

Partisan Gerry

Politics is an ugly business.

Now more than ever, political disputes spill into our federal and state courtrooms, keeping many attorneys like me busy during the even (and odd) numbered years. This past summer, we saw over 80 candidate petition challenges filed in Maricopa County alone.¹ These battles are particularly heated when control of Congress and state legislatures is at stake.

As we approach the end of this decade's penultimate election cycle, it is a good time to look ahead to the next round of redistricting that will occur following the 2020 Census. Indeed, the political battles have already begun, as more than two dozen states and cities (including the City of Phoenix) have filed suit against the Census Bureau and the Commerce Department to remove the new citizenship question included in the 2020 census.² While it is illegal to share Census responses with law enforcement or immigration agencies, critics contend that the citizenship question will cause many immigrants to skip the 2020 Census and lead to an incomplete population count—resulting in a potential reduction of congressional seats and federal funding for states whose populations are undercounted.³

The 2020 Census data also will affect how districts are redrawn for state and federal elections. One challenge that is the



subject of intense public, judicial and academic debate is partisan gerrymandering. This occurs when one political party draws a district map in a manner that unfairly dilutes the opposition's voting strength. For over 30 years, litigants and judges in courts around the country—including here in Arizona—have confronted claims of partisan gerrymandering, but a clear legal standard for such claims has yet to emerge.

Supreme Court Struggles for a Federal Standard

Constitutional claims for partisan gerrymandering date back to 1986, when a fractured

U.S. Supreme Court decided *Bandemer v. Davis*.⁴ While six justices agreed that the question of whether a partisan gerrymander violates the Equal Protection Clause is justiciable, no majority could agree on how to determine if a map crossed the constitutional line. Unsurprisingly, the lower courts struggled over the next 18 years to find a test worthy of the Court's approval.

In 2004, the Supreme Court decided *Vietth v. Jubelirer*,⁵ which again recognized the existence of a partisan gerrymander claim

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under the Equal Protection Clause. Yet the Court still could not muster a majority to define a judicially manageable standard for unconstitutional gerrymandering. In his now (in)famous concurrence, Justice Kennedy concluded that “clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights” had yet to present themselves.⁶ Consequently, almost every lower court confronted with a partisan gerrymander claim

has ruled in favor of the mapmaker.

All eyes were on Justice Kennedy earlier this year when the Supreme Court considered *Gill v. Whitford*, a partisan gerrymander case challenging the constitutionality of Wisconsin’s congressional map.⁷ The lower court struck down the map as a partisan gerrymander based on an “efficiency gap” analysis that compares each party’s “wasted” or unnecessary votes (*i.e.*, votes cast for a losing

candidate or votes cast for a winning candidate in excess of the number of votes needed to win)—an approach that many thought would provide the elusive “clear, manageable, and politically neutral standards” that a majority of justices could agree on going forward. But after much anticipation, the Court concluded that the plaintiffs lacked standing, upheld the maps, and declined to adopt any standard for finding partisan gerrymandering under the Equal Protection Clause.⁸

An Answer on the Horizon?

While *Gill* left litigants and lower courts to figure out a standard on their own, litigation in North Carolina has presented the Supreme Court another opportunity to weigh in. On August 27, 2018, a three-judge panel of the Middle District of North Carolina decided *Common Cause v. Rucho*,⁹ which found North Carolina’s 2016 Congressional Redistricting Plan to be a partisan gerrymander that violates the Equal Protection Clause, First Amendment, and Article I of the U.S. Constitution. The 294-page majority decision provides a comprehensive analysis of the governing law and legal standard for each constitutional claim. Although that court had no trouble finding the partisan gerrymander unconstitutional, it recently concluded that there is not enough time to remedy the voting districts before the upcoming November 2018 elections. As

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of the date of this article, the district court is considering whether North Carolina’s congressional maps must be redrawn before the 2020 election cycle.

It may never reach this issue, however. On August 31, 2018, the legislative defendants appealed the ruling to the Supreme Court and filed an emergency motion to stay the district court proceedings. The requested stay is significant, as the district court could otherwise bar the use of the gerrymandered maps in the 2020 elections. Election law attorneys everywhere are now watching the

Supreme Court—as well as the confirmation proceedings for Supreme Court nominee Brett Kavanaugh, whose vote could mean the difference between a federal standard or continued struggles to define partisan gerrymandering under the U.S. Constitution.

What Happened in Pennsylvania

Despite the extreme examples of partisan manipulation presented in the *Rucho* appeal, most election law practitioners agree the Supreme Court will be unable to agree

on a federal standard. But all is not lost. An opinion by the Pennsylvania Supreme Court earlier this year may foreshadow a new frontier in the quest to find a judicial answer to partisan gerrymander claims.

On February 7, 2018, the Pennsylvania Supreme Court boldly went where no court has gone before. In *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*,¹⁰ the court struck down the 2011 congressional map drawn by the Republican-led Pennsylvania General Assembly under the Free and Equal Elections Clause in the Pennsylvania Constitution.¹¹ That provision provides that “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”¹²

Reviewing the provision’s language, history and Pennsylvania precedent, the court first explained that, unlike the federal Equal Protection Clause, the Free and Equal Elections Clause “was specifically intended to equalize the power of voters in our Commonwealth’s election process, and it explicitly confers this guarantee.”¹³ The court recognized—unequivocally—that partisan gerrymandering dilutes votes in violation of the state constitution:

It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. . . . A broad and robust interpretation of [the Free and Equal Elections Clause] serves as a bulwark against the adverse consequences of partisan gerrymandering.¹⁴

Next, the court examined the standard for determining a dilution claim under the Free and Equal Elections Clause, finding guidance in the Pennsylvania Constitution’s three expressly stated “neutral benchmarks” for creating voting districts.¹⁵ Under this standard, courts must examine whether the districts: (1) are “compact and contiguous”; (2) are “as nearly equal in population as practicable”; and (3) do not needlessly divide any county, city or town (unless necessary to obtain population equality).¹⁶ A congressional redistricting plan violates the Free and Equal Elections Clause if it subor-

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dinates these neutral criteria “to extraneous considerations such as gerrymandering for unfair partisan political advantage.”¹⁷

The Pennsylvania Supreme Court’s decision sent shockwaves throughout the nation. Many now wonder whether partisan gerrymander claims grounded in similar clauses in other state constitutions are the new battleground for partisan gerrymander claims.¹⁸

Arizona’s Free & Equal Elections Clause

Could Arizona someday confront a similar partisan gerrymander claim under its state constitution? It’s certainly possible, as the Arizona Independent Redistricting Commission will once again redistrict its congressional and state boundaries following the decennial census in 2020. The Commission is a constitutional entity of ordinary citizens created by the voters in 2000 as Proposition 106, but it has not been immune from allegations of partisan gerrymandering.¹⁹

Several federal and state lawsuits challenged the congressional and state legislative maps drawn by the Commission earlier this decade. Although there was no direct allegation of partisan gerrymandering, one suit alleged that the Commission’s Democratic majority had favored the Democratic Party in creating a state legislative map where the population of the largest and smallest district deviated by 8.8 percent. The U.S. Supreme Court ultimately rejected that claim in *Harris v. Arizona Independent Redistricting Commission*.²⁰ The challengers may have considered a partisan gerrymander claim but were likely dissuaded by the lack of clear guidance from the U.S. Supreme Court.

Would the result have been any different if the challengers brought a claim under the Arizona Constitution? It’s worth exploring, as the question may come up during a future redistricting. Article 2, Section 21 of the Arizona Constitution provides, “All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” This is nearly identical to Pennsylvania’s Free and Equal Elections clause, which was incorporated into the Pennsylvania Constitution over a decade before the adoption of the U.S. Constitution.²¹ Interesting-

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ly, the Free and Equal Elections Clause has no federal counterpart.

Like Pennsylvania, Arizona’s constitutional framers saw fit to include the Free and Equal Elections Clause in Article 2 of the Arizona Constitution, which spells out Arizona’s Declaration of Rights, rather than Article 7, which contains the Suffrage and Election provisions. The Declaration of Rights contained in Article 2 is an enumeration of the fundamental individual human rights possessed by the citizens of Arizona and cannot be diminished by an act of the Arizona Legislature.

Although this provision has been in the

Arizona Constitution since statehood, only a few court decisions mention it.²² *Chavez v. Brewer* is the most developed analysis of Article 2, Section 21 to date. There, the Arizona Court of Appeals held that Arizona’s constitutional right to a “free and equal” election is implicated when votes are not properly counted, and challengers may be entitled to injunctive and/or mandamus relief if they can establish that a significant number of votes cast on certain electronic voting machines will not be properly recorded or counted.²³

In reaching its holding, the court quoted a 1932 Illinois Supreme Court opinion



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interpreting Illinois' Free and Equal Elections Clause, as follows: "Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector – where each ballot is as effective as every other ballot."²⁴ The reference to an "effective" ballot could equally apply to a voter residing in one-party-dominated district drawn as a result of a partisan gerrymander. For example, a registered Republican in Arizona who resides in a heavily Democratic district may not consider his or her general election vote to be effective because that voter will not have been permitted to cast a ballot in the Democratic primary election, which may very well determine who will represent the district following the general election.²⁵

The Pennsylvania Supreme Court interpreted its Free and Equal Elections Clause to mandate "that all voters have an equal opportunity to translate their votes into representation."²⁶ Should the Arizona courts follow the lead of the Pennsylvania Supreme Court, we could easily see a lawsuit ground-

ed in Article 2, Section 21 of the Arizona Constitution by the political party or party faithful who believe that the Commission has drawn a map that deprives their voters of an equal opportunity to translate their votes into representation.

Will State Courts Become Politicized?

Should an Arizona court one day strike down a congressional or legislative map as an unconstitutional partisan gerrymander,

the responsible judges could face severe political backlash. Unlike federal judges who enjoy life tenure and protected salaries to insulate them from politics, state court judges must stand for election or retention, and decisions in political cases often agitate the losing party.²⁷

Political retribution for unfavorable rulings in political cases has become all too common. In Pennsylvania, U.S. Senator Patrick Toomey called the Pennsylvania Supreme Court's ruling a "blatant, unconstitutional, partisan power grab that under-

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mines our electoral process” and said that the question of whether to impeach the majority justices is “a conversation that needs to happen.”²⁸ Resolutions to impeach the four Democratic justices in the majority were introduced in the Pennsylvania House of Representatives but have not resulted in any impeachment proceedings to date.²⁹


Aside from impeachment, state court judges may face attacks when they are up for re-election or retention. In 2010, three Iowa justices were defeated at the ballot box because they declared same-sex marriage bans unconstitutional under the Iowa Constitution.³⁰ In 2014, conservative groups spent thousands of dollars in an unsuccessful effort to defeat the retention of four Kansas Supreme Court justices after that court’s controversial ruling that school funding in Kansas was inadequate.³¹ And in 2014, three Tennessee Supreme Court justices were attacked as soft on crime but narrowly held onto their seats after touting their record of upholding most death sentences.³² Sadly, 77 percent of judges surveyed in a re-

cent poll conducted by the National Judicial College indicated that they no longer feel the judiciary is a coequal branch of government.³³

The political realities of having to run for election may very well dissuade state court judges from wading into the “political thicket” of redistricting cases under a rarely invoked provision of their state constitutions.

Final Thoughts

In 1946, Justice Felix Frankfurter warned about the hazards of the Court entering into the “political thicket” of redistricting after decades of declaring these matters to be nonjusticiable political questions.³⁴ That thicket has proven thorny in the federal courts. There have been judicial cuts and scrapes but no serious injuries (yet). I worry that the thicket may not be so kind to state court judges in the controversial space of partisan gerrymandering. As I mentioned at the beginning of this article, politics is

an ugly business, and the courts have not been spared ugly treatment when resolving these cases. It remains to be seen whether the Pennsylvania Supreme Court’s decision is the start of a long-term trend or is merely a short-term fad. I’ll be eagerly watching along with my election law colleagues. 

endnotes

1. *Election cases spike*, THE BRIEF (Maricopa County Clerk of Court), Sept. 2018, available at <https://content.govdelivery.com/accounts/AZMARIC/bulletins/20acb19> (last accessed Sept. 18, 2018).
2. See e.g. *State of New York v. U.S. Dep’t of Commerce*, No. 1:18-CV-2921 (S.D.N.Y.). On May 22, 2018, the Phoenix City Council voted 7–2 to approve a motion to authorize the city manager to “join an appropriate lawsuit to challenge the U.S. Census Bureau decision to include a citizenship question in the 2020 Census.” Griselda Zetino, *Citizenship question on Census could cost Phoenix millions of dollars*, KTAR NEWS, Aug. 10, 2018, available at <http://ktar.com/sto->



- ry/2171280/citizenship-question-on-census-could-cost-phoenix-millions-of-dollars/ (last accessed Sept. 18, 2018).
3. Deborah Barfield Berry, *Census deadline looms for public to comment on adding citizenship question*, USA TODAY, Aug. 7, 2018, at www.usatoday.com/story/news/politics/2018/08/07/citizenship-question-2020-census-stirs-protests-and-comments/924713002/.
 4. 478 U.S. 109 (1986).
 5. 541 U.S. 267 (2004).
 6. *Id.* at 307-08.
 7. 138 S. Ct. 1916 (2018). The Court also had before it a partisan gerrymander case out of Maryland, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).
 8. Similarly, in *Benisek v. Lamone*, the Court upheld the lower court's refusal to preliminarily enjoin Maryland's congressional map.
 9. *Common Cause v. Rucho*, Case Nos. 1:16-cv-1026 and 1:16-cv-1164, ___ F.3d ___, 2018 WL 4087220 (Aug. 27, 2018).
 10. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).
 11. The Free and Equal Elections clause is found at Pennsylvania Constitution, Article I, Section 5. Although the petitioners in *League of Women Voters* also argued that the partisan gerrymander also violated their state constitutional rights to free expression and equal protection, the Pennsylvania Supreme Court declined to reach these arguments. *See League of Women Voters*, 178 A.3d at 802 n.63.
 12. *League of Women Voters*, 178 A.3d at 803.
 13. *Id.* at 812.
 14. *Id.* at 814.
 15. *See id.* at 815-16 (discussing Pa. Const., art. 2, § 16).
 16. *Id.* at 816-17. The Arizona Constitution similarly sets forth "goals" the Arizona Independent Redistricting Commission must strive to accommodate when drawing congressional and legislative maps, including drawing districts that comply with the U.S. Constitution, are equal in population, compact and contiguous, respect communities of interest, use geographic features, municipal and county boundaries, and favor competitiveness to the extent practicable. ARIZ. CONST. art. 4, pt. 2, § 1(14).
 17. *Id.* at 817. The Pennsylvania Supreme Court did not rule out the possibility that an unconstitutional gerrymander that comports with these "floor criteria," however. *See id.*
 18. Pennsylvania was the first state to adopt the current Free and Equal Elections clause in 1790, followed by Delaware in 1792. Eleven other states, including Arizona, have included similar clauses in their constitutions. *See League of Women Voters*, 178 A.3d at 808 n.69.
 19. *See, e.g., Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016).
 20. *Id.*
 21. *League of Women Voters*, 178 A.3d at 802.
 22. *See, e.g., Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (rejecting argument that requiring felons to pay off their criminal fines and restitution orders in order to vote violates the Arizona Constitution's Free and Equal Clause); *Public Integrity Alliance Inc. v. City of Tucson*, 2015 WL 10791892 (D. Ariz. May 20, 2015) (declining to find that Arizona's Free and Equal Clause affords any greater protections than either the Due Process Clause of the U.S. Constitution or the Privileges and Immunities Clause of the Arizona Constitution).
 23. 222 Ariz. 309, 320, ¶ 34, 214 P.3d 397, 408-09 (App. 2009).
 24. *Id.* at 319, ¶ 33, 214 P.3d at 407 (quoting *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932)).
 25. The Arizona Constitution permits unaffiliated voters to choose and vote in one of the recognized parties' primary election. ARIZ. CONST. art. 7, § 10.
 26. *League of Women Voters*, 178 A.3d at 804.
 27. Laurie Roberts, *Arizona Supreme Court's Invest in Ed ruling could blow up the coming election*, ARIZ. REP., Aug. 31, 2018.
 28. Christopher Ingraham, *Pennsylvania Republicans lost the redistricting battle. Now, they're declaring war on the courts*, WASH. POST, Feb. 22, 2018.
 29. Mark Scolforo, *GOP plan to impeach 4 Pennsylvania justices over redistricting rulings remains in limbo*, ASSOC. PRESS, Apr. 22, 2018.
 30. A.G. Sulzberger, *Ouster of Iowa judges sends signal to bench*, N.Y. TIMES, Nov. 3, 2010.
 31. Steve Rose, *Attempt to oust Kansas Supreme Court judges is likely doomed*, KAN. CITY STAR, June 18, 2016.
 32. *See* Keep Tennessee Courts Fair, "July 29 – Truth Test" (campaign advertisement video), available at <http://www.brennancenter.org/analysis/buying-time-2014-tennessee> (last accessed Sept. 18, 2018).
 33. *Survey: Judges no longer feel the judiciary is a "coequal" branch*, NAT'L JUDICIAL COLL., Feb. 21, 2018, available at <http://www.judges.org/survey-judges-no-longer-feel-judiciary-coequal-branch/> (last accessed Sept. 18, 2018).
 34. *Colegrove v. Green*, 328 U.S. 549, 553-56 (1946).