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A Tale of (at Least) Two Gerrymanders

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At the same time congressional committees are investigating allegations of Russian meddling in the 2016 election, the judiciary has been grappling with another critical challenge to American democracy: the preponderance of partisan and racial gerrymandering. The manipulation of district lines to create electoral advantage is not a new problem. In the early history of our country, Patrick Henry famously tried to draw congressional district lines that would keep James Madison from winning a seat in our first congressional elections. But courts today face the specter of elected officials and party officers using high-end technology and increasingly fine-grained data about voters to create maps that lock in their advantage and shut out opponents for years. Recent rulings and pending litigation in both district courts and the U.S. Supreme Court could have a significant impact on the balance of power at both the state and federal level on the new round of redistricting after the 2020 census. North Carolina may be ground zero, the first piece of a doctrinal puzzle that ends, hopefully, in fewer gerrymanders that distort democracy.

The Tar Heel state has been in the news a lot. In 2013, it passed an omnibus law, H.B. 589, 2013 Gen. Assemb. (N.C. 2013), imposing a wide-range of restrictions on voting that a federal

appeals court concluded was intended to discriminate against minority voters. *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). That bill and the subsequent lawsuit came on the heels of the state's controversial 2011 redistricting cycle which has raised claims of both a racial and a partisan gerrymander.

In *Cooper v. Harris*, formerly *McCrory v. Harris*, where plaintiffs alleged that Republican legislators illegally "packed" African-American voters in two congressional districts during the last redistricting cycle, a three-judge panel held that race unconstitutionally predominated in the design of those districts. *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), aff'd by the Supreme Court on May 22, 2017, 137 S.Ct. 1455 (2017). This case is important because it turns on its head the legal doctrine that had been used to dismantle districts that were perceived to give minority voters an advantage. In this case, the allegation was that minority voters were being injured because there were too many minority voters in the district, resulting in less influence overall. In many prior cases, districts that had been comprised mostly of minority voters were challenged by those who thought it was unfair that minority voters could have such a large influence in the outcome of those elections.

In fact, this is the first time the Supreme Court has upheld a lower court ruling in a racial-gerrymandering case that had vindicated the rights of minority plaintiffs. Moreover, the high court made clear that plaintiffs could challenge redistricting plans without having to meet technical and burdensome proof requirements, like presenting alternative maps or proof that the challenged lines violated traditional redistricting criteria. Significantly, the court recognized that racial discrimination motivated by partisan interests is still racial discrimination.

After a victory by the plaintiffs in the racial gerrymandering case, the North Carolina state legislature was forced to develop a remedial map. But the new set of lines was, in turn, also challenged—this time, as a partisan gerrymander. Instead of commencing a separate action, plaintiffs piggy-backed their new claims on the original case. So, the racial gerrymandering case morphed into a partisan gerrymandering one. The three-judge panel hearing the case denied the plaintiffs' partisan gerrymandering claims, and the plaintiffs appealed.

To date, the Supreme Court has been unable to create a judicially manageable standard for deciding that a partisan gerrymander violated the constitution. The last two times the court has heard arguments on a partisan gerrymandering case, *Vieth v. Jubelier* and *League of United Latin American Citizens v. Perry*, the court deferred on providing an answer. The plaintiffs (and the Brennan Center as amicus) have asked the court to reverse the panel's ruling. The Supreme Court will decide if it will take the case sometime this month. If the court decides to do so, arguments are likely to be set for Fall 2017.

There are two more racial redistricting cases and two more partisan gerrymandering cases originating out of North Carolina making their way through the courts. And more cases in Alabama, Georgia, Maryland, Pennsylvania, Texas, Virginia and Wisconsin, and arguably Arizona (which is winding down).

The Wisconsin case, *Gill v. Whitford*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), petition for cert. granted, (June 19, 2017) (No. 16-1611) is a partisan gerrymandering claim and is especially noteworthy because this case is the first time in more than 30 years that a trial court found, after a full trial, that a redistricting map represented a partisan gerrymander. There, the court noted that in Wisconsin, Republicans won 60 out of 99 seats in the Wisconsin Assembly in 2012, while garnering only 48.6 percent of the statewide vote. The three-judge panel hearing the case concluded that the map violated both the First and Fourteenth Amendments, blending traditional constitutional legal principles with substantive evidence. It reviewed the map drawers' calculations (designed to ensure partisan advantage), and employed new social science measures that revealed bias in the map. Supreme Court arguments will take place in the Fall.

Extreme gerrymanders are likely to be implicated by these court decisions. As such, they should serve as a cautionary note for elected officials thinking about using partisanship as a tool for job security.

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