Reapportionment, Politics, and the Law
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The U.S. Supreme Court only takes a small percentage of cases submitted to it. Consequently, forecasting what cases the Court will take for review is always difficult. But guessing what cases the Court will hear can be a piece of cake compared to explaining why it decides a case the way it does. Case in point: Vieth v. Jubelirer, the Pennsylvania 2002 congressional redistricting case.

It was a huge surprise last year that the Court decided to hear the redistricting case at all. Many wondered what the Court saw that it didn’t like. Certainly there was nothing new in what the Republican controlled state legislature did in 2001 when it redrew the congressional boundary lines to favor their own party. Indeed, redistricting is a well-established national political ritual that takes place every ten years following constitutionally required census enumeration. By common consent, and historical practice, it is used to protect incumbents while reducing the other party’s congressional strength to the bare minimum.

The Pennsylvania legislature in 2001 seemed to be following the script. It adopted a plan that reduced the state's delegation from 21 to 19, reflecting national population growth. The plan itself was a classic gerrymander that also reduced the number of Democrats in the delegation by redrawing the political map to favor Republican candidates.

The gerrymander itself was unusually successful. In order to accomplish its political objectives, the Republican controlled state legislature combined four Democratic districts into two, created two new "safe" or at least two likely Republican seats, and forced one Democratic and one Republican incumbent to run against each other in a district highly favorable to the Republicans.

The Pennsylvania delegation before the 2002 reapportionment stood at 11 Republicans to 10 Democrats. After the 2002 election-following the redistricting--the Democrat's were reduced to seven seats, the smallest number of seats held by the party since the advent of two party system competition in Pennsylvania.

The power grab was blatant, but not fundamentally different from similar partisan power grabs in Texas, Georgia, and some other states following reapportionment. It must be said that those bringing the legal action raised some compelling claims. Three in particular seemed strong:

- That partisan gerrymandering can be unconstitutional.
- That the gerrymandering of congressional seats violates the equal protection rights of voters in the state.
- That the US Constitution is violated when boundary lines are drawn to ensure that one party wins a disproportionate number of congressional seats even though party candidates for statewide office routinely win less than half of the statewide popular vote.

The latter argument perhaps seemed particularly relevant. In the end, however, the Court did not even answer the appellants' claims.
Well, why not? In simplest terms, five members of the Court--Scalia, Rehnquist, O'Connor, Thomas, and Kennedy--reached the conclusion that the issues raised in the case were not "justiciable," meaning the legal questions raised in the redistricting case were judicial questions, and, therefore, not capable of judicial resolution. In other words, the Court said what the state legislature did in the Pennsylvania case was acceptable, because this gerrymandering--the drawing of boundary lines for partisan purposes--is beyond the reach of US courts.

By its refusal to find the Pennsylvania case justiciable, the Supreme Court has reaffirmed and reinforced the life or death power legislatures have on members of congress. Both members of congress and congressional districts are now more than ever mere political pawns to be moved around at the whim and to the advantage of the party in power.

The Court's policy of non-interference is bound to influence future decennial redistricting. Almost certainly it will heighten partisanship, prevent compromises between the parties in state legislatures, and embolden extreme redistricting for partisan advantage. The political party that controls both chambers of any legislature can decimate its congressional opponents with legal impunity, as Republicans did to Democrats in the latest round of redistricting in Pennsylvania, or even punish its own members for acts of independence or of disloyalty.

The Supreme Court has now permitted all of this. The state legislature may by state law combine congressional districts in almost any way it chooses--to make it difficult, if not impossible, for an incumbent to win reelection. Incumbents can be forced to run against one another or be given districts so new in their political and demographic composition that reelection becomes problematic. Nor is the Pennsylvania case necessarily the end of it. The Supreme Court might hear at least one more major case that could enhance the power of legislatures to a degree unparalleled in American history.

The case involves an unprecedented second redistricting of Texas' congressional seats--in this case after the Republicans captured control of the legislature in 2002. The issue here is whether congressional boundaries can be redrawn essentially at any time--at the whim of legislatures. The stakes in the Texas case couldn't be higher. If the Texas practice is upheld, state legislatures would have the power to alter the balance of state congressional delegations virtually at will. Even more ominously, they could at any time change the party balance in the federal House of Representatives.

Such a development would have long lasting consequences for the exercise of political power in the nation. Bizarre as this seems, such a possibility exists until or unless the Supreme Court says otherwise. The Pennsylvania experience suggests that Court intervention is far from certain.

Meanwhile, the lesson of Vieth v. Jubelirer is clear enough. Apparently the only limitation on legislative power in reapportionment is a veto on racially motivated redistricting. The Court will still look at the creation of districts involving minority representation; otherwise, however, raw political power, rather than rule of law, now dominates the process.

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