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Let the democratic process work

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The national political process may be dramatically changed by a recent decision of a three-judge federal court in Wisconsin that invalidated the partisan gerrymandering of the Wisconsin legislature. On Nov. 21, in *Whitford v. Gill*, the court held that the gerrymandering denied equal protection. If this

ruling is affirmed by the U.S. Supreme Court, this would change districting for state legislatures and the House of Representatives in many states across the country.

Partisan gerrymandering - where the political party controlling the legislature draws election districts to maximize seats for that party - is nothing new. In fact, the practice is named for Massachusetts Gov. Elbridge Gerry who in 1812 signed a bill that redrew the state senate election districts to benefit his Democratic-Republican party. But what has changed are the sophisticated computer programs that make partisan gerrymandering far more effective than ever before. The political party that controls the legislature now can draw election districts to gain a much more disproportionate number of safe seats for itself.

This is exactly what occurred in Wisconsin, where Republicans took advantage of their control of the legislature to give themselves a disproportionate number of seats relative to their voting strength. The Republicans employed two gerrymandering techniques in order to lessen the effect of votes for Democrats statewide: "cracking" - "dividing a party's supporters among multiple districts so that they fall short of a majority in each one" - and "packing" - "concentrating one party's backers in a few districts that they win by overwhelming margins."

The gerrymandering worked. As the federal court explained: "In 2012, the Democrats received 51.4% of the statewide vote, but that percentage translated into only 39 Assembly seats. A roughly equivalent vote share for Republicans (52% in 2014), however, translated into 63 seats - a 24 seat disparity." Put another way, "[i]n 2012, the Republicans won 61% of Assembly seats with only 48.6% of the statewide vote. ... In 2014, the Republicans garnered 52% of the statewide vote but secured 64% of Assembly seats. ... Thus, the Republican Party in 2012 won about 13 Assembly seats in excess of what a party would be expected to win with 49% of the statewide vote, and in 2014 it won about 10 more Assembly seats than would be expected with 52% of the vote."

Partisan gerrymandering is inconsistent with basic principles of democratic government, as well as constitutional guarantees of equality in voting. Democracy involves voters choosing their elected officials, but partisan gerrymandering has elected officials choosing their voters.

Justice Ruth Bader Ginsburg, writing for the Supreme Court in *Arizona State Legislature v. Arizona Redistricting Commission* (2015), explained that independent redistricting commissions are desirable because they "impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives."

California and Arizona are among a minority of states which have independent commissions to draw election districts. In a majority of the states, the political party that controls the state legislature draws districts for both the U.S. House of Representatives and for the state legislature. They inevitably do so in a way to maximize their political control.

In *Davis v. Bandemer* (1986), the Supreme Court held that challenges to gerrymandering are justiciable and that substantial vote dilution through gerrymandering denies equal protection. The court said that gerrymandering is unconstitutional if it involves "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."

But in *Vieth v. Jubelirer* (2004), the court dismissed a challenge to partisan gerrymandering, and a plurality of four justices said that such suits are inherently nonjusticiable political questions. Republicans controlled the Pennsylvania legislature and they drew election districts to maximize Republican seats. In *Vieth*, the plurality concluded that *Davis* had proven impossible to implement and the plurality opinion, written by Justice Antonin Scalia, concluded that challenges to partisan gerrymandering are nonjusticiable political questions. Scalia, joined by Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas, said that there are no judicially discoverable or manageable standards and no basis for courts ever to decide that partisan gerrymandering offends the Constitution.

Justice Anthony Kennedy, concurring in the judgment, provided the fifth vote for the majority. He agreed to dismiss the case because of the lack of judicially discoverable or manageable standards, but he said that he believed that such standards might be developed in the future. Thus, he disagreed with the majority opinion that challenges to partisan gerrymandering are always political questions; he said that when standards are developed, such cases can be heard. Justices John Paul Stevens, David Souter and Stephen Breyer wrote dissenting opinions, which Justice Ginsburg joined, arguing that there are standards that courts can implement.

The court offered no more clarity in a subsequent decision, *League of United Latin American Citizens v. Perry* (2006), where it again dismissed a challenge to partisan gerrymandering. After Republicans gained control of the Texas legislature in 2002, they redrew districts for Congress so as to maximize likely seats for Republicans. The redistricting was very successful. The Texas congressional delegation went from seventeen Democrats and fifteen Republicans in the 2002 election to eleven Democrats and twenty-one Republicans in the 2004 election. Many lawsuits were brought and again the court in a 5-4 decision, with no majority opinion, dismissed the case.

It is in this context that the challenge to Wisconsin's gerrymandering is enormously important. This is the first decision since the Supreme Court's rulings to find gerrymandering to be unconstitutional. The three-judge federal court, in a lengthy opinion by 7th Circuit Judge Kenneth Ripple, said that it now is possible to measure the effects of partisan gerrymandering by quantifying an "efficiency gap." The court explained that "[t]he efficiency gap is the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast."

The court applied this through a three-part test: First, plaintiffs have to establish that a state had an intent to gerrymander for partisan advantage. Second, the plaintiffs need to prove a partisan effect, by proving that the efficiency gap for a plan exceeds a certain numerical threshold. Third, and finally, if the plaintiffs meet these requirements, then the burden is on the defendants to rebut the presumption by showing that the plan "is the necessary result of a legitimate state policy, or inevitable given the state's underlying political geography." If the state is unable to rebut the presumption, then the plan is unconstitutional.

The three-judge court used this test and concluded in a 2-1 decision that the election districts for the Wisconsin legislature were drawn with the purpose and effect of enhancing Republican seats and decreasing those for Democrats. The court found no legitimate purpose for this disparity and found the partisan gerrymandering to be unconstitutional.

Federal law requires that the Supreme Court grant review of decisions by three-judge federal courts and it likely will hear the case next term. My hope is that the justices will be persuaded by Judge Ripple's careful ruling, which followed a trial, and hold that such partisan gerrymandering is unconstitutional. That will dramatically change our national political landscape for the better.

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