Status of Partisan Gerrymandering and Electioneering in the Polling Place

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Redistricting (Gill v. Whitford)

• Wisconsin redistricting case regarding partisan gerrymandering
• Decision from 3 judge panel on 11/21/16 finding unconstitutional partisan gerrymander.
• Court admitted that the law in this area is “still in its incipient stages.”
• Court believed partisan gerrymander to be an abuse of power.
• Wisconsin followed all applicable “traditional redistricting principles.”
• 1 voter found to have standing to challenge the entire state’s map and not just his own district.
By contrast here is PA-CD 07
Redistricting (Gill v. Whitford) DISSENT

• Points out that Wisconsin followed all the rules regarding compactness, contiguity, and respect for political subdivision boundaries.

• Long history of partisan gerrymandering in this country. Specifically upheld on worse facts by SCOTUS.

• Plaintiffs want the “efficiency gap” principle to be enshrined in constitutional law.

• The efficiency gap model “begs the question of whether a partisan gerrymander occurred.”

• Efficiency gap model has “practical problems as well.”
Redistricting (Gill v. Whitford)

• SCOTUS took certification, huge number of amicus briefs
• Argument occurred on October 3, 2017
  • Whether there was error in allowing a statewide challenge.
  • Whether the court below violated existing precedent by finding impermissible partisan gerrymander when all traditional principles followed.
  • Whether the court below adopted a watered down version of the plurality test in *Davis v. Bandemer*.
  • Whether WI should have a chance to give evidence under the chosen standard.
  • Whether partisan gerrymander claims are justiciable at all.
Redistricting Gill v. Whitford

• SCOTUS decision June 18, 2018.
• 9-0 vacated and remanded with Chief Justice Roberts writing
• Justices Thomas and Gorsuch joined except as to part III and Thomas wrote concurrence joined by Gorsuch (part III requires the remand and Thomas would have had the district court dismiss the case).
• Justice Kagan concurred joined by Justices Ginsburg, Breyer and Sotomayor
Roberts Opinion

• “[A] plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has “a personal stake in the outcome,” Baker v. Carr, 369 U. S. 186, 204 (1962), distinct from a “generally available grievance about government,” Lance v. Coffman, 549 U. S. 437, 439 (2007) (per curiam).”

• Allegations of such standing were made, but there was no proof.

• Therefore vacated and remanded to the district court where plaintiffs can attempt to produce such proof.
Roberts Opinion

• Interesting part is Section II of the opinion with a look at the Court’s partisan gerrymandering cases.

• “Our power as judges to “say what the law is,” Marbury v. Madison, 1 Cranch 137, 177 (1803), rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of legal right. Our considerable efforts in Gaffney, Bandemer, Vieth, and LULAC leave unresolved whether such claims may be brought in cases involving allegations of partisan gerrymandering.”

• Here no evidence of standing because no evidence of particularized harm.
Kagan concurrence

• Writes separately to talk about what kinds of evidence could show particularized harm for the plaintiffs.
• Also writes separately to discuss other possible types of harm could be shown besides vote dilution due to “packing and cracking.”
• In addition to possible vote dilution, the plaintiffs should explore a possible harm due to infringement of the first amendment’s right of association. i.e. a burden to a group of voters to express themselves as a group legislatively.
• Interestingly, Justice Kagan quotes Justice Kennedy a lot in the concurrence.
Redistricting

• Maryland and North Carolina also had partisan gerrymandering claims before SCOTUS.
• SCOTUS sent both of them back to the lower court.
• Texas Plaintiffs tried to make a partisan gerrymandering claim at SCOTUS, but the court did not grant the petition on that claim.
Redistricting (Perez v. Texas)

• Three judge panel ruled on the 2011 maps earlier in 2017.
• Trial held on the 2013 maps.
• Court ruled on 8/15/2017 that 2013 maps intentionally discriminated in two congressional districts.
• Court ruled that there was intentional discrimination in 9 state house districts in four counties.
Redistricting (Perez v. Texas)

- Racial redistricting case where Texas’ defense was partisan gerrymander not racial.
- Court upheld the maps in all but one district.
- District court missed the presumption of legislative good faith and improperly reversed the burden of proof.
Electioneering (Minnesota Voter Alliance v. Mansky)

• 7-2 opinion by Chief Justice Roberts striking down Minnesota’s polling place electioneering law as too vague.

• “Under Minnesota law, voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.”

• No guidance on what “political” means.

• Too vague to stand.
Electioneering (Minnesota Voter Alliance v. Mansky)

• However, states have a legitimate interest in limiting political speech at polling places.

• “A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government controlled property set aside for the sole purpose of voting. The space is “a special enclave, subject to greater restriction.” ISKCON, 505 U. S., at 680. Rules strictly govern who may be present, for what purpose, and for how long.”

• “[W]e see no basis for rejecting Minnesota’s determination that some forms of advocacy should be excluded from the polling place, to set it aside as “an island of calm in which voters can peacefully contemplate their choices.””
Electioneering (Minnesota Voter Alliance v. Mansky)

• “Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.”

• “But the state must draw a reasonable line.”

• “unmoored use of the term political” is not a reasonable line.

• Texas and California received a shout out as drawing a similar restriction in “more lucid terms.”
Electioneering (Minnesota Voter Alliance v. Mansky)

• Justice Sotomayor in dissent did not agree that Minnesota’s law was necessarily not susceptible to reasonable interpretation.
• She would have remanded the question to the Minnesota supreme court for a definitive definition of what “political” meant in this context.