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Will the Supreme Court Decide That Democrats Have Too Much Power?

This term, the justices will hear at least three cases that could upend the partisan balance of power.

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Most appellate lawyers would advise against filing a Supreme Court brief beginning, "QUESTION PRESENTED: Does a key constituency of the Democratic Party have too much power?" That, however, is a key unstated question in at least three cases on the docket for the term that opens Monday.

I doubt that, in 1787, anyone expected the Supreme Court to become central to the political process. Under the text, that was mostly left to the states, with a supervisory role for Congress. Nonetheless, 150 years and a few key amendments later, the Court in the 1940s began to carve out a role as arbiter of the political game—who votes, who can serve in office, how political parties can manage their own affairs, how Congress and state legislatures draw districts, and how campaigns are carried on. The trend began with a series of cases invalidating "white primaries" in Southern states, then gathered force under Chief Justice Earl Warren with cases on districting, voting, and even who can serve in a state legislature. It shows no sign of abating nearly half a century after Warren vacated the center chair.

Of the three cases coming before the Court, two are actually there because of the Court's appellate jurisdiction—meaning they are among the relatively small number of cases, mostly about election districts, that the Court is required by law to consider. The first, and less important, is another look at redistricting in Arizona. Last term, the Court by 5-4 upheld the state's system of congressional redistricting by independent commission rather than by bitterly partisan legislature. Voters approved the system by popular initiative in 2000, and after the 2010 census, the Republican legislative majority asked the Court to void the system, arguing that it ran afoul of Article I of the Constitution, which states that the "times, places, and manner" of federal elections "shall be prescribed in each state by the legislature thereof." "Legislature" meant only

the actual elected body, the GOP argued, not a new body created by the people exercising their legislative power at the polls.

Justice Kennedy, who reveres the popular initiative, voted with the Court's four liberals to uphold the commission; Chief Justice Roberts dissented bitterly, protesting not only that the commission system violates the Constitution, but that this particular commission didn't seem so all-fired independent to him.

Soon after its decision in the first case, the Court "noted probable jurisdiction" (meaning it found a serious issue to be settled) in Harris v. Arizona Independent Redistricting Commission, which looks at the Chief Justice's claim that the "independent" commission was partisan. In an effort to comply with the Voting Rights Act, the challengers argue, the commission drew too many "influence" legislative districts, where Latino voters would have a real opportunity to elect one of their own or at least form a key voting bloc. This "packed" Republicans into the other districts—meaning that those districts have too many voters. This "gives voters in the Democrat [sic] districts a greater say than their counterparts in non-Hispanic-white Republican-plurality districts," the challengers argue in their brief.

So the racial and partisan implications are clear. They are also clear in the second major redistricting case the Court will hear, Evenwel v. Abbott—and here the stakes are much larger. The issue in Evenwel is whether the Constitution's Equal Protection Clause requires legislative and congressional districts that have an equal number of people or an equal number of voters. During the 1960s, the Court enunciated a rule that legislative districts can't favor some areas or kinds of people over others; the principle came to be called "one person one vote." Most states have used population as the basis for districts; in 1966, however, the Court allowed Hawaii to use registered voters to draw the districts. This was needed, the state argued, because of the large number of out-of-state visitors and military personnel on the islands would skew the districts. The Court said the state could make that choice "only because on this record [the registered voter basis] was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."

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The challengers in Evenwel want to go a good deal further. States, they argue, must use a voter basis rather than overall population in drawing districts. The challengers' proposed bases—registered voters, eligible voters, or "citizen voting age population"—all produce districts that are whiter, older, and more Republican than population-based districts. Though the challengers' briefing soft-pedals this racial angle, an amicus brief by the Cato Institute helpfully laid out the stakes for the justices: On the population basis, it argues, "eligible Hispanic voters in other districts have their votes 'over-weighted' and 'over-valuated'" because those districts have large numbers of non-citizens.

A decision that states must use voters to draw districts would be a huge and radical shift; it would also produce potential chaos in states containing large numbers of immigrants, documented or undocumented.

The flaw in the challengers' argument, from the Court's point of view, may be exactly that potential for massive confusion on the eve of elections. The challengers tell the Court not to

worry its pretty head about the right basis, just invalidate the population basis and then sit back and watch the litigation. ("This appeal," their brief whistles as it approaches the graveyard, "need not resolve every implementation issue.") This isn't a good argument to use with any appellate Court; it portends years of appeals and arguments. It may be made less persuasive to the justices by the fact that (as the Stanford law professor Nathaniel Persily has pointed out) neither the Census nor other common demographic surveys provide reliable data on citizenship, meaning that even the most basic numbers in every districting plan would be subject to bitter dispute. For that reason, many observers more learned than I (such as New York University's Richard Pildes) think the Court may adopt Texas's position that states should have a choice of bases. (Even that may sow partisan squabbling; a Republican legislature might be tempted to begin an off-year redistricting by abandoning population and choosing an eligible-voter basis as a way to lock in the current majorities more tightly.

The two districting cases are hard to call; there may be justices eager to upend both Arizonan and national politics, but the Court may have "noted jurisdiction" only because the issues are important. Nothing major may come of either.

But the third major partisan case, Friedrichs v. California Teachers Association, seems far more likely to produce a political earthquake. Under the First Amendment, the Court has previously ruled, public employees cannot be required to join a union; however, if state law allows, unions may be designated "exclusive bargaining representative" for a given set of workers (teachers, for example). The union then negotiates salary, benefit, and working conditions for all the employees, union or non-union.

Representation costs money. To reimburse the unions for the cost of representing non-union workers, each employee is required to pay a fee. This fee is lower than the dues, because by law it cannot include expenses for political activities like lobbying. The Supreme Court approved this arrangement in a 1977 case called Abood v. Detroit Board of Education; but beginning in 2012, Justice Samuel Alito has written two majority opinions denouncing Abood and public-employee unions in general. Friedrichs offers the chance to overrule Abood. Given the solid five-justice bloc in two earlier public-employee union cases, it's hard to avoid the conclusion that the result—which will be devastating to the unions, reliable pillars of the Democratic Party—is baked in the cake.