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Supreme Court Will Revisit Political Gerrymandering

Walter Olson

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It comes as no surprise that the Supreme Court has agreed to hear the case of Gill v. Whitford, in which a district court struck down the Wisconsin legislature's partisan gerrymander. Conservative justices want to hear the case as a way to correct an error, while liberals see it as their last best chance to tee up a landmark constitutional case on redistricting while Anthony Kennedy is still on the Court. Within hours, however, the grant of review was followed by a kicker – an order staying the court order below, over dissents from the four liberals – that calls in question whether the momentum is really with those hoping to change Kennedy's mind.

Last time around, in 2004's Vieth v. Jubelirer, the Court foreshadowed this day. Four Justices led by Scalia declared that for all the evils of political gamesmanship in drawing district lines – a practice already familiar before the American revolution – there was and is no appropriately "justiciable" way for the Court to correct things; it would be pulled into a morass of subjective and manipulable standards that could not be applied in a practical and consistent way and would cost it dearly in political legitimacy.

Justice Anthony Kennedy, in a separate concurrence, agreed in dismissing the Pennsylvania case at hand, and said the Court was "correct to refrain from directing this substantial intrusion into the Nation's political life" that would "commit federal and state courts to unprecedented intervention in the American political process." But he left the door open to some future method of judicial relief "if some limited and precise rationale were found to correct an established violation of the Constitution."

That set up a target for litigators and scholars to shoot for: can a formula be found that is "limited and precise" enough, and based on an "established" enough constitutional rationale, to convince Justice Kennedy? After all, the Court's 1962 Baker v. Carr one-person-one-vote decision on districting had been an unprecedented intervention in the American political process, but also one that could be implemented by a simple formula yielding consistent outcomes and little need for ongoing supervision (take the number of people in a state and divide by the number of districts).

Plaintiffs in the Wisconsin case are hoping that a newly devised index they call the "efficiency gap" can serve as an adequately objective measure of whether partisan gerrymandering has taken place, given the presence of evidence of such motivation. Even if courts accept this, it is another

big jump to the confidence that they can provide consistent and predictable remedies unaffected by judges' own political prejudices.

The decision to stay or not stay a lower court order often provides a peek as to which side the Justices expect to prevail. And the five-member majority to stay the Wisconsin order – a majority including unsurprisingly Gorsuch, but more significantly Kennedy – suggests that at this point it is the conservative side's case to lose.

Whatever the Court's disposition of the Wisconsin case, gerrymandering remains a distinctive political evil, an aid to incumbency that promotes the interests of a permanent political class, and a worthy target for efforts at reform. I've written more on that here and here.

Walter Olson is a senior fellow at the Cato Institute's Center for Constitutional Studies and is known for his writing on the American legal system.