Viewpoint: The Most Important Supreme Court Case for Californians Isn't What You Think

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The most important case for Californians in the U.S. Supreme Court's 2014-15 term didn't come out of any California court. It didn't come out of the U.S. Court of Appeals for the Ninth Circuit, either.

Nor did it have anything to do with health care or marriage. *King v. Burwell*, the case challenging the federal health care exchange, didn't apply to California or the 13 other states with their own health care exchanges. And while a different decision in *Obergefell v. Hodges* might have temporarily brought Proposition 8 back into force, it would have no doubt been short-lived, with California polls showing marriage equality well past the 60 percent popular support mark some eight years after its passage.

Rather, the most important case of the term for California was a dispute that took place entirely between two political bodies in Arizona. In *Arizona State Legislature v. Arizona Independent Redistricting Commissio*n, the Supreme Court weighed an existential threat to a feature of Arizona governance that California matches virtually identically: an agency created by ballot initiative, made up of a politically balanced group of retired civil servants, professors, professionals and business owners, to re-draw after each once-a-decade census the districts in which state and federal elections take place.

An electoral district's size and shape are critical to who gets elected. That's especially so in the age of "big data," in which parties have access to sophisticated voting data down to individual blocks. This data is important because, in a two party contest, the more of the other party's voters one can pack into a single district, the fewer of those voters can compete in all the other districts. So if there are two districts which each have a 55-45 majority for the other side, and I can redraw those districts so the other side has a safe 65-35 majority in one but other is now 55-45 in my favor, I've netted a new district for my party without getting a single new vote. It's a lot easier to change a map than a mind.

This is gerrymandering, and it's an ancient American custom. Named for a salamander-shaped, incumbent-favoring electoral district drawn in 1812 under a statute backed by Massachusetts governor Eldridge Gerry, gerrymandering is the art of creating electoral maps that ensure one party or another wins more representatives than the party's actual share of the vote should earn.

Because district maps are traditionally redrawn once every decade by a state's legislature (to account for voters who've move into, out of, or around a state), the party that happens to be in power at the time gains a distinct advantage. That makes gerrymandering especially pernicious, because it's self-reinforcing: the more a party gains power, the easier it is to redraw individual districts in ludicrous shapes to guarantee it retains control.

The fine art of gerrymandering is widely practiced in many states today, with flourish and by both parties. Maryland's District Three is called "The Preying Mantis" due to its worshipful, insectoid shape. Texas's District Thirty-Five is nicknamed "The Upside-Down Elephant," a nod both to the district's outline and, sarcastically, to the state's longtime Republican majority. You can pretty much guess from its sobriquet how gerrymandered Pennsylvania's District Seven—"Goofy Kicking Donald Duck"—is.

The Supreme Court has held that drawing districts to dilute a racial minority's voting power violates the Fourteenth Amendment, and the Voting Rights Act requires most southern states to get preclearance from the Justice Department to avoid racial discrimination when re-drawing district maps. But neither the Supreme Court nor Congress have ever taken a clear position on gerrymandering for partisan, rather than racial, reasons.

In almost half the states, voters have become sufficiently fed up with redistricting shenanigans that they've done something about it. Twenty-one states use redistricting commissions in some fashion; in seven, the commission is advisory and the final say is still left to the majority party in the legislature. That leaves fourteen states in which an independent, non-partisan body, rather than the state legislature, draws the district maps every decade. The maps the commissions draw often make both parties unhappy, which suggests they may be working.

Although half the states with redistricting commissions enacted them pursuant to a traditional legislative process, voters in the other half—including Arizona and California—had to go around their legislatures and enact redistricting commissions through the ballot initiative process. Ballot initiatives and referendums may be de rigueur to Arizonans, Californians and most inhabitants of the American West living in states molded by

the early-20th century's egalitarian Progressive movement, but they would have shocked and likely terrified the nation's aristocratic founders, who saw the dangers of mob rule played out via guillotine during the revolutions in France taking place around the same time.

Reflecting the founders' mistrust of the decision-making capabilities of the unwashed masses, the United States Constitution leaves no room for direct democracy. It makes no mention of referendums or initiatives, and Article IV guarantees that the states shall offer "a republican form of government" to their citizens, not a "democratic" one. Too much direct democracy, James Madison wrote in Federalist 10, risks "turbulence and contention." Even today, the average Virginian is more likely to associate ballot initiatives with the appurtenances of West Coast hippiedom, like marijuana and assisted suicide, than anything else.

So in 2012, when the Republican-dominated legislature in Arizona decided the party would likely end up with more seats if it controlled the redistricting process rather than letting the independent non-partisan redistricting commission established by a 2000 ballot initiative do it, it filed a federal lawsuit with this constitutional backdrop. The lawsuit asserted that a redistricting commission established by ballot initiative, like Arizona's (and California's), violates the Constitution's "Elections Clause," Article I, Section 4, which states that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof … ." An independent commission created by ballot initiative, the plaintiffs argued, is not "the Legislature" of anything.

That argument, facile though it may seem, has textualist appeal. It also arises within a body of federal case law that never squarely addressed the question what role a law passed by ballot initiative plays in the constitutional scheme. In just 2013, the Supreme Court held in *Hollingsworth v. Perry* that the proponents of a ballot initiative lack standing to defend the constitutionality of the initiative in federal court, even if the state itself gives the proponents that authority. Justice Anthony Kennedy complained the opinion failed to "take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials"—but he was in dissent. As the only Westerner on the court (he hails from Sacramento), Justice Kennedy is uniquely positioned to speak to the importance of the initiative system in California, and how contrary to its hippie-dippy reputation, our initiative process controls everything from taxes to criminal punishments to voting.

Although Arizona's Republican legislators didn't have the Hollingsworth result in hand when they filed their lawsuit, they surely took heart when they saw it. Perhaps, they may have concluded, the lack of respect the court showed for the initiative process there would lead it to show the same disrespect to initiative-created redistricting commissions, and that, in turn, would allow the Republicans to entrench their dominance of Arizona politics even further. (Presumably, they also concluded restoring the same power to supermajority-wielding Democrats in California was someone else's problem).

A specially convened panel of three district court judges heard the suit, finding for the redistricting commission. On direct appeal, the U.S. Supreme Court affirmed in full—but on the very last day of the term, and on the slimmest of 5-4 majorities. Writing for the court, Justice Ruth Bader Ginsburg (joined by Justice

Kennedy and the rest of the court's left-leaning bloc) first considered whether the Arizona Legislature had standing to bring the suit at all, finding that it did because it alleged a concrete and particularized injury in the form of loss of authority to draw district maps.

On the merits, the court held that "the Legislature" referred to in the Elections Clause invokes not a specific body but rather "the legislative function," which might include a gubernatorial veto power or, in some states, the ballot initiative process. Further, a 1911 federal election law, passed around the Progressive movement's peak, included specifically worded language intended to allow for ballot initiative-led redistricting efforts, even though no states had such laws yet in place. Accordingly, the court concluded that the redistricting commissions easily pass constitutional muster.

Importantly, for the first time, the Supreme Court offered language of respect for ballot initiatives and laws passed by plebiscite. "The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature," Justice Ginsburg acknowledged. "But," she continued, "the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power." Thus, the Elections Clause does not prevent Arizonans from employing direct democracy to "restore the core principle of republican government, namely, that the voters should choose their representatives, not the other way around."

In the short term, *Arizona State Legislature* will give a much-needed boost to the nation's beleaguered and underappreciated redistricting commissions. Unsurprisingly, state legislatures run by majority parties tend to underfund redistricting commissions, and although vital, the commissions' work is complex and detailed, offering little of the verve necessary to capture even a few seconds of viewer attention on the nightly news.

In the longer term, however, the case offers valuable legitimacy for ballot initiatives from some of the soberest pillars of East Coast establishment. That's not to say there isn't a ways to go; Chief Justice John Roberts Jr.'s historically fascinating but excruciatingly formalistic dissent implied that the ballot initiative creating the commission, far from a pinnacle of democracy and good government, constituted a relatively sinister effort to "permanently and totally displace [ ] the legislature from the redistricting process." But Roberts still lost, while with the Supreme Court's blessing, voters won.

The Recorder *welcomes submissions to Viewpoint. Contact Laurel Newby at lnewby@alm.com .*

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