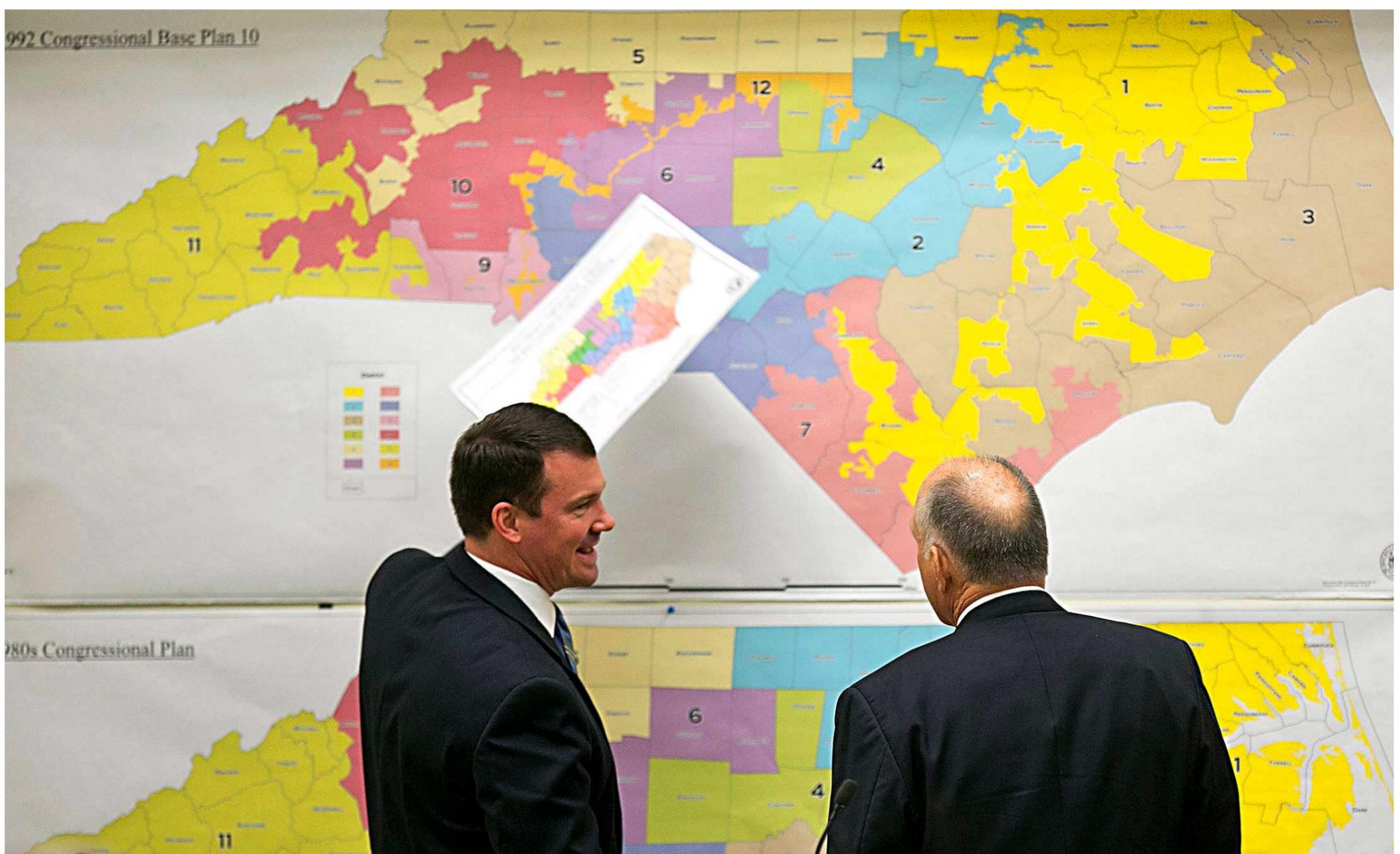


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# The Supreme Court Is Finally Tackling Gerrymandering

● Academics give SCOTUS cover to rule on extreme cases of redistricting.

By Peter Coy and Greg Stohr



▲ (From left) Republican state Senators Dan Soucek and Brent Jackson review historical maps during the Senate Redistricting Committee for the 2016 Extra Session at the North Carolina General Assembly on Feb. 16, 2016. Federal judges ruled on Jan. 9, 2018, that North Carolina's congressional district map drawn by legislative Republicans is illegally gerrymandered because of excessive partisanship that gave the GOP a rock-solid advantage for most seats and must be redone. PHOTOGRAPHER: COREY LOWENSTEIN/THE NEWS & OBSERVER/AP PHOTO

U.S. Chief Justice John Roberts Jr. hates gerrymandering cases. When courts overturn legislatures' redistricting maps, "you're taking these issues away from democracy" and deciding them on what "I can only describe as sociological gobbledygook," Roberts said in October during oral arguments in a Wisconsin redistricting case, *Gill v.*

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For years the U.S. Supreme Court has been unwilling to tackle partisan gerrymandering. That left state political parties free to redraw voting maps in egregious ways using ever more powerful software. But the high court may finally be ready to crack down on extreme cases of gerrymandering. It's taking up two cases this term, including the one in Wisconsin, where Democrats are challenging the Republican-drawn map used to elect the state assembly. The other, *Benisek v. Lamone*, which it will hear this spring, concerns a Democrat-drawn congressional district in Maryland.

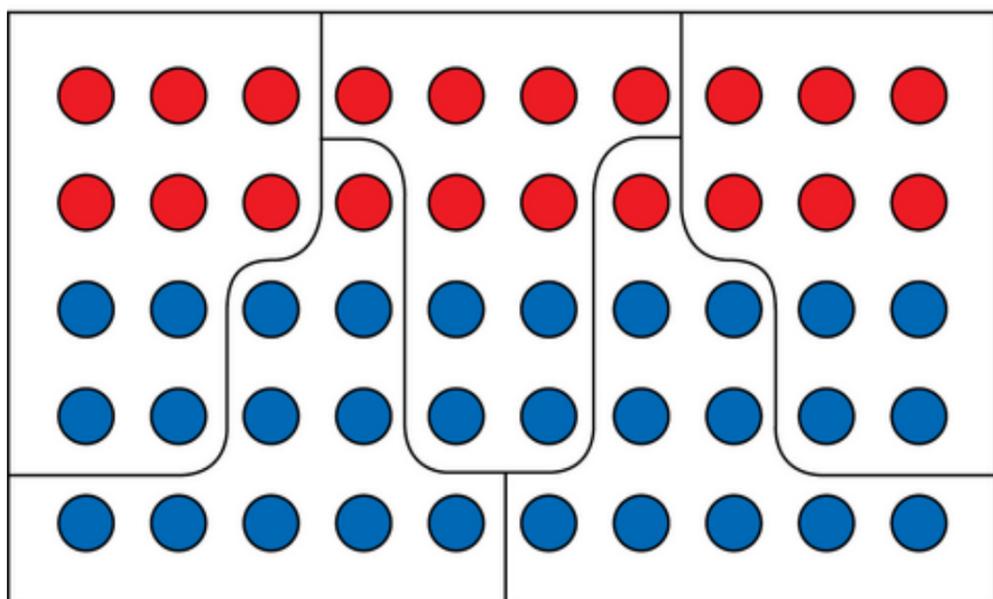
Political scientists, statisticians, and other number-crunchers have worked hard to reassure the justices that it's possible to decide cases in a way that won't expose them to accusations of playing politics. The same sophisticated tools that legislatures use to give their party an advantage can also be used to judge when a party has verged into the realm of unconstitutional bias. "We totally know how to do this," says [Gary King](https://gking.harvard.edu/) , a political scientist at Harvard, who's consulted for both major parties as well as independents and courts on redistricting issues.

Lower courts are also pressuring the high court to act. On Jan. 9 a three-judge federal panel came down against gerrymandering in a North Carolina case, saying judges should be open to "new academic theories"—a message that seemed to be aimed at the Supreme Court.

## How to Game a District

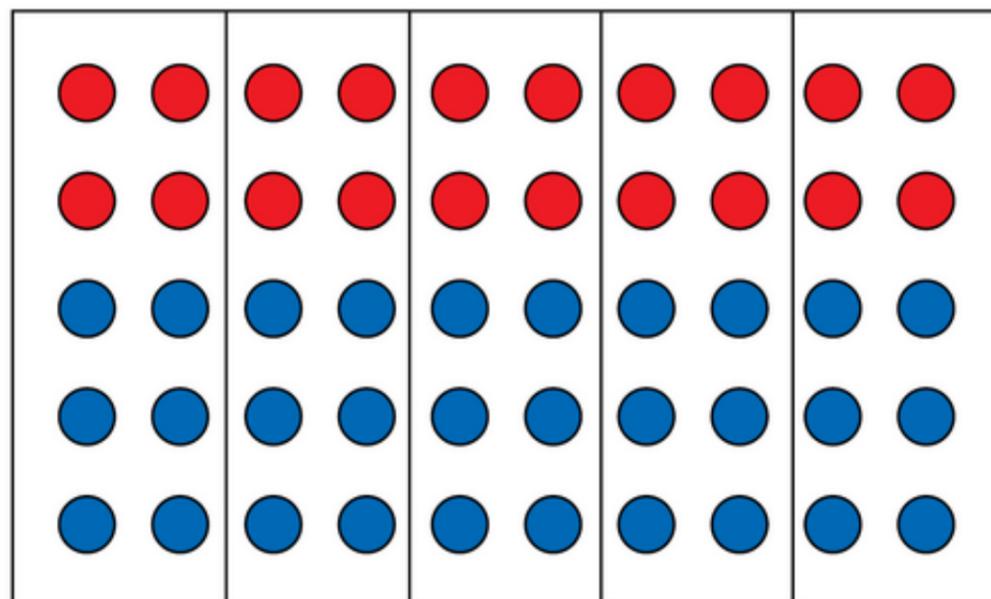
A beginner's guide to gerrymandering from the *Journal of Law & Politics*

### REPUBLICAN PLAN



Republicans account for 40 percent of

### DEMOCRATIC PLAN



In the same hypothetical state,

the voters in this hypothetical state but still manage to have majorities in three of the five congressional districts. They do this by drawing the boundaries to “pack” the majority Democrats into just two of the districts.

Democrats make up 60 percent of the voters, but they have majorities in all five of the congressional districts. How? By drawing the boundaries to “crack” concentrations of Republican voters, making them a minority in each district.

GRAPHIC BY BLOOMBERG BUSINESSWEEK

Those theories aren’t all new. King and a co-author, Robert Browning, came up with the principle of “partisan symmetry” in 1987. It says, simply enough, that districts should be drawn so the parties would achieve the same outcomes given the same number of votes. For example, if the lines are drawn such that Republicans win 80 percent of a state’s seats when they have only 55 percent of the votes, that’s fine—as long as Democrats would also win 80 percent of the seats when they have 55 percent of the votes.

King and two colleagues offered the partisan symmetry standard to the Supreme Court in a 2006 redistricting case, *LULAC v. Perry* <<https://www.law.cornell.edu/supct/html/05-204.ZS.html>> . By King’s count, it was discussed and positively evaluated in three of the opinions, including the plurality one. Justice John Paul Stevens (since retired), joined by Justice Stephen Breyer, said it could be “a helpful (though certainly not talismanic) tool.” In the Wisconsin case, the Democrats say one way to assess partisan symmetry is through a measure called the “efficiency gap,” which looks at how many votes a party “wastes” by winning one district with a large margin while losing another by a whisker.

King argues that the Supreme Court should avoid drawing a sharp line between what’s acceptable and not, because that would encourage redistricters to “crawl right up to the edge.” Instead, he says, it should state the principle of partisan symmetry and make clear to both parties that if they violate it, the courts could take over redistricting in their states. “They’ll be scared to death” and will stay well away from the edge, King says.

As usual, the swing vote could be Justice Anthony Kennedy. In a 2004 case, *Vieth v. Jubelirer* <<https://www.law.cornell.edu/supct/html/02-1580.ZS.html>> , he joined a majority in upholding a Pennsylvania congressional map. But he refused to say that partisan gerrymandering claims aren’t “justiciable”—that is, courts aren’t capable of resolving them. That left open the possibility a standard could be developed. In the *Gill v. Whitford* arguments, Kennedy pushed a lawyer for the Republicans to concede that it would be unconstitutional for a state to pass a redistricting law explicitly written to favor one party or the other. That’s a step toward saying that extremely partisan redistricting could also be unconstitutional.

Kennedy, 81, is “getting older, and there’s a good reason to think he might want to establish a legacy to American democracy” by helping craft a standard for partisan gerrymandering, King says. If the court doesn’t come down on gerrymandering this term, it’s hard to see when it would. Says Richard Hasen, an election-law expert at the University of California at Irvine School of Law: “This is the use-it-or-lose-it moment.”

