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The Boundaries of Partisan Gerrymandering

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The boundaries of partisan gerrymandering



JOHN GREABE

Constitutional Connections

In my most recent column, I expressed concern about the effectiveness of the constitutional decision rules that currently govern gerrymandering – the redrawing of electoral districts in a manner that favors the incumbent majority at the expense of those out of power.

Briefly, the Constitution has not been interpreted to prohibit redistricting with an eye toward advancing the interests of the political party in power. But it has been interpreted to

bar legislators from redistricting on racial grounds – at least in most circumstances.

The problem is that voters from certain racial groups tend to vote overwhelmingly for a single party. Thus, one way to gain partisan advantage in racially diverse states is to dilute the voting power of racial groups who tend to vote for the other party. This is accomplished by either “packing” voters from these groups into districts the other party is going to

win anyway, or “cracking” them into a number of different legislative districts so that they fall somewhat short of a majority in each one.

As matters now stand, redistricting that results in such packing and cracking is constitutional if a court finds that its “predominant purpose” was merely to secure partisan advantage. But it is unconstitutional if a court finds that racial motivations

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New gerrymandering case may all come down to Justice Anthony Kennedy

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predominated.

As a consequence, if the law remains as it is, we can expect that state legislatures will simply engage in a form of kabuki theater when they redistrict. They will fill the legislative record with references to their naked partisan goals – and scrub it of references to race – in order to persuade the courts to find that politics, and not race, predominated in their decision-making.

On the ground, little will change – at least so long as voters do not punish legislators who engage in partisan gerrymandering.

This is why so many observers are closely watching the progress of *Gill v. Whitford*, a case from Wisconsin that the Supreme Court may decide to take up as early as this week. *Gill* presents the

court with an opportunity to hold that the Constitution places limits on partisan gerrymandering even where a racial motivation is not shown.

Gill arose from a constitutional challenge to partisan gerrymandering carried out by the Republican-controlled Wisconsin state legislature in 2011, following the 2010 national census. (State legislatures redistrict every 10 years to account for population changes recorded in the most recent census.)

As a result of this gerrymandering, in 2012, Republicans won 60 out of 99 seats in Wisconsin's general assembly even though they secured only 48.6 percent of the statewide vote. And in 2014, they won 63 out of 99 seats with a mere 52 percent of the statewide vote.

Democratic voters sued and claimed that the legislature's action violated their

First Amendment associational rights and 14th Amendment equal protection rights. By a 2-1 vote, a federal trial court agreed and upheld their claims. (There are special procedural provisions, including one for a three-judge trial court, that are used in election law cases of this sort.) In a subsequent order, the court directed the Wisconsin legislature to redistrict in a less partisan manner.

What makes the case potentially so important is that the court found both that there are judicially manageable decision rules under which the plaintiffs' claims may be adjudicated, and that the Wisconsin legislature's conduct was unconstitutional under those rules.

Specifically, the court accepted and applied an innovative mathematical formula proposed by the plaintiffs that measures whether candidates

for the winning party received a disproportionately smaller number of "wasted votes" – the extra votes for winning candidates that were not needed to win, and all votes cast for losing candidates – than candidates for the losing party. And the court then held that the gap between the large number of wasted votes cast for Democrats, and the relatively small number of wasted votes cast for Republicans, was unconstitutionally large.

In the past, a number of Supreme Court justices have expressed doubt that partisan gerrymandering is consistent with the First and 14th Amendments. But a majority of the court has never been able to agree on a standard that marks an appropriate constitutional boundary. For this reason, several other justices have opined that no such standard exists, and that

claims of unconstitutional partisan gerrymandering are not susceptible to judicial review.

If the court decides to review the Wisconsin ruling on its merits, the justices will probably divide into at least two camps. The court's more conservative justices will likely remain unpersuaded that partisan gerrymandering claims are a proper subject of judicial review. But its more liberal justices will likely be more inclined to see the case as justiciable, and may well be receptive to the approach taken by the lower court.

As has so often been the case in recent years, it may all come down to Justice Anthony Kennedy.

In a 2004 case, Justice Kennedy joined with a conservative plurality in rejecting a claim of unconstitutional partisan gerrymandering. But he did not agree with the plurality that such claims could

never be properly adjudicated. Rather, he preferred to leave the door open to the eventual emergence of judicially manageable decision rules to evaluate such claims.

Will counting and comparing wasted votes – as the Wisconsin court has done – strike Justice Kennedy as an appropriate and judicially manageable method for operationalizing constitutional limits on partisan gerrymandering? Stay tuned. And recognize that, if the lower court's decision in *Gill* is upheld, the effect on redistricting after the 2020 census could be profound.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)