

## Drawing a Line

### Supreme Court Should Keep Hands Off Tempting Electoral Target

BY RICHARD L. HASEN

**O**n Dec. 10, the Supreme Court will consider the invitation of some Pennsylvania Democrats to impose a new set of constitutional rules to police claims of partisan gerrymandering. Given the recent escapades of the Texas Legislature and others in re-districting twice in a single decade to gain partisan advantage, the Court may be tempted to accept the invitation. But it should decline.

At issue in *Vieth v. Jubelirer* is the claim that the Pennsylvania Legislature redrew the lines for the state's congressional districts in ways that favor Republicans too much. Even though there are more Democrats than Republicans in the state, the Democrats argue, Republicans will have a big advantage in House elections—at least until the next redistricting. The minority will be able consistently to capture a significant majority of the seats. This, Democrats complain, violates the U.S. Constitution.

The Court last considered a partisan gerrymandering claim back in the 1986 case of *Davis v. Bandemer*. A majority of the justices said that courts could decide such claims, but no majority agreed on a workable standard for judging them. Indeed, most observers agree that, in practice, *Bandemer* imposes an impossibly high bar to proving that members of a major party suffered from such a gerrymander. In the last 17 years, virtually no such claims have succeeded.

#### SPOILING THE SOUP

No doubt, it will be tempting for the justices to intervene today. Since the reapportionment revolution begun in *Baker v. Carr* (1962), the Supreme Court has thrust itself headfirst into the electoral process. In the decades before *Baker*, the Court decided an average of 10.3 election law cases per decade. Since

*Baker*, that number has increased to an average of 60 election law cases per decade. Along the way, both liberal and conservative majorities have severely constricted the opportunities for democratic experimentation.

Thus, the Court has imposed a one-person, one-vote rule not only in state contests but also in local elections, frustrating any efforts toward regional government along the federalist lines enshrined in the U.S. Constitution. It has prevented legislatures from imposing campaign finance spending limits, thereby all but dooming efforts at meaningful reform based on decreasing the demand for electoral funding. It has interpreted the Voting Rights Act to require something like proportional representation in redistricting jurisdictions with substantial minority populations, while concomitantly telling those jurisdictions that if they make race the “predominant factor,” their redistricting constitutes an “unconstitutional racial gerrymander.” And in deciding challenges to the Florida 2000 presidential vote, it has arguably imposed a whole new standard of equal protection on the nuts and bolts of elections.

So, too, the Court may be tempted to jump into the partisan redistricting fray. Observers have decried the lack of competition in House races (incumbents have an astronomically high re-election rate), and some blame partisan redistricting. Thus, the Court might wish to put more teeth into its *Bandemer* test to spur political competition, if not to protect the amorphous rights of the voters of Pennsylvania, who in 2000 gave majority support to liberal Al Gore for president and conservative Rick Santorum for senator.

#### BAD ANSWER

But the Court should not do so—for three reasons. First, districting is only a small part of the incumbency story. We also see extremely high incumbent re-election rates for governors, senators, and other statewide officeholders, for whom districting is irrelevant. If the concern is competition, why not read the Con-

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stitution to require (or at least allow) term limits for Congress—a much more effective way to get incumbents out of office?

Second, prohibiting partisan gerrymanders on the ground that they infringe on the rights of the other party's voters will simply shift the action in redistricting to *bipartisan* gerrymandering, where incumbents from both parties draw districts to protect themselves from challenge. Thus, California's recent sweetheart deal would be off-limits, and the competition problem would not be solved.

Third, redistricting is a heavily political process, and it is wrong for courts to impose a one-size-fits-all solution. Although many Democratic-leaning and reform-oriented organizations have filed amicus briefs in the Supreme Court supporting the Pennsylvania Democrats, one such group—the leadership of the Alabama Legislature—filed a brief opposing them.

The Alabama Legislature recently engaged in a redistricting effort that would probably fail the proposed gerrymandering standard—because although Alabama is about 51 percent Democratic, its new redistricting has given Democrats 71 percent of the seats in one house of the legislature and 60 percent in the other. The reason: a historic compromise between white and black Democratic legislators to “unpack” minority voters and spread them around to increase the party's voting strength. Should this be seen as unconstitutionally infringing on the rights of Alabama's Republican voters if Republicans cannot win seats in numbers more proportional to their statewide strength?

At bottom, the question is not whether partisan gerrymandering is generally a good thing. It is not, and more competition for legislative seats may be desirable—though perhaps we have enough party competition within Congress to make up for the lack of competition on the House district level. Longer incumbencies might also benefit voters through better constituent services and members' enhanced ability to gain leadership positions within the legislature.

The real question is: Who gets to decide the form of redistricting—the courts or the voters? Other states can, and perhaps should, follow Iowa's lead and establish a nonpartisan redistricting commission. States with a strong initiative process might even do so without obtaining the permission of the self-interested legislature.

But the Supreme Court should not further police redistricting. Unless the Court is dealing with a core, uncontested equality right, such as the right to vote irrespective of race, or with an issue about which there is near social consensus, such as the odiousness of a poll tax, it is better off leaving electoral matters alone. Otherwise, courts stifle democratic experimentation and ossify our political process. ■

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