6-4-2017

Race, Partisan Gerrymandering and the Constitution

John M. Greabe
University of New Hampshire School of Law, john.greabe@law.unh.edu

Recommended Citation

John M. Greabe, *Race, Partisan Gerrymandering and the Constitution,* Concord Monitor, Jun. 4, 2017 at D1, D3.

Race, partisan gerrymandering and the Constitution

JOHN GREABE
Constitutional Connections

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?

SEE **CONSTITUTION** D3

Using race as major factor in redistricting violates Equal Protection Clause

CONSTITUTION FROM D1

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 (Justice Gorsuch did not participate in the case) to affirm the lower court's judgment that the second district – District 12 – also was unconstitutional. The workability issues arise in connection with the court's treatment of District 12.

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 so as to maximize the power of the controlling political party and minimize the power of the minority party.

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 as unconstitutional on the ground that the legislature had used race as a predominant factor in drawing it. The state countered with a completely different characterization of what had happened: The legislature had done nothing more than engage in constitutionally permissible partisan gerrymandering.

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.

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 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 legislative record made it absolutely clear 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 monolithic 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 just 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.

(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.)