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COMMENTS

WELCOME TO THE JUNGLE: GERRYMANDERING AND OKLAHOMA'S JOURNEY INTO THE REDISTRICTING THICKET IN *WILSON V. STATE EX REL. STATE ELECTION BOARD*

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I. INTRODUCTION

On March 26, 1812, readers of the *Boston Gazette* thumbed through pages and noticed a bizarre woodcut printed prominently in the newspaper.[1] The woodcut showed a creature stretched awkwardly across the page with names of local Massachusetts townships from Essex County printed all over its body.[2] Governor Eldridge Gerry and the Jefferson Republicans enacted legislation that included making these strung-together townships a new state senatorial district.[3] Federalists

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1. *The Gerry-mander*, BOS. GAZETTE, Mar. 26, 1812, at 2; *see also* Kenneth C. Martis, *The Original Gerrymander*, 27 POL. GEOGRAPHY 833, 833–39 (2008).

2. Martis, *supra* note 1, at 833–35.

3. *Id.*

cried foul and opined that this district looked an awful lot like a salamander, to which the Federalists created the portmanteau "Gerrymander," combining Governor Gerry's name with salamander to describe the practice of construing legislative districts for the benefit of one party over the other.[4] The moniker is still in use today, as is the practice the name describes and the inevitable challenges to this practice.

While challenges to political gerrymandering come every redistricting cycle,[5] courts have passed on chances to enter this tangled forest.[6] Instead, courts have handled cases where population is the catalyst for the challenge but have refused to lay down criteria drawing definitive lines that they could use to determine if certain legislative districts have been gerrymandered.[7] Despite this reluctance, courts are smart to avoid getting involved in partisan battles over gerrymandering.

The Oklahoma Supreme Court recently took up two cases, *Wilson v. Fallin* (*Wilson I*)[8] and *Wilson v. State ex rel. State Election Board* (*Wilson II*),[9] brought by the same petitioner, a state senator, challenging the State Senate Redistricting Act of 2011.[10] The senator, Jim Wilson of Cherokee County, Oklahoma, asserted that the Redistricting Act did not take into consideration a list of "local interest factors" enumerated in article V, section 9A of the Oklahoma Constitution.[11] The court ruled that certain parts of section 9A were unconstitutional and upheld the Redistricting Act in *Wilson I*.[12] In *Wilson II*, Senator Wilson brought his case to a state district court, and when that court dismissed the case under res judicata,[13] Wilson again found his assertions before the Oklahoma Supreme Court. Again, the court upheld the Redistricting Act.[14]

4. *Id.* at 833–34, 836.

5. *See generally* Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379 (2012) (analyzing the development of challenges to redistricting in the United States).

6. *See generally* Andrew P. Miller & Mark A. Packman, *The Constitutionality of Political Gerrymandering:* Davis v. Bandemer *and Beyond*, 4 J.L. & POL. 697, 697 (1988).

7. Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1097–98 (2007).

8. Wilson v. Fallin (*Wilson I*), 2011 OK 76, 262 P.3d 741.

9. Wilson v. State *ex rel.* State Election Bd. (*Wilson II*), 2012 OK 2, 270 P.3d 155.

10. OKLA. STAT. tit. 14, §§ 80.35–80.35.4 (OSCN through 2012 Leg. Sess.).

11. *Wilson I*, 2011 OK 76, ¶¶ 2–3, 18; OKLA. CONST. art. V, § 9A.

12. *Wilson I*, 2011 OK 76, ¶ 1.

13. *Wilson II*, 2012 OK 2, ¶¶ 1–3.

14. *Id.* ¶ 8.

Part II of this Comment surveys the development of courts' treatment of redistricting cases since World War II, as well as Oklahoma's history concerning redistricting challenges. Part III discusses the Oklahoma Supreme Court's decisions in *Wilson I* and *Wilson II*. Finally, in Part IV, the court's decision is closely analyzed and compared to precedent cases.

II. TRAILBLAZING COURTS ENTER THE REDISTRICTING THICKET

A long line of cases preceded *Wilson I* and *Wilson II* with regard to redistricting legislative districts. *Reynolds v. Sims*[15] is often recognized as the seminal case involving challenges to state redistricting legislation. However, before *Reynolds*, a slew of other cases created the quagmire of redistricting legislation. In order to understand the depth of this muddle, an analysis of the evolution of the law in this area is helpful.

A. The Population-Only Standard

The overriding policy consideration in the redistricting of legislative districts is that of the "one person, one vote" principle, first promulgated in *Gray v. Sanders*.[16] This principle asserts that the vote of each person must be weighed equally.[17] The only way this is possible is if legislative districts are apportioned so the populations of the districts are as equal as possible. In *Gray*, the United States Supreme Court struck down a Georgia constitutional provision that allocated representatives to the state legislature based on county populations.[18] Justice Douglas asserted that the concept of "one person, one vote" was wrapped up in the Equal Protection Clause of the Fourteenth Amendment.[19] Therefore, a person has a constitutional right for his or her vote to be weighed equally against the votes of other individuals. Not surprisingly, *Gray* was in direct opposition to the practices of state legislatures across the United States at

15. Reynolds v. Sims, 377 U.S. 533 (1964).

16. Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

17. *Reynolds*, 377 U.S. at 562.

18. *Gray*, 372 U.S. at 370–71, 381.

19. *Id.* at 379–80. ("This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

that time.[20]

In all fifty states during the 1960s, a minority of the population held the fate of state legislatures in its hands.[21] Southern states were especially notorious for this practice.[22] For example, 14% of Marylanders and Floridians controlled the fate of their respective state senates.[23] In Alabama, population disparities[24] between districts were a whopping 41-to-1, while Tennessee's population disparity was around 23-to-1. [25]

Gray followed *Baker v. Carr*, a case from Tennessee that, for the first time, ignited a storm of litigation challenging the status quo.[26] *Baker* reflected a new direction that the Supreme Court decided to take.[27] The Eisenhower and Kennedy administrations took a direct interest in redistricting legislation for the first time, and *Baker* served as the conduit by which courts would infuse themselves into the issue.[28] Some states preferred the status quo and refused to redistrict whenever new census figures reflected changes in population.[29] Additionally, state courts refused to remedy the problem, convinced "that they were powerless to

20. *See* ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 58 (1965).

21. *Id.* at 45–47.

> This [statistic] is arrived at by placing the various legislative districts in rank order from the smallest population per member to the largest. Beginning with the smallest population end of the scale the districts are cumulated to reach that portion of the population of the state that has the power to elect a majority of the house in question.

Id. at 43.

22. *See id.* at 46–47.

23. *Id.* at 46.

24. Population disparity or population variance means the ratio between the most populated district and the least populated district. *See* Fain v. Caddo Parish Police Jury, 312 F. Supp. 54, 55 n.2 (W.D. La. 1969).

25. DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 29 (1992); *see also* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1652 (1993).

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

27. *See* Jon M. Anderson, Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. PA. L. REV. 183, 192 (1987) (detailing the interest that officials in the Eisenhower and Kennedy administrations took in redistricting litigation); *see also* ROYCE HANSON, THE POLITICAL THICKET: REAPPORTIONMENT AND CONSTITUTIONAL DEMOCRACY 44, 52–53 (1966).

28. Anderson, *supra* note 27, at 192; HANSON, *supra* note 27, at 52–53.

29. *See* Alexander v. Taylor, 2002 OK 59, ¶ 14, 51 P.3d 1204, 1209 (noting that *Baker* was a necessity because courts and legislatures were not correcting bad district maps when decennial censuses revealed changes in population).

do anything about it."[30]

Prior to *Colegrove v. Green*,[31] courts would go nowhere near redistricting challenges because they characterized these claims as political questions not within their power to decide.[32] Justice Frankfurter, in *Colegrove*, refused to invalidate a forty-year-old apportionment plan Illinois used to determine congressional representation by reasoning that the plaintiffs' claims were grounded in the Guarantee Clause rather than the Equal Protection Clause.[33] Justice Frankfurter saw redistricting as a political question and refused to let the Court "enter this political thicket."[34] Instead, with somewhat circular reasoning, Justice Frankfurter decided the state legislatures were the right bodies to police redistricting.[35] Justices Black, Douglas, and Murphy disagreed.[36] They saw the gross disparity in the populations of individual congressional districts in Illinois.[37] Justice Black's dissent went a step further than voting for the plaintiffs on equity grounds.[38] He saw the right to "an equally effective voice"[39] as a constitutional issue under Article I, in that "those qualified [have] a right to vote and a right to have their vote counted."[40]

In *Baker*, Justice Brennan flipped *Colegrove* on its head.[41] Redistricting was no longer a political question; it was therefore justiciable because it encompassed "judicially discoverable and

30. *Id.*

31. Colegrove v. Green, 328 U.S. 549 (1946).

32. *See* Miller & Packman, *supra* note 6, at 697.

33. *Colegrove*, 328 U.S. at 556. The Guarantee Clause ensures states a form of Republican government. These claims are not justiciable. Instead, only Congress can enforce the Guarantee Clause. *See* U.S. CONST. art. IV, § 4; Coleman v. Miller, 307 U.S. 433, 445, 446 (1939). *But see* Arthur Earl Bonfield, Baker v. Carr*: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 263 (1962) (arguing that redistricting legislation should be challenged under Guarantee Clause claims rather than Equal Protection claims); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 226 (1987) (arguing that there may be no basis for courts to refuse to hear a Guarantee Clause claim based on a political question).

34. *Colegrove*, 328 U.S. at 556.

35. *Id.*

36. *Id.* at 566–74 (Black, J., dissenting).

37. *Id.* at 566–69.

38. *See id.* at 571.

39. *Id.* at 574.

40. *Id.* at 570.

41. Justice Brennan relies heavily on Justice Black's dissent and Justice Rutledge's concurrence in *Colegrove*. *See* Baker v. Carr, 369 U.S. 186 (1962).

manageable standards," and there were no concerns as to violation of separation of powers.[42] Justice Frankfurter wrote a furious dissent, pointing out that the majority was ignoring precedent by entering into the foreign realm of political questions and Guarantee Clause claims.[43] Justice Harlan joined Justice Frankfurter's dissent and predicted that a wave of claims to legislative redistricting would follow.[44] He was right.[45]

Reynolds v. Sims[46] was one of the cases that followed *Baker* into the "political thicket." *Reynolds* held "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[47] This mandate solidified what was previously shifting sand in the quest for fair legislative redistricting.[48] With a concrete standard now in place, it was up to the states to implement it.

However, there were problems with the population-only paradigm. First, legislatures could draw districts so populations were equal but still gerrymander the districts so minorities (racial, religious, political, or otherwise) would be at a disadvantage.[49] Second, it would be a mathematical and statistical impossibility for legislatures to draw districts that held the exact same number of people across a given state.[50] In short, population equality did not mean that the system could guarantee fairness.

These deficiencies led Chief Justice Warren to determine that deviations from the strict population requirements were allowed only if the state did so in advancing "a rational state policy."[51] This policy

42. *Id.* at 217.

43. *See id.* at 297 (Frankfurter, J., dissenting) ("The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label.").

44. *See id.* at 339 (Harlan, J., dissenting).

45. *See* HANSON, *supra* note 27, at 57–58 (describing the numerous claims post-*Baker* challenging redistricting as "a legal blitz"); *see generally* Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645 (1963) (providing a survey of litigation in all fifty states challenging redistricting plans in the aftermath of *Baker* within one year of the decision).

46. Reynolds v. Sims, 377 U.S. 533 (1964).

47. *Id.* at 568.

48. *See* Stephanie Cirkovich, Note, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 CARDOZO L. REV. 1823, 1829 (2010) (noting that *Reynolds* would no longer tolerate population deviations).

49. *Id.* at 1830–31; *Reynolds*, 377 U.S. at 577–79.

50. Cirkovich, *supra* note 48, at 1830; *Reynolds*, 377 U.S. at 579.

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

would help ensure voters had "equally effective" votes.[52] However, the only way to ensure equally effective votes would be for the whole population to elect each member of a legislative body.[53] Again, this would create a problem in that minority voters would be locked out of choosing representatives because the majority would elect only its candidates.[54] This at-large model is quite impractical for legislatures.[55] The only alternative remaining was proportional representation, which was already the norm in many state houses.[56]

The exception Chief Justice Warren carved out in *Baker* for deviations led to more headaches. In *Brown v. Thomson*, the Supreme Court upheld the constitutionality of Wyoming's redistricting plan, specifically with regard to Niobrara County.[57] The plan stated that Niobrara County would be its own district and receive one representative.[58] However, there was a problem. According to the 1980 census, Niobrara County contained 2,924 people, and the ideal district in Wyoming would have 7,337 people.[59] The average state house district deviated from the ideal district[60] by 16%, while the total population deviation[61] of house districts was 90%.[62] Justice Powell, in his opinion for the Court, recommended that the total population deviation in legislative redistricting plans should not exceed 10%.[63]

52. *Id.* at 565 ("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. Modern and viable state government needs, and the Constitution demands, no less.").

53. Anderson, *supra* note 27, at 201–02.

54. *Id.* at 202.

55. *See id.*

56. Multi-member districts are the majority in the United States when taking into consideration municipal offices and state boards. *See* Paul F. Eckstein, *Musings on Redistricting Litigation*, LITIG., Fall 2007, at 42, 43; *see also* Gordon E. Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 257, 257–58 (B. Grofman & A. Lijphart eds., 1986).

57. Brown v. Thomson, 462 U.S. 835, 848 (1983).

58. *Id.* at 839–40.

59. *Id.* at 839.

60. An ideal district population divides the total population of the given district by the number of districts in the jurisdiction. *See* Mahan v. Howell, 410 U.S. 315, 334–35 (1973) (Brennan, J., dissenting in part).

61. Total deviation is calculated by adding the absolute values of the percentage of the district with the largest deviation and the percentage of the district with the smallest deviation. *Id.*

62. *Brown*, 462 U.S. at 838.

63. *Id.* at 842 ("'[M]inor deviations from mathematical equality among state

Out of this ten percent rule, partisans in state legislatures gained a new way to obfuscate the "one person, one vote" rule. Many states passed redistricting measures that came as close to the ten percent threshold as possible.[64] The rules for proportional representation were bent, but they did not break. Plans falling within the ten percent deviation have been struck down, but more often than not, the preservation of proportional representation and district population equality fall to reasons that do not further the state interest.[65] The unwillingness of courts to journey out of the "safe harbor"[66] of the ten percent rule means sketchy redistricting plans are often rubber-stamped by courts.

Unfortunately, the Supreme Court was no help in this quandary. In *Davis v. Bandemer*, it held that proportional representation is not constitutionally mandated.[67] *Davis* added more fuel to the fire. Justice White seemed ready to throw up his hands in resignation that population

legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.' Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." (citation omitted) (quoting Gaffney v. Cummings, 412 U.S. 735, 745 (1973))).

64. *See* Cirkovich, *supra* note 48, at 1833–37. Following the 2000 census and subsequent redistricting, "[t]hirty-two states had population deviations of more than nine percent in at least one chamber of their legislatures." *Id.* at 1837; *see also Redistricting Population Deviation 2000*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/legislatures-elections/redist/redistricting-population-deviation-2000.aspx (last visited Jan. 26, 2013).

65. *See, e.g.*, Larios v. Cox, 300 F. Supp. 2d 1320, 1341 (N.D. Ga.), *aff'd* 542 U.S. 947 (2004) (holding that even though population deviation for the districts was under 10%, the plan was not designed with traditional criteria in mind); Hulme v. Madison Cnty., 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (holding that the commissioner's "boorish" behavior in going about redistricting was not a state interest, even though the population deviation was 9.7%); Vigo Cnty. Republican Cent. Comm. v. Vigo Cnty. Comm'rs, 834 F. Supp. 1080, 1088 (S.D. Ind. 1993) (holding that redistricting with a population deviation of 3.8% merely for the sake of avoiding a lawsuit is not a state interest).

66. *See* Rodriguez v. Pataki, 308 F. Supp. 2d 346, 364 (S.D.N.Y. 2004); *see also* Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1031 (D. Md. 1994) ("[A] redistricting plan with a maximum deviation below ten percent is *prima facie* constitutional and there is no burden on the State to justify that deviation.").

67. Davis v. Bandemer, 478 U.S. 109, 130 (1986) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.").

equality may never be a reality.[68] He argued that "[a]s 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."[69] In short, discriminatory intent could be assumed, according to Justice White. However, the assumption must overcome a high burden of proof. A voter challenging a redistricting scheme must demonstrate "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[70] Justice White was searching for a minimum threshold by which a court could determine whether voter discrimination had occurred.[71] Furthermore, Justice White assumed that in an election there should be a given outcome if discrimination does not take place.[72]

B. Gerrymandering

Courts have passed on tackling the issue of gerrymandering.[73] This should come as no surprise as courts have reluctantly ventured into the redistricting fracas. The well-worn assertion that gerrymandering is a political question provides reluctant courts cover and leaves majority parties to run riot in carving up state maps.[74] Courts have come only halfway on overhauling redistricting cases. The population-only paradigm fits because it admonishes state legislatures to be fair in redistricting while avoiding altogether the partisan minefield inherent in gerrymandering claims. However, some gerrymandering claims have gained traction in courts.

Prior to *Davis*, several claims came before the Supreme Court that sought to destroy gerrymandered redistricting plans, and true to form, the Court declined to rule for the plaintiffs in these cases. Predictably, the Court sought cover under the protection of the political question principle.[75] In one case, the Court invalidated a New Jersey plan but did

68. *See id.* at 129.
69. *Id.*
70. *Id.* at 133.
71. *See* Anderson, *supra* note 27, at 217–19 (arguing that Justice White's opinion gives no guidance as to the standards by which courts should use to adjudicate discriminatory claims).
72. *Id.* at 218–19.
73. *Id.* at 203.
74. *See generally id.*
75. *See* Gaffney v. Cummings, 412 U.S. 735, 753–54 (1973) (holding that politics and redistricting are inseparable, but a plan that minimized the impact of political groups

so on population-only grounds, rather than gerrymandering, even though the Court threw in some dicta indicating its disapproval of district boundaries.[76]

While *Davis* tackled the issue of population in redistricting head on, momentum stalled with regard to gerrymandering. Justice White's high threshold to prove voter discrimination all but guaranteed that gerrymandering claims, while justiciable, were unlikely to prevail in court.[77] To complicate matters, the Court held that a redistricting plan does not violate the Equal Protection Clause simply because one party would find it difficult to win elections under the plan.[78]

The Court closed the door in *Vieth v. Jubelirer* when it held that political gerrymandering claims were not justiciable in federal court because there were "no judicially discernible and manageable standards" by which a court could adjudicate those claims.[79] Federal courts wanted no part of political gerrymandering.[80] Naturally, the Court did not limit the ability of state courts to hear these cases.

Additionally, courts have been reluctant to upset the apple cart when it comes to racial gerrymandering. In 1965, Congress passed the Voting Rights Act (VRA), guaranteeing racial minorities the ability to exercise their right to vote.[81] Section 2 of the VRA freed all persons across all jurisdictions in the United States from roadblocks that would prevent those persons from exercising their right to vote.[82] State legislatures responded by creating districts comprised mostly of racial minorities. This practice was challenged in *Shaw v. Reno* after North Carolina redistricted following the 1990 census.[83] After weaving its way through the judicial system, the case ended up with a second version, *Shaw v. Hunt*, where the Court held that North Carolina did not have to enact

might be susceptible to constitutional challenge under the Equal Protection Clause).

76. Karcher v. Daggett, 462 U.S. 725, 758–59 (1983).

77. *See* Anderson, *supra* note 27, at 218–19 (arguing that Justice White sets a high threshold for challengers to overcome).

78. Davis v. Bandemer, 478 U.S. 109, 132 (1986) ("[A] failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.").

79. Vieth v. Jubelirer, 541 U.S. 267, 281 (2004).

80. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 421–23 (2006) (holding that a Texas redistricting plan was constitutional because there is no test for determining political gerrymandering).

81. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

82. *Id.* § 2.

83. Shaw v. Reno (*Shaw I*), 509 U.S. 630, 633 (1993).

such a plan to comply with the VRA.[84] Furthermore, Justice Rehnquist opined that carving out a district solely on racial grounds violated the Equal Protection Clause.[85]

Similarly, in *Bush v. Vera*, the Texas state legislature contorted[86] a congressional district to the extent that candidates had to carry maps with them when campaigning because the district boundaries changed "block to block."[87] Because the district was represented by African-Americans for the better part of two decades, Texas argued that the "nonretrogression principle" applied to keep an African-American in Congress representing the district.[88] The Supreme Court did not buy this argument and held that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*."[89] Surprisingly, courts have traditionally ruled against those asserting claims of racial gerrymandering. This is par for the course. History has shown that other racial gerrymandering and political gerrymandering claims fail to stir the court into action that would put a halt to the practice.

C. Oklahoma Courts and their Journey into the Brambles

1. The *Reynolds v. Sims* Aftermath

Mere months after *Reynolds v. Sims* was handed down by the Supreme Court, Oklahoma got in on the act with *Reynolds v. State Election Board*.[90] This case shook the foundations of election law in

84. Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 901–02, 918 (1996).

85. *Id.* at 907 ("Racial classifications are antithetical to the Fourteenth Amendment, whose 'central purpose' was 'to eliminate racial discrimination emanating from official sources in the States.'" (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964))).

86. Bush v. Vera, 517 U.S. 952, 973–74 (1996) ("It resembles '"a sacred Mayan bird, with its body running eastward along the Ship Channel from downtown Houston until the tail terminates in Baytown. Spindly legs reach south to Hobby Airport, while the plumed head rises northward almost to Intercontinental. In the western extremity of the district, an open beak appears to be searching for worms in Spring Branch. Here and there, ruffled feathers jut out at odd angles."'" (quoting MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1996, at 1335 (1995))).

87. *Id.* at 974.

88. *Id.* at 983.

89. *Id.*

90. Reynolds v. State Election Bd., 233 F. Supp. 323, 327 (W.D. Okla. 1964) ("[The redistricting plan] is in certain enumerated respects repugnant to the Federal Constitution and must, therefore, fail."). This case was decided on August 7, 1964, just nine weeks after the Supreme Court issued its ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964).

Oklahoma by striking down a state constitutional amendment and nullifying sections 9A and 10A[91] of the Oklahoma Constitution based on their "repugnance" to the Equal Protection Clause.[92] Essentially, this case stood on the solid foundation laid by *Reynolds*. The court in *State Election Board* went along with the notion that anything short of population equality in legislative districts was a violation of the Due Process Clause.[93] Pieces of section 9A setting the number of senators, duration of terms, and election cycles were allowed to stand, but the county-based system for legislative districts had to give way to districts that contained equal populations.[94] However, the court went further than merely telling the state legislature that changes were needed. Instead, the court itself reapportioned the state legislature into equal population districts for the purpose of special elections that would result in a population-only legislative body.[95]

In *Ferrell v. Oklahoma ex rel. Hall*,[96] the court sought to "breathe new life" into the discarded section 9A.[97] African-American voters raised a challenge to the Oklahoma State Senate Apportionment Act of 1971,[98] arguing that truncating and holding over the elections of senators in traditionally black senate districts violated their right to vote.[99] The district court apparently thought it went too far eight years earlier in *State Election Board*; it had hastily thrown the baby out with the bathwater in an expedited effort to comply with *Reynolds*.[100] Section 9A is good law

91. Section 9A of article V of the Oklahoma Constitution deals with the senate, while section 10A deals with the house of representatives. OKLA. CONST. art V, §§ 9A, 10A.

92. *State Election Bd.*, 233 F. Supp. at 327–28.

93. *Id.* at 328–29.

94. *Id.* at 329.

95. *Id.* at 331–32.

96. Ferrell v. Oklahoma *ex rel.* Hall, 339 F. Supp. 73 (W.D. Okla.), *aff'd*, 406 U.S. 939 (1972), *overruled in part by* Davis v. Bandemer, 478 U.S. 109 (1986).

97. *Id.* at 84 ("We hereby correct that oversight and breathe new life into Section 9A so that in the future the Legislature may not completely and entirely disregard compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors in subsequent redistricting so long as *population* is given primacy.").

98. OKLA. STAT. tit. 14, §§ 80.1–80.7 (repealed 1981).

99. *See Ferrell*, 339 F. Supp. at 74–75; *see generally* Margaret B. Weston, Comment, *One Person, No Vote: Staggered Elections, Redistricting, and Disenfranchisement*, 121 YALE L.J. 2013 (2012) (detailing the difference between holdovers and truncations and surveying the fifty states for their practices after redistricting).

100. The relatively quick turnaround in section 9A being declared unconstitutional and then constitutional again may be related to the decision in *State Election Board* that initially declared section 9A unconstitutional mere months after the Supreme Court

insomuch that population must be the guidepost by which legislatures redistrict. Other factors may serve as supplements to help the legislature achieve the best scenario possible.[101]

With section 9A in the good graces of the law once more, there were few challenges to redistricting state legislative districts in Oklahoma. Oklahoma courts had firmly placed themselves into the thicket; the only way out would be for a definitive case to put to rest all subsequent questions as to section 9A.

2. Gerrymandering in Oklahoma

While gerrymandering is nothing new, that is especially the case in Oklahoma. For the majority of statehood, Democrats have controlled the state.[102] However, Republicans and Democrats alike have a history of gerrymandering in Oklahoma.[103]

Republican efforts to gerrymander in Oklahoma actually came from Washington, D.C.[104] When new states are added to the Union, Congress sets the congressional district boundaries.[105] When Oklahoma became a state in 1907, Republicans in Congress drew districts that they hoped would send three Republicans to Washington out of five total seats.[106] The plan backfired when Democrats prevailed in four of the five districts.[107]

After the 1980 census, Democrats did their best to see that the Oklahoma Congressional Delegation held a limited number of Republicans.[108] The Fifth Congressional District, Oklahoma County,

announced its decision in *Reynolds*. Indeed, *State Election Board* is quite deferential to *Reynolds*, even going as far as to withhold judgment until *Reynolds* had been adjudicated. See *State Election Bd.*, 233 F. Supp. at 328 ("[Another case] was remanded to allow us to effect reapportionment of the State of Oklahoma in accordance with the principles announced in Reynolds v. Sims, and to that end, leave in this Court the power to fashion a remedy in the light of well-known principles of equity." (citation omitted)).

101. *Ferrell*, 339 F. Supp. at 84.

102. *See generally* SAMUEL A. KIRKPATRICK, DAVID R. MORGAN & THOMAS G. KIELHORN, THE OKLAHOMA VOTER: POLITICS, ELECTIONS, AND PARTIES IN THE SOONER STATE (1977).

103. *See id.* at 157–65.

104. *See* JAMES R. SCALES & DANNEY GOBLE, OKLAHOMA POLITICS: A HISTORY 30–33 (1982).

105. *See id.* at 31.

106. *Id.*

107. *Id.*

108. *See* Robert Redwine, Comment, *Constitutional Law: Racial and Political Gerrymandering — Different Problems Require Different Solutions*, 51 OKLA. L. REV.

contained the heaviest concentration of Republicans in the state.[109] Second to that was the Republican stronghold of Bartlesville, north of Tulsa.[110] Democrats in the state legislature drew the Fifth District so that it included Oklahoma County, but then the boundaries grew wildly to the north, along Interstate Highway 35.[111] At the Kansas border, the Fifth District took a jaunt to the east and encircled Bartlesville.[112] The goal of the Democratic legislature was to create one safe Republican district while ensuring Democrats had four other safe districts.[113]

Inevitably, Republicans cried foul and submitted an initiative petition to the public in order to overturn the plan.[114] By a four percentage point margin the petition failed, and Democrats had their congressional redistricting plan.[115] However, it was not a happy ending for Democrats; over the next few years, Republicans took those "safe" districts away one by one.[116]

Neither the Republican gerrymander of 1907 nor the Democrat gerrymander of 1981 were brought before a court.[117] At the time of statehood, courts did not hear gerrymandering cases, and Republicans in 1981 thought they could appeal directly to the people. Moreover, these instances were of gerrymandering congressional borders, not state legislative district boundaries. Therefore, neither of these instances provided courts in Oklahoma the opportunity to take a stand on gerrymandering.

373, 383 (1998) (detailing Democrats' attempts to gerrymander in 1981).

109. *Id.*

110. *Id.*

111. *See* STEFFEN W. SCHMIDT ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY 387 (3d ed. 1989) (recognizing the Democratic party's attempt to redraw the Fifth District as an example of gerrymandering).

112. *Id.*

113. *Id.*

114. Redwine, *supra* note 108, at 383.

115. *Id.*

116. *Id.*

117. *See id.* at 391–94.

III. *WILSON V. STATE EX REL. STATE ELECTION BOARD*

A. The Preliminary Challenge: Wilson v. Fallin

After the 2010 decennial census, Oklahoma began the process of redistricting. For the first time in the history of the state, the Republican Party was in charge of both houses of the state legislature at the time of redistricting.[118] Predictably, the plan to redistrict the state senate was met with controversy in *Wilson I*.[119] The challenge to the plan was brought by Senator Jim Wilson, who represented the Democrat stronghold of district 3.[120] The State Senate Redistricting Act of 2011[121] redrew district lines so Senator Wilson's hometown of Tahlequah was cut out of the traditional district 3 territory.[122] He was not alone. Four other senators', two Republicans and two Democrats, residences were cut out of the districts they represented in the senate.[123]

Senator Wilson's challenge to the act came from two directions. First, he attacked the validity of the State Senate Redistricting Act under article V, section 9A of the Oklahoma Constitution.[124] More specifically,

118. Mike McCarville, *Oklahoma's Top Political Stories of 2011*, MCCARVILLE REP. (Jan. 1, 2012), http://www.mccarvillereport.com/archives/394. In Oklahoma, the duty to redistrict lies with the legislature. If the legislature comes to an impasse, a bipartisan emergency committee is set up to break the gridlock with a plan of its own. OKLA. CONST. art. V, § 11A.

119. Wilson v. Fallin (*Wilson I*), 2011 OK 76, 262 P.3d 741.

120. *Id.* ¶ 1.

121. OKLA STAT. tit. 14, §§ 80.35–80.35.4 (OSCN through 2012 Leg. Sess.).

122. *See Wilson I*, 2011 OK 76, ¶ 3 n.4; *Jim Wilson's Biography*, PROJECT VOTE SMART, http://www.votesmart.org/candidate/biography/55533/jim-wilson (last visited Jan. 26, 2013). Senator Wilson had served four years prior in the state house of representatives. Coupling that time with his eight years in the senate rendered him term limited. *See* OKLA. CONST. art. V, § 17A.

123. *See Wilson I*, 2011 OK 76, ¶ 3 n.4. The court notes that Senator Wilson's petition focuses on district 3 and does not "explicitly" provide details for other districts. *Id. See* Michael Bates, *Oklahoma Senate Redistricting: Five Senators Carved out of Their Districts*, BATESLINE (May 13, 2011, 11:24 AM), http://www.batesline.com/archives/2011/05/oklahoma-senate-redistricting-fi.html.

124. *Wilson I*, 2011 OK 76, ¶ 3.

> The state shall be apportioned into forty-eight senatorial districts in the following manner: the nineteen most populous counties, as determined by the most recent Federal Decennial Census, shall constitute nineteen senatorial districts with one senator to be nominated and elected from each district; the fifty-eight less populous counties shall be joined into twenty-nine two-county districts with one senator to be nominated and elected from each of the two-county districts. In apportioning the State Senate, consideration shall be given

Senator Wilson claimed that the State Senate Redistricting Act did not provide districts "'which as nearly as possible provide for compactness, political units, historical precedents, economic and political interests.'"[125] Second, he pointed out that the Redistricting Act needlessly partitioned three counties within district 3,[126] and, at the same time, it split the "heart of the Cherokee Nation" between three separate districts.[127]

The court in *Wilson I* was put in a quandary as to the constitutionality of section 9A by precedent. Section 9A had been declared unconstitutional in 1964 by a federal district court in *State Election Board*, closely adhering to the Supreme Court's ruling in *Reynolds*.[128] That same district court, however, reversed course in 1972 in *Ferrell*, and the pendulum swung the other way when the previously unconstitutional provisions were reinstated.[129]

Senator Wilson noted the demographic differences between the Redistricting Act and the proposed redistricting plan he brought before the court.[130] In the Redistricting Act, the largest district was comprised of 78,943 persons, and the smallest district was comprised of 77,350 persons.[131] The ideal district would be comprised of 78,153 persons.[132]

> to population, compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors, to the extent feasible.
>
> Each senatorial district, whether single county or multi-county, shall be entitled to one senator, who shall hold office for four years; provided that any senator, serving at the time of the adoption of this amendment, shall serve the full time for which he was elected. Vitalization of senatorial districts shall provide for one-half of the senators to be elected at each general election.

OKLA. CONST. art. V, § 9A.

125. *Wilson I*, 2011 OK 76, ¶ 3.

126. *Id.* ¶¶ 3–4 & n.4. Southern Mayes, eastern and southeastern Delaware, and eastern Cherokee counties comprise the new district 3, as well as all of Adair County. *See Oklahoma Senate Districts 2011*, OKLA. ST. LEGISLATURE, http://www.oksenate.gov/Senators/2011_maps/districts/Statewide_Senate_Districts.pdf (last visited Jan. 26, 2013).

127. *Wilson I*, 2011 OK 76, ¶ 3 n.4. District 3, district 9, and district 18 now comprise all or some of the previous district 3. *Compare Oklahoma Senate Districts 2011*, *supra* note 126, *with Oklahoma Senate Districts Based on the 2000 Census*, OKLA. ST. LEGISLATURE, http://www.oksenate.gov/senators/images/districts/state_districts_map.pdf (last visited Jan. 26, 2013).

128. *See supra* Part II.C.1.

129. *See supra* Part II.C.1.

130. *Wilson I*, 2011 OK 76, ¶ 4. The Constitution of Oklahoma requires a qualified elector who is challenging a reapportionment plan also to present a better alternative. *See* OKLA. CONST. art V, § 11C.

131. *Wilson I*, 2011 OK 76, ¶ 4.

132. *Id.* ¶ 4 n.5.

Therefore, the total population deviation under the Redistricting Act would be a little over two percent. Under Senator Wilson's alternative plan, the largest district would be comprised of 78,929 persons, while the smallest district would remain the same.[133] Senator Wilson's plan, therefore, would not violate the *Reynolds* population requirement.

Additionally, Senator Wilson pointed out two other details that would make his plan superior. First, his plan would split counties only sixty-two times, whereas the Redistricting Act splits counties eighty times.[134] Second, under his plan, district compactness would be 65.5% while under the Redistricting Act compactness would be 58.9%.[135] Senator Wilson admitted that not every district was flawed, and he only explicitly stated that district 3 did not comply with section 9A.[136]

The court in *Wilson I* dealt a blow to Senator Wilson's aspirations to strike down article V, section 9A of the Oklahoma Constitution.[137] Chief Justice Taylor noted that the county-based apportionment codified in section 9A violated the population-only "one person, one vote" mandate under *Gray* and *Reynolds*.[138] Therefore, the county-based scheme promulgated in section 9A violated the Equal Protection Clause of the Fourteenth Amendment.[139] Senator Wilson's claim that the Redistricting Act unnecessarily divided counties failed because the county-based apportionment scheme failed to comport with constitutional requirements.

Furthermore, Chief Justice Taylor was keen on noticing a very important difference in language between what section 9A actually stated and what Senator Wilson claimed it said: The language of the statute listed local-interest factors bookended by the qualifying language of "consideration shall be given" and "to the extent feasible."[140] The state legislature, when it enacted section 9A, gave subsequent lawmakers discretion to deviate from a population-only formula. Chief Justice Taylor pointed out that Senator Wilson misunderstood the language pertaining to the formula.[141] Senator Wilson wanted the court to direct

133. *Id.* ¶ 4.
134. *Id.*
135. *Id.*
136. *Id.* ¶ 3 n.4.
137. *Id.* ¶ 1.
138. *Id.* ¶¶ 13–14.
139. *Id.* ¶ 15.
140. *Id.* ¶¶ 9, 21–22; OKLA. CONST. art. V, § 9A; *see also* Wilson v. State *ex rel.* State Election Bd. (*Wilson II*), 2012 OK 2, ¶ 7, 270 P.3d 155, 158.
141. *Wilson I*, 2011 OK 76, ¶ 3; *see also Wilson II*, 2012 OK 2, ¶ 7.

the legislature to consider these local-interest factors in redistricting.[142] However, the court pointed out that these factors were not controlling or mandatory under the population-only standard.[143]

The court also entertained issues from two of the respondents in the case. Paul Ziriax, Secretary of the Oklahoma State Election Board, had two items he wished for the court to address.[144] First, he wanted to know if Senator Wilson's challenge was "a superficial contest" between the state legislature and Senator Wilson.[145] Second, he wanted to know how important tribal boundaries were when the legislature was redistricting.[146]

The court did not answer Secretary Ziriax's first question. As to the second issue, the court decided that population was the only measure by which legislatures could redistrict.[147] The court did not address Secretary Ziriax's question because Senator Wilson's petition only dealt with the constitutionality of the Redistricting Act, rather than the methods legislatures may use to draw district boundaries.[148]

Secretary Ziriax's second item dovetails with an issue Senator Brian Bingman, President Pro Tempore of the state senate, wanted the court to address. He wanted to know by what standard a section 9A challenge could come before the court regarding sections 11C[149] and 11D.[150]

142. *Wilson I*, 2011 OK 76, ¶ 3.
143. *Id.* ¶¶ 22–23.
144. *Id.* ¶ 5 & n.6.
145. *Id.* ¶ 5.
146. *Id.* ¶ 5 n.6.
147. *Id.*
148. *Id.*
149. *Id.* ¶ 6.

> Any qualified elector may seek a review of any apportionment order of the Commission, or apportionment law of the legislature, within sixty days from the filing thereof, by filing in the Supreme Court of Oklahoma a petition which must set forth a proposed apportionment more nearly in accordance with this Article. Any apportionment of either the Senate or the House of Representatives, as ordered by the Commission, or apportionment law of the legislature, from which review is not sought within such time, shall become final. The court shall give all cases involving apportionment precedence over all other cases and proceedings; and if said court be not in session, it shall convene promptly for the disposal of the same.

OKLA. CONST. art. V, § 11C.

150. *Wilson I*, 2011 OK 76, ¶ 6.

> Upon review, the Supreme Court shall determine whether or not the apportionment order of the Commission or act of the legislature is in compliance with the formula as set forth in this Article and, if so, it shall

Furthermore, Senator Bingman asked the court to settle the old conflict between *State Election Board* and *Ferrell*.[151]

The court held that upon a challenge to a redistricting plan, section 11C "is limited to a claim that the apportionment does not comply with the population formula in section 9A."[152] Section 11C envisions the petitioner detailing why the redistricting plan should fail and bringing an alternative plan to the attention of the court.[153] Section 11D envisions that the court, taking in all the presented evidence, will consider the existing plan and the alternative before ruling "as a matter of law."[154] All other claims (i.e., "racially-motivated gerrymander claims, minority-vote dilution claims, and other voter discrimination claims") fall under the jurisdiction of the district courts.[155]

Justice Colbert's concurrence reiterated the majority's decision that the only unconstitutional part of section 9A was the county-based apportionment scheme.[156] Other factors are "tools" to guide the legislature.[157] Justice Colbert also recognized that these tools could circumvent the population-only standard.[158] Furthermore, Justice Colbert pointed out that *Vieth* precluded federal courts from adjudicating political gerrymandering cases.[159] Rather, the duty to take on this task implicitly falls to state courts because the standards used by courts to decide these cases are contained within state constitutions and laws. Justice Colbert opined that Senator Wilson failed because the local-interest factors in section 9A were not enough to provide the court with manageable standards it could have used to invalidate the Redistricting

> require the same to be filed or refiled as the case may be with the Secretary of State forthwith, and such apportionment shall become final on the date of said writ. In the event the Supreme Court shall determine that the apportionment order of said Commission or legislative act is not in compliance with the formula for either the Senate or the House of Representatives as set forth in this Article, it will remand the matter to the Commission with directions to modify its order to achieve conformity with the provisions of this Article.

OKLA. CONST. art. V, § 11D.

151. *Wilson I*, 2011 OK 76, ¶ 6.
152. *Id.* ¶ 20.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* ¶¶ 1–6 (Colbert, V.C.J., concurring).
157. *Id.* ¶ 4.
158. *Id.*
159. *Id.* ¶ 5.

Act.[160]

With his attack of the Redistricting Act in tatters, Senator Wilson changed his approach. The court opened a path to the district courts as a way to challenge redistricting plans. In this, Senator Wilson saw an alternative. After the Oklahoma Supreme Court ruled the Redistricting Act was valid, Senator Wilson sued in state district court to have the plan overturned.

B. Wilson v. State ex rel. State Election Board

In *Wilson II*, Senator Wilson tried again to challenge the Redistricting Act by suing the State of Oklahoma, instead of the Governor of Oklahoma, in state district court.[161] The district court judge dismissed this second challenge under the principle of res judicata.[162] Senator Wilson appealed to the Oklahoma Supreme Court to decide the case.

The second time around, the court did not expound on the substantive claims presented by Senator Wilson. Essentially, Senator Wilson was challenging the Redistricting Act of 2011 in *Wilson II* on the same grounds as *Wilson I*.[163] Once again, he wanted the court to invalidate the Act based on section 9A's list of local-interest factors and to replace the Act with his own plan.[164]

The court reviewed the petition de novo.[165] Chief Justice Taylor found that the Senator's claims had not changed from *Wilson I* to *Wilson II*.[166] Senator Wilson disagreed, claiming the court failed to address political gerrymandering in *Wilson I*.[167] To back up this assertion, Senator Wilson pointed out that in *Wilson I* the court "'unanimously expressly agreed'" that the local-interest factors enumerated in section 9A were "'valid and enforceable.'"[168]

Again, Chief Justice Taylor pointed out that Senator Wilson ignored the qualifying language in section 9A that bracketed the list of local-

160. *Id.* ¶ 6.
161. Wilson v. Oklahoma *ex rel.* State Election Bd. (*Wilson II*), 2012 OK 2, ¶ 1, 270 P.3d 155, 156–57.
162. *Id.* ¶ 10.
163. *Id.* ¶ 1.
164. *Id.*
165. *Id.* ¶ 4.
166. *Id.* ¶ 9.
167. *Id.* ¶ 3.
168. *Id.*

interest factors.[169] Chief Justice Taylor ruled the language was not as restrictive as Senator Wilson maintained.[170] Furthermore, Chief Justice Taylor stated that even if the court accepted Senator Wilson's claims there would simply not be enough evidence to find the legislature ignored the local-interest factors.[171] Moreover, the issue of political gerrymandering was not included in the majority opinion of *Wilson I* because Senator Wilson failed to explicitly assert a claim.[172] Instead of tackling the issue of gerrymandering in *Wilson I*, the court simply ignored it. Since Senator Wilson's claims were brought to the court in *Wilson II* "verbatim" from *Wilson I*,[173] the court dispensed of them under the principle of res judicata, thereby destroying Senator Wilson's ability to bring further challenges before the Oklahoma Supreme Court.

Senator Wilson did not assert any claims regarding race or class-based gerrymandering. However, in *Wilson I* the court stated that Senator Wilson objected to the "heart of the Cherokee Nation" being cut out of district 3.[174] Senator Wilson did not suggest that the senate's redistricting plan should be subjected to review under a racial gerrymandering claim.[175] Therefore, under the court's holding in *Wilson I*, Senator Wilson's case would go forward in district court if there were some cognizable claim of racially motivated gerrymandering.[176] However, no such claim was ever made.

Justice Colbert's concurring opinion in *Wilson II* started with the issue of political gerrymandering. In *Wilson II*, he attempted to "dispel any belief that *Wilson I* stands for the proposition that this Court will not address a claim of political gerrymandering, minority-vote dilution, or any other form of voter discrimination . . . and the standard set forth in section 9A for determining whether an apportionment treats voters equally."[177]

Justice Colbert also recognized the platform for bringing these claims was already used in *Wilson I*, which meant that Senator Wilson exhausted his opportunities for remedy of a political gerrymandering

169. *Id.* ¶ 7.
170. *Id.*
171. *Id.*
172. *Id.* ¶¶ 6–9.
173. *Id.* ¶ 1.
174. Wilson v. Fallin (*Wilson I*), 2011 OK 76, ¶ 3 n.4, 262 P.3d 741, 743 n.4.
175. *Id.* ¶¶ 1–5 (Colbert, V.C.J., concurring).
176. *Id.* ¶ 6.
177. *Wilson II*, 2012 OK 2, ¶ 1 (Colbert, V.C.J., concurring).

claim.[178] Since this claim was previously adjudicated, Senator Wilson failed to present a claim upon which relief could be granted in *Wilson II*.

IV. THE INEVITABILITY OF *WILSON* AND THE INTEGRITY OF THE COURTS

In two-party systems, any issue can devolve into a rhetorical war—redistricting is no exception. Nevertheless, courts do the best they can while trying to be above the fray. Before World War II, the United States' judicial system refused to rule on redistricting and reapportionment cases, some of the most partisan issues. After the floodgates were opened in *Colegrove*, *Baker*, and *Reynolds*, courts had no choice but to play referee in partisan contests, where winners tried to tilt the scales so that they would be successful for a long time to come.

Wilson II stands for the proposition that Oklahoma courts should follow current trends and precedents rather than wading out into the waters of political gerrymandering. Senator Wilson's contention that his plan would better serve the people of Oklahoma presented the court with a unique issue: What if he is right? However, there might be a more important question: What if the court says he is right? According to section 9A's enumerated local-interest factors, Senator Wilson's plan looks better on its face. However, it is important to remember that Senator Wilson is in the minority. He is essentially asking the court to undo what popularly elected officials did with the mere stroke of a pen.

On the surface, *Wilson II* sticks out like a sore thumb. The Redistricting Act gained large bipartisan support in the senate.[179] Senator Andrew Rice, the Senate Minority Leader, regarded the Redistricting Act as fair but voted against it in "'solidarity with members'" of the Democratic caucus who were "'unhappy with the process, and who will vote against the bill.'"[180] Senator Wilson's challenge to the Redistricting Act appears to run counter to prevailing opinions at the capitol.

Courts must maintain objectivity in all things.[181] In many jurisdictions, judges at the municipal and county levels are elected by

178. *Id.* ¶ 2.

179. The Redistricting Act passed the Oklahoma Senate 38 to 6. *See Bill Information for SB 821*, OKLA. ST. LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=SB821&Session=1100 (last visited Jan. 26, 2013).

180. *Senate Redistricting Plan Unveiled*, CAPITOLBEATOK (May 11, 2011), http://capitolbeatok.com/reports/senate-redistricting-plan-unveiled.

181. *See* Redwine, *supra* note 108, at 395–98 (enumerating reasons why courts should stay away from getting involved in political gerrymandering cases).

constituents, while at the state and federal level, judges are appointed by partisans who are elected by the public.[182] The judicial system tries to stay above the fray by being on the side of the law.[183] Had the Oklahoma Supreme Court found for Senator Wilson, it would have taken sides in a partisan struggle.[184]

The "one person, one vote" standard established in *Gray* and perpetuated in cases like *Reynolds* offers courts the ability to right wrongs when it comes to redistricting. However, Justice White's deviations in *Baker* created more problems than they solved. In order to navigate this minefield, courts often err on the side of the legislatures and the people. Rather than make a decision, courts defer to democratically elected officials and establish high standards in order for challenges to prevail. Seemingly, *Wilson II* is an instance where a court entrenched itself behind these high standards and let the representatives of the people do their jobs.

Precedent cases form the paradigm under which future courts could work. The Oklahoma Supreme Court followed this paradigm and stopped at the point where other courts have refused to go any further. Senator Wilson, in comparing his redistricting plan to the Redistricting Act, offered the court bait by which it could easily say that his alternative plan was better. Fortunately, the court did not bite.

Instead, the court finally answered questions surrounding *State Election Board* and *Ferrell*. By declaring the county-based language in section 9A unconstitutional, the court dealt with Senator Wilson's contention that his plan was superior because counties were less divided. In the end, this did not matter. The Oklahoma Supreme Court embraced *Reynolds* to the fullest. At the same time, the court left *Ferrell* largely intact. The population requirement would be the North Star for redistricting, but the local-interest factors enumerated in section 9A would serve as supplementary guides. Senator Wilson built his case on a misunderstanding of the language of the local-interest factors. The decision to keep the structure of *Ferrell* offers courts cover to decide redistricting cases on a population basis without venturing into the messy world of political gerrymandering.

182. *Id.*

183. *See id.*

184. *See* Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, *in* POLITICAL GERRYMANDERING AND THE COURTS 240, 240 (Bernard Grofman ed., 1990); *see also* Edward Still, *The Hunting of the Gerrymander*, 38 UCLA L. REV. 1019, 1037 (1991) (book review).

Senator Wilson's failure to properly understand the constitutional provision allowed the court wiggle room to dismiss the case and dispose of the challenge. Fortunately, Senator Wilson did not pin the court down in presenting his challenge in such a way that the court had to set a baseline for determining the degree to which compactness, political units, historical precedents, and economic and political interests would have to be considered by future legislatures and courts. With regard to the substantive claims, Senator Wilson's challenge did not differ from *Wilson I* to *Wilson II*,[185] but the court hinted at the problem with his assertions. The court might have entertained evidence that the legislative committee, in drawing district boundaries, considered the local-interest factors set forth in section 9A at an abusive level.

Moreover, Justice Colbert's concurrence suggested that, given the right set of facts, the court would take on political gerrymandering. Perhaps the distinction here was the court would entertain claims of political gerrymandering but not necessarily agree with a claim that district lines were gerrymandered for political reasons. Indeed, Justice Colbert threw gerrymandering into a generic group he called "claims of voter inequality."[186] This group included "minority-vote dilution, or any other form of voter discrimination."[187] Justice Colbert went on to suggest there was simply no prima facie claim for gerrymandering. Therefore, according to Justice Colbert, Senator Wilson asserted that nothing would suggest gerrymandering deserved special attention in *Wilson I* or *Wilson II*.

The decision by Chief Justice Taylor to omit gerrymandering from the opinions in *Wilson I* and *Wilson II* was predictable. The court took the path of least resistance by not extending the opinion to cover political gerrymandering. Justice Colbert asserted that a claim of political gerrymandering was wrapped up in Senator Wilson's challenge to the Redistricting Act because of a lack of specific proof to set the gerrymandering claim apart as something important. Since Senator Wilson agreed the population-only standard was not at issue in the challenge, the court saw no need to touch section 9A's local-interest

185. Wilson v. Oklahoma *ex rel*. State Election Bd. (*Wilson II*), 2012 OK 2, ¶ 1, 270 P.3d 155, 157 ("As in *Wilson I*, nowhere in his filings in the present case does Senator Wilson allege that the Legislature did not give consideration to the extent feasible to the local-interest factors he sets out in his petition.").

186. *Id.* ¶ 3 (Colbert, V.C.J., concurring).

187. *Id.* ¶ 1.

factors.[188] Furthermore, since the local-interest factors were not controlling, the county-based scheme in section 9A was unconstitutional, and Senator Wilson offered no objection to the population-only standard, the court had no choice but to uphold the Redistricting Act. Without specific evidence of gerrymandering, there was no need for the court to address the issue.

Nevertheless, *Wilson I* left the door open for Senator Wilson.[189] The district court was qualified to hear cases regarding political gerrymandering, according to Justice Colbert.[190] That is exactly what Senator Wilson tried. However, in state district court, Senator Wilson found no sympathy. The finding that res judicata precluded Senator Wilson from bringing the challenge in district court made sense; his claims in *Wilson I* were identical to *Wilson II* except for one difference—Senator Wilson's claim that the district court was the right court to hear this challenge.[191] The district court correctly dismissed his claims, and the subsequent appeal found no favor with the Oklahoma Supreme Court.

The language used by Chief Justice Taylor in *Wilson II* suggested that Senator Wilson's attempts at invalidating the Redistricting Act were getting old. Chief Justice Taylor noted that "[Senator Wilson] again merely states that his redistricting plan is better than the plan passed by the Legislature and signed by the Governor."[192] Indeed, Paul Ziriax pointed out as much in *Wilson I*.[193]

Secretary Ziriax's observation that *Wilson I* was a "superficial contest" pitting Senator Wilson against thirty-eight of his colleagues is hard to ignore.[194] Senator Wilson's desire to rekindle the fight over the Redistricting Act lies at the heart of these cases. In *Wilson I*, the court pointed out that Senator Wilson's challenge to the Redistricting Act only went so far as to include his home, district 3. In fact, four other incumbent senators were moved out of their districts due to the Redistricting Act, including three Republicans.[195] Senator Wilson's

188. *See* Wilson v. Fallin (*Wilson I*), 2011 OK 76, ¶¶ 22–23, 262 P.3d 741, 748 ("Senator Wilson effectively agrees that the apportionment therein is based on population . . . .").

189. *See id.* ¶ 6 (Colbert, V.C.J., concurring).

190. *Id.*

191. *Wilson II*, 2012 OK 2, ¶ 1.

192. *Id.*

193. *See Wilson I*, 2011 OK 76, ¶ 5.

194. *Id.*

195. David Meyers (R-Ponca City) moved from district 20 to district 36, Rob Johnson

motives appeared to be self-serving. Seemingly, Senator Wilson chose the Oklahoma Supreme Court to serve as his whetstone to grind his political axe. The court did not answer Secretary Ziriax's inquiry; rather, it avoided the mess entirely by ignoring Senator Wilson's hidden motives and sticking to deciding the law.

Additionally, the court was not moved by Senator Wilson's claim that the Redistricting Act cut out Tahlequah, the Cherokee capital, from district 3. As Secretary Ziriax pointed out, the Cherokee Nation still had adequate representation in the state senate.[196] The court silently held that tribal boundaries are contained within the factors in section 9A that supplement the population-only paradigm; therefore, the tribal boundaries of the Cherokee Nation were not even considered by the court as a factor in its decision.[197] The court did not want to get involved with the Republican–Democrat battles in the capitol, much less enter the rough waters of tribal politics.

V. CONCLUSION

The Oklahoma Supreme Court has firmly aligned itself with the rest of the country in its decision to only overturn redistricting plans that deviate from the population-only standard. This standard provides courts with a stable guideline to adjudicate unfair redistricting plans. All other considerations are purely supplemental and find little to no weight with courts. The *Wilson I* and *Wilson II* decisions highlight the inflexibility of courts nationwide to nullify redistricting plans based on anything but the population-only standard. The court in these cases was right in doing so. Diving headlong into this political battle between Senator Wilson and the legislature would have compromised the court's integrity as a neutral institution above the political fray.

(R-Kingfisher) moved from district 22 to district 26, Tom Adelson (D-Tulsa) moved from district 33 to district 39, and Jim Reynolds (R-Oklahoma City) moved from district 43 to district 45. *See* Bates, *supra* note 123.

196. *See Wilson I*, 2011 OK 76, ¶ 5 n.6.

197. *Id.*