Two Ways of Looking at Gerrymandering

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Protestors against gerrymandering outside the Supreme Court in October 2017. Credit Joshua Roberts/Reuters

Even though Doug Jones won a famous statewide victory in last month’s Alabama Senate race, he actually lost — less famously — to Roy Moore in six of the state’s seven congressional districts. That’s right: He carried only the heavily black Seventh Congressional District, into which the Alabama Legislature has jammed almost a third of the state’s African-American population while making sure that the rest of the districts remain safely white and Republican.

That’s gerrymandering in the raw. Something equally raw, although less overtly racial, happened in Maryland back in 2011, when the overwhelmingly Democratic State Legislature decided that two Republicans out of Maryland’s eight-member congressional delegation was at least one Republican too many. The 2010 census required the state to shrink the majority-Republican Sixth District by 10,000 people in order to restore one-person, one-vote equality among the districts. Seeing its opportunity for some major new line-drawing, the Legislature conducted a population transfer. It moved 66,417 Republican voters out of the district while moving into it 24,460 Democratic voters from safely Democratic adjoining districts, a swing of more than 90,000 votes. And guess what? The 20-year Republican incumbent, Roscoe Bartlett, lost the 2012 election to the Democratic candidate, John Delaney, who has won re-election ever since.
The best news to come out of the Supreme Court in months was its quiet announcement, late on a Friday afternoon in early December, that it was adding to its calendar a challenge to the Sixth District lines, brought by seven Republicans who formerly voted in the old district. This case, Benisek v. Lamone, has received much less attention than Gill v. Whitford, the case the justices heard in October that challenges a notorious Republican gerrymander of the Wisconsin State Assembly. But I predict that the Maryland case, which the court will hear in early spring, will prove to be the more important of the two.

Based on my informal survey of friends and colleagues, the few who are aware of the Maryland case assume it to be a copycat case with little independent significance. But consider its odd trajectory to the court. Last Aug. 24, a special three-judge federal court voted 2 to 1 to reject the plaintiffs’ request for an order requiring new district lines to be in place for the 2018 midterm election. A week later, the plaintiffs appealed to the Supreme Court, along with a motion to expedite consideration of the case so that it could be heard in November, just weeks after the argument already scheduled in the Wisconsin case. When the justices denied that request, without comment, on Sept. 13, the natural assumption was that the court would simply keep the Maryland case on hold until it decided the Wisconsin case later in the term.

So the court’s announcement that it would go ahead and hear the Maryland case after all was a surprise. What happened inside the black box that is the justices’ private weekly conference? One theory is that the justices were attracted by the bipartisan symmetry of hearing both cases, one brought by Democrats and the other by Republicans. After all, during the argument in the Wisconsin case, Chief Justice John G. Roberts Jr. worried aloud that it would cause “very serious harm” to the Supreme Court’s “status and integrity” if people perceived the court as intervening in the gerrymander issue in order to favor one party over another.

Perhaps, but a more interesting explanation lies in the doctrinal difference between the two cases. The theory of the Wisconsin case is that the Republican-engineered gerrymander violated the 14th Amendment’s guarantee of equal protection. In the 2012 election, the first after the Wisconsin Legislature’s new Republican majority redrew the Assembly district lines, Republicans won only a minority of the statewide vote but captured 60 of the 99 seats; the new lines corralled Democratic voters into some districts and scattered them among others, where they were doomed to be ineffectual in electing their preferred candidates.

The Wisconsin Democrats challenged the Assembly districting as a whole, rather than focusing on particular districts. But the Supreme Court’s election law precedents, stemming from an earlier era when the court’s focus was on racially discriminatory election practices, are distinctly unfavorable to statewide challenges based on equal protection violations in particular districts. This was a hurdle that the Wisconsin plaintiffs’ lawyer, Paul M. Smith, struggled to overcome in the face of questions from the conservative justices about whether his clients even had standing to bring the statewide case.

The Maryland case, by contrast, challenges a single district and was litigated not under the Equal Protection Clause but as a question of the Republican voters’ rights under the First Amendment’s guarantee of free speech and association. The theory is that the Democratic power brokers dismantled the old Sixth District in retaliation for its voters’ support of their incumbent
Republican representative. This is an approach crafted to appeal specifically to Justice Anthony M. Kennedy, who is widely — and I think correctly — perceived as holding the balance of power on whether the court will ever invalidate any redistricting as an unconstitutional partisan gerrymander.

In its last gerrymander case 14 years ago, the court divided 5 to 4 in rejecting a challenge to a Republican gerrymander of Pennsylvania’s congressional districts. Four justices in that case, Vieth v. Jubelirer, wrote that the federal courts lacked jurisdiction to review a political gerrymander. In a separate opinion, Justice Kennedy also voted to reject the claim — but not categorically. He wrote: “Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause.”

And it was clear during the Wisconsin argument in October that Justice Kennedy had not lost his interest in the First Amendment as a vehicle for attacking a gerrymander. Addressing Wisconsin’s solicitor general, Misha Tseytlin, Justice Kennedy suggested that he agreed with the state’s argument that the Democratic plaintiffs lacked standing to pursue their equal protection challenge. “You have a strong argument there,” he told the state’s lawyer, and continued:

“But suppose the court — and you will just have to assume, we won’t know the exact parameters of it — decided that this is a First Amendment issue, not an equal protection issue. Would that change the calculus so that, if you’re in one part of the state, you have a First Amendment interest in having your party strong or the other party weak?”

“No, it wouldn’t,” Solicitor General Tseytlin unsurprisingly answered. But the question lingered, the justices surely aware that this very question was sitting in their in-basket.

By the time the court agreed to hear the Maryland case, two months had passed since the Wisconsin argument. During that time, a majority opinion had presumably been assigned on the basis of the justices’ initial straw vote — always subject to change as draft opinions begin to circulate and prove to be more or less persuasive. Did Justice Kennedy, having voted with all his colleagues against expediting the Maryland case, decide that it was, after all, the necessary vehicle for converting his hypothetical First Amendment musings into actual law? Or perhaps the liberal justices, discerning that the Wisconsin case would not turn out to their liking, seized on the Maryland case as the best, or perhaps the only way to get the court to take a first step, however limited, in the direction of finding partisan gerrymanders unconstitutional.

If the Republican challengers prevail in the Maryland case, their victory is likely to be only a first step: What happened to the Sixth District was so transparent, and excuses for it so fanciful, that few other gerrymanders may match it. On the other hand, two centuries of constitutional history teaches that the first step often proves to be the most important.