

A First-Monday-Week Firecracker!

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

Happy “First Monday in October!” -- the day the Supreme Court comes back from summer recess and begins oral arguments and case decisions through next June.

This Term the Supreme Court is jumping right into its work. The day after “First Monday,” the justices are confronting one of the most consequential and long-delayed questions in constitutional jurisprudence: when does “political gerrymandering” violate the Equal Protection clause of the U.S. Constitution? Political gerrymandering is manipulation of state-legislative or congressional districts by a state’s majority party to enhance its political domination at the expense of the minority party.

The question has obvious political implications. “Political gerrymandering” has been done in states where Democrats dominate state legislatures and governorships. But because Republican-party officeholders now dominate a majority of state governments, a green light for political gerrymandering will disproportionately empower the Republican agenda – including by enabling state laws about voter qualifications and election practices for *federal* congressional and presidential elections. On the other hand, if the Court accepts the invitation of the challengers in *Gill v. Whitford* to invalidate the state-legislative districts Wisconsin drew in 2011, federal courts will serve as potentially significant brakes on rampant abuse of majority political power.

Beyond the political dimensions, *Gill v. Whitford* shows that declaring a legal principle is not the same as being able to implement it effectively. It has been 31 years since the Court held in *Davis v. Bandemer* that partisan manipulation of legislative districts violates the 14th Amendment’s Equal Protection clause “when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole” over multiple election cycles.

In the intervening years the Court has been unable to agree on a yardstick for determining when unconstitutional partisan manipulation is present. The result is that no Supreme Court majority has ever found a districting scheme to be unconstitutional on partisan-gerrymandering grounds.

The classic example is *Vieth v. Jubelirer*. In this 2004 decision, four justices developed three different standards for drawing the line between acceptable and unacceptable partisanship. This was partly why Justice Scalia, who led another group of four justices seeking to retreat from the partisan-gerrymandering battlefield, argued that the Court’s political-gerrymandering line was “incapable of principled application.” Yet, because Justice Kennedy held out hope for a future “limited and precise” test, the Court lacked a critical fifth vote to close the constitutional door.

The *Gill* challengers seek to offer a Court majority – and especially Justice Kennedy – an effective solution to this long-standing dilemma. Specifically, challengers urge the Court to adopt the definition used by the lower judges striking down the Wisconsin districting plan – a three-element doctrine employing a disputed “efficiency gap” metric (which focuses on the extent to which a districting scheme deliberately “wastes” minority-party votes by dispersing or concentrating them).

Ultimately, *Gill* pointedly illustrates the “political thicket” the Court enters when it deals with political-gerrymandering arguments. By contrast to cases defining and remedying district manipulation on numerical and racial lines, defining the law violation in political-gerrymandering cases is inherently more subjective. And active participation in partisan contests by federal judges -- whose legitimacy depends upon being seen as “above politics” – is especially likely to seem inappropriate. In this area fraught with at the least the appearance of a politicized judiciary, judges and justices also confront the reality that non-judicial remedies are unlikely. This is because political gerrymandering aims to insulate a state’s majority party from being “voted out of office” by voters affiliated with the minority party.

In several ways, then, the Court has picked quite an explosive firecracker for celebrating the opening days of its 2017 Term!