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Gill v. Whitford and Its Potential Effects on Gerrymandering

By Samantha Koldenhoven*

Introduction

The U.S. Supreme Court is starting its new term this October with many blockbuster cases on the docket. One of the first cases the nine Justices will be hearing, *Gill v. Whitford*, is a challenge on a redistricting plan made by Republican legislators in Wisconsin. This case could establish when political infusation motivates redistricting lines, and when this political infusation would allow courts to police partisan gerrymandering. The standard being proposed by the Wisconsin court is the “efficiency gap” test. The issue of partisan gerrymandering has divided the Court for decades and the issue is being heard again in *Gill* this upcoming term. With Justice Anthony Kennedy due to retire in the near future and most likely holding the swing vote, this is a hot button issue for the Supreme Court.

Background

The newly Republican-controlled Wisconsin redrew the lines of its districts after the 2010 census. Following this redistricting, the Republican party maintained control in the 2012 and 2014 elections by getting sixty and sixty-three seats, respectively.¹ Although the Democrats won the majority vote in 2012 with fifty-one percent, they only had thirty-six seats within the Assembly.² There was a challenge to this new redistricting plan brought to the Western District of Wisconsin claiming the plan was unconstitutional because it was diluting the Democratic votes by “cracking” and “packing” the district lines.³ Although acknowledging political motives are inherent in redistricting, the Plaintiffs claimed there was too much political influence within this plan, thus violating the “one person, one vote” doctrine.⁴ The

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¹ *Whitford v. Gill*, 218 F.Supp.3d 837, 902 (W.D.Wis. 2016).

² *Id.*

³ *Id.* at 903.

⁴ *Id.* at 844.

District Court agreed with the challenges and came up with a test for the determination of undue political influence within redistricting plans.⁵

Court's Analysis

The court in this case, noted that although it can be difficult to tell when the politics are overly influential, this case was expressly unconstitutional.⁶ The court used a three-prong test to determine the unconstitutionality of the plan: (1) the plan must intend to burden the representational rights of the voters, (2) the plan had to have a discriminatory effect, (3) and the discriminatory effect was not justified.⁷ The court reasoned under the discriminatory intent prong, the plan did in fact comply with traditional redistricting criteria, but the plan was aimed to secure Republican control of the Wisconsin Assembly and the Democrats would likely not regain control any time soon.⁸ The court reasoned under the discriminatory effect prong that the plan allocated votes among newly created districts so that the number of Republican seats would not drop below fifty percent. Even when Republicans were electoral minority in two actual elections, they maintained the majority legislative power.⁹ The court analyzed the "efficiency gap" calculation to determine the Republican control.¹⁰ The court reasoned the plan failed under the justification prong because it was not in Wisconsin's legitimate districting interest, or political geography, that the Republicans gained only a modest natural advantage.¹¹

Author's Analysis

The Supreme Court has heard this type of case before and has yet to come to a conclusion on how to determine undue political influence in the redistricting plans. With the Court having four conservative and four liberal leaning justices, this case most likely will come down to the vote of Justice Anthony Kennedy. Justice Kennedy has mentioned in *Vieth* that he

⁵ *Id.* at 930.

⁶ *Whitford v. Gill*, 218 F.Supp.3d 837, 883 (W.D.Wis. 2016).

⁷ *Id.* at 884.

⁸ *Id.* at 895-96.

⁹ *Id.* at 903.

¹⁰ *Id.*

¹¹ *Id.* at 910.

is open to the idea of a test to determine this issue, but it will not be easy to come up with an objective test to set a precedent.¹² The “efficiency gap” test might be the silver bullet for the Court but the Justices might tweak the model. Justice Kennedy often holds the swing vote in cases and it is difficult to determine which way he will rule because he is a “middle of the road” Justice. Justice Kennedy wants a mathematical model that will be viable and legitimate.¹³ Although this “efficiency gap” model seems workable at the moment, there has been criticism that it only catches the voting anomalies.¹⁴ With technology advancing, partisan gerrymandering is becoming more of an issue and it is getting easier for legislators to find a way to “pack” or “crack” the district lines.¹⁵ As a result, it seems the Supreme Court has taken this case on to find a screening method for future cases involving partisan gerrymandering. The “efficiency gap” method has many of the key criteria Justice Kennedy has been looking for, but the real question is, will it be enough to win him over?

Conclusion

Although there is no way to know for certain what Justice Kennedy will decide, his vote in this upcoming case is critically important for the voters in future elections.

Edited by Luke Jackson

¹² *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004).

¹³ *Id.*

¹⁴ Justin Levitt, Symposium: Intent Is Enough SCOTUSblog (2017), <http://www.scotusblog.com/2017/08/symposium-intent-enough/> (last visited Sep 20, 2017).

¹⁵ *Vieth*, 541 U.S. at 312.

