Heading Back to the Thicket

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Heading Back to the Thicket
Voting district cases pose politically and racially charged questions

BY RICHARD C. REUBEN

The late Justice Felix Frankfurter once referred to the thorny constitutional questions raised by legislative districting as a “political thicket” the Supreme Court ought to avoid.

Frankfurter offered the advice in 1946, and it has been ignored ever since. Rather, the Court has plunged right into that thicket in recent years with a heavy docket of voting rights cases. The pattern is continuing in this election year.

“After several years of cases, we still have no clear sense of where the Court is heading, and in areas as politically and racially charged as redistricting, the Court’s indecisiveness only encourages politics at its ugliest,” laments Richard H. Pildes, a voting rights scholar at the University of Virginia School of Law in Charlottesville.

The pattern is continuing in this election year. Over reality because it mixes group-based rights with individual-based rights.

“It’s difficult to think of a voting rights claim without thinking of a group claim rather than an individual claim,” says Gerald Gunther, a leading constitutional scholar at Stanford Law School in Palo Alto, Calif. Voting rights claims essentially assert that voter influence is being diluted, he notes, not that a single individual is being denied the franchise.

“The Court purports to hold on to that notion, while at the same time supporting the ideal that individuals ought not be treated differently because of their race,” Gunther says. “But when you put them together, something doesn’t quite add up.”

Dissenting in Miller, Justice Ruth Bader Ginsburg said the decision was not “the last word” on voting rights.

Sure enough, just hours after announcing its decision in Miller, the Court agreed to review a cluster of voting district cases from Texas and North Carolina.

The North Carolina cases, consolidated as Shaw v. Hunt, No. 94-923, revisit a district struck down two years ago because of its “bizarre” shape. The Texas cases, consolidated as Bush v. Vera, No. 94-805, have an immediate political impact, especially with elections approaching later this year.

“If the Court strikes down a bunch of districts, then the affected states will have to redraw their electoral districts in time for the 1996 elections,” says Pamela S. Karlan, a voting rights litigator and a professor at the University of Virginia School of Law in Charlottesville. “This could be incredibly disruptive, forcing candidates to raise money and run for election without even knowing what their district is.”

The key vote on the Supreme Court may belong to Justice Sandra Day O’Connor, who wrote a separate concurrence in Miller cryptically suggesting the main opinion should not be read too broadly. Her vote likely will determine whether, and how, lower courts will be guided on the meaning of Miller or whether voting rights law is destined for case-by-case Court review that assures continuing uncertainty over the legitimacy of many of the country’s political districts.