KELLY EATON is a third year Political Science major, concentrating in pre-law. Her choice in major is based on her deep passion for human rights and social justice. After she graduates, she plans on pursuing an MBA and a career in financial and political consulting. In her free time, Kelly enjoys filmmaking, kickboxing, and photography. At Cal Poly, she is a member of the sorority Kappa Alpha Theta and was an Orientation Leader for the freshman class of 2016.
VOTE DILUTION IN AMERICAN POLITICS AND CONSTITUTIONAL LAW
Kelly Eaton

Question Presented
Under what conditions does vote dilution in single district elections violate the rights of expression, association, and due process provided by the Constitution, and what standards should the Supreme Court rely on when adjudicating questions of vote dilution?

Background
Vote dilution occurs when the voting power of individuals is diminished. Vote dilution can be achieved through discriminatory voting practices or the process of gerrymandering, which is performed by election officials. Election officials can engage in both racial and partisan gerrymandering. According to the Legal Information Institute, “Two typical forms of vote dilution involve ‘cracking’ a minority community between several election districts, and ‘submerging’ minority communities in multi-member districts.” ¹ In gerrymandering, “cracking” splits up the collective votes of a minority, while “submerging,” or “packing,”

combines the votes of a minority with a majority so that the minority votes carry less weight. In addition to laws which require photo identification for voting, among others, these gerrymandering tactics effectively squander the right of expression and association of voters. Furthermore, vote dilution results in unfair treatment that violates due process of the law. All of this culminates to a lack of voter equality in the United States.

To begin with, the Constitution provides for the right of expression and association through the First Amendment. Due process is a right of the law as per the Fifth and Fourteenth Amendments of the Constitution; the right to vote is necessary to upholding all of these rights. Although the right to vote is not explicitly stated in the Constitution, “the right to vote is the most important right granted to a U.S. citizen.” Nonetheless, the right to vote is not sufficient to upholding the rights of expression, association, and due process. To be sufficient, the right to vote must include the right to an equally weighted vote. In Election Law: Cases and Materials, authors Hasen and Lowenstein affirm that “full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.” Currently, vote dilution is preventing this.

The importance of the right to an equally weighted vote was officially recognized by the passage of the Voting Rights Act of 1965. The Voting Rights Act, or the VRA, is defined as “an important federal civil rights law that protects minorities from discriminatory voting practices.” In 1965, the significance of the Voting Rights Act laid in the prohibitions on practices such as literacy tests. The establishment of the coverage formula and preclearance was also significant. However, today what is most significant about the Voting Rights Act is that it protects against vote dilution. This is accomplished through Section 2 of the Act, which “prohibits drawing election districts in ways that improperly dilute minorities’ voting power.” Section 2 effectively addresses racial gerrymandering as a tactic of vote dilution.

The amount of voting rights cases throughout history is substantial. In 2008, the Supreme Court decided the case Crawford v. Marion County Election

---

4 *Op. Cit.*, fn. 1
5 Ibid.
Board. In this case, the Supreme Court upheld the constitutionality of an Indiana law that required voters to show photo identification prior to voting. The decision was made on the grounds that voter fraud posed a bigger problem to the state of Indiana than the votes that would be lost on account of some voters not having photo identification. Thus, the Court formally acknowledged voter fraud as a form of vote dilution, but failed to address questions of access under photo identification laws.

Five years later, in the 2013 Supreme Court case Shelby County v. Holder, the Supreme Court overturned Section 4(b) of the Voting Rights Act, which effectively overturned Section 5 of the Act as well. Section 4(b) of the VRA established the coverage formula, a formula used to identify regions where racially discriminatory voting practices had led to vote dilution. This formula was necessary because, “when Congress enacted the Voting Rights Act of 1965, it determined that racial discrimination in voting had been more prevalent in certain areas of the country.”\(^6\) Preclearance, found in Section 5, is an extension of the coverage formula whereby covered regions must approve any new voting measures with the federal government. However, there is no power to enforce preclearance without a coverage formula.

Out of deference for state sovereignty, the Court in Holder felt that the coverage formula targeted some states too harshly, and that states should be able to enact their own voting measures. Part of the Court’s reasoning was that, “the conditions that justified Section 5 no longer characterize voting in the covered jurisdictions...voter turnout and registration rates now approach parity.” This led the Court to declare the coverage formula, which was reauthorized by Congress in 2006, unconstitutional. Shelby County v. Holder is often perceived as a setback for minority voting rights. As the dissenting opinion acknowledges, “second-generation barriers” to minority voting still exist. These are “efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot.”\(^7\) Photo identification laws are just one example of second-generation barriers to minority voting.

In 2016, the Supreme Court case Evenwel v. Abbott was a progressive step towards combating vote dilution. In this case, the Court held that


\(^7\) Ibid.
total population must be used in redistricting processes, according to the “one person, one vote” principle implied by the Equal Protection Clause. This opposed the exclusive use of voting-eligible population in redistricting. Justice Ginsburg, who delivered the majority opinion, writes, “As the Framers of the Constitution and the 14th Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy decisions.” Thus, Abbott ensured that minority groups, who are less likely to be registered to vote, and nonvoting groups, such as children, are still considered in the drawing of legislative districts. Accordingly, each member of the population must be given equal weight.

Lastly, Whitford v. Gill is an ongoing case that may be brought before the Supreme Court. On November 21st, 2016, the United States District Court for the Western District of Wisconsin overturned legislative districts created by the Wisconsin Republican majority. These districts were drawn in secret, as Republicans prevented the Wisconsin Democratic minority from participating in the redistricting process. The result was malapportioned districts, largely favoring Republicans. In the majority opinion, the District Court finds that, “as a result of the statewide partisan gerrymandering, Democrats do not have the same opportunity provided to Republicans to elect representatives of their choice to the Assembly...the electoral influence of plaintiffs and other Democratic voters statewide has been unfairly and disproportionately reduced.” In addition to overturning the districts contended in Gill, the District Court also approved the plaintiff’s proposed standard for determining unconstitutional partisan gerrymandering. The standard is a three-part test: plaintiffs must prove that the defendant had the intent of partisan gerrymandering, that the partisan gerrymandering had a discriminatory effect, and that the discriminatory effect did not result from some alternative. This standard puts a significant burden of proof on the plaintiff, but nevertheless should be seen as positive. Its adoption signals that vote dilution is a serious problem that should be addressed by the Supreme Court.

---

Judicable and Manageable Standards for Racial and Partisan Gerrymandering

Judicable and manageable standards for racial and partisan gerrymandering were first addressed in the landmark Supreme Court case, Baker v. Carr. The 1962 decision gave the Court the power to decide future redistricting cases, due to the fact that redistricting was both a political and legal question. In the majority opinion, Justice Brennan states that a political question is characterized by “a lack of judicially discoverable and manageable standards for resolving it.” A legal question, on the other hand, does have these standards for resolving it. Although Justice Brennan does not explicitly offer standards for resolving redistricting cases, he does imply the necessity of these standards, as redistricting will be considered a legal question going forward. Since the decision made in Baker v. Carr, three standards have been developed to determine whether unconstitutional racial or partisan gerrymandering has occurred in redistricting processes. The first is the symmetry standard, which compares the seats that each political party receives relative to their vote share in an election. The second standard is the efficiency gap, which compares the percentage of wasted votes for each political party in an election. The third standard is proportionality, which determines “whether minorities have the opportunity to elect representatives of their choice in a number of districts roughly proportional to the percentage of minority voters in the population as a whole.” Proportionality measures racial gerrymandering, while the symmetry standard and the efficiency gap measure partisan gerrymandering.

To prevent racial and partisan gerrymandering, state redistricting plans must traditionally follow six criteria. Districts must maintain compactness, communities of interest, contiguity, equal populations, partisan fairness, and a lack of racial political considerations involved in the process of redistricting. According to Professor Justin Levitt of Loyola Law School, “Few states define precisely what ‘compactness’ means, but a district in which people generally live near each other is usually more compact than one in which they do not...a ‘community of interest’ is just a group of people with a common interest

(usually, a common interest that legislation might benefit).” Next, “a district is contiguous if you can travel from any point in the district to another point in the district without crossing the district’s boundary.” Finally, populations of districts must be kept as equal as possible.

Unfortunately, very few state redistricting plans follow the last two criteria—partisan fairness and a lack of racial political considerations involved in the process of redistricting. “Individual districts...[are often] drawn to favor or disfavor candidates of a certain party, or individual incumbents or challengers.” As Whitford v. Gill demonstrates, majority-minority requirements in redistricting have been unclear for some time. “Partisan fairness” is not a strict enough criteria for state redistricting plans, which gives majorities the power to draw district lines in their favor, while minorities often lack this power. In addition, “redistricting has [also] been abused to dilute racial and ethnic minorities’ voice at the polls.” This brings up questions of access, and whether or not minority groups have the right to an equally weighted vote. However, Section 2 of the Voting Rights Act still offers some protection for voting rights in the future. Looking forward, Whitford v. Gill is poised to overcome past issues of vote dilution if it is appealed to the Supreme Court and the District Court’s decision is upheld. The three-part test for unconstitutional partisan gerrymandering approved by the District Court provides a judicable and manageable standard for redistricting cases. The Supreme Court should apply this standard to future redistricting cases, whether they involve partisan or racial gerrymandering. While partisan and racial gerrymandering target different groups of voters, they both result in vote dilution that could be effectively addressed by this standard.

**Wisconsin Gerrymandering and Whitford v. Gill**

Prior to this legal brief, six Cal Poly students enrolled in Voting Rights and Representation, taught by Professor Michael Latner, Ph.D., and completed a project where they gerrymandered the state of Wisconsin. The names of the collaborators were Evan Boogay, Annie Campbell, Jake Clark, Kelly Eaton, Sam Goldman, and Abby Bull-Windham. Their objective was to make Wisconsin's...
eight congressional districts more Republican. The old congressional districts from 2010 were mostly Republican to begin with. Only two districts were Democratic, Districts 2 and 4.

Figure 1: Map of Republican Gerrymander of Wisconsin

Beginning with partisan demographics, the old districts had an average of 1,112,384 Republicans in the majority. There were an average of 999,946 Democrats. In terms of racial demographics, the old districts had a total population of 5,665,863, with a total of 4,719,502 White individuals in the majority. There were a total of 350,562 Black individuals, 335,096 Hispanic individuals, 129,248 Asian individuals, and 48,301 Native American individuals in the population. 83,154 individuals identified themselves as another ethnicity.
Figure 2: Table of Old and New Racial and Partisan Demographics of Wisconsin

Focusing on Districts 4 and 5, the group engaged in partisan gerrymandering in favor of the Republican Party to achieve their objective. Aforementioned District 4 was predominantly Democratic; District 5, Republican. Their gerrymandering technique was based on diluting the Democratic vote in District 4 as much as possible. They used a massive portion of District 5 to “crack” the Democratic vote in the city of Milwaukee, located in District 4. “Cracking” resulted in approximately 60,000 new Republican voters in District 4 who were originally in District 5. The group decided to leave District 2 as a Democratic district. To make District 2 Republican, the students would have had to drastically alter the contiguity of the district, which would have appeared extremely biased. Making the district appear fair, while not actually being fair, would have been nearly impossible in the amount of time they had to complete the project.

After gerrymandering the state of Wisconsin, seven new congressional districts were majority Republican, while only a single new district was majority Democratic. The eight new congressional districts were contiguous and of near equal populations. The new districts, excluding the Democratic District 2, contained between 51.58% and 59.28% Republican voters. District 4, which originally had 70.90% Democratic voters, had only 48.42% after gerrymandering. These Democratic voters were moved to District 5, which had a 46.66% Democratic vote compared to a previous 33.40% after gerrymandering. The districts were not the most compact; however, the effectiveness of the partisan
gerrymander justified the strange appearance of some of the new congressional districts. Racial demographics remained the same in the new districts as in the old districts. Partisan demographics reflected Republicans still in the majority.

Through the gerrymandering process, the racial composition of the districts was altered. All of the congressional districts became majority White, between 63.90% and 93.90%. The Black, Hispanic, Asian, Native American, and other populations were spread out among districts, effectively disintegrating their voting power. Therefore, not only did the Republican gerrymander create partisan inequality in favor of Republicans, it also created racial inequality. Thus, the group concluded that district boundaries were extremely significant, and that vote dilution could easily occur through gerrymandering.

In the recent case Whitford v. Gill, the Republican Party in Wisconsin did exactly what Boogay, Campbell, Clark, Eaton, Goldman, and Bull-Windham did in their project. They enacted what was known as Act 43, governing the creation of the state assembly district map. The result was a Republican gerrymander of Wisconsin. The recent ruling on November 21, 2016, states that, “Act 43 was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats. Moreover, as demonstrated by the 2012 and 2014 elections, among other evidence, we conclude that Act 43 has had its intended effect.” Should the Supreme Court find Act 43 to be an unconstitutional partisan gerrymander, in accordance with the District Court decision, it would be the first time in history. It would result in the three-part test becoming the judicable and manageable standard for partisan gerrymandering. The standard could extend to racial gerrymandering as well. Until then, “partisan gerrymandering [will increasingly become] the political choice for legislators to maintain power.”

It is likely that gerrymandering schemes like Act 43 will continue to threaten voter equality in the future.

The Broader Landscape

“Currently, politicians are allowed to choose their own voters and draw voting maps that are self-serving, at the expense of American voters and our democracy

16 Op. Cit., fn 10
18 Ibid.
For example, photo identification laws, as well as registration requirements, tend to discriminate against poor voters, minority voters, and Democrats. These measures have largely been justified by the intent to prevent voter fraud. However, there is little evidence that voter fraud exists. New York University School of Law warns, “We must be careful not to undermine free and fair access to the ballot in the name of preventing voter fraud.” They find, “Voter fraud claims reveal that voter fraud is very rare, voter impersonation is nearly non-existent, and much of the problems associated with alleged fraud in elections relates to unintentional mistakes by voters or election administrators.”

But whether voter fraud is prevalent or not, it remains a form of vote dilution, and the Supreme Court must be careful in evaluating its effects.

Another voting rights issue is the exclusion of prisoners from voting, also known as felony disenfranchisement. “Forty-eight states prohibit current inmates from voting, 36 keep parolees from the polls, 31 exclude probationers, and only two—Vermont and Maine—allow inmates to vote.” Just like photo identification laws and registration requirements, felony disenfranchisement is a form of vote dilution that creates voter suppression. Denying felons the right to vote may be justified on the basis that they have broken laws. Yet, all methods of vote dilution are related in that they diminish the value of the individual vote. In a democracy, individual votes should have equal value no matter the individual. This is especially true in the United States, where government was founded upon notions of equality. As Reynolds Holding of Time states, “We should be finding ways to get more voters to the polls, not looking for excuses to keep them away.”

**Conclusion**

Vote dilution is often treated as “politics as usual.” However, it creates the serious problem of voter inequality, and any level of voter inequality should not be tolerated in democratic systems. Democratic voting implies the right to vote, but more importantly, the right to an equally weighted vote. This is
why adopting a system of proportional representation may be the next step for the United States government in protecting voting rights. Until a system of proportional representation is put in place, recent cases like *Whitford v. Gill* are combatting vote dilution and establishing a judicable and manageable standard for gerrymandering. According to the First, Fifth, and Fourteenth Amendments, voting rights are a compelling state and federal interest that deserve protection by the Supreme Court. All things considered, the Supreme Court should apply strict standards when adjudicating questions of vote dilution. It goes without saying that it has been difficult to establish voting equality in the United States. There are still changes to be made before each individual in the United States has the right to an equally weighted vote. Getting there will require policy collaboration on both sides of the aisle and landmark decisions made by the Supreme Court. In the meantime, it is crucial to be aware of the issue of vote dilution in American politics and constitutional law; but more importantly, to be aware of its effects on electoral outcomes.