs in *Whitford*, for example, raised it as possible evidence of partisan gerrymandering regarding Wisconsin's lines. As the district court explained in *Whitford*:

> The efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast. When two parties waste votes at an identical rate, a plan's EG is equal to zero. An EG in favor of one party, however, means that the party wasted votes at a

> lower rate than the opposing party. It is in this sense that the EG arguably is a measure of efficiency: Because the party with a favorable EG wasted fewer votes than its opponent, it was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats.[37]

Votes can be "wasted" in two ways: either by being cast in favor of a losing candidate, or by being cast in excess of the majority needed for a winning candidate to reach victory.[38] If a district is heavily Democratic and the Democratic candidate wins by a large margin, all votes cast for that candidate above the 50-percent-plus-one threshold count as "wasted." Conversely, all votes Republican voters cast for their losing candidate in that district would be "wasted." The end result is that if a political party engages in conventional gerrymandering practices — "packing" and "cracking" the opposing party's voters into and across districts[39] — the line-drawing party will have fewer wasted votes than the other, as it will place more of its voters in competitive districts where they eke out narrow victories.[40]

One of the virtues claimed by proponents of efficiency gap analysis is that it helps to demonstrate the magnitude and durability of partisan redistricting effects.[41] As such, it may serve as useful circumstantial evidence of partisan intent.[42] Various studies have considered a 7-8 percent efficiency gap as a threshold for a legally significant EG that is likely to "persist over the life of the plan."[43] The EGs for the Wisconsin plan at issue in *Whitford* were 13 percent and 10 percent for 2012 and 2014, respectively — "among the largest scores" for any state.[44]

Plaintiffs in a challenge to New York's state legislative lines could similarly point to a high efficiency gap to bolster their claims. We conducted an analysis of the EGs for New York's state legislative districts in the 2012, 2014, and 2016 elections — every election using the current maps, which were drawn in 2012. For contested races, we calculated how many votes would be needed to garner a 50-percent-plus-one majority of the votes that went to the two major parties, and used that figure to calculate the "wasted" votes for each party. For uncontested races, we first imputed votes prior to the efficiency gap calculation. To do so, we calculated each major party's average share of the vote total for its respective presidential candidate that cycle[45] in each of three scenarios: when that party ran an incumbent for the state seat, when the opposing party ran an incumbent, and when neither party ran an incumbent. We then used those values to impute vote totals for each major party in an uncontested district by applying the relevant average share to the presidential vote total in that district.[46]

Using this method, we found overall efficiency gaps (combining numbers for the state Senate and Assembly) of 11.51 percent in favor of Republicans in 2012, 11.64 percent in favor of Republicans in 2014, and 12.81 percent in favor of Republicans in 2016. In the Assembly, the EGs were 10.94 percent in favor of Republicans in 2012, 4.20 percent in favor of Republicans in 2014, and 10.47 percent in favor of Republicans in 2016. In the Senate, the EGs were 12.08 percent in favor of Republicans in 2012, 19.18 percent in favor of Republicans in 2014, and 15.17 percent in favor of Republicans in 2016.[47]

This is essentially consistent with the plaintiffs' expert findings in *Whitford*, where Professor Simon Jackman calculated that New York's median efficiency gap estimates were the *most* Republican-favoring out of any state over the period he surveyed, with pro-Republican efficiency gaps of 13 percent and 8 percent in 2012 and 2014,

respectively.[48] The differences between our calculations and Professor Jackman's are likely attributable to differences in methodology in imputing vote totals for uncontested races.[49] By either estimation, the Republican-favoring efficiency gap in New York is on average beyond the 7-8 percent threshold for legal significance suggested by the plaintiffs in *Whitford* and by Professors Stephanopoulos and McGhee.[50] If this gap persists, efficiency gap analysis may therefore help to bolster a constitutional challenge to future New York lines.

If such analysis plays a role in a New York redistricting challenge, defenders of the district lines would likely argue that these numbers are inconsistent with patterns of political control in the state legislature. While the EG certainly favors Republicans *more* strongly in the Senate, it still favors Republicans in the Assembly — which might be seen as a surprising outcome given Democrats' longstanding control of the Assembly.[51] Defenders of the lines could argue, for example, that Republicans have a natural political geography advantage for the reasons discussed further in Section III.B. Plaintiffs bringing the challenge might contest this, however, by pointing to other explanations for why the Assembly has a pro-Republican efficiency gap. It could be argued, for example, that the Assembly is, historically, highly uncompetitive in favor of Democrats, such that Assembly Democrats have seen little need to compound their advantage by gerrymandering to place Republican candidates at a further disadvantage (except perhaps to help or hinder certain candidates rather than the party overall). Such a result would be compatible with both the pro-Republican EG in the Assembly and the more pronouncedly pro-Republican EG in the Senate, where Senate Republicans have more of an incentive to solidify their electoral standing given their slim majority.[52] Plaintiffs could also argue that Senate Republicans benefited from adding a sixty-third district in a Republican-friendly upstate area prior to the 2012 elections,[53] a strategy that Assembly Democrats are unable to pursue given the Assembly's fixed number of seats.

Whether these explanations ultimately would succeed depend on a deeper analysis of the facts underlying New York's lines, and what evidence existed to demonstrate partisan intent. It is worth considering more broadly, however, what obstacles have existed to partisan gerrymandering challenges in New York — and whether the 2014 amendment alters the landscape surrounding those obstacles.

III. Overarching Obstacles to New York Partisan Gerrymandering Challenges

Regardless of how they seek to prove partisan intent in violation of the 2014 amendment, future challenges on those grounds must still address previous obstacles to New York partisan gerrymandering challenges. Specifically, courts will likely consider how redistricting challenges under this provision interact with previous case law on bipartisan gerrymandering, as well as how they interact with New York's political geography.

A. Bipartisanship

As discussed *supra*, courts have typically treated "bipartisan gerrymanders" as inappropriate targets for partisan gerrymandering claims,[54] and this has diminished the viability of multiple New York challenges.[55] Once the redistricting commission goes into

effect, it will seemingly present a clear example of a bipartisan redistricting effort. Moreover, even New York's legislative redistricting efforts have typically involved input from both major parties, with a general aim of favoring incumbents.[56]

Despite the prevalent role that bipartisanship has played in past New York challenges, a state constitutional challenge under the 2014 amendment may avoid the issue entirely. In addition to prohibiting genuinely *partisan* gerrymandering, the text of the amendment also expressly prohibits drawing districts "to discourage competition or for the purpose of favoring or disfavoring incumbents"[57] — the hallmark of a bipartisan gerrymander, where the protections for incumbents and partisan control over one chamber may trump the potential for (and perceived value of) electoral competitiveness for the incumbents' political party across the entire legislature.[58] As such, it appears that one primary reason courts previously dismissed partisan gerrymandering challenges in New York may not serve as a defense to challenges under this amendment.

B. Political Geography

Prospective plaintiffs may have to contend more seriously with a political geography defense to a partisan gerrymandering challenge, even one brought under the 2014 amendment. New York features densely populated cities in addition to sparsely populated rural areas, and Democrats are often more densely concentrated than Republicans due to a variety of factors.[59] It will be argued that this makes it difficult for even the most well-meaning, neutral legislature to draw district lines that fulfill its other objectives — like compliance with federal and state redistricting requirements — without skewing the districts' political balance. The *Vieth* Court recognized this as a potential issue, rejecting the plaintiffs' standard in that case as nonjusticiable partly because, "[w]hether by reason of partisan districting or not, party constituents may always wind up 'packed' in some districts and 'cracked' throughout others."[60] If facets of political geography hinder a plaintiff's ability to show that the districts *actually* discriminate against members of a political party, then this could threaten a state constitutional challenge.

There are, of course, ways plaintiffs could resist such a conclusion. In particular, the district court in *Whitford* endorsed a strategy for addressing political geography concerns that may prove generally useful to future challengers. The state in *Whitford* pointed to Wisconsin's political geography as a justification for the plan it selected.[61] The court accepted that Wisconsin's political geography gave Republicans "a modest natural advantage in districting,"[62] but ultimately concluded that this "modest" advantage did not excuse the sizable partisan effect of the plan at issue. In doing so, the majority looked to the fact that the Wisconsin legislature considered and rejected otherwise comparable plans for partisan reasons,[63] as well as the plaintiffs' expert's ability to draw a more neutral plan that still conformed to traditional legislative objectives.[64] If plaintiffs in a New York challenge could make a similar showing, they might be successful in resisting the political geography defense.

Conclusion

If history is any guide, New York's legislative district lines will end up in court after the 2020 redistricting cycle. This new constitutional "hook" and some of the recent approaches to identifying and proving partisan gerrymandering give new promise to potential challenges.

Endnotes

1 No. 16-1161, 2017 WL 1106512 (S. Ct. 2017). Disclosure: Jenner & Block currently represents the plaintiffs in *Whitford* in their Supreme Court challenge.

2 See, e.g., Robert Barnes, "Supreme Court could tackle partisan gerrymandering in watershed case," Washington Post, June 12, 2017, http://www.washingtonpost.com/politics/courts_law/supreme-court-could-tackle-partisan-gerrymandering-in-watershed-case/2017/06/11/e166e3aa-4c5d-11e7-bc1b-fddbd8359dee_story.html?hpid=hp_rhp-top-table-main_gerrymander-229pm%3Ahomepage%2Fstory&utm_term=.50e9de32afaf. See, generally, "Whitford v. Gill: District Court Offers New Standard to Hold Wisconsin Redistricting Scheme Unconstitutional," 130 Harvard Law Review 130, 7 (2017): 1954-61, https://harvardlawreview.org/wp-content/uploads/2017/05/1954-1961_Online.pdf (praising the district court opinion in *Whitford* as offering a narrow, but manageable, standard for assessing partisan gerrymandering claims).

3 541 U.S. 267 (2004).

4 *Vieth* was not the Court's most recent partisan gerrymandering case. It was followed by *League of United Latin American Citizens v. Perry* ("*LULAC*"), which echoed *Vieth* in concluding that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." 548 U.S. 399, 418 (2006). Disclosure: Jenner & Block represented plaintiffs in the Supreme Court in both *Vieth* and *LULAC*.

5 478 U.S. 109 (1986). *Bandemer* explicitly contemplated the potential for a successful partisan gerrymandering claim. Ibid. at 125.

6 *Vieth*, 541 U.S. at 281.

7 Ibid. at 311-12 (Kennedy, J., concurring) ("That no such [justiciable] standard has emerged in this case should not be taken to prove that none will emerge in the future").

8 See *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (rejecting a congressional redistricting plan on the grounds that it discriminated against Hispanic and African-American district residents).

9 The Supreme Court has held that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

10 *Fund for Accurate & Informed Representation v. Weprin*, 796 F. Supp. 662, 669 (N.D.N.Y. 1992).

11 See *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 368 n.24 (S.D.N.Y. 2004).

12 See ibid. at 353.

13 See *Favors v. Cuomo*, 881 F. Supp. 2d 356, 369 (E.D.N.Y. 2012) (finding that the division of the Ramapo Chasidic Jewish community was not demonstrably a partisan gerrymander because the plaintiff failed to show that the plan "degrades or dilutes the Chasidic Jewish community's influence on the political process as a whole").

14 See *Schneider v. Rockefeller*, 31 N.Y.2d 420, 431 (1972).

15 Ibid. at 430.

16 See *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280, 284 (2d Dep't 1984) (looking to federal case law prior to *Davis v. Bandemer* and holding that partisan gerrymandering claims are nonjusticiable).

17 80 N.Y.2d 70, 78-79 (1992).

18 See ibid. at 77-8.

19 Ibid. at 79.

20 See Jessica Bakeman, "Voters approve all three ballot propositions," *Politico*, November 5, 2014, http://www.politico.com/states/new-york/albany/story/2014/11/voters-approve-all-three-ballot-propositions-017202.
21 See N.Y. Const. Art. III, § 5-b; see also Sam Roberts, "Ballot Item Would Reform Redistricting, at Least in Theory," *New York Times*, October 12, 2014, http://www.nytimes.com/2014/10/13/nyregion/ballot-item-would-reform-redistricting-at-least-in-theory.html?_r=0 (summarizing the debate over the measure).
22 N.Y. Const. Art. III, § 5-b. Each of these members must not have been a state legislator, legislative employee, lobbyist, or political chairman in the three years prior to appointment, among other limitations. See ibid. § 5-b(b).
23 Ibid. § 5(b)(f).
24 Ibid. § 5(b)(g).
25 Ibid. § 4(b). The legislature has two opportunities within a limited timeframe to approve plans put forth by the redistricting commission without amendment, after which it may introduce amendments to the implementing legislation.
26 See ibid. § 4(b)(1)-(3).
27 Ibid. § 4(c)(5).
28 See Fla. Const. Art. III, § 20 (providing, *inter alia*, that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent").
29 The text of the amendment does not appear to apply retroactively, as section 4(c) establishes "principles [that] shall be *used in the creation* of state senate and state assembly districts." N.Y. Const. Art. III, § 4(c) (emphasis added). Similarly, the summary of the ballot proposal described the principles laid out in section 4(c) as "principles to be applied in *creating* districts." *Form of Submission of Proposal Number One, An Amendment*, N.Y. St. Board Elections (2014), http://www.elections.ny.gov/NYSBOE/Elections/2014/Proposals/ProposalOneFinal.pdf. Given the Court of Appeals' dictate that "statutes as well as constitutional provisions are to be construed as prospective only, unless a clear expression of intent to the contrary is found," *Ayman v. Teachers' Retirement Bd.*, 9 N.Y.2d 119, 125 (1961), it is likely that section 4(c)(5) would be more likely to be a tool against partisan gerrymandering in future line-drawing.
30 172 So. 3d 363 (Fla. 2015). Disclosure: Jenner & Block represented plaintiffs in this litigation.
31 See ibid. at 380.
32 Ibid. at 375 (quoting in re Senate Joint Resolution of Legislative Apportionment 1176, 93 So. 3d 597, 617 (Fla. 2012) (mem.)).
33 See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 735-36 (1973).
34 See *League of Women Voters of Florida v. Detzner*, 172 So. 3d at 371-72. The court based its decision in part on evidence of "the intent of individual legislators and legislative staff members involved in the drawing of the redistricting plan[, which is] relevant in evaluating legislative intent." Ibid. at 380.
35 Ibid. at 375.
36 Efficiency gap analysis was first introduced as a metric of partisan gerrymandering in Nicholas O. Stephanopoulos and Eric M. McGhee, "Partisan Gerrymandering and the Efficiency Gap," *University of Chicago Law Review* 82, 2 (2015): 831-900, https://poseidon01.ssrn.com/delivery.php?ID=813098115094004094119066030078126093024068064058019036096099064030008025112021013092025021018032000121001000091066000095017029049037039013080019105103106078113127033016071086121120014000067065126024115088003093121015087024087098076100080110012090121&EXT=pdf.
37 *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016) (internal quotation marks omitted).

38 See Stephanpoulos and McGhee, 834; see also Eric Petry, "How the Efficiency Gap Works," Brennan Center for Justice, n.d., https://www.brennancenter.org/sites/default/files/legal-work/How_the_Efficiency_Gap_Standard_Works.pdf (providing a helpful summary of the theory).
39 See, e.g., Stephanopoulos and McGhee, 834.
40 Ibid. at 851.
41 See ibid. at 877-8.
42 Professors Stephanopoulos and McGhee explicitly framed their analysis in terms of effects rather than intentions. See ibid. at 823, n.2. It may be possible, however, for advocates to extend the analysis to apply to circumstantial evidence of intent.
43 *Whitford v. Gill*, 218 F. Supp. 3d 837, 860-61 (W.D. Wis. 2016) (discussing analysis by Professor Simon Jackman, an expert for the plaintiffs, assessing nationwide efficiency gaps and setting 7 percent as the legally significant threshold); Stephanopoulos and McGhee, 884 (proposing 8 percent as the threshold for a plan to be presumptively unconstitutional). Interestingly, the legally significant threshold varies depending on whether the efficiency gap favors Democrats or Republicans. Professor Jackman found that while a 6 percent or 7 percent gap in favor of Republicans indicated a low probability of Democrats "flipping" the legislature within a given electoral map, only a gap of 8 percent or 9 percent in favor of Democrats had equivalent legal significance. Pls.' Ex. 3 at 66, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 15-cv-421-bbc). As he noted, "[t]he asymmetry here reflects the fact that districting plans evincing apparent Democratic advantages are not as durable or as common (in recent decades) as plans presenting evidence of pro-Republican gerrymanders." Ibid.
44 *Whitford v. Gill*, 218 F. Supp. 3d at 861; see also *infra* note 48 and accompanying text (discussing New York's consistently high efficiency gap scores).
45 For 2014, we used the values from the 2012 presidential election.
46 One could also run a regression analysis to impute vote totals in uncontested districts, see sources cited *infra* note 49, but this approach similarly incorporates the political breakdown and incumbency effect on votes in each district.
47 The numbers reflect that 2014 was an outlier in efficiency gaps, both in the Senate and in the Assembly. One possibly relevant difference between 2014 and the other years is that 2014 was a gubernatorial election year.
48 Pls.' Ex. 3, *supra* note 43, at 35. Professor Jackman noted that "[s]tatewide [Democratic vote share in New York] ranges from 53.7% to 69.2%, but Democrats only win 70 (1972) to 112 (2012) seats in the 150 seat state legislature, so [Democratic seat share] ranges from .47 to .75, considerably below that we'd expect to see given the vote shares recorded by Democrats if the efficiency gap were zero." Ibid.
49 See Stephanopoulos and McGhee, 866 (discussing strategies for imputing votes in uncontested races); Pls.' Ex. 2 at 44, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (No. 15-cv-421-bbc) (same). Uncontested races are among the most significant to an efficiency gap calculation, as they "occur largely when one party sees zero probability of winning because the majority party has such overwhelming majorities in the district." Ibid. at 39.
50 See sources cited *supra* note 43.
51 "New York State Legislature," Ballotpedia, n.d., http://ballotpedia.org/New_York_State_Legislature.
52 In contrast to the Assembly, the Senate is divided between thirty-two Republicans and thirty-one Democrats. Ibid.

53 See Thomas Kaplan, "Republicans, Outnumbered, Keep Power in Albany," *New York Times*, June 13, 2012, http://www.nytimes.com/2012/06/14/nyregion/republicans-outnumbered-keep-power-in-new-york-state.html. The decision to add an extra seat was controversial because it resulted from an application of two different methods to different sets of counties, either of which would have yielded a different number of seats if applied consistently. See *Cohen v. Cuomo*, 19 N.Y.3d 196, 200-01 (2012). Despite these concerns, the Court of Appeals upheld the seat addition. Ibid. at 202.

54 See *supra* note 9; see also the "Foreword" in Richard H. Pildes, "The Constitutionalization of Democratic Politics – The Supreme Court, 2003 Term," *Harvard Law Review* 118, 28 (2004): 74-5 (noting that even two of the three dissents in *Vieth* proposed approaches that would not affect bipartisan gerrymandering, though Justice Stevens's approach might apply regardless of "whether or not Justice Stevens intended his approach to have this effect"). The district court in *Whitford*, for example, was quick to conclude that its assessment might change if a plan were otherwise shown to be "nonpartisan or bipartisan." *Whitford v. Gill*, 218 F. Supp. 3d 837, 908 (W.D. Wis. 2016). The court noted that the Wisconsin challenge did not present this issue, since the plaintiffs demonstrated compelling evidence of both partisan intent and effect. See ibid.

55 See *supra* notes 10-12 and accompanying text.

56 See, e.g., David Wells, "The Redistricting Cartel," *City Journal* (Summer 1992), https://www.city-journal.org/html/redistricting-cartel-12693.html (describing the 1992 redistricting process as a bipartisan effort to protect incumbents). New York is not alone in this by any means. See, e.g., Samuel Issacharoff and Pamela S. Karlan, "Where to Draw the Line: Judicial Review of Political Gerrymanders," *University of Pennsylvania Law Review* 153, 1 (2004): 541- 78, https://www.law.upenn.edu/journals/lawreview/articles/volume153/issue1/IssacharoffKarlan153U.Pa.L.Rev.541(2004).pdf. ("[T]he magnitude of the risk of discriminatory partisan gerrymandering is overwhelmed by the fact of nondiscriminatory bipartisan gerrymandering that renders elections in the United States immune to voter preferences.")

57 N.Y. Const. Art. III, § 4(c)(5).

58 Issacharoff and Karlan, 572.

59 See Jowei Chen and Jonathan Rodden, "Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures," *Quarterly Journal of Political Science* 8, 3 (2013): 239-69, 241 (2013) (explaining factors that contribute to this phenomenon); see also *supra* notes 51-53 and accompanying text.

60 *Vieth v. Jubelirer*, 541 U.S. 267, 289-90 (2004).

61 *Whitford v. Gill*, 218 F. Supp. 3d 837, 912 (W.D. Wis. 2016)

62 Ibid. at 919. The dissent argued that, even assuming that geography played only a "modest" role, it "seriously undermine[d] the notion that the Republicans in this case engaged in a partisan gerrymander of historic proportions." Ibid. at 963 (Griesbach, J., dissenting).

63 See ibid. at 924 (majority opinion).

64 Ibid. at 920.