COMMENTARY

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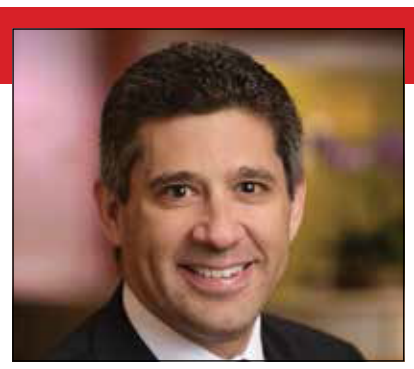

WISCONSIN'S CENTRAL ROLE IN THE FUTURE OF PARTISAN GERRYMANDERING

On October 3, the Supreme Court heard oral arguments in the case *Gill v. Whitford*.

The basic facts are that Republicans, having gained control of both houses of the Wisconsin legislature and the Governorship in 2010, enacted a legislative-redistricting plan, known as Act 43, designed to maximize their chances of maintaining a legislative majority under any likely future voting scenario. Over the course of several months, lawyers and political scientists used sophisticated statistical techniques and map-drawing software to prepare various maps.

They evaluated the degree to which each proposed map would improve Republicans' electoral prospects. The maps ultimately chosen resulted in a substantial Republican advantage: in 2012, the state-wide Republican vote share was 48.6 percent, yet Republicans won 61 percent of all Assembly seats; in 2014, the Republicans won 64 percent of the seats with a vote share of 52 percent.

When I describe the case this way, people tend to be skeptical. Since I've written an amicus brief in support of the challengers of Act 43, they assume I've given an advocate's version of the facts. After all, I've described a clear attempt to rig elections; surely, they think, there must be more to the case, or this would not be before the Supreme Court.

But these facts are essentially undisputed. The record even shows that a prominent staff member for the Wisconsin Senate Majority Leader, when presenting Act 43 to the Republican caucus, spoke from prepared notes that stated, "The maps we pass will determine who's here 10 years from now," and "We have an opportunity and an obligation to draw these maps that Republicans haven't had in decades."

The defendants' own expert testified that "under any *likely* electoral scenario, the Republicans would maintain a legislative majority." In a 2-1 decision, a three-judge panel of the Wisconsin District Court deemed Act 43 unconstitutional. Even the dissenting judge agreed that "it is almost beyond question that the Republican staff members who drew the Act 43 maps intended to benefit Republican candidates." The issue in *Gill v. Whitford* is not whether partisan gerrymandering occurred, but whether the Supreme Court will do anything about it.

The origins of the United States lie in the idea that the government should derive its legitimacy from the consent of the governed, rather than from the power of those who govern.

In 21st century Wisconsin, the means have changed, but the outcome is the same: Those who hold governmental power can impose their will upon a citizenry to whom they are not meaningfully accountable and do not fairly represent. President Ronald Reagan described the woeful state of affairs in his 1987 address to the Republican Governors Club: "Legislatures have so rigged the electoral process that the will of the people cannot be heard."

Today, the situation has become even more acute. Using sophisticated statistical analyses and computer-aided map-drawing software, map-makers "crack" and "pack" voting districts to ensure that incumbent legislators can choose their preferred voters, rather than voters choosing their preferred legislators.

Given that the partisan intent and effect of Act 43 is undisputed, and given these core American democratic values, it can be difficult to understand what makes *Gill v. Whitford* a difficult case.

The answer traces back to a pair of political gerrymandering cases. In 1986, all nine justices agreed in *Davis v. Bandemer* that claims of political gerrymandering were justiciable, but failed to agree upon a clear standard by which such cases should be adjudicated.

Vieth v. Jubelirer came before the court in 2004. Seven of the nine justices were new since the *Bandemer* case. The court was unable to reach a majority decision. Justice Antonin Scalia, joined by justices Sandra Day O'Connor, Clarence Thomas, and Chief Justice William Rehnquist, found that in the eighteen years since *Bandemer*, "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged," and therefore concluded that no such standards exist, "that political gerrymandering claims are non-justiciable and that *Bandemer* was wrongly decided."

Justices David Souter, Ruth Bader Ginsburg, John Paul Stevens, and Stephen Breyer dissented, finding political gerrymandering claims justiciable under *Bandemer*, and the gerrymander in question to be unconstitutional. Justice Anthony Kennedy agreed with the dissenters insofar as he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." But Kennedy did not believe such a standard had been presented in *Vieth*, and therefore concurred in the decision not to strike down the gerrymander. Amidst the 4-1-4 fracture was a significant point of agreement: Scalia explicitly agreed with Stevens' concerns about the "incompatibility of severe partisan gerrymanders with democratic principles."

The justices considering *Gill v. Whitford* are now confronted with a) a clear case of intentional partisan gerrymandering, and b) agreement among all previous justices that partisan gerrymandering is incompatible with democratic values, but c) a muddled pair of Supreme Court precedents. Scalia's opinion fell one vote short of a majority, so *Vieth* did not overrule *Bandemer*. Today, the continued viability of *Bandemer* appears to rest again on the vote of Kennedy. Act 43's defenders have argued forcefully that the court should adopt Scalia's view.

At oral argument, the justices appeared to align as the conventional wisdom had predicted. Justices Breyer, Ginsburg, Sonia Sotomayor, and Elena Kagan appeared inclined to strike down Act 43 as an unconstitutionally severe political gerrymander. Justice Sotoymayor asked, "Could you tell me what the value is to democracy from political gerrymandering? How does that help our system of government?"

Chief Justice John Roberts, along with Justices Samuel Alito and Neil Gorsuch, seemed skeptical that the matter was justiciable. (Thomas, as usual, did not speak.) Roberts feared an unmanageable influx of redistricting cases: "And every one of them will come here for a decision on the merits. These cases are not within our discretionary jurisdiction. They're the mandatory jurisdiction. We will have to decide in every case whether the Democrats win or the Republicans win. So it's going to be a problem here across the board." The Chief Justice and Alito also expressed skepticism about the reliability of the social science and statistical measures proffered as judicially manageable standards. Roberts dismissed them as "sociological gobbledygook" and Alito asked "is this the time for us to jump into this?"

Kennedy, again, will most likely be the swing vote. Much of the reporting on the oral argument has concluded that Justice Kennedy seems sympathetic to the challengers. But this isn't really news. In *Vieth*, Kennedy was also clearly sympathetic to the challengers, but ruled against them because he wasn't satisfied that the court had found a workable standard. The same may prove to be true in *Gill*. Justice Kennedy's comments, on their own, may not reveal any fundamental change in his views since 2004.

What has fundamentally changed since 2004 is the current and likely future composition of the court. Kennedy's opinion in *Vieth* and comments during oral argument in *Gill* make it clear that Kennedy believes severely partisan gerrymanders are justiciable, but that he does not want to strike down any particular gerrymander until he finds the right case and the right judicial standard. He may or may not think *Gill* presents the right case and the right standard, but there are other considerations.

Kennedy is 81. Ginsburg is 84, and Breyer is 79. It is likely that at least one of them will leave the court before a Democrat is in the White House. If any of these three are replaced by a Republican president, the court will most likely tip in favor of Scalia's views in *Vieth*.

Kennedy faces a "now or never" dilemma. If the *Gill* decision does not hold that political gerrymanders are justiciable, and that manageable standards exist to adjudicate such cases, it is highly like that the next political gerrymandering case will come before a Court that has the votes to adopt Scalia's opinion in *Vieth* and overrule *Bandemer*. Such a decision would clear the field for ever-more aggressive political gerrymandering and deeply erode core American democratic values.

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At Gettysburg, President Abraham Lincoln expressed a vision of America as a "government of the people, by the people, for the people." Partisan gerrymandering facilitates a government of the people, by the entrenched ruling elite, for the entrenched ruling elite.

The court must not abandon the issue on the grounds that it is a "political question" best resolved through the political system. Because the fundamental source of concern is a broken political system, we cannot expect the political system to mend itself. The Supreme Court is uniquely positioned as the only American institution that carries both the ability and the responsibility to protect our foundational democratic ideals. With Lincoln's vision in mind, it now falls to the court to ensure that a "nation so conceived and so dedicated, can long endure."

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