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LSG Update: The State of Redistricting

Author: Raul Lopez, Raul@TexasLSG.org

This spring is set to be a pivotal one for redistricting in the courts. There are eight states with electoral maps involved in ongoing redistricting litigation. More importantly, there are two specific cases before the U.S. Supreme Court—*Gill v. Whitford* from Wisconsin and *Benisek v. Lamone* from Maryland—that could drastically reshape how lines are drawn and possibly become the most important redistricting cases this decade. These cases deal with the issue of partisan gerrymandering—the question of how much partisan influence is too much. The decisions that the Court reaches in these cases will lay the foundation for what maps will look like in 2018, 2020, and the next decade.

The U.S. Supreme Court has already heard the landmark partisan-gerrymandering challenge to Wisconsin's congressional maps on October 3, 2017. Oral arguments to Maryland's partisan map favoring Democrats were heard last month. With these cases, along with the race question in the Texas case (*Abbott v. Perez*) slated to be heard on April 24th, it's safe to say the justices will have their hands full interpreting the statutory and constitutional limits on electoral-map drawing.

Background and Context

There are thirty-seven states that give state lawmakers significant discretion into how boundaries are drawn for voting districts. Under the current redistricting system, state legislatures redraw their voting districts after each decennial census. Based on the population counts of each state as dictated by the census, there is a reallocation of the 435 seats in Congress with some states either gaining or losing electoral seats. Legislators are supposed to strictly follow changes in population numbers when redrawing district maps.

However, lawmakers often are accused of abusing their discretion by allowing the party that holds a majority in the legislature to redraw districts in a way that favors their own candidates in order to retain majority control. Seth Masket, director of the Center on American Politics at the University of Denver said, "The court has traditionally granted a good deal of deference to states in drawing legislative districts for explicitly partisan purposes." This has mainly been a result of having no principled way of determining how much partisan favoritism is too much. "There seems to be a point at which justices think that a given map is just too partisan, although that point remains ill-defined," Masket said.

In recent redistricting cases that have come before the Court, the justices have shown a growing unease with highly partisan redistricting plans, and arguments made in the Wisconsin and

Maryland cases suggest there is a glimmer of hope for those seeking to limit partisan gerrymandering.

The Supreme Court has not delved into partisan gerrymandering since *Vieth v. Jubelirer* in 2004, a case challenging Pennsylvania's congressional map that gave Republicans an overwhelming advantage in electing its delegation. In a split decision that had no majority opinion (4–1–4 vote), the Court decided not to intervene in this case because no appropriate judicial solution could be found. While the four conservative justices agreed partisan gerrymandering is "unlawful," there was simply no way of determining what was too much. Justice Antonin Scalia went so far as to declare that the Court should affirm all claims related to political—not racial—gerrymandering "nonjusticiable" meaning that courts simply could not make a decision on them. Because no court prior had been able to find an appropriate remedy to partisan gerrymandering claims in the years since the Court ruled on *Davis v. Bandemer* (which held that a solution had not been found but might exist), Scalia wrote that it was time to recognize that the solution simply did not exist.

While the four liberals on the Court agreed the federal courts can and should intervene, it was Justice Anthony Kennedy's decision and guidance in his opinion that set the stage for *Gill*.

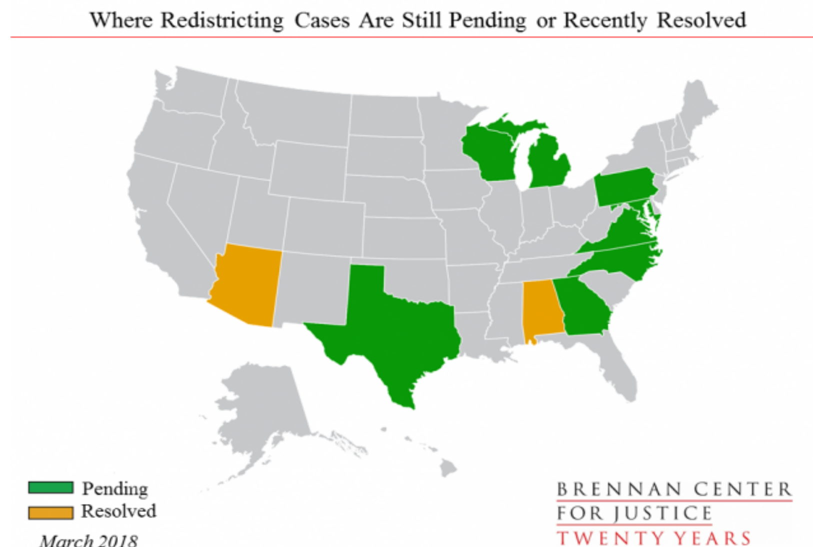
According to the Brennan Center for Justice, Kennedy outlined what a successful challenge might look like. First, he suggested that partisan gerrymandering is unconstitutional because it violates the First Amendment, not the Equal Protection Clause (this was the main argument in *Vieth*). The Equal Protection Clause heavily emphasizes whether a law discriminates on the basis of race, religion, national origin, and sex. It gives less weight to whether or not a law discriminates on the basis of political affiliation. The First Amendment, on the other hand, centers more on whether the government favors or punishes a particular viewpoint.

In addition, Kennedy asked plaintiffs to propose a standard that didn't ask the federal courts to guarantee that a political party would win a number of seats proportional to the number of votes they received. The *Vieth* opinion offered vague contours of a potentially workable standard:

(1) It can't be so squishy that courts will be inundated with weak but non-\frivolous partisan-based redistricting challenges; and
(2) It can't seek to enforce political proportionality; but
(3) It should take into account those instances when a redistricting process yields electoral results that are grossly disproportionate when compared to the partisan composition of the state's voters.

Current Partisan Gerrymandering and Redistricting Litigation

The Court has heard two partisan gerrymandering cases this term, with a third waiting on deck. The decision on whether or not to consider the challenge to North Carolina's congressional maps is still pending. Overall, there are [eighteen cases in eight states] currently under legal review.



An update on the current state of the Wisconsin, Maryland, North Carolina, and Texas redistricting cases is discussed below; additional information on the remaining cases can be found in Appendix A at the conclusion of this report.

Wisconsin (*Gill v. Whitford*)

Oral arguments were heard on October 3, 2017 and a Supreme Court decision is expected before the end of June.

Democrats won a majority of the statewide vote in the state Legislature in 2012 and 2014, but garnered only 39 of the 99 seats. "In November 2016, a panel of three federal judges declared that the state assembly plan adopted by Wisconsin's Republican-controlled legislature in 2011 was an unconstitutional partisan gerrymander that violated both the Equal Protection Clause and the plaintiffs' First Amendment freedom of association. The ruling was the first time in over three decades that a federal court invalidated a redistricting plan for partisan bias.

To evaluate the constitutionality of the map, the panel applied a three-part test that asked whether the map had discriminatory intent, had a discriminatory effect, and if there were some other legitimate reason, like the natural political geography of the state, that the map had a partisan skew. The panel concluded that the map displayed both bad intent and bad effect, citing evidence that the map drawers used special partisan measurements to ensure that the map maximized Republican advantages in assembly seats. Despite Democrats winning a majority of the statewide assembly vote in 2012 and 2014, Republicans won at least sixty of the ninety-nine assembly seats in each election."

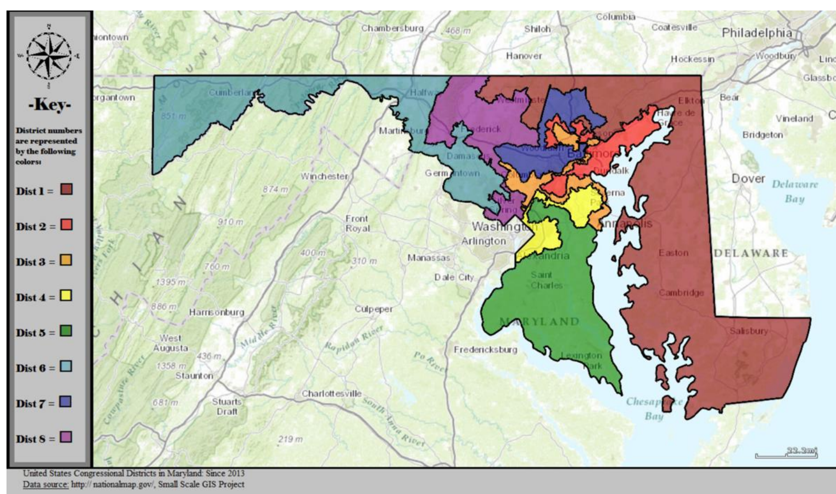
As it has been mentioned, this is the biggest case in this term's docket. While the decision will only affect Wisconsin's state races, it is likely the court writes a broad opinion that affects races at the state and congressional level around the country.

Maryland (*Benisek v. Lamone*)

Arguments were heard on March 28, 2018. The current maps remain in effect, pending the appeal.

Democrats in control of the Legislature in 2011 drew a map that strongly favors their party. Maryland is known for having the most gerrymandered district in the country, Maryland's 3rd Congressional District. However, the issue in this case focuses on its 6th Congressional District.

"The plaintiffs argue that the congressional map adopted by the Democratic-controlled legislature in 2011 violates Republican voters' representational and associational rights guaranteed by the First Amendment because lawmakers deliberately targeted and punished voters who supported Republican candidates when drawing district lines.



According to the plaintiffs, lawmakers intentionally used information about voters' histories and party affiliations to move large numbers of Republican voters out of the state's Sixth Congressional District and move large numbers of Democratic voters in, thus flipping the district from a reliable Republican seat into a safe Democratic one."

The result of this case is unlikely to affect the upcoming 2018 elections or change the political landscape of the Maryland Legislature, as it will affect a net of one seat in Republican's favor.

North Carolina (*Harris v. Cooper*) and (*Rucho v. League of Women Voters of North Carolina*)

There are three cases challenging North Carolina's replacement maps—one of which was struck down by the Supreme Court as a racial gerrymander.

"*Harris v. Cooper* is an appeal at the Supreme Court that arises from objections that plaintiffs lodged to a remedial map put in place following their victory in a racial gerrymandering suit. The plaintiffs argued at the district court that the new map should be enjoined because it merely replaced an unconstitutional racial gerrymander with an unconstitutional partisan gerrymander."

League of Women Voters and Common Cause filed two cases challenging North Carolina's 2016 remedial map on partisan gerrymandering grounds and on January 9, 2018, the court struck down the map as an unconstitutional partisan gerrymander and blocked the state from using the plan for future elections. The legislative defendants filed an emergency motion with the Supreme Court, asking the Justices to stay the remedial map drawing process pending their decisions in the

Wisconsin and Maryland cases. On January 18, 2018, the Court issued an order staying the district court's decision, including the remedial map process, pending appeal and decision from the court on whether to take it up—which should occur at the end of April.

This decision will likely not change anything for the 2018 elections. If the maps are ordered to be changed permanently, it likely won't be until after the midterms. Republicans have a 10-3 advantage in the state; if the state were drawn evenly, it could be a three-seat pickup for Democrats.

Texas (*Abbott v. Perez*)

Voters in Texas, alongside organizations representing African-Americans and Latinos, filed a series of lawsuits in 2011 alleging Texas' congressional and state house plans violated the U.S. Constitution and Section 2 of the Voting Rights Act.

On March 10, 2017, the panel issued a ruling on challenges to the 2011 congressional map. The court's 2-1 decision held that four districts in the plan were unconstitutional racial gerrymanders and that the creation of Texas 35th congressional district could not be justified by a need to comply with Section 2 of the Voting Rights Act. The panel also ruled that Texas had unconstitutionally and intentionally packed and cracked minority voters in the Dallas-Fort Worth area and in the creation of the configuration of Texas' 23rd Congressional District in the 2011 congressional plan. However, the court rejected intentional vote dilution claims related to the greater Houston area.

The court has not yet ruled on requests that Texas be placed under Section 3 preclearance.

On August 15 2017, the court ruled that Texas' 27th and 35th Congressional Districts violated the Constitution and the Voting Rights Act. In addition, the court found that enactment of the 2013 congressional plan was intentionally discriminatory. On August 24, the panel issued an opinion finding that the 2013 state house plan violated the Constitution and Voting Rights Act and, in addition, purposefully maintained discriminatory features in the 2011 plan.

The court instructed the State of Texas to indicate whether it would hold a special session on redistricting to redraw the congressional and state house plan and, in the event the state chose not to redistrict provisionally, set a remedial hearing for early September 2017.

The state appealed the rulings on the congressional and state house maps and requested a stay of the remedial process. The Supreme Court granted the state's request to stay the remedial processes and agreed to hear the State of Texas' appeals of rulings on the congressional and state house plans.

The Supreme Court is set to hear oral arguments on this case on April 24th.

Texas Voting Rights and Preclearance

While the Wisconsin and Maryland cases focus on partisan gerrymandering, Texas' *Abbott v. Perez* centers on racial gerrymandering. It's important to distinguish the difference, as this case will certainly bring up the possibility of placing Texas back in preclearance.

When a state is found to have acted with a racial bias—in matters relating to redistricting, voter ID, registration, where and when voting can take place, etc.—the federal courts are allowed to order "preclearance" for any changes related to those matters. In essence, in accordance with provisions in Section 3 of the Voting Rights Act, those states would get "bailed-in." This means that the Department of Justice or the federal courts have to sign off and pre-clear any changes made by these states that have a historical pattern of intentionally discriminating in its voting and election laws. For many years, Texas was among the states that had to be precleared under Section 5 of the Voting Rights Act. Texas' history of racial discrimination put us on a short leash along with other, mostly Southern states that also have troubled histories when it comes to the voting rights of minority voters.

On June 25, 2013, the Supreme Court struck down the coverage formula for the Voting Rights Act's preclearance provision. Thus, removing the restraints placed on states under Section 5. No jurisdiction is currently required to seek preclearance other than those that have been "bailed in" by specific court order. According to the Brennan Center, there are currently three: Evergreen, AL; Charles Mix County, SD; and the Village of Port Chester, NY.

After seven years, Texas finds itself before the Supreme Court in a legal battle over a case in which lower federal courts found lawmakers discriminated against voters of color. Texas faces the possibility of redrawing a whole new set of congressional and state maps, and of possibly being bailed back in to the preclearance provision of the Voting Rights Act.

Looking Ahead

By June, the U.S. Supreme Court will likely decide on *Gill v. Whitford*, laying the foundation for what the maps will look and how maps are drawn not only in Wisconsin, but across the country. The impact of this decision could create a ripple effect felt long after the 2020 census. Since Justice Kennedy set the stage for the current legal fights before the Court with his opinion in *Vieth v. Jubelirer*, it is likely he will be the swing vote in these cases, as well.

While these cases will certainly not end gerrymandering litigation, it may very well be the best chance those in favor of limiting partisan gerrymandering will have for a while. There has been rumors of Kennedy retiring, but it is unknown what the future holds for him on the bench.

Looking back at his *Vieth* decision, it appears he seems determined to get the issue of gerrymandering addressed once and for all. In his opinion, Kennedy quoted a North Carolina state senator: "Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" Our country deserves a better process for equitable representation. What that process looks will likely be determined by the end of this year.

Appendix A: Additional Redistricting Cases Under Legal Review

Pennsylvania (*League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*)

In January, the Pennsylvania State Supreme Court struck down the state's 2011 congressional map as an unconstitutional partisan gerrymander. The GOP Legislature and Democratic Governor were ordered to draw new maps and the Supreme Court subsequently denied the appeal. The deadline to submit a new plan to the Governor expired and on February 19, 2018, the Pennsylvania Supreme Court released a new congressional map to take effect for the May 15, 2018, primaries. Meanwhile, two lawsuits challenging the 2011 congressional map are still pending in the federal courts.

Michigan (*League of Women Voters of Michigan v. Johnson*)

Michigan asked the federal district court to stay proceedings until the Wisconsin and Maryland cases are decided, or dismiss the case altogether. The federal court denied the request for stay, but it heard arguments for dismissal on March 19 and is currently pending a decision.

Virginia (*Bethune-Hill v. Virginia State Board of Elections*)

A three-judge panel in district court concluded that the issue of race had not predominated in the drawing of the 11 challenged districts. The Supreme Court ruled 6-2 that the wrong legal standard was used to reach that conclusion. The case was sent back to the district court and a hearing was held on October 2017. A decision is expected this spring.

Georgia (*Georgia State Conference of the NAACP v. Georgia*) and (*Thompson v. Kemp*)

On February 23 2018, a Georgia district court dismissed the plaintiffs' discriminatory intent claim and denied the defendants' motion to dismiss the violation of Section 2 of the Voting Rights Act claim. Discovery on the racial gerrymandering claims concluded on March 9. A hearing on the plaintiffs' request for a preliminary injunction could take place in the spring.

Arizona (*Leach v. Arizona Independent Redistricting Commission) and (Arizona State Legislature v. Arizona Independent Redistricting Commission*)

Lawmakers and voters in Arizona challenged the state's congressional maps for violating the state constitution. "The court dismissed one count in the complaint for failure to state a claim. After the plaintiffs filed a second amended complaint, the Superior Court of Arizona stayed the case pending the U.S. Supreme Court's resolution of *Ariz. State Legs. v. Arizona Independent Commission*, a case. After the Supreme Court issued an opinion validating Arizona voters' right to remove the responsibility for redistricting from the state legislature and delegate it to an independent redistricting commission, the plaintiffs filed a third amended complaint claiming the commission failed to comply with constitutional procedures."

On March 16, 2017 the Superior Court of Arizona dismissed all challenges. In a hearing held in July 2017, the court formally closed the case.

Alabama (*Alabama v. Alabama Legislative Black Caucus*)

"A three-judge panel originally rejected claims of racial gerrymandering. But, in 2015, the Supreme Court reversed in a 5-4 decision and instructed the lower court to reconsider whether the new redistricting map drawn by Alabama's Republican-led legislature diluted the voting strength of the state's African Americans by packing them into districts. Although Alabama was under an obligation imposed by the Voting Rights Act not to diminish the effectiveness of existing African-American districts, the Supreme Court concluded that the percentage of the black voting age population necessary to accomplish that end could not be determined by fixed rule but instead required a district-by-district analysis.

On remand, the panel ruled in a 2-1 decision that 12 of the 36 challenged districts were unconstitutional racial gerrymanders, but upheld the other 24 districts. The Alabama district court approved a procedure for the legislature to adopt a new map that corrects the deficiencies in the 12 unconstitutional districts in time for the 2018 elections."

The state legislature approved a remedial redistricting plan on May 19 2018, which it submitted to the court on May 30 in compliance with the district court's order. The Alabama Legislative Black Caucus filed objections to portions of the state legislature's remedial plans, but the Alabama Democratic Caucus, however, said in a separate filing that it was satisfied with the remedial plans and had no further objections.

On October 23 2017, the Alabama district court issued its final judgment, denying objections from the Alabama Legislative Black Caucus and approved the remedial plan. The court closed the case following the final judgment.