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The Party Line:

Gerrymandering at the Supreme Court

By Justin Levitt



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In the rarefied Chamber of the United States Supreme Court, Justices often use oral argument to talk to each other, speaking through (and sometimes past) the litigants in order to persuade their colleagues.

And now the Justices are talking in a whole new dimension: time. In one of this Term's blockbuster cases, argued just weeks ago,

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Justice Kennedy was vigorously engaged in a continuing conversation with the ghosts of Justices past—and perhaps even more important, with Justice Kennedy, circa 2004.

The case in question is *Gill v. Whitford*, a hotly anticipated battle over partisan gerrymandering. Court watchers did not have long to wait for the fireworks: the case was argued on October 3, just the second day of the Court's new Term.

At stake is an issue core to our self-governance. The district lines that define constituencies for local, state, and federal office—embracing some communities and splintering others—determine which groups of people representatives represent, and which policies those representatives pursue. Those who are interested in the economy, the environment, international affairs, domestic security, health care, taxes, education, zoning, or hundreds of other matters vital to personal and public well-being are (or should be) interested in the redistricting process. It is the infrastructure of our infrastructure.

States have a fair amount of discretion to determine how these districts are drawn. Some ask that districts roughly follow county or city lines, or that district shapes be relatively compact, or that districts try to accommodate communities of interest. Most states with such constraints allow substantial latitude in their application.

Federal law adds a few constraints of its own, vital for equitable representation. It requires, for example, that each district contain approximately the same number of people: This is why district lines are redrawn every ten years, after the Census determines how many people live where. Federal law also prohibits intentional racial discrimination, vote dilution in violation of the Voting Rights Act, and districts otherwise drawn predominantly based on race without adequate justification.

And then there is the issue at hand. In

2008 and 2010, California voters committed the state and federal redistricting process to an independent bipartisan commission—but in most states, the legislature has control of the pen. And where one political party controls the entire apparatus of government during the decennial redistricting cycle, it has often used that power to draw district lines tilting the electoral map in its favor.

The concept is not new. Historians have long debated whether Patrick Henry drew Virginia's district lines to deny a seat in the First Congress to James Madison, the Constitution's primary author. (It didn't work.) And the "Gerry-mander" owes its name to a 1812 Massachusetts plan attempting to secure elections for the Democratic-Republican party. Both halves of that party's namesake have since abused the process for their own ends: An extreme gerrymander drawn by Texas Democrats with unilateral control in the 1990s was replaced by a similarly extreme gerrymander drawn by Texas Republicans with unilateral control in the 2000s.

Judges have not condoned this behavior, but neither have they put an end to it. The Supreme Court last confronted the issue in depth in 2004, in *Vieth v. Jubelirer*—and the result reflects a jurisprudential divide that has spanned at least the last six decades.

In *Vieth*, all nine Justices agreed that "an excessive injection of politics" into the redistricting process violates the Constitution. But the Court splintered on the two logical follow-up questions: how to know when an injection of politics is excessive, and who should decide. The four more conservative Justices said that courts could not reliably determine that dividing line, and would have removed the federal judiciary from the process entirely. The four more liberal Justices said that courts could determine that dividing line, but could not themselves agree on what the line was. In three different opinions, they offered three distinct legal standards.

Justice Kennedy, as usual, occupied the center square. He rejected all of the tests proposed, but refused to slam the courthouse door entirely, expressly inviting future redistricting litigants to serve up an appropriate constitutional line. For years, claimants did, to no avail; case after case was dismissed for want of a viable federal standard. As Professor Gary King memorably explained, the issue was technically justiciable but had not yet been “justished.”

Until last year. For the first time in at least three decades, a federal trial court struck a redistricting plan as an unconstitutional partisan gerrymander. The court carefully canvassed the shards of existing doctrine, mapping the existing jurisprudential landscape. And it found that plaintiffs had proven that the Wisconsin state legislature had drawn its own districts in order to “make the political system systematically unresponsive to a particular segment of the voters based on their political preference.” That is, in Wisconsin, where the two major political parties are substantially competitive, partisan majorities had deliberately drawn district lines to durably entrench their own party’s continuing control, even against a wave of electoral support for the opposition. Whatever the outer contours of prohibitions against partisan gerrymandering, the court determined that this sort of proof established a constitutional violation.

Constitutional challenges to statewide redistricting plans are subject to a special federal statutory procedure: They are heard by a three-judge trial court and subject to direct Supreme Court appeal. Supreme Court review of such appeals is mandatory, and not subject to the normal certiorari calculus. Though the Court disposes of most by summary affirmance, summary disposition would have been a singularly odd choice for such a momentous matter. And so we arrived at the October 3 argument.

Justices Kennedy, Thomas, Ginsburg, and Breyer were all on the record in *Vieth*, but

five Justices had joined the Court since. It is always difficult to assess predilections from

‘Justice Kennedy’s question turns on the role of invidious intent in the redistricting process—or, indeed, in any state action. In most other contexts, government actors may not act against individuals based on their desire to associate with a particular political party.’

any individual argument. But to many observers, the Chief, Justice Alito, and Justice

Gorsuch seemed skeptical that the plaintiffs had offered a viable constitutional standard. Justices Sotomayor and Kagan seemed more satisfied. If those impressions prove correct, the case will come down to Justice Kennedy. Again.

Justice Kennedy, for his part, concentrated on one recurring question. It was the first question he asked of the state legislature's advocate, and it was the question to which he repeatedly returned—indeed, it was his last question of the argument.

The question: “If the state has a law or constitutional amendment that’s saying all legitimate factors must be used in a way to favor party X or party Y, is that lawful?” The answer he received is that such a statute would not be lawful. That exchange may well be the key to the case.

Justice Kennedy’s question turns on the role of invidious intent in the redistricting process—or, indeed, in any state action. In most other contexts, government actors may not act against individuals based on their desire to associate with a particular political party. A long line of public employment cases presents the doctrine most clearly: Aside from select policy-making positions, the state may not favor or disfavor individuals because of their partisan affiliation. In *Heffernan v. City of Paterson*, just last Term, the Supreme Court explained that even the intent to injure based on perceived political affiliation was sufficient to state a constitutional claim. And despite the myriad political calculations in any tax bill, it would be unthinkable to subject Republicans to higher taxes—whatever the amount—simply because of their preference for the Republican party.

Indeed, this question of inappropriate partisan intent has even been resolved in the redistricting context, albeit only obliquely. Districts must have approximately the same population, but the Court has built in some latitude: Population variance among state legislative districts does not generally amount to

a constitutional concern if the difference between most and least populous is less than ten percent. But in 2004, the same year as *Vieth*, the Court in *Cox v. Larios* summarily affirmed a decision striking districts with a population variance of less than ten percent, when the reason for the variance was deliber-

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ate partisan advantage. Districts leaning Democratic were systematically underpopulated, at Republicans’ expense. And though hundreds of other explanations would have raised no judicial eyebrows, the fact that the variance was driven by the deliberate desire to disadvantage voters based on their partisan preference made all the difference.

Justice Kennedy has been wrestling with this question of impermissible intent for some time. In 2004, he was not convinced that

intent alone amounted to a violation of the Equal Protection clause. But he also raised the possibility of a partisan gerrymandering standard based on the First Amendment, the constitutional clause at issue in cases like *Heffernan* where intent is the real turning point. And the question he would not abandon at the oral argument in *Gill* is a question about intent alone: It assumes that a statute requiring redistricting for the benefit of party X can be evaluated without knowing how much benefit was actually achieved.

The lower court in *Gill* offered a more demanding standard: Not only did it find that the legislature intended to durably entrench one party at another's expense, but it actually did so. And the proof of that proposition was the other matter occupying the Court at oral argument.

The marquee piece of evidence offered to prove both intent and effect is a calculation called the "efficiency gap." It was not the only evidence put forward: There was direct testimony by mapmakers, and the progression of draft district plans from mildly partisan to strikingly so. But the efficiency gap took center stage. Legislators attempting to execute a partisan gerrymander will often "pack" opposition voters into a few heavily saturated districts that the opposition wins handily, and "crack" the remainder among a larger number of districts that the opposition narrowly loses. That is, gerrymanderers ensure that opposition voters are dispersed less efficiently than voters of their own party. The "efficiency gap" attempts to measure this disparity. Virtually every district plan will have *some* efficiency gap: Voters are not everywhere evenly distributed. But extreme outliers raise a red flag, indicating that one party is likely to win and keep on winning, despite any other political trends. And when those outliers can't be explained by legitimate choices—think of jury selection with no response to a *Batson* challenge—extreme efficiency gap scores can provide evidence of

both effect and intent.

The efficiency gap is not a perfect measure, either as an evidentiary calculation or as a mechanism for marketing constitutional decisionmaking. Both types of flaws occupied significant time during oral argument in *Gill*. This is what Chief Justice Roberts meant when he expressed hesitation about allowing the case to turn on "sociological gobbledygook." Commentary on the case has also focused primarily on the efficiency gap—the measure is often portrayed either as the innovative silver-bullet constitutional distinction between excessive partisanship and the "normal" kind, or the shamanistic totem beguiling technocrats into thinking they've found an objective answer.

The truth is at neither extreme. The efficiency gap is a clever piece of rebuttable evidence, useful in some instances and less useful in others. It may help to establish impermissible intent and impermissible impact, as it did in this very case. Other evidence may be mustered to the same cause. But it is odd to think that the existence of a cause of action turns on the mechanical details of one piece of evidence. The trial court deployed but did not depend on the efficiency gap. We shall see how pivotal it appears on appeal.

The Supreme Court is wondering whether the Constitution contains a prohibition on reckless speeding. The plaintiffs have offered a serviceable radar gun. Most of the discussion has concerned the mechanics of the radar gun. But that may well prove a footnote. If the questions posed at oral argument are any indication, Justice Kennedy appears to be focused on the broader question. Only time will tell if he is merely talking to himself.

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Professor Justin Levitt, at Loyola Law School, Los Angeles, is a nationally recognized expert on constitutional law and the law of democracy. He is the counsel of record for an amicus brief in Gill v. Whitford on behalf of several civil rights organizations.