Race, Partisan Gerrymandering and the Constitution

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For the most part, the Constitution speaks in generalities. The 14th Amendment, for example, instructs the states to provide all persons the “equal protection of the laws.” But obviously, this cannot mean that states are always forbidden from treating a person differently than any other person. Children can, of course, be constitutionally barred from driving, notwithstanding the Equal Protection Clause.

Thus, there is a need within our constitutional system to refine the Constitution’s abstract provisions. Otherwise, public officials and the people would not know what is permitted and what is forbidden.

The process of refinement has devolved principally (although not exclusively) to the courts. It is the courts that have told us that the Equal Protection Clause permits the states to discriminate on the basis of age in issuing driver’s licenses, but ordinarily does not permit the states to treat persons differently on the basis of their race.

In distilling abstract constitutional provisions into more concrete “decision rules,” courts consider a number of factors. One important factor is the workability of the decision rules they are imposing. Are they comprehensible? Can they be applied with relative ease, predictability and consistency? Are they in fact likely to accomplish the goals that animate them?
Using race as major factor in redistricting violates Equal Protection Clause

A recent Supreme Court decision, Cooper v. Harris, reveals serious workability issues with the decision rules governing how state legislatures must treat race and partisan interests when they engage in congressional redistricting.

Cooper involved constitutional challenges to two North Carolina congressional districts whose boundaries were redrawn following the 2010 census.

The court unanimously upheld a lower court judgment concluding that the first district had been unconstitutionally drawn, and voted 5-3 concluding that the first district's lines were an unconstitutional violation of the Equal Protection Clause.

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Governing how state legislatures engage in congressional redistricting presumably violates the Equal Protection Clause.


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To understand the problem, one must bear three things in mind.

First, under current Supreme Court precedent, a state legislature's use of race as a "predominant factor" in redistricting presumably violates the Equal Protection Clause.

Second, under current Supreme Court precedent, a state legislature faces no constitutional limitation on engaging in partisan gerrymandering — i.e., intentionally redistricting presumably to violate the Equal Protection Clause.

Third, African American voters in North Carolina (as elsewhere) overwhelmingly vote for Democrats. Indeed, African American voters in North Carolina are more likely to vote for Democrats than voters who are registered as Democrats.

Given these facts, what happened in North Carolina should come as no surprise. The state legislature, which was controlled by Republicans following the 2010 census, packed a large number of African American voters into District 12 — a district that was already certain to elect a Democrat — in order to prevent these voters from participating in the election of representatives from other North Carolina congressional districts.

District 12 was challenged — i.e., intentionally redistricting presumably to violate the Equal Protection Clause — because these voters were highly likely to vote for Democrats.

As noted above, the lower court agreed with the challengers and held District 12 unconstitutional. By a 5-3 vote, a majority of the Supreme Court affirmed, largely on the ground that the record evidence — which contained a number of references to race by new District 12's architects — supported the lower court's finding.

Justice Alito, writing for the six-judge majority, stated that the redistricting presumably violated the Equal Protection Clause. He noted that the legislature's use of race as a "predominant factor" in redistricting presumably violated the Equal Protection Clause.

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Yes, the state conceded, the legislature had intentionally increased the number of African American voters in District 12 for purposes of diluting the impact of their votes. But it did not engage in this action because of these voters' race. Rather, it did so because these voters were highly likely to vote for Democrats.

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Justice Alito, writing for himself and two others, took strong exception to this ruling and to the way in which the lower court had characterized the legislature's conduct. He thought that the legislature's predominant motive was political — i.e., "to pack the district with Democrats and thus to increase the chances of Republican candidates in neighboring districts."

Cooper thus resolved the constitutional challenge to North Carolina's District 12. But it really did not resolve the important constitutional question raised by the case — whether state legislatures engaged in redistricting may intentionally draw district lines in ways that impose electoral disadvantages on racial groups that tend to vote in politically monopolistic ways. The answer to the question raised in Cooper should be consistent across the country, regardless of whether references to race or politics "predominate" in a given state's redistricting record.

One way that the court could deal with the problem would be to reconsider its hands-off stance with respect to whether the Constitution imposes limits on partisan gerrymandering. Interestingly, a case from Wisconsin that is presently making its way to the court could set the stage for such a reconsideration.

I will discuss this case, and the court's approach to the problem of partisan gerrymandering, in my next Constitutional Connections column.

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