Partisan Intent

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- Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 **Mich. L. Rev.** 351 (2017).
- Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 **Wm. & Mary L. Rev.** (forthcoming 2017), available at SSRN.

Constitutional debates about gerrymandering often start from the premise that redistricting bodies may pursue overtly partisan goals. The Court's fractured decision in *Vieth v. Jubelirer* offers support for this idea: Justice Scalia's plurality opinion characterized "partisan districting" as a "lawful and common practice," conceding only that an "*excessive* injection of politics is unlawful." Justice Kennedy's concurrence in the judgment similarly noted that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied" and that any workable test for evaluating a partisan gerrymander must be capable of "measuring the particular burden a given partisan classification imposes on representational rights." ((Admittedly, Justice Kennedy sent mixed messages on this point. In contrast to the above passages, which suggest some toleration for intentionally partisan gerrymanders, Kennedy also indicated that a gerrymander might qualify as unconstitutional where political classifications "were applied in an invidious manner or in a manner unrelated to any legitimate legislative objective." Some two years after *Vieth*, however, Justice Kennedy would voice opposition to a "sole-intent standard," contending in *LULAC v. Perry* that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights.")) Even Justices Souter and Ginsburg, though rejecting the outcome in *Vieth*, were willing to concede that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan" and that "the issue is one of how much is too much." It is therefore not surprising that much of the post-*Vieth* commentary and case law has taken this point for granted: to the extent there might be a "judicially manageable standard" for adjudicating partisan gerrymandering claims, that standard must be capable of distinguishing between the merely partisan gerrymander (which the Constitution permits) and the excessively partisan gerrymander (which the Constitution condemns). Such a standard, in other words, must answer the question of "how much is too much."

In their recent, respective articles, Professors Michael Kang and Justin Levitt resist this framing of the inquiry. Rather than attempt to ask "how much" partisanship is "too much" partisanship, each author would instead ask whether a particular type of partisanship has infected the redistricting process (K. 354; L. 2). Thus, as Levitt puts it, the law of partisan gerrymandering should make it clear that "public action undertaken in order to disfavor citizens because of their party affiliation is not merely a species of normal politics, but impermissible in any degree" (L. 37). And Kang similarly maintains that courts ought expressly to "identify partisan purpose as constitutionally illegitimate" (K. 373). Both authors thus propose inquiries that would treat the presence of forbidden *partisan intent* as an independently sufficient basis for invalidating a legislative redistricting scheme.

Kang and Levitt each make a persuasive case on behalf of an intent-centered approach. For one thing, as Levitt points out, a renewed focus on partisan intent would help to ease concerns about judicial manageability, by bringing the law of partisan redistricting within the courts' institutional comfort zone. Judges probe for "suspect" and "invidious" purposes across a range of different doctrines, and, that

task, though often difficult, is not typically regarded as inherently unmanageable. What is more, an intent-based focus may help courts sidestep some of the analytical challenges that presented cause for concern in *Vieth*—challenges such as developing "comprehensive and neutral principles for drawing electoral boundaries," formulating "independent judicial standards for measuring a burden on representational rights," and/or "demonstrat[ing] how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation." *Vieth*, 541 U.S. at 306-12 (Kennedy, J., concurring in the judgment). Rather than place those questions at the forefront of the inquiry, an intent-based framework would "identify only a narrow range of considerations as out of bounds," while at the same time remaining "appropriately agnostic about a wide range of representational preferences left to the political process" (L. 17).

In addition, an intent-based approach would help to align redistricting case law with other areas of doctrine in which overtly partisan motives are already disfavored. Kang offers an especially thorough formulation of this argument, highlighting several other domains in which courts have refused to validate intentionally partisan government actions. Kang discusses in detail: (1) a variety of First Amendment decisions in which the Court and individual Justices have condemned government action that discriminates on the basis of a speaker's partisan affiliation (K. 376-83); (2) "second-order" redistricting cases (including one summarily affirmed by the Court), in which lower courts have prohibited legislatures from assigning even slightly overpopulated districts, otherwise permissible under the principle of *Reynolds v. Sims*, with partisan motives in mind (K. 384-90); (3) case law concerning the Article I Elections Clause's delegation of power to prescribe the "times, places and manner" of congressional elections, a power—that though generally broad—does not permit states to "dictate electoral outcomes," or "favor or disfavor a class of candidates" (K. 390-92 (quoting *U.S. Term Limits Inc. v. Thornton*)); and (4) a recent spate of lower-court decisions on voter-ID and other ballot-access restrictions, in which, Kang suggests, concerns about partisan motivation may be playing an unstated but significant role (K. 392-402). From this point of view, the Justices' acquiescence to partisanship in redistricting decisions looks less like a reflection of and more like a "glaring exception" to a foundational constitutional norm (K. 376).

But more is at stake here than just doctrinal coherence. As both authors make clear, an intent-based approach would also effectuate a valuable ideal. Government action aimed at "punish[ing] or subordinat[ing] disfavored partisan affiliation" is a distinctly harmful phenomenon, different in kind from (and in fact directly threatening to) normal political competition for voters' hearts and minds (L. 21). As Levitt puts the point:

> That a Democratic or Republican legislator may vote on legislation with an eye toward improving her appeal in the next election is a very different matter than voting on legislation designed to improve her prospects by means other than appeal. Legislating with the intent to improve one's political prospects by injuring Democrats or Republicans, because they are Democrats or Republicans, is a distinctly toxic form of partisanship, readily distinguishable from the rough-and-tumble of other political choices.

(L. 33). And Kang strikes a similar note: "The notion that the majority party in government can actively discriminate against the interests of the opposition violates a basic sensibility about democratic competition and fairness"; it is, in fact, "the definition of a process failure begging [for] judicial intervention" (K. 353). An intent-based test—in contrast to a "how much is too much" test—would refuse to countenance this sort of behavior as normal and to-be-expected.

Finally, Kang and Levitt both point out that a rule against partisan motives would have positive spillover effects within the law governing race-based gerrymandering claims (L. 55-56; K. 415-18). Where a

redistricting body is accused of drawing maps in a racially discriminatory fashion, that body will sometimes respond with the odd defense that the map in fact serves partisan rather than race-based purposes. But if the Court were to make clear that partisanship does not generally qualify as a legitimate state interest, then the "party not race" defense would go away, and courts would no longer need to confront the difficult task of determining whether the true motivation behind a gerrymander was party-based or race-based. Instead, as Levitt notes, "redistricting bodies would be forced to justify lines based on publicly-permissible criteria—and, perhaps, even draw lines based on those criteria in the first instance" (L. 57).

Neither author promises a panacea. There is, for one thing, the problem of implementation. Simple as an intent-based prohibition may be to state in the abstract, judges still must figure out how to effectuate that prohibition on the ground. Kang and Levitt both sketch out potential doctrinal frameworks, ((Levitt would place the burden on challengers to show "that particular lines were drawn 'at least in part because of, not merely in spite of, [their] adverse effects' on a partisan group" (L. 43 (quoting *Personnel Administrator of Massachusetts v. Feeney*), while at the same time allowing the government to rebut circumstantial evidence of invidious intent by demonstrating "that an alternative, legitimate, rationale actually drove the districting choice" or "that the same decisions would have been made even in the absence of the invidious motive" (L50). (Notably, and in contrast to the Court's approach to race-based gerrymandering claims, Levitt would not require challengers to show that the forbidden intent was the "predominant" motive for a gerrymander (L. 36).) Kang, by contrast, would have courts consider whether it was "more probable than not that partisan purpose significantly explains a redistricting's partisan characteristics to the exclusion of legitimate state interests under rational basis" (K. 405), with such a finding derivable from the government's failure to "explain an alternative, legitimate basis for its resulting partisan discrimination" or the government's willingness to "admit[] its partisan purpose" (K. 410). Levitt thus appears to envision a sort of burden-shifting framework operating along the lines of existing, equal protection-based approaches to establishing discriminatory intent, whereas Kang has in mind an inquiry "aimed at the imputation of an objective legislative aim necessary to make intelligible the legislative adoption of a particular redistricting" (K. 410).)) but both authors acknowledge that additional questions remain. If, for instance, judges were permitted to infer illicit intent from the presence of egregiously partisan effects (K. 358; L. 57), then those same judges would have to make some attempt at quantifying and drawing conclusions about the extent of a map's partisan bias, thus confronting the same sorts of measurement and line-drawing problems about which some of the Justices fretted in *Vieth*. Similarly, if judges were permitted to infer partisan intent from an absence of legitimate government interests underlying a redistricting plan, then those same judges would need to say something about what sorts of interests *do* qualify as legitimate within the redistricting context (and thus, in turn, engage with thorny, big-picture questions about representative government and democratic fairness). These problems don't strike me as insuperable, and they do not necessarily undermine the suggestion that an intent-based test would prove *relatively* more administrable than the approach envisioned in *Vieth*. But the devil is in the details, and working through those details will not always be smooth sailing.

In addition, an intent-based approach may be susceptible to evasion and manipulation. Forbidden intent will often be difficult to prove, and that difficulty, as both authors acknowledge, would likely shield some badly-motivated gerrymanders from judicial invalidation. This outcome, moreover, would likely become increasingly frequent if an intent-based prohibition were openly adopted, as ill-intentioned redistricting bodies would grow more careful about and adept at covering their tracks. Again, the point should not be overstated: even if direct evidence of illicit partisanship proves difficult to uncover, circumstantial and indirect evidence might still sometimes suffice to show that the forbidden intent was there all along. Still, as Levitt himself concedes, if illicit intent is the relevant doctrinal lodestar, then "there will be circumstances in which invidious partisan intent exists in the world but cannot adequately be proven" (L. 52).

But even if the authors' proposed re-framing of the inquiry does not produce a perfectly effective method of policing partisan gerrymandering, the re-framing itself would still yield positive consequences. Yes, redistricting bodies might respond to an intent-based test by suppressing their expressions of partisanship. But that itself would be a good thing, as a reduction in the broadcasting of partisan motivations might help to mitigate voter disillusionment with public institutions (L. 54). In addition, as Kang points out, a prohibition on overtly partisan gerrymanders might over time help legislators to "internalize the nonpartisanship norm to a degree and launder their internal thinking in the face of judicial stigmatization" (K. 412). This isn't a totally pie-in-the-sky dream: Levitt highlights other areas of election regulation in which it is "strikingly rare to find public officials justifying their choices based on the raw desire to punish members of an opposing political party," and he attributes that fact to a "deep—and hearteningly abiding—norm in most public spheres against tribal partisanship as a motivating force for action" (L. 45-46.). If that norm can prevail in other contexts, perhaps it might come to prevail within the redistricting context as well.

With the Court poised to revisit the issue of partisan gerrymandering in *Gill v. Whitford* (and perhaps a case coming out of Maryland as well), we soon will see whether the Justices show any interest in an intent-centered approach. (A major question mark is Justice Kennedy, who in *LULAC v. Perry* criticized a proposed intent-based test, but who in oral argument during *Gill* hinted that he might be willing to strike down a gerrymander for intent-related reasons.) But regardless of what happens this Term, these articles remain worth a read, as they offer up two especially informed, thoughtful, and analytically satisfying takes on a difficult constitutional problem. What is more, both articles provide a useful reminder that even justified cynicism about the way the political process works need not always translate into defeatism about what constitutional law forbids. Invidiously partisan motivations might always influence the redistricting process; but it does not follow that such motivations must therefore be regarded as constitutionally appropriate. Sometimes it is possible to be both realistic about what government officials are likely to do and idealistic about what the Constitution requires them to do. Kang and Levitt have convinced me that the law of partisan gerrymandering represents one area in which that disconnect can and should be maintained.

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