



Spring 2014

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### Recommended Citation

Levi A. Monagle, *Undermining Checks and Balances: the Fallout of Maestas v. Hall*, 44 N.M. L. Rev. 277 (2014).

Available at: <https://digitalrepository.unm.edu/nmlr/vol44/iss1/11>

# UNDERMINING CHECKS AND BALANCES: THE FALLOUT OF *MAESTAS V. HALL*

Levi A. Monagle\*

“As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.” – Justice Byron White

## I. INTRODUCTION

*Maestas v. Hall* is a case about an unfortunate but uncontroversial failure of a very political process: the devolution of legislative redistricting into partisan gerrymandering. More importantly, it is a case about a judiciary struggling to find an apolitical solution to a political puzzle—succeeding in some respects and failing in others. At its high points, the opinion enshrines traditional redistricting principles alongside the equal-population principle and explicitly acknowledges the problems partisan redistricting poses. At its low points, the opinion undermines the role of the governor in the legislative process and gives undue deference to a simple legislative majority which failed to construct a single partisan-neutral plan.

This note uses *Maestas v. Hall* and the litigation surrounding it as a case study of the tendency of legislative redistricting to devolve into partisan gerrymandering.<sup>1</sup> It criticizes the New Mexico Supreme Court for undermining a longstanding external check on legislative power by minimizing the executive role in the redistricting process.<sup>2</sup> At the same time, it praises the court for reviving an internal check on legislative power by requiring consideration of traditional redistricting principles in future legislative redistricting.<sup>3</sup> Ultimately, the note argues that legislatures are unfit to manage redistricting, and suggests that the courts should involve themselves in the redistricting process whenever they have the opportunity. It concludes by briefly discussing particular methods of combatting partisan gerrymandering in future redistricting controversies.<sup>4</sup>

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\* Class of 2014, University of New Mexico School of Law. My sincerest thanks to Professor Michael Browde for providing me with a moment of clarity.

1. See *infra* Part V.A.

2. See *infra* Part V.B.

3. See *infra* note 103.

4. See *infra* Part V.C.

## II. BACKGROUND

### A. The Legal Framework of Redistricting

In *Reynolds v. Sims*,<sup>5</sup> the U.S. Supreme Court held that both houses of state legislatures must be apportioned on the basis of population, and that state legislative redistricting plans must construct districts “as nearly of equal population as is practicable.”<sup>6</sup> The purpose of this “equal-population principle” is to prevent vote dilution.<sup>7</sup> The Supreme Court has held that vote dilution violates the Equal Protection Clause.<sup>8</sup>

While adherence to the equal-population principle is the overriding objective in congressional redistricting,<sup>9</sup> state redistricting plans need only meet the standard of *substantial* population equality.<sup>10</sup> In either case, “mathematical nicety is not a constitutional requisite.”<sup>11</sup> A redistricting analysis at the state level may lend greater weight to factors beyond the equal-population principle than may a congressional redistricting analysis,<sup>12</sup> so long as these factors further rational state policies<sup>13</sup> and do not violate the equal-population principle.<sup>14</sup> A redistricting plan with population deviations over ten percent establishes a *prima facie* Equal Protection Clause violation.<sup>15</sup> Court-drawn plans are held to stricter compliance with the equal population principle than legislative plans,<sup>16</sup> and deviations from the equal population principle in court-drawn plans must be specifically justified under historically-significant state policies.<sup>17</sup>

In state redistricting cases, one factor that must be considered (in addition to the equal-population principle) is adherence to the require-

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5. 377 U.S. 533 (1964).

6. *Id.* at 577.

7. *Id.* The equal-population principle is also known as the “one person, one vote” doctrine, *see* *Maestas v. Hall*, 2012-NMSC-006, ¶ 1, 274 P.3d 66, 70. *See also id.* ¶ 14 (vote dilution is accomplished “by means of state districting plans that allocate legislative seats to districts of unequal populations, thereby diminishing the relative voting strength of each voter in overpopulated districts”).

8. *Reynolds*, 377 U.S. at 566.

9. *Karcher v. Daggett*, 462 U.S. 725, 732–33 (1983).

10. *See Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

11. *Reynolds*, 377 U.S. at 569.

12. *Id.* at 578; *see also Mahan v. Howell*, 410 U.S. 315, 321 (1973) (citing *Reynolds* in support of the position that state redistricting is more flexible than congressional redistricting).

13. *Reynolds*, 377 U.S. at 579.

14. *Id.* at 581.

15. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983).

16. *See generally Chapman v. Meier*, 420 U.S. 1, 26 (1975).

17. *See Connor v. Finch*, 431 U.S. 407, 419–20 (1977).

ments of the Voting Rights Act.<sup>18</sup> The Voting Rights Act of 1965 prohibits states from using any electoral practice that might deny or abridge voting rights on a racial basis.<sup>19</sup> A minority group challenging a redistricting scheme under the Voting Rights Act must make three threshold showings: 1) that the group is sufficiently large and compact to form a majority in a single-member district; 2) that the group is politically cohesive; and 3) that a white majority under the current districting scheme “votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.”<sup>20</sup> Once these criteria are met, the key inquiry is whether the minority group has “an equal opportunity to participate in the political processes and to elect candidates of their choice.”<sup>21</sup>

### *B. The Legal Framework of Partisan Gerrymandering*

Partisan gerrymandering is “the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>22</sup> It is a destructive practice, for “to the extent that a citizen’s right to vote is debased, he is that much less a citizen.”<sup>23</sup> Unfortunately, such gerrymandering is “painfully ubiquitous.”<sup>24</sup> It follows each decennial census,<sup>25</sup> as the majority party tries to strengthen its position in light of (or in spite of) shifts in the partisan composition of the relevant electorate. Until 1986, the U.S. Supreme Court gave little attention to partisan gerrymandering,<sup>26</sup> focusing instead on racial gerrymandering.<sup>27</sup> However, in *Davis v. Bandemer*,<sup>28</sup> the Court held that partisan gerrymandering claims were subject to judicial consideration under the same logic as racial gerrymandering claims.<sup>29</sup> The Court also held that partisan gerrymandering could violate the Equal Protection Clause if a plaintiff could

18. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

19. 42 U.S.C. §§ 1973–1973bb-1.

20. *Thornburg*, 478 U.S. at 50–51.

21. *Id.* at 44.

22. BLACK’S LAW DICTIONARY 756 (9th ed. 2010).

23. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

24. Charles Backstrom, Samuel Krislov & Leonard Robins, *Desperately Seeking Standards: The Court’s Frustrating Attempts to Limit Political Gerrymandering*, PS: POLITICAL SCIENCE AND POLITICS, Vol. 39, No. 3 409, 409 (July 2006).

25. Heather Lamparter, *An Overview of Partisan Gerrymandering Litigation in the Last Twenty Years*, 43 DUQ. L. REV. 455, 455 (2004–2005).

26. *Id.*

27. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).

28. 478 U.S. 109 (1986).

29. *Id.* at 125.

“prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>30</sup>

The Court noted in *Bandemer* that it should not be difficult to prove intentional discrimination against an opposition party so long as the redistricting plan at issue had been legislatively drafted.<sup>31</sup> The Court went so far as to *assume* that the state legislature in *Bandemer* had acted with discriminatory purpose (reinforcing the message that showing discriminatory purpose was an easy requirement to meet);<sup>32</sup> however, the Court overruled the district court’s holding that *any* adverse effect on a party’s influence satisfied the second requirement of the Equal Protection analysis.<sup>33</sup> Ultimately, the Court struggled to set out a clear standard for establishing discriminatory effect, stating broadly that discriminatory effect “must be supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process.”<sup>34</sup>

The *Bandemer* decision was not particularly useful to the lower courts: between 1986 and 2004, not a single redistricting plan was struck down as a partisan gerrymander under *Bandemer*.<sup>35</sup> In 2004, the U.S. Supreme Court revisited the issue of partisan gerrymandering in *Vieth v. Jubelirer*.<sup>36</sup> A plurality of the Court (in an opinion authored by Justice Scalia) argued that the history of irresolution surrounding partisan gerrymandering claims made it clear that there were in fact “no judicially discernible and manageable standards” for adjudicating such claims.<sup>37</sup> Justice Scalia characterized the history of the *Bandemer* test as “one long record of puzzlement and consternation”<sup>38</sup> and observed that “the test has been criticized for its indeterminacy by a host of academic commentators.”<sup>39</sup> Justice Kennedy, as a fifth vote concurring in the judgment, wrote separately that he was not willing to foreclose the possibility that some judicially workable standard might eventually be found.<sup>40</sup> The status of

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30. *Id.* at 127.

31. *Id.* at 129.

32. *Id.* at 141.

33. *Id.* at 129–30.

34. *Id.* at 133.

35. Lamparter, *supra* note 25, at 457 (citing James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELEC. L. J. 643, 644 (Winter 2004)).

36. 541 U.S. 267 (2004).

37. *Id.* at 281.

38. *Id.* at 282.

39. *Id.* at 283 (citing L. Tribe, AMERICAN CONSTITUTIONAL LAW § 13–9, p. 1083 (2d ed. 1988)).

40. *Id.* at 306 (Kennedy, J., concurring in the judgment).

partisan gerrymandering as a valid claim in federal court after *Vieth* is tenuous at best.<sup>41</sup>

### III. THE 2011 HOUSE REDISTRICTING BATTLE

Members of the New Mexico House of Representatives are elected from seventy compact and contiguous single-member districts,<sup>42</sup> and the Legislature has the decennial responsibility to redraw district lines in keeping with the federal census.<sup>43</sup> However, when a legislature fails to redraw district lines in compliance with Constitutional requirements, the courts may assume the legislature's redistricting responsibilities.<sup>44</sup> The most important of these requirements is that legislatures draw districts in compliance with the "equal population principle."<sup>45</sup>

Following the 2010 federal census, the majority-Democratic Legislature passed a redistricting bill—House Bill 39.<sup>46</sup> The bill did not receive a single Republican vote in its favor.<sup>47</sup> It was vetoed by Republican Governor Susana Martinez, who claimed that the redistricting scheme violated the equal-population principle and that it did so "for purely partisan reasons."<sup>48</sup>

Various groups challenged the constitutionality of the existing redistricting map.<sup>49</sup> Rather than deal with each of these cases separately, the supreme court consolidated all the pending redistricting cases under one caption<sup>50</sup> and tasked retired District Judge James Hall with creating a

41. The issue of a judicially manageable standard for political gerrymandering claims was reexamined in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), but the Supreme Court continued to rely on *Vieth*.

42. N.M. CONST. art. IV, § 3(C); N.M.S.A. 1978, § 2-7C-3 (1991).

43. N.M. CONST. art. IV, § 3(D).

44. See *Baker v. Carr*, 369 U.S. 186 (1962).

45. See *supra* Part II.A.

46. *Maestas*, 2012-NMSC-006, ¶ 2. HB 39 will generally be referred to as "the Legislative Plan," as it is in parties' briefs and in the statements of Judge Hall and the New Mexico Supreme Court.

47. *Maestas*, 2012-NMSC-006, ¶ 8.

48. See House Executive Message No. 11 (Oct. 7, 2011) at 2, stating that "the only way to avoid eliminating a district in the north central region and providing the appropriate additional new district on the Westside of Albuquerque was to grossly overpopulate the Albuquerque districts, while simultaneously under-populating the districts in north central New Mexico."

49. *Maestas*, 2012-NMSC-006, ¶ 9.

50. The pending apportionment cases were consolidated under the caption of *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. D. Ct. January 3, 2011). Judge Hall's initial opinion in *Egolf* was divided into two sections (Findings of Fact and Conclusions of Law) with numbered paragraphs. Judge Hall's remand opinion in *Egolf* was

House redistricting plan that passed constitutional muster.<sup>51</sup> Six complete redistricting plans were presented at the outset of the trial.<sup>52</sup> Nine additional alternative plans were eventually produced.<sup>53</sup> Representatives of various Native American tribes also submitted a partial plan addressing their concerns with the current redistricting scheme.<sup>54</sup> This plan was referred to as the “Multi-Tribal/Navajo Nation Plan.”<sup>55</sup>

After eight days of testimony,<sup>56</sup> Judge Hall adopted the Executive Respondents’ Alternate Plan 3.<sup>57</sup> In his opinion, Judge Hall held that court-ordered redistricting required adherence to a *de minimis* population deviation standard<sup>58</sup> (i.e., strict adherence to the equal-population principle),<sup>59</sup> and that in instances of court-ordered redistricting even minor deviations from ideal district population required careful justification.<sup>60</sup>

Judge Hall proceeded to consider the claims of the Multi-Tribal/Navajo Nation Petitioners. He found that the current redistricting scheme violated the Voting Rights Act with regard to the state’s Native American population,<sup>61</sup> that the Multi-Tribal/Navajo Nation Plan effectively remedied the violations,<sup>62</sup> and that the greater-than-*de minimis* population deviations under the Multi-Tribal/Navajo Nation Plan were justified by

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attached as an appendix to the New Mexico Supreme Court’s opinion in *Maestas*. For the sake of clarity, citations to Judge Hall’s initial opinion in *Egolf* will differentiate between the two sections of that opinion (e.g., “*Egolf*, No. D-101-CV-2011-02942, Findings of Fact ¶ 8”); citations to Judge Hall’s remand decision will cite to the appropriate page of the *Maestas* appendix.

51. *Maestas*, 2012-NMSC-006, ¶ 9.

52. *Id.* ¶ 10. These were the plans originally presented: 1) the Legislative Plan (HB 39); 2) the Executive Plan; 3) the James Plan; 4) the Sena Plan; 5) the Egolf Plan; and 6) the *Maestas* Plan.

53. *Egolf*, No. D-101-CV-2011-02942, Findings of Fact ¶ 28.

54. *Maestas*, 2012-NMSC-006, ¶ 10.

55. *Id.*

56. *Id.* ¶ 3.

57. *Id.* ¶ 13.

58. *Egolf*, No. D-101-CV-2011-02942, Conclusions of Law ¶ 8.

59. *Chapman v. Meier*, 420 U.S. 1, 27 (1975). “The population deviation of a district is the percentage by which a district’s population is above or below the ideal population” under the equal-population principle. *Maestas*, 2012-NMSC-006, ¶ 23. The ideal population is calculated by dividing a state’s total population by the number of districts being drawn. *Id.* ¶ 5.

60. *Connor v. Finch*, 431 U.S. 407, 419–20 (1977).

61. *Egolf*, No. D-101-CV-2011-02942, Conclusions of Law ¶ 22.

62. *Id.* ¶ 23.

compliance with the Voting Rights Act<sup>63</sup> and furtherance of other significant state policies.<sup>64</sup>

Judge Hall found that the Legislative Plan—the plan originally vetoed by Governor Martinez—contained population deviations that could not be justified by “historically significant state policy or unique features,”<sup>65</sup> and that the Egolf and Maestas Plans (which used the Legislative Plan as a starting point)<sup>66</sup> suffered from the same defects.<sup>67</sup> Though each of these plans remedied existing Voting Rights Act violations by incorporating the Multi-Tribal/Navajo Nation Plan,<sup>68</sup> they all maintained population deviations in districts not affected by that plan (and unnecessary to its furtherance) and were thus unsatisfactory to the court.<sup>69</sup> However, incorporation of the Multi-Tribal/Navajo Nation Plan into the Legislative, Egolf, and Maestas Plans did reassure Judge Hall that the State had a significant interest in the protection of Native American voting rights and that some population deviations were necessary to secure those rights.<sup>70</sup>

In his initial decision, Judge Hall noted that many of the unjustified population deviations in the Legislative, Egolf, and Maestas Plans appeared rooted in partisan bias—in the desire of the Democratic majority to preserve Democratic strongholds in the north-central part of the state despite the fact that these districts were significantly underpopulated.<sup>71</sup> Although the plans’ authors eventually attempted to remedy this partisan underpopulation by consolidating a north-central district, Judge Hall noted similar partisan bias in the revised plans’ proposed incumbent pairings<sup>72</sup> and (finding similar bias similarly unacceptable) turned to the Executive’s proposed plans.

Judge Hall noted that while the original Executive Plan could not be adopted for failure to remedy the violations of the Voting Rights Act detailed in the Multi-Tribal/Navajo Nation Plan,<sup>73</sup> it “recognize[d] the importance of low population deviations in court-ordered plans.”<sup>74</sup> Judge Hall mentioned no partisan concerns regarding the Executive Plan. Thus, Judge Hall adopted Executive Alternate Plan 3, which incorporated the

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63. *Id.* ¶ 24.

64. *Id.*

65. *Id.*

66. *Id.* ¶ 29.

67. *Id.* ¶¶ 29–30.

68. *Id.* ¶ 27.

69. *Id.*

70. *Id.* ¶ 28.

71. *Egolf*, No. D-101-CV-2011-02942, Findings of Fact ¶¶ 32–41.

72. *Id.* ¶¶ 105, 111.

73. *Egolf*, No. D-101-CV-2011-02942, Conclusions of Law ¶ 32.

74. *Id.* ¶ 33.



Multi-Tribal/Navajo Nation Plan into the original Executive Plan, reasoning that it “properly place[d] the highest priority on population equality and compliance with the Voting Rights Act as required by law.”<sup>75</sup>

The Maestas and Egolf Petitioners petitioned for a writ of superintending control, requesting that the New Mexico Supreme Court assume jurisdiction over the case and either remand it to Judge Hall with instructions regarding the proper legal standards for court-ordered redistricting or reverse Judge Hall and adopt a different plan altogether.<sup>76</sup> Concerned that the dispute might delay House elections, the New Mexico Supreme Court granted the petition and established an expedited briefing schedule.<sup>77</sup>

#### IV. DECISION AND RATIONALE

##### A. *Standard of Review: “Thoughtful Consideration”*

In his initial decision, Judge Hall held that the Legislative Plan was not entitled to deference because it had not successfully navigated the legislative process (i.e., been signed by the Governor) and become law.<sup>78</sup> On appeal in *Maestas*, the Legislative Petitioners contested the holding, arguing that “thoughtful consideration” should entail some degree of deference to the Legislative Plan. The Legislative Petitioners argued that redistricting, as a political task that requires the careful balancing of competing interests, is within the Legislature’s purview regardless of the Executive’s participation.<sup>79</sup> The Legislative Petitioners focused on the importance of public deliberation, transparency of process, and opportunity for public input, and argued that their plan was satisfactory on all three counts.<sup>80</sup> Finally, the Legislative Petitioners appealed to “the will of the people” and argued that the “thoughtful consideration” standard “requires that a Legislative Plan be adopted by the Court if it is consistent with the law, follows the last clear expressions of State Policy on redis-

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75. *Id.* ¶¶ 33–34.

76. *Maestas*, 2012-NMSC-006, ¶ 3.

77. *Id.* ¶ 4.

78. *Egolf*, No. D-101-CV-2011-02942, Conclusions of Law, ¶ 11.

79. Petitioners’ Opening Brief at 33 (N.M. Sup. Ct. No. 33,387), 2012 WL 3236221, at \*33 (citing *Perry v. Perez*, 132 S.Ct. 934, 941 (2012)).

80. *Id.* at 35, 2012 WL 3236221, at \*35 (“The Legislature’s plan is entitled to heightened consideration . . . because it is the only plan which is the product of the open and transparent legislative process and the only plan which represents a balancing and reconciliation of competing interests undertaken by the people’s representatives.”).

tricting, avoids radical or partisan change, and respects other traditional redistricting principles[.]”<sup>81</sup>

The Executive Respondents argued that Judge Hall’s understanding of the “thoughtful consideration” standard should be upheld,<sup>82</sup> and that to hold otherwise (i.e., to equate “thoughtful consideration” with significant deference) would allow partisan legislatures to engage in end-runs around executive vetoes.<sup>83</sup> Since governors as well as legislatures are “integral and indispensable parts of the legislative process,”<sup>84</sup> the deferential standard proposed by the Legislative Petitioners was premised on an inconsistency: claiming adherence to the legislative process as a justification for ignoring an indispensable step in the legislative process. Finally, the Executive Respondents argued that since “thoughtful consideration” was not a deferential standard, it was proper of Judge Hall to disregard the Legislative Plan due to its refusal to correct systematic under-population of districts in the north-central part of the state.<sup>85</sup>

*Maestas* seemed to adopt the Legislative Petitioners’ interpretation of “thoughtful consideration.” The court stated that “it would be unacceptable for courts to muzzle the voice of the people simply because the Legislature was unable, *for whatever reason*, to have its redistricting plan become law.”<sup>86</sup> (Of course, the “reason” for the Legislature’s inability to have its redistricting plan become law was perfectly clear—particularly to the Republican legislators and citizens adversely affected by its partisanship). The court also drew directly from the Legislative Petitioners’ arguments regarding the importance of public comment, open deliberation, and transparency, and reiterated the argument that legislatures rather than courts were the proper balancers of competing political interests.<sup>87</sup> The supreme court thus incorporated each of the Legislative Petitioners’

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81. *Id.* at 31, 2012 WL 3236221, at \*31 (emphasis added).

82. Respondents’ Opening Brief at 28 (N.M. Sup. Ct. No. 33,387), 2012 WL 3307078, at \*28.

83. *Id.* at 31, 2012 WL 3307078, at \*31 (arguing that if thoughtful consideration were to be equated with deference, “a partisan legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the court defer to their proposal”).

84. *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982); *see also* *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197 (1972) (indicating that neither the preferred redistricting plan of a governor nor the preferred redistricting plan of a state legislature were entitled to deference absent one plan’s successful navigation of the full legislative process). Interestingly, the court in *Beens* indicated that a *governor’s* preferred redistricting plan could be entitled to the same “thoughtful consideration” as a legislature’s preferred redistricting plan.

85. Respondents’ Opening Brief at 32, 2012 WL 3307078, at \*31.

86. *Maestas*, 2012-NMSC-006, ¶ 32 (emphasis added).

87. *Id.*

three primary arguments for deference into the opinion (and failed to take account of any of the Executive Respondents' arguments to the contrary). The court then transitioned into a discussion of the state policies which might properly justify deviations from the "one man, one vote" principle.<sup>88</sup>

*B. Substantive Issues: De minimis Variation, Redistricting Objectives, and Partisan Bias*

Beginning with Judge Hall's initial decision,<sup>89</sup> extending to the supreme court's review of that decision in *Maestas v. Hall*, and concluding with Judge Hall's decision on remand, each court faced three basic questions. First, what is the scope and substance of the *de minimis* variation standard?<sup>90</sup> Second, what weight is to be given to "traditional redistricting principles" versus the "one man, one vote" principle? Finally, what constitutes "partisan bias" or a "partisan plan?"

Because Judge Hall's findings of fact regarding the Voting Rights Act violations alleged by the Multi-Tribal/Navajo Nation Plan were not challenged on appeal, the court adopted the Multi-Tribal/Navajo Nation Plan and said that any redistricting scheme eventually adopted would have to accommodate that plan.<sup>91</sup> The question then turned to the relative importance of the equal-population principle vis a vis "legitimate and rational state policies" which might result in increased population deviations.<sup>92</sup>

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88. It is unclear whether the supreme court meant for the direct transition to a discussion of possible reasons for deviation to suggest a limiting principle regarding the scope of deference under "thoughtful consideration," or whether the supreme court saw a discussion of "the will of the people" (in the context of legislative deference) as a good mood-setting introduction to a discussion of delineated policies for deviation and inadvertently instituted a policy of deference *without* a limiting principle.

89. *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. D. Ct. January 3, 2011).

90. *Chapman v. Meier*, 420 U.S. 1 (1975).

91. *Maestas*, 2012-NMSC-006, ¶ 18; on appeal, the Egolf Petitioners questioned whether, based on his findings of fact, Judge Hall had adequately accounted for the Hispanic community of Clovis in his Voting Rights Act analysis. Citing the decision of a federal three-judge panel in *Sanchez v. King*, No. 82-0067-M (D.N.M. 1984) (finding that Clovis' Hispanic population had suffered an array of racial and ethnic discrimination), the court held that Judge Hall should provide on remand for "an effective majority-minority district in and around the Clovis area unless specific findings are made . . . that Section 2 Voting Rights Act considerations are no longer warranted." *Maestas*, 2012-NMSC-006, ¶ 20. For Judge Hall's response, see text accompanying *supra* notes 80–86.

92. *Maestas*, 2012-NMSC-006, ¶ 21.

The Legislative Petitioners argued that Judge Hall had erred in applying a *de minimis* population deviation standard,<sup>93</sup> that that standard only applied to redistricting by federal courts,<sup>94</sup> and that the *de minimis* standard should not be applied by a court when doing so would override legitimate and rational state policies not in conflict with the Constitution or the Voting Rights Act.<sup>95</sup> For their part, the Executive Respondents argued that the *de minimis* standard applied to *all* courts engaged in redistricting<sup>96</sup> because more stringent standards were necessary when the judiciary became embroiled in the quintessentially legislative function of political interest-balancing.<sup>97</sup>

The New Mexico Supreme Court adopted the Legislative Petitioners' position and overruled Judge Hall. It held that under U.S. Supreme Court precedent, courts engaged in redistricting are required to consider legitimate and rational state policies "whenever adherence to state policy does not detract from the requirements of the Federal Constitution."<sup>98</sup> The court affirmed Judge Hall in acknowledging the *de minimis* population deviation standard for all court-ordered redistricting.<sup>99</sup> However, the court noted that the U.S. Supreme Court had not given clear definition to that standard<sup>100</sup> and that other court-approved plans generally contained population deviations between five and ten percent.<sup>101</sup>

The court then turned to the question of whether "legitimate and rational state policies" could justify greater-than-*de minimis* population deviations in court-ordered redistricting schemes in New Mexico. It recognized the legitimacy and rationality of a number of state policies contained in the bipartisan New Mexico Legislative Council redistricting guidelines,<sup>102</sup> including the non-division of precincts, preservation of recognized communities of interest, and the consideration of geographic

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93. Petitioners' Opening Brief at 9, 2012 WL 3236221, at \*9.

94. *Id.* at 15, 2012 WL 3236221, at \*15.

95. *Id.* at 19, 2012 WL 3236221, at \*19.

96. Respondents' Opening Brief at 23, 2012 WL 3307078 at \*23. The Executive Respondents cited to two New Hampshire redistricting cases in support of this argument: *Below v. Gardner*, 963 A.2d 785, 791 (N.H. 2002), and *Burling v. Chandler*, 804 A.2d 471, 478 (N.H. 2002).

97. Respondents' Opening Brief at 22, 2012 WL 3307078 at \*22.

98. *Maestas*, 2012-NMSC-006, ¶ 21 (citing *White v. Weiser*, 412 U.S. 783, 795 (1973)).

99. *Id.* ¶ 25.

100. *Id.* ¶ 26.

101. *Id.* ¶ 26, n.2 (citing cases).

102. New Mexico Legislative Council, *Guidelines for the Development of State and Congressional Redistricting Plans*, (January 17, 2011), available at <http://www.nmlegis.gov/lcs/redcensus/docs/Approved%20Redistricting%20Guidelines.pdf>.

boundaries.<sup>103</sup> After discussing the particular application of some of the terms contained in those guidelines,<sup>104</sup> the court held that courts engaged in redistricting could and should<sup>105</sup> deviate from the equal-population principle in furtherance of rational legislative policies, provided that those policies did not conflict with the constitution or the Voting Rights Act.<sup>106</sup>

Noting the importance of apparent and actual neutrality<sup>107</sup> in the politically charged endeavor of redistricting, the court was quick to note that partisan plans should not be adopted, and that “a court’s adoption of a plan that represents one political party’s idea of how district boundaries should be drawn does not conform to the principle of judicial independence and neutrality.”<sup>108</sup> While the court recognized that Judge Hall had scrutinized many of the proffered plans for such partisan bias,<sup>109</sup> it observed that he had lent insufficient attention to partisan bias in Executive Alternate Plan 3 (due in part to the fact that it had been introduced into evidence at the eleventh hour, “after the political science experts who had scrutinized the [other] plans . . . were no longer available to testify”).<sup>110</sup> The court then proceeded to detail a number of partisan problems with Executive Alternate Plan 3.<sup>111</sup>

Because the court ultimately concluded that Judge Hall thought himself too closely bound by the equal-population principle<sup>112</sup> the case

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103. *Id.* The guidelines indicate that plans must provide districts of substantially equal population, that plans shall not split precincts, that plans must be in compliance with the Voting Rights Act, that plans shall only use single-member districts, and that plans shall draw districts “consistent with traditional districting principles” (including making efforts to preserve communities of interest, considering political and geographic boundaries, preserving existing districts where possible, and considering the residency of incumbents).

104. *Maestas*, 2012-NMSC-006, ¶¶ 35–38.

105. *Id.* ¶ 39 (“By only deviating [from the equal-population principle] for enunciated state policy reasons, the court complies with the constitution and furthers the state’s interests”).

106. *Id.*

107. *Id.* ¶ 31.

108. *Id.* ¶ 29.

109. *Id.* ¶ 4.

110. *Id.* ¶ 40.

111. *Id.* ¶¶ 40–42.

112. *Id.* ¶ 39. In the remand decision, Judge Hall observed that his findings and conclusions in the initial decision did not support this assertion of the court that he found himself “bound to a plus-or-minus one-percent population deviation with the sole exception of addressing the requirements of the Voting Rights Act.” Judge Hall further observed that the standard adopted by the court was the same standard that he had used in his initial decision, and that the deviation range of 6.68% in the initial plan was actually greater than the deviation ranges in two of the cases cited by the

was remanded to Judge Hall with specific instructions to “draw a partisan-neutral map that complies with [the equal-population principle], the requirements of the Voting Rights Act, *and considers other historical and legitimate state redistricting principles*.”<sup>113</sup> The court also instructed Judge Hall to incorporate the Multi-Tribal/Navajo Nation Plan into any redistricting map that he drew.<sup>114</sup>

In a terse remand decision, Judge Hall collapsed the supreme court’s discussion of deference to the Legislature into an observation that the supreme court (while adopting the language of the Legislative Petitioners’ arguments for deference) had not *specifically required* that deference and thus “agreed” that he “was not required to adopt the Legislative Plan as long as [he] gave that plan thoughtful consideration.”<sup>115</sup> Since Judge Hall found that he had given “thoughtful consideration” to the Legislative Plan in his first analysis, he did not reconsider it.<sup>116</sup> Judge Hall then proceeded to a second analysis with Executive Alternate Plan 3 (rather than the Legislative Plan) as his starting point.<sup>117</sup>

Judge Hall balked at the notion that he had concluded that he was “bound to a plus-or-minus-one-percent population deviation,”<sup>118</sup> noting that “the legal standard on population equality that was adopted and applied by this Court matches the supreme court’s recitation of the applicable law almost word-for-word.”<sup>119</sup> Nonetheless, in keeping with specific supreme court instructions<sup>120</sup> and armed with the added flexibility that the “new” population deviation standard afforded him, Judge Hall proceeded to reexamine the possibility of reunifying a number of recognized communities of interest that had been split under Executive Alternate Plan 3. Judge Hall ultimately made only minor changes to that plan.<sup>121</sup>

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court in arguing against the applicability of a  $\pm 1\%$  standard. *Maestas*, 2012-NMSC-006 app. at 32–45, 274 P.3d at 91.

113. *Maestas*, 2012-NMSC-006, ¶ 43(emphasis added).

114. *Id.*

115. *Maestas*, 2012-NMSC-006 app. at 32–45, 274 P.3d at 90.

116. *See id.* at 90 n.3. Judge Hall also observed that “the starting point for the creation of a final plan was left to [his] discretion” by the supreme court. *Id.*

117. *Id.*

118. *Id.* at 91 n.6.

119. *Id.*

120. *Maestas*, 2012-NMSC-006, ¶¶ 43–45.

121. *Maestas*, 2012-NMSC-006 app. at 32–45, 274 P.3d at 92–97.

## V. ANALYSIS & IMPLICATIONS

### A. *The Tendency of Redistricting to Devolve into Partisan Gerrymandering*

Redistricting is an inherently political process.<sup>122</sup> Every line drawn on a map of partisan voters has partisan effects.<sup>123</sup> It is not a question of intent: however lines are drawn, with or without partisan intent, they have partisan impact. In the words of Robert G. Dixon, Jr. (characterized by the *Bandemer* court as "one of the foremost scholars of reapportionment"<sup>124</sup>), "the key concept to grasp is that there are no neutral lines for legislative districts."<sup>125</sup>

Redistricting has traditionally been viewed as a proper function of the legislature because of its inherently political nature.<sup>126</sup> However, the longstanding use of redistricting to disenfranchise black voters has led to increased judicial scrutiny of redistricting.<sup>127</sup> The avidly partisan redistricting efforts of the political branches have come under increased scrutiny since the 1960s.<sup>128</sup> With the formulation of workable standards for the examination of proposed plans, the judiciary has incrementally assumed a more active role in the redistricting process.<sup>129</sup>

After *Vieth*, the future of partisan gerrymandering as a distinct claim is far from certain. Those interested in preventing partisan gerrymandering would be well advised to look to methods beyond private litigation to further their objectives. *Maestas* points to one such method: impeding partisan gerrymanders with an executive veto. The purpose of this note, then, is threefold: first, to emphasize the relative unfitness of legislatures

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122. In *Colegrove v. Green*, 328 U.S. 549, 554 (1946), Justice Felix Frankfurter observed that "[t]he one stark fact that emerges from a study of the history of [legislative] apportionment is its embroilment in politics, in the sense of party contests and party interests."

123. See Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 191, 193 (Arend Lijphart & Bernard Grofman eds., 1984) ("The necessity of drawing district lines present [sic] well-nigh intractable problems . . . no matter how they are drawn, some groups are advantaged and others are disadvantaged. Gerrymandering exacerbates, but does not create, this problem").

124. *Davis v. Bandemer*, 478 U.S. 109, 129 n.10 (1986).

125. Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7 (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds., 1982).

126. See, e.g., *White v. Weiser*, 412 U.S. 783, 795 (1973).

127. See *supra* note 27.

128. See *Baker v. Carr*, 369 U.S. 186 (1962).

129. See *Brown v. Thomson*, 462 U.S. 835 (1983); *Connor v. Finch*, 431 U.S. 407 (1977); *Chapman v. Mier*, 420 U.S. 1 (1975); *Reynolds v. Sims*, 377 U.S. 533 (1964).

to manage redistricting in a fair manner; second, to stress the importance of checks on legislative partisanship; and third, to urge state courts to embrace a more aggressive role in the redistricting process whenever the legislature and executive come to impasse.

The judiciary should not abdicate its responsibility for effectuating fairness and the appearance of fairness<sup>130</sup> to a branch of government more concerned with partisan advantage.<sup>131</sup> The Court in *Bandemer* stated that redistricting is “a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls.”<sup>132</sup> Effective removal of redistricting from legislative halls should in fact be the tacit goal whenever possible. While the New Mexico Supreme Court declined to take this step in *Maestas*, it is a step that the New Mexico courts *should* take to an increasing degree moving forward—in recognition of the reality that redistricting is a task well-suited to the judiciary and ill-suited to the legislature.

The alternative is for the judiciary to continue to promulgate the fiction that partisan legislatures can realistically be expected to produce redistricting plans that do not seek partisan advantage.<sup>133</sup> Common sense and available evidence do not support this premise: legal scholars and political scientists deride it; case-by-case evidence (including the evidence available from *Maestas*) undermines it; and the courts themselves evade it or question it outright.

At the academic level, the idea that partisan legislatures might produce non-partisan redistricting plans is viewed with great skepticism. Legal scholars have stated that “legislative dominance of the [redistricting] function is too often tantamount to a defendant’s self-determination of his guilt or innocence,” adding that “it is unrealistic to expect a body to legislate against its own interests.”<sup>134</sup> This view is shared by political scientists, who characterize legislative redistricting as “an obvious conflict of interest”<sup>135</sup>—an observation rooted in James Madison’s aphorism that no man should be a judge in his own case.<sup>136</sup> Other political scientists recog-

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130. *Maestas*, 2012-NMSC-006, ¶ 27.

131. See *infra* notes 134–53 and accompanying text.

132. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986).

133. The court states in *Maestas* that “the courts should not select a plan that seeks partisan advantage.” 2012-NMSC-006, ¶ 31.

134. Robert G. Dixon, Jr. & Gordon W. Hatheway, Jr., *The Seminal Issue in State Constitutional Revision: Reapportionment Method and Standards*, 10 WM. & MARY L. REV. 888, 905 (1968–69).

135. Gordon E. Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 257, 274 (Bernard Grofman & Arend Lijphart eds., 1986).

136. THE FEDERALIST No. 10 (James Madison).



nize that one of the traditional impediments to partisan gerrymandering—the complexity and difficulty of the task—has been largely eliminated by the invention of powerful redistricting software.<sup>137</sup> There is consensus among many experts that the task of redistricting should be transferred out of legislative hands—either to designated bipartisan committees<sup>138</sup> or to other bodies which do not have a vested interest in the outcome of redistricting.<sup>139</sup>

Case-by-case evidence of legislative redistricting drives the academic point home.<sup>140</sup> The litigation around *Maestas v. Hall* is replete with evidence of naked partisanship: Ben Lujan, the Democratic Speaker of the House of Representatives, specifically instructed his mapmaking consultant to develop a plan that “avoided eliminating a district in the [Democratic] north-central region of the state,”<sup>141</sup> even though the districts in the north-central region of the state were under-populated.<sup>142</sup> An expert witness testified that when the Executive Respondents were instructed by the court to incorporate the Multi-Tribal/Navajo Nation Plan into their existing plan, they “systematically increased Republican performance in several districts” in a manner “not made necessary by accommodating the

137. See Backstrom, Krislov & Robins, *supra* note 24, at 411 (“Complexity has historically been the real deterrent [to partisan gerrymandering]. But today’s computers effortlessly run through hundreds of alternative plans which would have required tedious human manipulation by expensive experts. The census and other data are usually obtainable by a few clicks of the mouse. Ingenious programs can match past voting patterns to current residential locations.”).

138. Dixon & Hatheway, *supra* note 134 (“The choice of bipartisan commissions has substantial justification, given the inherent deficiencies of legislative and gubernatorial dominance and the virtual nonexistence of the animal called the ‘nonpartisan.’”).

139. Baker, *supra* note 135 (“[T]ransferring the function of redrawing constituencies to noninvolved parties is a move considered basic by many . . . a key consideration should be a decisive role for nonlegislators.”).

140. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 113–18 (1986). The *Bandemer* court recounted how the Speaker of the House of Representatives of Indiana said that the driving motivation behind the majority’s redistricting map was “to save as many incumbent Republicans as possible. *Id.* at 117 n.5; see also Backstrom, Krislov & Robins, *supra* note 24, at 411–12 (discussing the severe partisan gerrymandering contested in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)); Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 849 (2012) (“In Illinois, private memorandums between the Democratic Congressional Campaign Committee and state legislative leadership offices instructed that a ‘critical part of the remapping process is altering the districts of incumbent Republicans to complicate their paths back to Washington.’” (citation omitted)).

141. *Egolf*, No. D-101-CV-2011-02942, Findings of Fact ¶ 32.

142. *Id.* ¶ 34.

tribal concerns.”<sup>143</sup> Ultimately, HB 39 passed through the House without a single Republican vote<sup>144</sup>—making it a per se partisan plan. Judge Hall found fatal partisan bias in the Legislative Plan,<sup>145</sup> the Egolf plans,<sup>146</sup> and the *Maestas* plans.<sup>147</sup> The court in *Maestas* found fatal partisan bias in Executive Alternate Plan 3,<sup>148</sup> criticizing improper incumbent pairings and a consolidation which created a “strongly partisan district.”<sup>149</sup>

In light of the case-by-case evidence of the tendency of redistricting to devolve into partisan gerrymandering, courts faced with the task of redistricting find themselves in the awkward position of paying lip service to legislative primacy while constantly striking down legislative plans for partisan bias. The court in *Maestas* wrote that while it was “the Legislature’s constitutional responsibility” to manage the redistricting project,<sup>150</sup> it was “because of the inability of our sister branches of government to find a way to work together” that “the judiciary in New Mexico finds itself embroiled in this political thicket.”<sup>151</sup> While arguing that partisan-neutral maps could in fact be crafted,<sup>152</sup> the court nonetheless required Judge Hall to “reject *all* of the previously submitted plans because of the political advantage sought by the parties”<sup>153</sup>—a clear admission that the political process had failed to produce a single partisan-neutral plan.

### B. Misguided Deference

Substantial evidence indicates that partisan legislatures will produce redistricting plans that seek partisan advantage.<sup>154</sup> At the same time, the New Mexico Supreme Court has stated in *Maestas* that redistricting plans that seek partisan advantage are unacceptable in the eyes of the state judiciary.<sup>155</sup> The nature of the impasse suggests its own solution—trans-

143. Petitioners’ Opening Brief at 25, 2012 WL 3236221, at \*25.

144. *Maestas*, 2012-NMSC-006, ¶ 8. See also *Bandemer*, 478 U.S. at 115 n.2 (noting that the redistricting plan in that case passed the Indiana legislature along party lines).

145. *Egolf*, No. D-101-CV-2011-02942, Findings of Fact ¶ 41.

146. *Id.* ¶ 105.

147. *Id.* ¶¶ 110–11. The fatal partisan bias in both plans came in the form of unfair incumbent pairings. For instance, one of the *Maestas* plans grouped three Republican incumbents into the same Roswell district. *Id.*

148. *Maestas*, 2012-NMSC-006, ¶ 40 (“[B]ecause of its own recognition that the plan contained significant partisan performance changes, the district court should have rejected Executive Alternate Plan 3 . . .”).

149. *Id.* ¶ 41.

150. *Id.* ¶ 6.

151. *Id.* ¶ 27.

152. *Id.* ¶ 43.

153. *Id.* ¶ 43 (emphasis added).

154. See *supra* Part IV.A.

155. *Maestas*, 2012-NMSC-006, ¶ 31.

ferring the redistricting task from the legislature to some more suitable body,<sup>156</sup> in keeping with the recommendations of legal scholars and political scientists alike.<sup>157</sup> Given its deep-seated concern for neutrality and fairness, the judiciary is an obvious candidate for future management of redistricting. However, under federal Supreme Court precedent, state legislatures have primary jurisdiction over state legislative redistricting, and state courts may not “pre-empt the legislative task.”<sup>158</sup> The question, then, is not whether courts can ignore the redistricting plans of the legislature altogether and simply craft their own—they cannot—but how much deference (if any) they should adopt in reviewing legislative redistricting plans crafted with partisan intent.

In *Maestas*, the “thoughtful consideration” standard became a proxy for the debate over how much judicial deference should be given to legislative redistricting plans.<sup>159</sup> The meaning of “thoughtful consideration” was strongly contested at the trial level.<sup>160</sup> A key point of contention was whether or not legislative plans had to be signed by the Governor and adopted into law in order to merit the deference that the Legislative Petitioners claimed was their due.<sup>161</sup> The Executive Respondents argued that the Governor was “integral and indispensable” to the legislative process,<sup>162</sup> and that the Legislative Plan was not entitled to deference because it had been vetoed by the Governor and never became law.<sup>163</sup> The Legislative Petitioners downplayed the significance of the Governor’s veto,<sup>164</sup> focusing instead on 1) the ability of the Legislature to balance competing political interests, 2) the Legislature as the vessel for “the will of the people,” and 3) the transparency of the Legislature’s process in inviting input for the Legislative Plan.<sup>165</sup>

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156. See *supra* text accompanying notes 138–139.

157. See *supra* notes 134–139 and accompanying text.

158. See *White v. Weiser*, 412 U.S. 783, 795 (1973); *Sixty-seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 195–201 (1972); *Ely v. Klahr*, 403 U.S. 108, 114 (1971); *Whitcomb v. Chavis*, 403 U.S. 124, 160–61 (1971).

159. See *Maestas*, 2012-NMSC-006, ¶ 32.

160. See *supra* Part III.A; the standard is also referred to in the parties’ briefs as “special consideration” or “heightened consideration.”

161. See *supra* note 78 and accompanying text.

162. *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982); see also *Beens*, 406 U.S. at 197 (indicating that neither the preferred redistricting plan of a governor nor the preferred redistricting plan of a state legislature were entitled to deference absent one plan’s successful navigation of the full legislative process).

163. Respondents’ Opening Brief at 30–31, 2012 WL 3307078, at \*30–31.

164. The issue of the gubernatorial veto was briefly addressed in Petitioners’ Opening Brief at 25–27, 2012 WL 3236221, at \*25–27.

165. See *supra* text accompanying notes 79–81.

The New Mexico Supreme Court made two mistakes when it adopted the Legislative Petitioners' deferential conception of "thoughtful consideration."<sup>166</sup> first, it undermined an *existing* check on legislative power by effectively writing the executive branch out of the redistricting process; second, it missed an opportunity to place an *additional* check on legislative power by failing to assert an aggressive judicial role in the redistricting process. As a result, the power to redistrict lies almost entirely (and certainly more than "primarily") in the hands of a legislature that is institutionally prone to abusing it.<sup>167</sup>

The court's first mistake is disturbing. In justifying its adoption of a deferential conception of "thoughtful consideration," the court stated that "the Legislature is the voice of the people, and it would be unacceptable for courts to muzzle the voice of the people simply because the Legislature was unable, *for whatever reason*, to have its redistricting plan become law."<sup>168</sup> This was a critical omission: the reason that the Legislature was "unable . . . to have its redistricting plan become law" was that *the Governor vetoed it*.<sup>169</sup> It was not as though the Legislature left its redistricting plan in its other pants when it went to obtain a gubernatorial signature, or as though the Legislature's dog ate the plan that the Governor intended to sign (if only anyone could remember what it said). An executive veto is a common, foreseeable, and constitutionally-enshrined<sup>170</sup> reason for the *non*-implementation of any piece of legislation, popular or not—and so designed as a key step in a system of checks and balances.<sup>171</sup>

By downplaying the practical significance of a gubernatorial veto, the court has undermined the well-established executive role in New Mexico's legislative process<sup>172</sup>—at least with regard to redistricting.<sup>173</sup> Moreover, it has done so on the basis of a highly questionable but

166. See *supra* text accompanying notes 86–88.

167. See *supra* notes 134–153 and accompanying text.

168. *Maestas*, 2012-NMSC-006, ¶ 32 (emphasis added).

169. See *supra* note 48 and accompanying text.

170. N.M. CONST. art. IV, § 22; U.S. CONST. art. 1, § 7.

171. See THE FEDERALIST NO. 51 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

172. The court's minimization of this most basic executive role is especially puzzling in light of its introductory acknowledgment that "there is no more important task for the Legislature *and the Governor* to perform than the decennial reapportionment of districts for state and national elective offices." *Maestas*, 2012-NMSC-006, ¶ 1 (emphasis added).

173. It remains an open question whether the same logic that supported a circumvention of the Executive role in the legislative process in the context of redistricting might be applied in other contexts.

broadly arguable premise—that the will of a simple majority of the Legislature, standing alone in the face of substantial internal opposition and an executive veto, nonetheless represents the “voice of the people” to a degree that merits judicial deference.<sup>174</sup> One of the most important purposes of the judiciary is to resist legislative wrongdoing<sup>175</sup>—to *deter* wrongdoing, rather than defer to it.<sup>176</sup> However, if a governor’s veto of a legislative redistricting plan is to be ignored by the courts, “a partisan state legislature could simply pass any [plan] it wanted, wait for a gubernatorial veto, file suit on the issue and have the court defer to their proposal.”<sup>177</sup> Downplaying the significance of an executive veto undermines the executive role in the legislative process, and may result in significant damage to New Mexico’s system of checks and balances.<sup>178</sup>

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174. This premise was criticized by Judge Sutin, writing in lone dissent: “I think the Majority is mistaken in thinking that the ‘public will’ is measured solely or even primarily from an un-enacted legislative plan. . . . The legislative plan passed with *all Republicans and some Democrats* voting against passage. The Governor, *elected by the will of the majority of voters*, vetoed [it].” *Maestas*, 2012-NMSC-006, ¶ 57 (Sutin, J., dissenting) (emphasis added).

175. See Honorable Gerald E. Rosen & Kyle W. Harding, *Reflections Upon Judicial Independence As We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution’s “Crown Jewel”*, 29 FORDHAM URBAN LAW JOURNAL 791, 798 (2001) (“The role of the judiciary is to protect against majority excess when that excess violates fundamental liberties. A judge need not give credence to a legal argument simply because it is supported by public opinion.”).

176. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he firmness of the judicial magistracy . . . not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.”).

177. Respondents’ Opening Brief at 31, 2012 WL 3307078, at \*31 (quoting *Carsens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982)). It should be noted that this direct circumvention did not ultimately come to pass in *Maestas*: while the court indicated that legislative plans should generally be granted deference so as to avoid the “muzzling” of “the voice of the people,” it did not order Judge Hall to grant such deference to the Legislative Plan that he had discounted in his initial decision. Some may take comfort from this result. Others may remain anxious over the seeming institution of a policy of judicial deference to simple legislative majorities—however subtly that policy is stated.

178. Ironically, it was the Legislative Petitioners that attempted a “checks and balances” argument in *Maestas*—but their argument appeared to contradict itself. On the one hand, the Legislative Plaintiffs claimed that “the Governor’s role with respect to passed legislation was limited to approving or vetoing the legislation,” Petitioners’ Opening Brief at 26, 2012 WL 3236221, at \*26 (citing *State ex rel. Clark v. Johnson*, 120 N.M. 562, 575 (1995)); on the other hand, they claimed that allowing a governor to “stand aside from the political process” and “veto whatever is passed by the legisla-

If the court's first mistake is disturbing, the court's second mistake is merely unfortunate. Dedicated as it was to the task of "articulating the legal principles that should govern redistricting litigation in New Mexico,"<sup>179</sup> the court in *Maestas* missed a golden opportunity to establish a more substantial judicial role in the redistricting process. This is unfortunate because redistricting is a task far better suited to the judiciary than to the legislative or executive branches.

The ultimate goal of redistricting is fairness,<sup>180</sup> and the foremost goal of the judiciary is fairness.<sup>181</sup> In contrast, the foremost goal of the Legislature is partisan advantage.<sup>182</sup> This arrangement—where a branch concerned with partisan advantage handles a task demanding fairness while a branch almost solely concerned with fairness watches from the sidelines—is absurd. Other justifications for the arrangement—efficiency, legislative expertise, public input, and the like—are increasingly under-

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ture"—in keeping with the gubernatorial role they just suggested—"undermined the entire political process of redistricting that is mandated by our constitution and laws." *Id.* at 27, 2012 WL 3236221, at \*26. If it was the contention of the Legislative Petitioners that the propriety of executive involvement in the redistricting process hinged solely on "use [of] resulting litigation to finally dictate his or her vision of the ideal political landscape," *id.*, it should be noted A) that the "resulting litigation" in *Maestas* originated with the Legislature, which did not see fit to attempt a veto override, and B) that upon turning the matter over to the courts, the executive branch was no longer in a position to "dictate" anything to anyone.

179. *Maestas*, 2012-NMSC-006, ¶ 4.

180. See *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment"); see also *Vieth v. Jubelirer*, 541 U.S. 267, 269 (2005); *Davis v. Bandemer*, 478 U.S. 109, 162 (1986); *Karcher v. Daggett*, 462 U.S. 725, 766 (1983).

181. See New Mexico Rules Annotated Rule 21-100 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." (emphasis added)); *In re Vincent*, 2007-NMSC-056, 143 N.M. 56 (characterizing the impartiality and the appearance of impartiality of the judiciary as a compelling government interest); *In re Schwartz*, 2011-NMSC-019, 149 N.M. 721 (emphasizing that judges must be aware of their duty of impartiality at all times); THE FEDERALIST NO. 78 (Alexander Hamilton) ("Considerate men . . . ought to prize whatever will tend to beget or fortify that [virtuous and disinterested] temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day."); see also Chief Justice Ruth McGregor, Chief Justice Shirley Abrahamson & Justice Sandra Day O'Connor, *A Conversation About Judicial Independence and Impartiality*, 89 JUDICATURE 339, 339 (2006) ("The truth is that we would like an umpire who favors us. But since you can't be assured of a favorable umpire on your side, and you don't want an umpire who favors the other side, you take . . . the second best thing, which is a neutral umpire. That's what you must want if you believe in our democratic system and you believe in the rule of law.").

182. See *supra* notes 134–53 and accompanying text.

mined by technological advances which allow for the generation of hundreds of plans by a few quick parameter inputs,<sup>183</sup> and totally undermined by the fact that courts have access to the same non-partisan redistricting consultants that currently work hand-in-hand with legislative redistricting committees.<sup>184</sup>

The judiciary surely recognizes this absurdity. At the same time, the courts understand that the first attempt at redistricting belongs to the legislative branch.<sup>185</sup> What becomes important, then, is a shift in judicial self-conception—a recognition that while redistricting belongs to the Legislature on paper, it belongs to the judiciary in spirit.

Particularly because it had set itself to the task of articulating core redistricting criteria, the *Maestas* court missed the opportunity to make an aggressive statement to this effect—to put the Legislature on notice as to a heightened state of judicial vigilance regarding partisan redistricting efforts in New Mexico. If redistricting “should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls,”<sup>186</sup> the New Mexico Supreme Court should have vowed to monitor redistricting closely, and let observers draw what conclusions they may. Such a statement would have signaled an end to judicial passivity in the face of an absurd delegation of authority, while simultaneously avoiding (on paper) “[preemption of] the legislative task.”<sup>187</sup>

Although the New Mexico Supreme Court’s decision in *Maestas v. Hall* undermined the gubernatorial veto and failed to embrace enhanced judicial oversight of the legislature, it implemented an important check on legislative gerrymandering when it enshrined traditional redistricting principles alongside the equal-population principle.<sup>188</sup> As the arguments in Judge Hall’s court made clear, the proper relation of these traditional

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183. *See supra* note 137.

184. For instance, demographer Brian Sanderoff of Research & Polling, Inc. worked hand-in-hand with legislators of both parties in the early stages of the redistricting process, crafting plans to their particular specifications. *Maestas*, 2012-NMSC-006, ¶ 7. Unfortunately, this meant that much of Mr. Sanderoff’s time was spent crafting blatantly partisan plans, like the plan requested by Speaker Lujan. *See supra* notes 144–49 and accompanying text. When it issued its remand order, the New Mexico Supreme Court ordered Judge Hall to draw a new plan in independent consultation with a redistricting expert, mentioning Mr. Sanderoff as such an expert under New Mexico Rules Annotated Rule 11-706. *Maestas*, 2012-NMSC-006, ¶ 45. Judge Hall worked directly with Mr. Sanderoff in crafting his final plan. *Maestas*, 2012-NMSC-006 app. at 32–45, 274 P.3d at 89.

185. *See supra* note 158 and accompanying text.

186. *See supra* text accompanying note 132.

187. *See supra* note 158 and accompanying text.

188. *Maestas*, 2012-NMSC-006, ¶¶ 34–39.



redistricting principles to the equal-population principle was unclear prior to the opinion in *Maestas*.<sup>189</sup> While no exact balancing formula was detailed in the opinion, it did at least clarify that traditional redistricting principles were as important as (if not more important than) the equal-population principle for the purposes of any New Mexico court's analysis.

This clarification should have beneficial effects on future redistricting. Unilateral judicial focus on equal-population districts at the expense of traditional redistricting principles has the effect of encouraging (or at least facilitating) gerrymandering.<sup>190</sup> Where the importance of traditional factors like district compactness is downgraded, "[n]o legislature should find it difficult to satisfy a standard of nearly exact equality, disregarding local subdivision lines . . . to achieve new levels of sophistication in partisan gerrymandering."<sup>191</sup> Thus, in reintroducing traditional principles to the redistricting equation, the court has complicated the task of gerrymandering for the future Legislatures that will likely attempt it. In the absence of the external checks on gerrymandering discussed above,<sup>192</sup> this internal check on gerrymandering could prove to be an important one.

### C. *Alternative Responses to the Problem of Partisan Gerrymandering*

Basic checks and balances and the use of traditional redistricting principles are both important tools in the fight against partisan gerrymandering, but there are other tools available as well. Many states have created non-partisan redistricting commissions designed to side-step the conflict of interest inherent to pure legislative redistricting.<sup>193</sup> These com-

189. See *supra* Part III.B.

190. Robert G. Dixon, Jr., *Computers and Redistricting: A Plea For Realism*, 2 RUTGERS J. COMPUTERS & L. 15, 16 (1971–72) ("[P]ushing deviations to miniscule levels does have the negative result of encouraging gerrymandering (or at least making it easier) by requiring abandonment of traditional restraints such as preserving local communities and following local political subdivision lines. The issue now overtly becomes political party advantage.").

191. Robert G. Dixon, Jr. & Robert B. McKay, *Election Districts: Substantial Population Equality, and Exceeded Expectations*, 1 HUM. RTS. 74, 80 (1970–71); see also Baker, *supra* note 135 ("Equipopulous districts, drawn by incumbents for perpetual political longevity, may offer no more prospect of translating electoral shifts into representational changes than did the old 'rotten boroughs' that were the proper target of the [redistricting] reformers.").

192. See *supra* Part IV.B.

193. Christopher C. Confer, *To Be About The People's Business: An Examination of the Utility of Nonpolitical / Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 118 (2003–2004) ("An alternative to legislative redistricting chosen by some states to combat the openly partisan maneuvering of members of the state legislature is the enactment by statute or through constitutional amendment of legislative redistricting commissions.").



missions vary widely in composition, form, and function,<sup>194</sup> but they share the central goal of “increasing electoral responsiveness and decreasing partisan bias.”<sup>195</sup> Proponents of these commissions argue that “because any successful plan requires the input and approval from both parties (or at the least, from one party and a neutral chairman), the potential for political mischief and aggressive partisan gerrymanders is greatly reduced.”<sup>196</sup>

In light of arguments regarding “the virtual nonexistence of the animal called the ‘nonpartisan,’”<sup>197</sup> other scholars have proposed redistricting processes analogous to “labor-management contract negotiations under binding arbitration.”<sup>198</sup> Proponents of arbitrated redistricting argue that redistricting plans are properly viewed as “allocations of limited (social/political/economic) resources among competing population groups,”<sup>199</sup> and thus advocate the use of zero-sum, give-and-take dynamics to achieve the same outcomes pursued by proponents of “nonpartisan” redistricting commissions.<sup>200</sup> The arbitrated redistricting model rests on the availability of “a judge or umpire whose career rides on his reputation for impartiality [as] the ultimate peacemaker between adversaries whose optimal strategy is maximally selfish.”<sup>201</sup> This realist model is incorporated to some degree in New Jersey, under the logic that “all redistricting is political, that any plan will likely be considered unfair by somebody, and that the best outcome is a redistricting plan that fits within the bounded set of ‘reasonably imperfect plans.’”<sup>202</sup>

Of course, the problem implicitly acknowledged by the arbitrated redistricting model is that “no matter how [redistricting lines] are drawn, some groups are advantaged and others are disadvantaged.”<sup>203</sup> The most effective (if most radical) solution to the problem of partisan gerrymandering, then, is to eliminate legislative districts altogether, and conduct at-

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194. *Id.* at 119–23.

195. Litton, *supra* note 140, at 850.

196. *Id.* at 865.

197. Dixon & Hatheway, *supra* note 134.

198. Lee Papayanopoulos, *Compromise Districting*, in REPRESENTATION AND REDISTRICTING ISSUES 59, 61 (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds., 1982).

199. *Id.* at 60.

200. *Id.* at 61 (“[S]uch a procedure need not strive to control gerrymandering through artificial criteria but can be made to fight fire with fire. That is, [the model] accepts gerrymanders as inputs and then allows them to cancel one another.”).

201. *Id.*

202. Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L. J. 1808, 1839 (2011–12)

203. See Weaver, *supra* note 123.

large elections for all seats in a given legislature. Gerrymandering is the drawing of district lines in a manner that depletes opposition voting strength;<sup>204</sup> a majority that cannot draw district lines cannot gerrymander, and a majority cannot draw district lines where there are no districts to be drawn. Of course, the elimination of electoral districts automatically entails the institution of proportional representation; but even opponents of proportional representation recognize that it is the most effective means of combating partisan gerrymandering.<sup>205</sup> While there is no right to proportional representation under the U.S. Constitution,<sup>206</sup> there is nothing under that Constitution which precludes states from implementing proportional representation in their own legislatures if they so desire.<sup>207</sup> Anyone concerned by the problem of partisan gerrymandering should at the very least begin to consider the possibility of eliminating single-member districts as a radical but effective solution.

## VI. CONCLUSION

Partisan gerrymandering dilutes voting power and degrades citizenship. Unfortunately, based on the partisan motivations that drive legislative action, legislative redistricting has the tendency to devolve into partisan gerrymandering. This tendency must be combated at every turn.

There is more than one way to combat the problem of partisan gerrymandering. Although *Vieth v. Jubelirer* may have foreclosed the path of private litigation, partisan gerrymandering may still be resisted at a structural level. In certain instances, our basic system of checks and balances may serve as an effective impediment to partisan gerrymandering. Unfortunately, the New Mexico Supreme Court's opinion in *Maestas v. Hall* damaged this system of checks and balances by undermining the execu-

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204. See *supra* note 22 and accompanying text.

205. See Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in *POLITICAL GERRYMANDERING AND THE COURTS* 240, 250 (Bernard Grofman ed., 1990) ("Court-ordered reform of representational systems based on *Bandemer*'s formulation of the problem will either be ineffective or it will be *too* effective . . . [the latter] would propel the Court (and us with it) down a path whose destination is proportional representation. A change that is so alien to our political institutions should not be taken at the behest of the Court.").

206. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("[T]he mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination.").

207. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) ("[J]udicial 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 and, within quite tolerable limits, succeeds in doing so.").

tive veto and failing to embrace a position of aggressive judicial oversight of legislative redistricting. At the same time, the court should be lauded for elevating traditional redistricting principles which may impede the partisan gerrymandering efforts of future legislatures.

At its earliest opportunity, the New Mexico Supreme Court should reconsider the legislative-deferential mindset which led it to undermine basic checks on partisan gerrymandering in *Maestas v. Hall*. Simultaneously, the people of this state should begin to consider the viability and desirability of more thorough reforms, including non-partisan redistricting commissions, arbitrated redistricting, and implementation of proportional representation.