The Boundaries of Partisan Gerrymandering

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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...
New gerrymandering case may all come down to Justice Anthony Kennedy

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predominated.

As a consequence, if the lower court decides as it is, we can expect that state legislatures will simply engage in a form of kabuki theater when they re-district. They will fill the legislative record with references to their naked partisan goals — and scrub it of references to race — in order to per­ change — at least so long as voters do not punish legisla­ tors who engage in partisan gerrymandering.

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. Whit­ ford, 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 constitu­ tional challenge to partisan gerrymandering carried out by the Republican-controlled Wisconsin state legislature in 2011, following the 2010 na­tional census. (State legisla­ tures redistrict every 10 years to account for population changes recorded in the most recent census.)

As a result of this gerry­ mandering, in 2012, Republi­ cans 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.

Voters sued and claimed that the legisla­ture’s action violated their First Amendment associa­ tional rights and 14th Amend­ ment equal protection rights. By a 2-1 vote, a federal trial court agreed and upheld their claims. (There are special procedural provisions, includ­ ing one for a three-judge trial court, that are used in elec­ tion law cases of this sort.)

In a subsequent order, the court directed the Wisconsin legis­ lature to redistrict in a less partisan manner.

What makes the case po­ tentially so important is that the court found both that there are judicially manage­able decision rules under which districts presented in the Wiscon­sin legislature’s conduct was unconstitutional under those rules.

Specifically, the court ac­ cepted and applied an innova­ tive 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 Republicans and the relatively small number of wasted votes cast for Republi­ cans, was unconstitutionally large.

In the past, a number of Supreme Court justices have expressed doubt that partisan gerrymandering cases 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 An­ thony Kennedy.

In a 2004 case, Justice Kennedy joined with a conser­ vative plurality in rejecting a claim of unconstitutional par­ tisan gerrymandering. But he did not agree with the plurality that such claims could never be properly adju­ dicated. Rather, he preferred to leave the door open to the eventual emergence of judi­ cially manageable rules to evaluate such claims.

Will counting and compar­ ing wasted votes — as the Wis­consin court has done — strike the others as an appro­ priate and judicially manage­ able method for oper­ alizing constitutional limits on partisan gerrymandering? Stay tuned. And recognize that, if the lower court’s deci­ sion in Gill is upheld, the ef­ fort on redistricting after the 2020 census could be pro­ found.

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