The Fourth Session

Will the Court Kill the Gerrymander?
NYR Daily 2/11/2018
Zachary Roth

On Tuesday, a panel of federal judges struck down North Carolina's congressional map, ruling it an unconstitutional partisan gerrymander. **State Republicans had drawn district lines with such ruthlessness that they had won ten out of thirteen seats in the 2016 election— 77 percent—even though they got only 53 percent of the vote.** GOP lawmakers, wrote Judge James Wynn Jr., had been "motivated by invidious partisan intent."

National Gallery, London/Bridgeman Images

Paolo Uccello:* St. George and the Dragon*, circa 1470

Republicans had openly admitted as much. "Nothing wrong with political gerrymandering," declared one of the lawmakers leading the process at a 2016 hearing. "It is not illegal." The GOP is likely to appeal Tuesday's ruling to the Supreme Court on those grounds.

Whether courts are empowered to block partisan gerrymanders—as opposed to gerrymanders involving racial discrimination, which just about everyone agrees are unconstitutional—**is a question the justices considered in October when they heard *Gill* v. *Whitford*, a challenge to Wisconsin's state assembly map.** The fate of North Carolina's map likely hangs on how the court decides *Gill*. A ruling is expected before the end of June.

There's much more at stake, too. An opinion in *Gill* that significantly reduces partisan gerrymandering could radically reshape the redistricting process for this decade and the next, with major implications for the fight to control both Congress and state legislatures. But it also could help fix America's increasingly embattled democracy.

Gill and the enormous gerrymander from which it emerged underscore how the justices' failure to act when they last had the chance, over a decade ago, has warped American electoral politics almost beyond recognition. Essentially, it has allowed Republicans to turn the last three elections for Congress and many statehouses into a strange simulacrum of competition, in which the parties compete vigorously for votes even though GOP control has often been all but assured from the outset. **At stake in *Gill*, ultimately, is the question of whether election outcomes can be made once again to provide at least a rough reflection of the popular will.**

*

States must redraw their congressional and state legislative maps after every census, which takes place in the first year of each decade. Before the 2010 mid-term elections, Republicans poured

resources into the battle for control of important state legislatures in order to gain power over the redistricting process that would follow. They emerged with full control of state government in crucial redistricting battlegrounds like Florida, Texas, Ohio, Virginia, North Carolina, Pennsylvania, Michigan, Wisconsin, and Alabama.

Then, they set about rigging the maps. **American political parties have been drawing district lines in their favor at least since Massachusetts Governor Elbridge Gerry's famous 1812 map**, which aimed to boost his Democratic-Republican Party and included the notorious salamander-shaped district from which the term "gerrymander" derives. But by 2011, Republican map-drawers had access to software exponentially more sophisticated even than that used by states like Pennsylvania a decade earlier. This allowed them, with unprecedented precision, to distribute Republican voters more efficiently than Democratic ones. They did so by grouping Democratic voters together into a small number of ultra-safe districts with clear Democratic majorities (it helped that Democrats already tend to cluster in cities), while creating a much larger number of districts that leaned Republican—by less extreme margins than the Democratic ones, but still by enough that the GOP was largely assured of winning them. In the next election, in 2012, **Democratic candidates for Congress won more votes than Republican candidates in Pennsylvania, North Carolina, Michigan, and Wisconsin, yet in all those states the GOP came away with more House seats**. (In Pennsylvania, Republicans won thirteen out of eighteen seats with less than 49 percent of the vote.) Nationwide, Democrats won 1.4 million more votes in congressional races than Republicans, but came away with thirty-three fewer seats. Stated bluntly, voters in 2012 wanted a Democratic Congress but got a Republican one, with the result that President Barack Obama's legislative agenda was stymied for two more years of his presidency than it would have been in a system that accurately reflected voters' collective preferences. In the two elections since then, Republicans' share of seats has again significantly exceeded their share of votes in both congressional and state legislative races.

Now, with President Trump deeply unpopular, Democrats are expected to pick up seats in the mid-term elections of November 2018. But thanks to the rigged map, analysts say, they'll need to win about 55 percent of the vote nationwide to carry a majority of House seats in Congress.

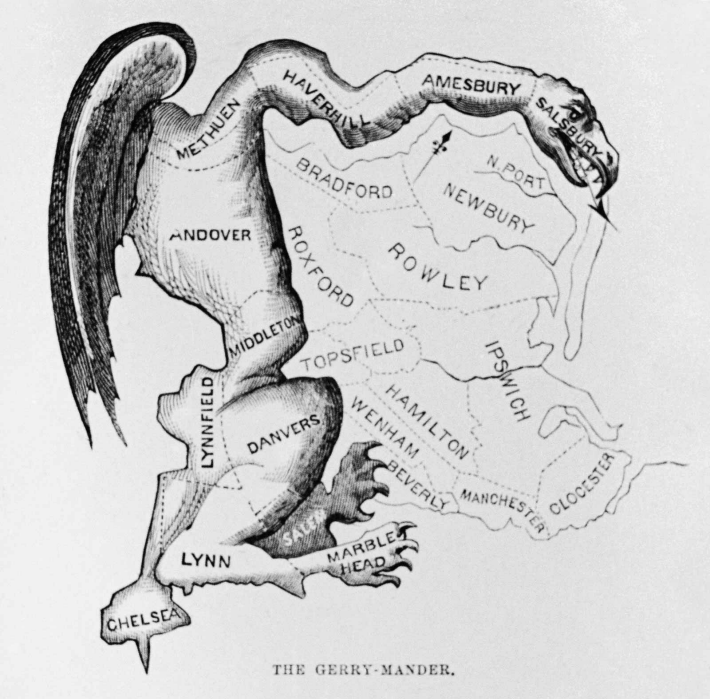
Besides clearly thwarting the will of voters, the Republican gerrymander has reduced the number of competitive districts, contributing to declining turnout as would-be voters come to feel, often with reason, that their voices don't matter. And there is evidence that it has contributed to the growing extremism of the Republican congressional caucus by creating so many safe Republican seats, whose holders have more to fear from a primary challenge than from the general election.

This manipulation has felt particularly threatening to the integrity of US democracy because it's only one way among several in which the right to meaningful political participation for ordinary Americans is being undermined. Over the last decade, extreme gerrymandering has coincided with state-level voter suppression laws that have largely targeted minorities and marginalized groups; with the evisceration of campaign-finance laws, giving outsized influence in elections to corporations and the super-wealthy; with the violation of longstanding congressional norms, which saw, for example, the Senate fail to vote on Merrick Garland's Supreme Court nomination; and even with the growing significance of the Electoral College, which twice in the last five presidential elections has handed the White House to the candidate who lost the popular vote. Together, these trends have threatened to create a sense that America's democratic system is dangerously unable to fulfill its prime function of translating the preferences of voters into political and policy outcomes.

Back in 2004, the Supreme Court heard *Vieth* v. *Jubelirer*, a challenge to Pennsylvania's congressional map, through which Republicans had essentially guaranteed themselves at least 60 percent of congressional seats for the next decade, even if Democratic candidates got more votes statewide. The map rendered the will of Pennsylvania's voters irrelevant.

The court's four liberal justices voted to strike the map down as an unconstitutional partisan gerrymander. The four conservatives voted to uphold it, saying that finding a legal standard to determine when a partisan gerrymander goes too far is impossible. Justice Anthony Kennedy was the swing vote, and in the end, he did what he often does: he sided with the conservatives while seeming to throw the liberals a bone. Kennedy said it might still be possible to come up with a legal standard for partisan gerrymandering in a future case. But he rejected the standard used by the plaintiffs in *Vieth* as arbitrary, and so upheld Pennsylvania's map.

Since then, legal scholars, political scientists, and statisticians have been developing a standard for



Bettmann/ Getty Images

The cartoon by Gilbert Stuart that coined the term "gerrymander," showing Massachusetts's electoral district in 1812; Stuart's friend called it a 'Gerry-mander,' a cross between a salamander and Massachusetts Governor Elbridge Gerry, who approved rearranging district lines for political advantage

identifying unconstitutional partisan gerrymanders that will satisfy Kennedy. *Gill* uses a standard that, gerrymandering opponents hope, may finally convince Kennedy to vote in their favor: the efficiency gap. Developed by Nicholas Stephanopoulos, a law professor at the University of Chicago who was among those representing the *Gill* plaintiffs, and the political scientist Eric McGhee, the efficiency gap compares each party's number of "wasted" votes—that is, votes that went to a losing candidate, or that went to a winner but weren't needed for victory. The larger the gap between the two parties' total number of wasted votes, the greater the advantage the map gives one party.

Wisconsin Republicans drew their most recent maps during a snow storm in February 2011. They did so not in the state capitol building in Madison, but across the street in the conference room of a friendly law firm—the better to invoke attorney-client privilege and shield the process from public scrutiny. The result was roughly comparable to the Pennsylvania congressional map that Justice Kennedy had reluctantly approved in 2004. Even though Democratic candidates for the Wisconsin assembly got more votes than Republicans statewide, the GOP wound up with five out of eight House seats in the 2012 election.

"There is close to a zero percent chance that the current plan's efficiency gap will ever favor the Democrats during the remainder of the decade," said Stephanopoulos and McGhee of the Wisconsin assembly map, in a calculation cited by a federal district court.

During oral arguments, the Supreme Court's four most conservative members did not sound convinced. Justice Neil Gorsuch likened the formula for the efficiency gap to his steak rub: "I like some turmeric, I like a few other little ingredients, but I'm not going to tell you how much of each." Chief Justice John Roberts dismissed it as "sociological gobbledygook." And, famously concerned about the court's reputation, the chief justice fretted that intervening in a case with such clear partisan implications would be seen by "the intelligent man on the street" as an effort to help one party at the expense of the other, causing "very serious harm to the status and integrity of the decisions of this court." (Why, despite the court's conservative, Republican-appointed majority, this hypothetical intelligent man would be likelier to see partisan bias in a ruling to intervene, benefiting Democrats, than in a ruling not to, benefiting the GOP, was left unexplained. Maybe the man wasn't as intelligent as Roberts thought.)

But Kennedy sounded much more open to the challengers' view. While asking nothing at all of the plaintiff's lawyer, he grilled Wisconsin's solicitor general with tough questions that hinted he may see extreme gerrymandering as a violation of a voter's right to freedom of association found in the First Amendment, of which he is famously protective.

Another development could also augur well for gerrymandering opponents. In December, the justices unexpectedly announced they would hear a second redistricting case, this one a challenge to a single congressional district drawn by Maryland Democrats. Why the court agreed to hear the Maryland case, which raises similar issues to *Gill*, isn't yet clear. But several court-watchers, noting Roberts's concerns about the court being seen as partisan, have offered a plausible theory: there may already be five votes for the plaintiffs in *Gill*, and the chief justice is more likely to join the majority in a decision that hurts Republicans if he knows the court has a chance to demonstrate its nonpartisanship by also striking down a district in Maryland that was drawn by, and favors, Democrats.

*

A result along those lines could have almost immediate repercussions. It would boost the plaintiffs not only in the North Carolina case, but also likely in a challenge to Texas's maps. But the real

impact of a Supreme Court ruling would be felt when the next redistricting cycle begins, after the 2020 census. **A clear statement by the court against partisan gerrymandering would empower lower courts to strike down the most egregious maps, and would probably also convince lawmakers and their map-drawers to act with more caution.**

Even leaving *Gill* aside, there are signs that the upcoming redistricting cycle may not repeat the worst excesses of the previous one. For one thing, Democrats won't be caught sleeping again. They've already launched an aggressive effort, led by former attorney general Eric Holder, to win control of the major redistricting battlegrounds in 2020, which would mean that fewer states than last time are likely to be under the one-party rule that ruthless gerrymandering requires. Holder's group also plans to support efforts to have independent commissions take over the redistricting process.

In fact, in a supreme irony, Republicans may be about to experience the downside of extreme gerrymandering. In order to most efficiently distribute their voters, they created a large number of districts with slightly more Republicans than Democrats, while creating very few ultra-safe Republican districts, since doing so would have wasted Republican votes. That strategy made sense for most election years. But now, the expected Democratic wave in this year's midterms could put in play all those weakly-leaning Republican districts. Some experts predict a "wave election," in which Democrats could gain as many as seventy-five seats. The Republican gerrymander of earlier in the decade could end up making a Democratic resurgence even more powerful than it would otherwise have been.

Still, the GOP may attempt to politicize the upcoming census itself, on whose data redistricting relies. The administration is now looking to add to the survey a question about citizenship, which civil-rights advocates fear could chill response rates from non-citizens. Among other troubling results, that could lead to redistricting plans that reduce the power of minority communities and boost that of white ones. And for the Census Bureau's top operational post, President Trump is reportedly considering Thomas Brunell, a Republican defender of gerrymandering who wrote a book entitled *Redistricting and Representation: Why Competitive Elections are Bad for America*.

Gill may lead to a fairer, more democratic redistricting process. But with Republicans doing all they can to maintain a hold on power as America's demographics rapidly change, it's unlikely to be the end of the story.

January 11, 2018, 7:00 am

Vieth *v.* Jubelirer

541 US 267 (2004)

Facts of the case

After the 2000 census reduced the size of the Pennsylvania Congressional delegation by two members, the Republican-controlled state legislature passed a redistricting plan that clearly benefitted Republican candidates. Several members of the Democratic party sued in federal court, claiming that the plan was unconstitutional because it violated the one-person, one-vote principle of Article I, Section 2 of Constitution, the Equal Protection clause, the Privileges and Immunities clause, and the freedom of association.

The district court dismissed all but the Article I, Section 2 claim. It held that the voters bringing the suit had not proved that they would be denied representation, only that they would be represented by Republican officials. Because the plaintiffs (those bringing the suit) were not denied the right to vote, to be placed on the ballot box, to associate as a party, or to express their political opinions, their political discrimination claims failed.

However, the court found the act unconstitutional because it created districts with different numbers of voters, thereby violating the one-person, one-vote principle. Because the plaintiffs had shown that it was possible to create districts with smaller differences, and because the defendants had failed to justify the disparities resulting under their plan, it was therefore unconstitutional.

Question

Can voters affiliated with a political party sue to block implementation of a Congressional redistricting plan by claiming that it was manipulated for purely political reasons? Does a state violate the Equal Protection clause of the 14th Amendment when it disregards neutral redistricting principles (such as trying to avoid splitting municipalities into different Congressional districts) in order to achieve an advantage for one political party? Does a state exceed its power under Article I of the Constitution when it draws Congressional districts to ensure that a minority party will consistently win a super-majority of the state's Congressional seats?

Conclusion

In a split decision that had no majority opinion, the Court decided not to intervene in this case because no appropriate judicial solution could be found. Justice Antonin Scalia, for a four-member plurality, wrote that the Court should declare all claims related to political (but not racial) gerrymandering nonjusticiable, meaning that courts could not hear them. Because no court had been able to find an appropriate remedy to political gerrymandering claims in the 18 years since the Court decided Davis v. Bandemer, 478 U.S. 109,

which had held that such a remedy had not been found yet but might exist, Scalia wrote that it was time to recognize that the solution simply did not exist.

Justice Anthony Kennedy, however, wrote in his concurring opinion (which provided the deciding fifth vote for the judgment) that the Court should rule narrowly in this case that no appropriate judicial solution could be found, but not give up on finding one eventually.

New York Review of Books

Let them Eat Cake

David Cole December 7, 2017, Issue

When David Mullins and Charlie Craig walked into Masterpiece Cakeshop, a bakery in Denver, Colorado, five years ago, they had no inkling that the encounter would take them to the United States Supreme Court. All they wanted was a wedding cake. But as soon as Jack Phillips, the bakery's owner, realized that the marriage they were celebrating was their own, he cut off the conversation, explaining that he would not make any cake for a same-sex wedding.

When they were turned away, Mullins and Craig brought a complaint before the Colorado Civil Rights Commission, which enforces the state's public accommodations law. That law, which dates back to 1885, requires businesses open to the public to treat their customers equally. (**Forty-five states have a similar law, as does the federal government**.) Since 2008, Colorado has specifically prohibited businesses from discriminating against customers on the basis of sexual orientation, in addition to disability, race, creed, color, sex, marital status, national origin, and ancestry. The commission found that by selling wedding cakes to straight couples but refusing to sell them to gay couples, the bakery had violated the public accommodations law. The Colorado courts upheld that decision, rejecting the bakery's First Amendment objections—as have courts hearing similar cases involving florists, banquet halls, photographers, and videographers. **In June, however, despite the unanimity among the lower courts, the Supreme Court agreed to hear the bakery's appeal.**

The case will be argued on December 5. (The ACLU represents Craig and Mullins, and I am co-counsel in the case.) It asks whose rights should prevail when the First Amendment's guarantees of freedom of religion, speech, and association come into conflict with equality—over a cake, no less. It is one of the most talked-about cases of the term, in part because it's so easy to conjure hypothetical variations: Could a bakery refuse to make a birthday cake for a black family because its owner objects to celebrating black lives?

The Masterpiece Cakeshop dispute is at the center of a new front in the clash between opponents and proponents of marriage equality. Even before the Supreme Court declared in 2015 that same-sex couples have a constitutional right to be married on the same terms as different-sex couples, opponents of marriage equality had begun invoking their own First Amendment rights, claiming that they should not have to do anything to support unions that are contrary to their sincere beliefs. This controversy is not limited to same-sex weddings. If the Court accepts the bakery's arguments, it will open a potentially gaping loophole in all laws governing businesses that provide "expressive" products or services.

The Trump administration has filed a friend-of-the-court brief supporting the bakery, the first time in history that the solicitor general has supported a constitutional exemption from an antidiscrimination law. One of the Justice Department's principal responsibilities is to enforce public accommodations and antidiscrimination laws, so it is generally skeptical of arguments for allowing citizens to evade their strictures. But not this administration, at least not when what's at issue is a religious objection to selling a cake to a same-sex couple.

Businesses have raised First Amendment objections to antidiscrimination laws in the past, but the Supreme Court has always rejected them. In 1968, the Court dismissed as "patently frivolous" a South Carolina restaurant chain's argument that serving black customers "interfere[d] with the 'free exercise of [its] religion.'" Five years later, when private racially segregated schools opposed a prohibition on racial discrimination in admissions, asserting that it violated their freedom of association, the Court acknowledged that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment," but ruled that such discrimination "has never been accorded affirmative constitutional protections." And in 1984, when a corporate law firm objected that a requirement to consider a woman for partner would interfere with its First Amendment rights to speak and associate, the Court once again rejected the contention, stating that there is "no constitutional right to discriminate." ...

If the courts were to recognize a First Amendment exemption to such general regulations of commercial conduct, it would render antidiscrimination laws, and many other business regulations, unenforceable in many settings. Consider the First Amendment right of association. Any prohibition on discrimination can be characterized as a requirement to associate with those with whom one would rather not associate. The Court must choose between the two, and its choice has been clear since *Brown* v*. Board of Education* declared segregation unconstitutional.

Religious exemptions are also generally incompatible with antidiscrimination laws. Beyond asking whether a religious belief is sincere, the courts have no way to

measure whether religious beliefs are “legitimate.” As a result, a constitutional religious exemption would free any business owner who framed his objection in religious terms from an obligation to treat his customers equally. **As Justice Antonin Scalia wrote for the Court in rejecting a free exercise claim in 1990, laws of general applicability “could not function” if they were subject to such religious challenges.** Quoting an 1878 decision, Scalia warned that such an exemption would “permit every citizen to become a law unto himself.”

Masterpiece Cakeshop’s objection rests on its owner’s Christian beliefs. And its complaint is ultimately a desire not to be associated with a same-sex couple’s wedding celebration; it objected to selling Craig and Mullins even a nondescript cake. But **because the Supreme Court has flatly rejected both association- and religion-based claims in such cases already, the bakery stresses that it is making a free speech claim. It maintains that it speaks through its cakes, which should make this case different.**

The reasons for rejecting exemptions based on religion and association, however, are equally applicable to free speech claims. Because almost any conduct can be engaged in for “expressive” purposes, the exceptions would very quickly swallow the rule. As the Supreme Court has recognized, “it is possible to find some kernel of expression in almost every activity a person undertakes.” Any business that uses creative or artisanal skills to produce something that communicates in some way could claim an exemption...

Likening its cakes to the art of Jackson Pollock and Piet Mondrian, Masterpiece Cakeshop claims that they deserve protection as free speech no less than Pollock’s canvases. But whether the cakes are artistic is beside the point. As an individual artist, Pollock would not have been subject to a public accommodations law and could have chosen his customers. But if he had opened a commercial art studio to the public, he, too, would have been barred from refusing to sell a painting because a customer was black, female, disabled, or gay.

The fact that a business’s products may be expressive does not give it the right to discriminate. Newspapers and book publishers, for example, are indisputably engaged in core First Amendment activity, but that does not mean that they can refuse to sell to (or hire) Mormons or women. As the Supreme Court stated in 1945, “The fact that the publisher handles news while others handle food does not…afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.” If newspapers can be required not to discriminate, then surely bakeries can as well—no matter how artistic their confections may be...

.

The Supreme Court has recognized a First Amendment objection to public accommodations laws on only two occasions, but both cases involved efforts by states to regulate the speech of private ideological associations, not the conduct of businesses open to the public. In 1995, the Court ruled that Massachusetts could not use its public accommodations law to require the private organizers of Boston's annual St. Patrick's Day parade to allow a gay pride contingent to march under its own banner. The parade organizers were open to gay marchers, but objected to an openly gay contingent carrying its own banner. The Court reasoned that a parade is an inherently expressive activity, and that by requiring the organizers to include a gay pride banner, the state was "alter[ing] the content" of the parade's message. **Similarly, in 2000, the Court ruled that New Jersey could not require the Boy Scouts to accept an openly gay Scout leader, because doing so directly interfered with the Boy Scouts' First Amendment right to choose leaders who did not undermine the group's mission.**

Masterpiece Cakeshop invokes these cases, but they are plainly different. The St. Patrick's Day parade organizers and the Boy Scouts are private groups that exist for the purpose of communicating ideas, not businesses serving the public in the commercial marketplace. Private organizations engaged in speech have a First Amendment right to choose their messages and their leaders. Businesses open to the public, by contrast, have no right to choose their customers.

But, some ask, what if a couple requested a cake bearing a written message? Surely the law should not require the bakery to write "Congratulations on your wedding" if the baker does not in fact feel congratulatory. And doesn't every wedding cake implicitly say just that? The problem with this question is its premise—namely, that if a business's conduct is sufficiently expressive, it earns the right to discriminate against its customers based on race, sex, sexual orientation, or other grounds.

Under Colorado law, as under most public accommodations laws, a bakery can decline to place any messages on a cake that it finds offensive, as long as that policy applies to all customers and is not a pretext for discrimination on the basis of identity. What it cannot do is refuse to provide to a gay couple the very same product that it will sell to a straight couple. In this case, moreover, Masterpiece Cakeshop refused to provide even a nondescript cake if it was to be used for a reception celebrating a same-sex couple's wedding. What triggered the objection was the identity of the customers, not any requested message. In fact, Craig and Mullins did not request a message at all.

Masterpiece Cakeshop's effort to carve out a First Amendment exemption to an antidiscrimination law that on its face does not target speech would require the

Court to depart from its general approach to similar claims. **The Court has consistently ruled that when a generally applicable law is not targeted at a constitutional right, the fact that it incidentally affects the right does not invalidate the law**. A law prohibiting the use of peyote by all citizens is not invalid because it impedes the ability of certain Native Americans to use peyote in their religious rituals. Similarly, the fact that a preference granted to veterans who apply for civil service jobs has the incidental effect of disadvantaging female applicants is not a denial of equal protection.

Only laws that target religion, or that are intended to deny equal treatment to a protected class, trigger heightened scrutiny under the First Amendment's religion clause and the Equal Protection clause. In a pluralist society, it is inevitable that many generally applicable laws will have incidental effects on different community members. But unless every man is to be a "law unto himself," there cannot be an exemption for everyone who complains about a law's indirect effect on his constitutional rights.

That principle is especially appropriate for antidiscrimination laws, like the Colorado law that Masterpiece Cakeshop seeks to evade. Such laws are by their very nature designed to ensure equal treatment for all, so that no one has to endure the stigma and shame of being turned away by a business that disapproves of who they are. If those laws were subject to exemptions for anyone who could claim his product or service was expressive, they would become not a safeguard against discrimination, but a license to discriminate.

The Supreme Court's Gerrymandering Case and Strategies for Winning Justice Kennedy's Vote

By Jeffrey Toobin October 5, 2017

Both liberals and conservatives try to push Justice Anthony Kennedy's First Amendment buttons.

Photograph by Stephen Voss / Redux

The secret to advocacy before the contemporary Supreme Court is no secret: it's all about pandering to Justice Anthony Kennedy. With the other eight Justices evenly split between liberals and conservatives, lawyers in controversial cases spend

most of their energy indulging the idiosyncratic passions of the rangy Californian who sits beside the Chief Justice.

That means, for the most part, talking about the First Amendment. In his thirty years on the bench, Kennedy has displayed an almost Pavlovian receptivity to claims of infringement on the freedom of speech. This has alternately pleased and enraged partisans on both sides. Liberals rue Kennedy's opinion for the Court in Citizens United v. FEC, the 2010 landmark decision that invalidated campaign-finance regulations, on the ground that they violated the free-speech rights of corporations. At the same time, Kennedy has been a reliable vote in favor of the rights of political dissenters, such as flag-burners. To get on the right side of Justice Kennedy, advocates know, it helps to get on the right side of the First Amendment.

Paul Smith, who represented the Democratic challengers to Wisconsin's gerrymandered legislative map this week, in Gill v. Whitford, gave a state-of-the-art demonstration of Kennedy-centric advocacy. Gerrymandering has traditionally been seen as a Fourteenth Amendment issue; in other words, when a majority party draws district lines to make it harder for its opposition to win seats, it's often been suggested that this behavior deprives the smaller party of the equal protection of the laws. But, in an earlier case about gerrymandering, Kennedy made a different argument in a characteristic way—and Smith took the unusual step of reading it out loud before the Court. "It's just a two-sentence description of our claim," Smith told the Justices (one of them in particular). **"First Amendment concerns arise where a state enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views.** In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." **Smith was betting that Kennedy would be more likely to strike down the Wisconsin gerrymander on free- speech grounds, rather than on an equal-protection basis.** Though it's perilous to predict the outcome of cases based on oral arguments, Kennedy did seem to give Smith's claim a more than respectful hearing.

Conservatives, too, try to push Kennedy's First Amendment buttons. In another big case this term, a gay couple is challenging the refusal of a Colorado bakery, on religious grounds, to make their wedding cake. The lower court sided with the couple,

asserting that the case represented a straightforward instance of a business discriminating against gay people, which is prohibited under Colorado law. But the Trump Justice Department has sided with the bakery, citing the First Amendment. The baker in the case, according to the government's brief, "views the creation of custom wedding cakes as a form of art, to which he devotes his creativity and artistic talents." The Justice Department goes on to argue, with rare eloquence for a legal brief, "An artist cannot be forced to paint, a musician cannot be forced to play, and a poet cannot be forced to write." The implication, in this bold and clever bid for Kennedy's vote, is that the same goes for bakers.

In the gerrymandering case, there was a rare unanimity among the Justices about the nature of the problem. Incumbent politicians have used advanced computer technology to draw district lines so that the outcome of the vast majority of elections is now preordained; even Justice Samuel Alito, no friend to the plaintiff Democrats, described the current situation as "distasteful." At the same time, the Justices recognized that it was difficult to craft a solution to the problem; Chief Justice John Roberts was especially wary of asking the courts to use "sociological gobbledygook" to weigh the propriety of district lines. Here again, though, the plaintiffs may have Justice Kennedy on their side. **While other judges worry about the competence of their peers to make tough calls, Kennedy has a reverence for the work of jurists, and he trusts them to get things right most of the time.** He often worries less about long-term implications than about correct results in the here and now. For example, in 2002, a West Virginia jury awarded a fifty-million-dollar damage judgment against a local coal company. **Don Blankenship, the chairman of the company, then spent more than three million dollars to elect his candidate to the State Supreme Court, and that justice then provided the deciding vote to overturn the judgment against the company**. But the United States Supreme Court reinstated the judgment, in an opinion by Kennedy. It was true, Kennedy noted in his opinion, that no one could prove that the campaign contributions led to bias on the part of the state judges, but the whole matter, in simple terms, stunk to high heaven. "It is true that extreme cases often test the bounds of established legal principles, and sometimes no administrable standard may be available to address the perceived wrong," Kennedy wrote. But sometimes, he concluded, you just have to do what's right.

This, then, may be the plaintiffs' best hope in the gerrymandering case. As Paul Smith stated in a stirring conclusion to his argument, "We're here telling you that you are the only institution in the United States that can solve this problem, just as democracy is

about to get worse because of the way gerrymandering is getting so much worse." In Wisconsin, as in West Virginia, enough may be enough,at least for Justice Kennedy.