



South Dakota Legislative Research Council

Issue Memorandum 95-36

MAJORITY-MINORITY DISTRICTS: LEGISLATIVE REAPPORTIONMENT AFTER *MILLER V. JOHNSON*

Introduction

The primary impact of the Supreme Court's most recent attempt to balance majority-minority electoral districts with the provisions of the Voting Rights Act of 1965 and the equal protection clause of the United States Constitution will be felt in the U.S. House of Representatives, but the greatest potential impact may be experienced in state legislative redistricting. The Court's critique of race-based political boundaries, first hinted at in the 1993 case of *Shaw v. Reno*, was sharpened and refined in the decision in *Miller v. Johnson* issued June 29, 1995. By striking down Georgia's congressional district map as racial gerrymandering, the Court has effectively asserted that there are limits to the protection of minority voting rights and that the state legislatures in attempting to safeguard those rights, even though in compliance with previous Supreme Court decisions and the promptings of the Justice Department, may, in good faith, have exceeded those bounds. This memorandum will examine the evolution of majority-minority electoral districts and the status of current law in the wake of *Miller v. Johnson*.

The Historical Background of Majority-Minority Districts

The right to vote is basic to any modern

democratic system. Although implicit in the original Constitution, the ratification of the Fifteenth Amendment in 1870 explicitly provided that the right of any citizen to vote could not be abridged by the United States or any state on the basis of race, color, or previous condition of servitude. Designed to protect the political rights of the slaves who were freed at the end of the Civil War, the Fifteenth Amendment was widely ignored and circumvented, first in the South and later in the black inner cities of the industrial North, until the passage of the Voting Rights Act of 1965 signaled the resolution of the federal government to once again serve as the guarantor of minority voting rights.

By the 1930s, the Jim Crow system and the political institutions that it had spawned to perpetuate itself, such as literacy tests, the closed primary, the poll tax, segregated party membership, and simple refusal to allow blacks to register and vote, were so entrenched across much of the nation that congressional or legislative reform seemed unlikely. But under the influence of the many liberal and activist justices appointed to the Supreme Court by President Franklin D. Roosevelt, and under the determined leadership of Justice Hugo Black, the Supreme Court began to revitalize the Fifteenth Amendment and to strike at the worst abuses against minority voting rights. The social and demographic revolution that

followed World War II and the New Deal political strategies of reaching out to minority voters were built on the foundation that the Supreme Court had laid. By the 1950s and early 1960s the civil rights movement was in full swing, and the Congress and the Supreme Court were hurrying to stay abreast of the gains that were being made against segregation and repression. The genesis of majority-minority districts stems directly from two momentous legal developments of this era, the enunciation of the doctrine of “one man-one vote” in the *Baker v. Carr* decision of 1962, and the congressional response to the challenge of the civil rights movement, the Voting Rights Act of 1965.

Once the Supreme Court had firmly established in *Baker v. Carr* that legislative districting was justiciable and that certain minimum federal standards were inherent under the Equal Protection Clause, a dramatic procession of cases between 1964 and 1973 served to define the parameters of these newly declared boundaries. But it was not until well after the passage of the Voting Rights Act of 1965 that a number of cases arising directly out of violations of the new federal statutes turned the Court’s attention away from redistricting in general to the protection of minority rights specifically. In the case of *Beer v. United States* (425 U.S. 130), the Court announced a “retrogression” test, stating that if the practical result of redistricting was that fewer minority candidates were elected than under the previous plan, a rebuttable presumption arose that the redistricting was illegal. In 1980, the Supreme Court tried to modify the retrogression test by ruling in the case of *City of Mobile v. Bolden* (446 U.S. 55) that the plaintiffs needed to prove an intent to discriminate in order to substantiate vote dilution claims. But Congress disapproved of the Court’s ruling in the *Bolden* decision, and, in 1982, amended the Voting Rights Act to

provide for the retrogression standard legislatively. Once again the focus was on results rather than intent.

Significant new ground was broken in 1985, when a federal appeals court found that, although a city ward plan for Chicago did not violate the retrogression standard, it did not, nevertheless, grant minority citizens a reasonable and fair opportunity to elect candidates of their choice. *Ketchum v. Byrne*, 630 F. Supp. 551 (D.C.N.D.Ill. 1985). Although *Ketchum* was not appealed to the Supreme Court, its logic proved decisive when the landmark case of *Thornburg v. Gingles* (478 U.S. 30) was heard in 1986. Here the Court found that the North Carolina Legislature had unfairly used multi-member districts, packing, and fracturing to dilute the impact of black voters in legislative elections. In *Gingles*, Justice Brennan indicated that a court “must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors.”

The Court went on to develop a new three-part test that a minority group must meet in order to establish a vote dilution claim. The test requires that a minority group prove that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) the test of an effective majority is that share of the population required to provide minorities with a “realistic opportunity to elect officials of their choice.”

Although the Court in *Gingles* stopped far short of requiring the creation of majority-minority districts in all cases that met the three-part standard, the Justice Department, which for a number of years had already been aggressively litigating minority voter disolution cases, effectively adopted the *Gingles* test and began to insist that states and

political subdivisions meet that standard or risk legal challenge. By the 1990 census, most state legislatures were convinced that any congressional or legislative redistricting plan which failed to create the maximum number of majority-minority districts was doomed to failure. The states made strenuous efforts at good faith compliance with the Gingles test as it was then universally understood. But subsequent cases were to indicate that the Supreme Court had not spoken its final word on majority-minority districts.

An Expression of Discomfort: Shaw v. Reno

By the 1992 election, seventeen new majority-minority congressional districts had been created by state redistricting plans. As a result, African-Americans increased their representation in the U.S. House of Representatives from twenty-six to thirty-nine and Hispanics from twelve to nineteen. Minority gains were particularly large in the South where blacks now represented Alabama, Florida, North Carolina, South Carolina, and Virginia for the first time since the end of Reconstruction. But the creation of so many majority-minority districts had other consequences. The concentration of minority blacks, who generally supported the Democratic party, caused neighboring districts to become correspondingly more white and Republican. This, coupled with other demographic and political trends which were especially strong in the South and West, had the practical effect of contributing to the defeat of an unusual number of Democratic congressional incumbents in 1992 and 1994. In some instances the beneficiaries were Democrat black freshmen representatives who displaced Democratic white incumbents, while in other districts Democratic incumbents whose districts had been deprived of many black supporters were less able to withstand Republican challenges.

The first concrete indication that the Court was not completely satisfied with the legislative response to *Gingles* was manifested in its opinion in *Shaw v. Reno*, 509 U.S. ____ (1993). In an attempt to create the maximum number of majority-minority congressional districts, the North Carolina Legislature created twelve very irregular districts with the primary purpose of packing as many black citizens as possible into the two most irregular districts, the first and the twelfth. (See Appendix C.) Both districts subsequently elected black congressmen, but the serpentine twelfth district was so bizarre in appearance that it attracted national attention if not derision. As Professor Grofman describes it in the caustic law review article titled "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing?,'" 14 *Cardozo L. Rev.* 1237, 1261:

It is approximately 160 miles long and, for much its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods. Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. . . . One state legislator has remarked that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Washington Post*,

Apr. 20, 1993, p. A4. The district even has inspired poetry: “Ask not for whom the line is drawn; it is drawn to avoid thee.”

Justice Sandra Day O’Connor, writing for a five-to-four majority, indicated that race-conscious maps like North Carolina’s have the potential to violate the Fourteenth Amendment’s guarantees of equal protection. Calling the twelfth district “irrational on its face,” she made it plain that there were limits as to how far states should go to create majority-minority electoral districts and that obvious gerrymandering would not be permitted in the future. But the opinion does not go on to discuss other potential objections to majority-minority districts besides shape.

An Expression of Rejection: Miller v. Johnson

Almost immediately additional appeals were filed to explore the gray areas that are hinted at in *Reno v. Shaw*. The first to work its way through the appellate system and reach the Supreme Court is *Miller v. Johnson*, (No. 94-631), decided on June 29, 1995. The Court in *Miller* goes far beyond the decision in *Reno v. Shaw* and effectively overturns much of the legislative and political response to *Gingles*. The Court in *Miller* establishes important new standards to be applied to all future redistricting plans.

The case comes out of Georgia where the legislature had initially drawn a map with two majority-minority congressional districts. However, when the American Civil Liberties Union and civil rights advocates demonstrated that three black-majority districts were feasible, Georgia, under strong pressure from the Bush administration’s Justice Department, redrew the map to provide three such districts. The original ACLU-sponsored “Max-Black”

plan was designed to create a solidly black, if quite irregular, eleventh district to supplement the already black-majority second and fifth districts. (See Appendixes A and B.) The Georgia Legislature substantially accepted the “Max-Black” Plan, but did considerable tidying of the district’s borders to make the district more compact. Certainly the district, which subsequently elected black Democratic Congresswoman Cynthia A. McKinney, is nowhere nearly as irregular as North Carolina’s twelfth.

In *Miller*, Justice Kennedy, writing for the same five-judge majority that had prevailed in *Reno v. Shaw*, took little notice of the defense’s two principal arguments that McKinney’s district did not have an excessively irregular shape and that state legislators had specifically created the district to meet the Justice Department’s view of the Voting Rights Act requirements. On the first point, he states:

Our circumspect approach and narrow holding in *Shaw* did not erect an artificial rule barring accepted equal protection analysis in other redistricting cases. Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.

On the second point, he is even more blunt:

We do not accept the contention that the State has a compelling

interest in complying with whatever preclearance mandates the Justice Department issues. When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied.

Kennedy then formulates a new standard for majority-minority districts. If racial identity reflects shared political interests, race may be a legitimate redistricting factor. Race cannot, however, be the "predominant factor."

The minority of the Court, speaking through Justice Ruth Bader Ginsburg, eloquently defended the status of majority-minority districts. She writes:

Legislative districting is highly political business. When race is the issue, however, we have recognized the need for judicial intervention to prevent dilution of minority voting strength. Generations of rank discrimination against African-Americans, as citizens and voters, account for that surveillance. . . . Special circumstances justify vigilant judicial inspection to protect minority voters--circumstances that do not apply to majority voters. A history of exclusion

from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum.

She closes with an important caveat for state legislators:

The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines. . . . Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw*, to provide a safe harbor. . . . In view of today's decision, that is no longer the case.

Conclusion

Since *Miller v. Johnson* is a case involving congressional redistricting and since South Dakota has only one congressional representative who is elected at large, the case does not directly apply to South Dakota. Nevertheless, the principles enunciated in *Miller* have the potential to be applied to all levels of electoral districting. In the past, this has generally been the case, and any legal standard that the Supreme Court has established at any electoral level has quickly spread to all others. At present there is no reason to believe that the Court will not eventually apply the standards in *Miller* to all state and local redistricting plans.

Currently, in South Dakota, Senate District 27 and House District 28A constitute majority-minority districts. (*See* Appendix D.) Both were created during the 1991 legislative

redistricting and both are intended to protect the voting rights of the Lakota people in those districts in accordance with the Legislature's understanding of the Justice Department's interpretation of the Voting Rights Act. The districts were formally cleared by the Justice Department, and no one has filed any lawsuit challenging their validity. In the absence of a successful legal challenge, Article III, section 5 of the South Dakota Constitution precludes any redistricting before 2001. It is thus unlikely that the South Dakota Legislature will face the issue of legislative redistricting in majority-minority areas until after the Supreme Court has had adequate opportunities to hear additional cases on related questions and to substantially elaborate on the principles enunciated in *Miller* which may have important consequences for South Dakota and all of her sisters states.

This issue memorandum was written by Reuben D. Bezpaletz, Chief Analyst for Research and Legal Services for the Legislative Research Council. It is designed to supply background

information on the subject and is not a policy statement made by the Legislative Research Council.
