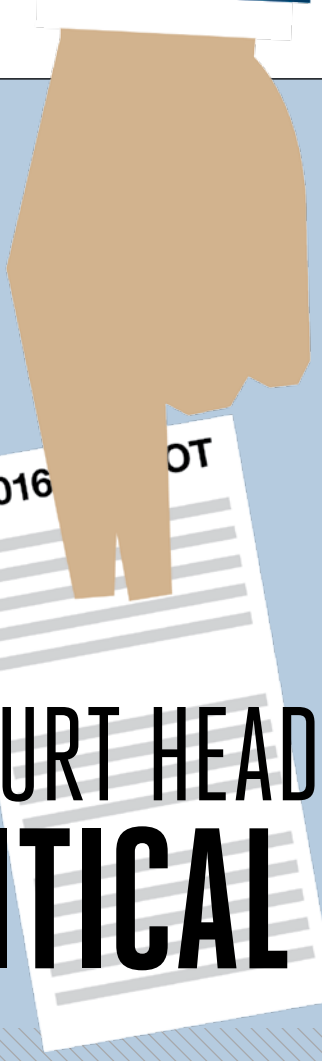
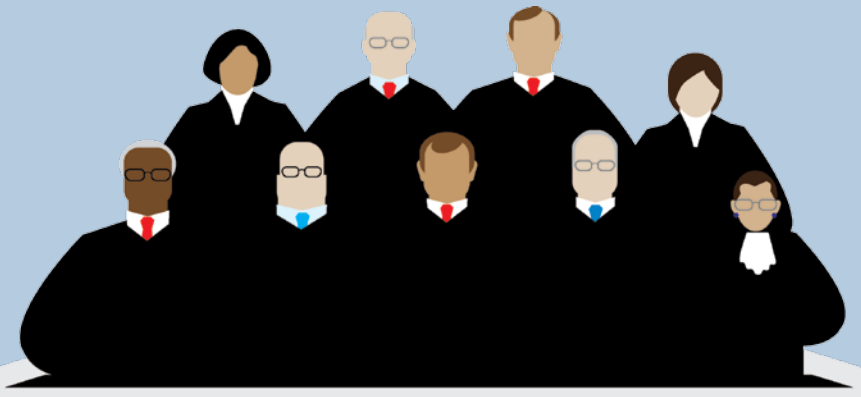


SUPREME COURT HEADS BACK INTO THE POLITICAL THICKET

by RICHARD L. HASEN



The Supreme Court will be back in session next month, and once again election law is on the docket. The Court is set to hear three election law cases so far in the October 2015 term, with more likely to come to the Court on an emergency basis as the 2016 elections bring out the inevitable army of election lawyers fighting in the voting wars. The three cases the Court will hear are on top of twenty-nine election law cases decided with a written opinion in the first decade of the Roberts Court. The Court long ago ignored Justice Felix Frankfurter's admonition to stay out of the "political thicket." Here is a quick look at what is at stake in the world of elections in the upcoming term.

***Evenwel v. Abbott*, No. 14-940.** *Evenwel* has the potential to be one of the most significant cases of the Supreme Court's term, even as the Court seems likely to delve into other hot issues from affirmative action to abortion to union rights. Since the 1960s, the Supreme Court has required states and localities that draw legislative districts to comply with the "one person, one vote" rule. Before cases such as *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), many states drew election districts unevenly. In California, for example, both Los Angeles County and Mono county had the same representation in the state Senate.

When the Supreme Court declared that the Fourteenth Amendment's Equal Protection Clause required states to draw equal districts, it did not explain what should be in the denominator to create such equality. Should it be the total population of each district, the total number of registered voters, the total number of eligible voters, or something else? In practice, most states use total population, which means that districts include children, non-citizens, felons who did not have their voting rights restored, and others lacking the franchise. In the 1966 case *Burns v. Richardson*, 384 U.S. 73 (1966), the Supreme Court allowed Hawaii to use total registered voters as its basis for creating equal districts, leaving the decision on denominator to the states: "The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Id.* at 92.

For years since *Burns*, lower courts consistently rejected arguments that the Equal Protection Clause requires those drawing maps to consider only the total number of voters, not total population, in the denominator. A three-judge court in *Evenwel*, citing the Supreme Court's decision in *Burns* and other cases, rejected such a challenge out of Texas, which alleged that districts drawn with heavy populations of non-citizen Latinos were "diluting" the votes of voters in districts with small non-citizen populations (that's because there are fewer voters in districts with lots of non-voting people in them).

Justice Frankfurter may have been right to warn the Supreme Court to stay out of the political thicket.

The Supreme Court surprisingly agreed to hear *Evenwel* after it had turned down a similar case in 2001 (over the lone dissent of Justice Thomas). If plaintiffs are successful, a "total voters" denominator rule could shift power to rural and Republican areas in Texas, California, and elsewhere, as those areas have fewer non-voters in their existing "total population" districts.

***Shapiro v. Mack*, No. 14-990.** One of the reasons the Supreme Court may have decided to hear *Evenwel* is the procedural posture of the case, an issue touched on by another case the Court will hear this term, *Shapiro v. Mack*. Most cases make it to the Supreme Court from lower federal courts or state supreme courts on a petition for writ of certiorari. Denial of a "cert. petition" is not a ruling on the merits, meaning that one cannot cite the Supreme Court's decision not to hear the case as an indication that the Supreme Court agrees with the lower court.

A small number of cases, mostly in the redistricting and campaign finance area, come to the Court by a different route. These cases, pursuant to federal statutes, are initially heard by a three-judge district court, with a direct "appeal" to the Supreme Court. Unlike cert. petitions, a Supreme Court decision to affirm or dismiss an appeal means that the lower court got the result (but not necessarily the reasoning) right. Some Justices have indicated they are more likely to take cases coming up on appeal because they do not want to make binding precedent without a full examination of the issue in the case. *Evenwel*, unlike other cases raising the "one person, one vote" denominator issue, came up to the Court on an appeal.

Shapiro v. Mack raises the question whether a single federal district court judge receiving a redistricting case that should be heard by a three-judge court has discretion not to form the three-judge court if the judge believes the issues raised in the case are frivolous. *Shapiro* arises out of a challenge to the drawing of a Maryland congressional district. A federal district court dismissed the case as frivolous and denied the request for a three-judge court. The issue may seem arcane, but the stakes are high because the three-judge court is often the best ticket into the Supreme Court. Nearly half of the twenty-nine elec-

tion law cases heard by the Roberts Court came up on appeal rather than a cert. petition.

***Harris v. Arizona Independent Redistricting Commission*, No. 14-232.** The final case the Court has set to hear, *Harris v. Arizona Independent Redistricting Commission*, also comes to the Supreme Court on appeal from a three-judge court, and it is the second redistricting case from Arizona to make it to the Court in two years. At the end of last term, the Supreme Court released its opinion in *Arizona Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. __, 135 S.Ct. 2652 (2015). In the *Arizona Legislature* case, the Supreme Court held that Arizona voters could use the initiative process to take away from the state legislature the right to draw congressional districts and put that power in the hands of an independent commission (much like voters have done in California). The legislature had argued that the Constitution's Elections Clause (in Article I, section 4) gave the state "legislature" the exclusive right to draw such districts, but the Supreme Court on a 5-4 vote read the term "legislature" expansively to include the power to set these rules via voter initiative.

ON TOPIC
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In the new *Harris* case, the question concerns not congressional districts but state legislative districts. When jurisdictions comply with the one person, one vote rule for state and local elections, redistricting authorities do not have to achieve perfect equality (whatever the denominator). Courts often allow deviations of up to ten percent for legitimate reasons, such as complying with city or county boundaries. The Arizona legislature alleges that the Commission had illegitimate reasons for deviating from perfect equality.

The legislature argues that the Commission was not so independent, and actually drew districts biased toward Democrats. They claim the Commission manipulated the size of the districts to help Democrats and to comply with Justice Department requirements under the Voting Rights Act. These requirements no longer apply to Arizona since the Supreme Court in *Shelby County v. Holder*, 570 U.S. , 133 S.Ct. 2612 (2013) held this part of the Voting Rights Act unconstitutional.

A ruling in this case has the potential to give courts more tools to police partisan gerrymandering, at least when those drawing district lines vary populations a bit to help one party capture extra seats in a state legislature or in Congress.

What Else Is Ahead? Two important voting rights cases are working their way up the lower courts toward potential Supreme Court review. The U.S. Department of Justice and civil rights plaintiffs have challenged Texas's strict voter identification law as well as a rollback of voting rules in North Carolina as violations of the Voting Rights Act and the Constitution. As the cases work through their appeals, election deadlines approach and the Supreme Court could be asked to provide emergency relief in the interim.

Campaign finance cases also could make it to the Court, as the Supreme Court's *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) decision continues to lead to questions about when and whether limits on money in politics violate the First Amendment. With record-setting "Super PAC" fundraising already underway for the 2016 elections, do not be surprised to see the Court asked to weigh in once again on the question.

Justice Frankfurter may have been right to warn the Supreme Court to stay out of the political thicket. These days, when election time comes, we all expect the Court to play a major role in crafting the rules of the game.

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