Coates' Canons Blog: North Carolina and the Specter of Partisan Gerrymandering

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From the earliest days of the American republic, the party in power has drawn election district lines to enhance its own electoral chances and minimize the chances of the opposing party. The very term *gerrymander* comes from just such a district drawn in Massachusetts in 1812.

How far can the legislature go? Is there a point at which partisan advantage is such a controlling factor that the resulting district plan can be termed a "*partisan* gerrymander" and ruled unconstitutional?

The U.S. Supreme Court has never found a particular case of *partisan* gerrymandering to be unconstitutional, but it has said a number of times over the last three decades that it might. In a 1986 case, a plurality of the Court said that a *partisan* gerrymander could be unconstitutional where there is "evidence of continued frustration of the will of a majority of the voters or an effective denial to a minority of voters of a fair chance to influence the political process." *Davis v. Bandemer*, 478 U.S. 109). In 2004, a different plurality of the Supreme Court in another case said that "severe partisan gerrymanders" are "incompatib[le] . . . with democratic principles." *Vieth v. Jubelirer*, 541 U.S. 267). In 2006, the Court again, with very split opinions, recognized that in the proper case a *partisan* gerrymander might be unconstitutional. *LULAC v. Perry*, 548 U.S. 399 (2006).

Still, the Supreme Court has never found the right test, the right measuring stick, the right questions to ask to determine when the regular practice of taking political advantage has transgressed into such an entrenchment of power as to be unconstitutional.

Now the Supreme Court has North Carolina's congressional districts before it on just that question.

A Racial Gerrymander Claim Goes to the Supreme Court

After each census, the North Carolina General Assembly redraws the districts for electing members of Congress (that is, the U.S. House of Representatives). When it has done the job, the lawsuits follow. In recent decades there has been one primary issue before the courts after each census: Were the districts drawn with race in mind to such an overwhelming extent that the redistricting plan should be called a "*racial* gerrymander" and declared unconstitutional? Over the years, North Carolina's districts have been to the U.S. Supreme Court on this issue more often than any other state's.

The congressional districts drawn after the 2011 census were no exception. A lawsuit challenged them on racial grounds and a federal district court stuck them down as unconstitutional. It ordered that new districts be drawn.

In May 2017 the U.S. Supreme Court agreed that the 2011 redistricting plan was a *racial* gerrymander.

The case, *Cooper v. Harris,* involves the First Congressional District, in the northeast portion of the state, and the infamous Twelfth District, which runs from Charlotte through parts of several counties in a narrow swath to the center of Greensboro. In both instances, the 2011 redistricting plan took white voters out of the districts and added black voters to the districts, for the express purpose of raising the black proportion of the voting age population to above 50%. Because of the clear relationship between race and partisan affiliation in modern-day North Carolina, the effect was to bring more Democratic voters into these districts that already voted heavily for Democratic candidates, and raise the proportion of Republican voters in neighboring districts. The mapmakers argued that the federal Voting Rights Act required that districts be drawn above the 50% level where possible. The Supreme Court struck down the mapmakers' argument on the basis that nothing in the VRA requires a 50% proportion, or any particular percentage. Since meeting the 50% proportion was the justification for taking race so strongly into account, and since that justification is wrong, the use of race was unjustified, the court held, and constituted an unlawful *racial* gerrymander.

Now, by the time the Supreme Court issued this decision, the General Assembly had already redrawn the congressional districts because of the order of the federal district court. These new districts were used in the 2016 election.

A Partisan Gerrymander Claim Takes Over

How did the General Assembly go about drawing the new districts?

In its *racial* gerrymander decision, the federal district court had already ruled that the General Assembly had taken race into account too much in drawing the original districts. The legislature wanted to make sure that it steered clear of making the same mistake twice. It needed to base the new districts unambiguously on something other than race. How about partisan advantage? The federal district court quoted the legislator in charge of redistricting in the N.C. House as saying, "I acknowledge freely that this would be a political gerrymander," and, "[W]e want to make clear that we . . . are going to use political data in drawing this map. It is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood. . . . I'm making clear that our intent is to use—is to use the political data we have to our partisan advantage."

Did the legislature turn an unconstitutional *racial* gerrymander into a questionable *partisan* gerrymander? The legal challengers raised just this objection. The federal district court turned down the objection. The court said:

"[I]t may be possible to challenge redistricting plans when partisan considerations go 'too far'. But it is presently obscure what 'too far' means."

Not knowing how to figure out when a legislature has gone "too far," the district court left the new districts intact. The challengers appealed to the Supreme Court.

So, now both claims—racial gerrymander as to the original districts and partisan gerrymander as to the new districts—were before the Supreme Court. As we have seen, the Court agreed that the original districts amounted to an unconstitutional *racial* gerrymander. It has not yet ruled on the *partisan* gerrymander claim.

As the matter stands in late June 2017, the Supreme Court has asked the parties for briefs on whether it should hear this *partisan* gerrymander claim with respect to the redrawn Congressional districts. Is the question properly before the court, in a case that started out on a completely different claim? The parties have filed those briefs and the Supreme Court is now deciding what to do.

This *partisan* gerrymander claim centered on North Carolina's redrawn congressional districts is, at least for now, before the Supreme Court.

A Second Partisan Gerrymander Claim and a Possible Trial

Meanwhile—while the Supreme Court is deciding what to do with the *partisan* gerrymander claim in the case before it—a completely different lawsuit on the same subject is before a different federal district court in North Carolina.

Two advocacy groups—Common Cause and the League of Women Voters—brought claims that the redrawn

Congressional districts amounted to a *partisan* gerrymander. Their claims were combined into one lawsuit.

In March 2017 the court in the new combined lawsuit determined that the Supreme Court cases from 1986 and 2004 and 2006 had "opened the door" for lower courts to try to find the standards, tests, and measures for determining just when partisan advantage has been taken "too far."

With that ruling, the court is poised to conduct a trial on the question and make a ruling—one way or the other—on whether North Carolina's current congressional districts are the result of a *partisan* gerrymander.

Where Things Stand

Very recently the Supreme Court agreed to hear an appeal from a *partisan* gerrymandering case from Wisconsin. By that action, the Supreme Court has indicated that it is willing to look at the question again. Will this be the time that, for the first time, the Court strikes down a districting plan because it is a *partisan* gerrymander? Will this case set the standard by which the North Carolina cases will be decided?

For North Carolina's congressional districts, two challenges are alive, both asserting that the redrawn districts amount to a *partisan* gerrymander. One challenge is already in the Supreme Court. Will the Court agree to take it up? The other is awaiting trial in the federal district court.

Perhaps the high court will soon, for the first time, fashion standards for saying when a legislature has gone "too far."

Links

- www.supremecourt.gov/opinions/16pdf/15-1262_db8e.pdf
- www.brennancenter.org/sites/default/files/legal-work/Memorandum_Opinion_03.03.2017.pdf