

Reapportionment

(for *Encyclopedia of the American Constitution, Supplement II*)

In 1991, reapportionment and redistricting were the most open, democratic, and racially egalitarian in American history. A series of U.S. Supreme Court decisions beginning with *Shaw v. Reno* in 1993, however, insured that the 2001 redistricting would be completely different.

The 1982 amendments to the Voting Rights Act and the Supreme Court's interpretation of them guaranteed minority groups unprecedented influence over redistricting in the 1990s. When Congress in 1981-82 considered requiring proof of only a racially discriminatory effect, rather than a racially discriminatory intent, to void state or local election laws, critics warned that this amendment would lead inexorably to racial gerrymandering and drives for proportional representation for minority groups. Congress adopted it anyway, and in an authoritative 1982 Senate report, it directed the Department of Justice not to allow states and localities in the Deep South and scattered areas throughout the country to put into force laws that had racially discriminatory effects. The Justice Department therefore became an active ally of minority voters during the 1990s redistricting.

In the most important voting rights decision of the 1980s, *Thornburg v. Gingles* (1986), Supreme Court Justice William Brennan sustained the new effect standard. Drawing on the 1982 Senate report and testimony from hearings on the Voting Rights Act, Brennan ruled that if a minority group was sufficiently large and geographically compact to dominate an electoral district, and if voting in the area was racially polarized, then states and localities had to draw districts that would enable minority voters to elect candidates of their choice. Because compactness was notoriously difficult to define, because Brennan hadn't tried to define it, and

because Congress in 1989 had rejected a compactness standard for congressional districts, redistricting planners in 1991 largely disregarded the compactness language in *Gingles*.

To facilitate the 1991 redistricting, the U.S. Census Bureau rapidly made population and ethnic data, already keyed to voting precincts, widely available in machine-readable form. Ethnic and interest groups, as well as factions of the political parties, individual politicians, and members of the general public were given access to computers and software that made drawing districts for local, state, and congressional seats quick and easy. Many of them drafted competing redistricting plans and took vigorous parts in hearings and debates. Organizations representing African-American and Latino voters, such as the National Association for the Advancement of Colored People, the Mexican-American Legal Defense and Education Fund, and the American Civil Liberties Union, were especially active.

Both Republicans and Democrats initially supported drawing more minority opportunity districts in 1991. Republicans sought to pack largely Democratic African-Americans and Latinos into as few districts as possible in order to maximize Republican seats. Democrats, who had to draw minority opportunity districts to satisfy their core constituents, aimed to minimize their party's losses of seats by extracting minorities from predominantly Republican districts, which often produced jagged boundaries. The result was the largest gain in minority representation since the 1870s, modest losses in overall Democratic representation in Congress, and, in reaction to both of these, a radical shift in Supreme Court doctrine by a five-person conservative Republican majority on the Supreme Court.

The Supreme Court had ruled in a series of cases in the 1970s and 80s that, in order to have standing to sue under the Fourteenth and Fifteenth Amendments, plaintiffs had to prove injury. In any event, an intent to comply with the Voting Rights Act, the Court decided, justified

race-conscious redistricting. [*United Jewish Organizations of Williamsburgh, Inc. v. Carey* (1977)] Therefore, when five white North Carolinians challenged two 57 percent black congressional districts that had elected the state's first African-American members of Congress in the 20th century on the grounds that planners had taken race into account in drawing the districts, the majority of a three-judge federal panel dismissed the case. In a bitterly contested 5-4 decision in *Shaw v. Reno*, the Supreme Court overturned the lower court, granting the five white plaintiffs standing on the grounds that the sprawling districts conveyed a symbolic message of racial difference to voters and public officials. It did not matter that whites were not discriminated against or whether the message that whites and blacks differed politically was true. The Fourteenth Amendment, Justice Sandra Day O'Connor said, prohibited any intentional governmental distinctions between people on racial grounds.

After the *Shaw* decision, losing congressional candidates and advocates of what they called "colorblind" policies, joined by southern state Republican parties, which now treated redistricting as an affirmative action issue, challenged all but one black- or Latino-majority congressional district in the South that had initially been drawn in the 1990s, and several majority-minority districts outside the South, as well. When a district court threw out two majority-black Georgia districts that were much more compact than those in North Carolina, the *Shaw* majority of the Supreme Court affirmed, condemning every district drawn for "predominantly racial" reasons or in which race had been used "as a proxy" for Democratic voting. No longer was a *Shaw*-type claim restricted to majority-minority districts or those whose shape annoyed some justices. [*Miller v. Johnson* (1995)] *Miller* and two 1996 cases dismissed compliance with the Voting Rights Act and attempts to overcome past discrimination or current racial bloc voting as justifications for race-conscious districting. Attempts to make it possible

for “discrete and insular minorities” to elect candidates of their choice, the majority ruled, were much less important than adherence to what it termed “traditional districting principles.” These newly discovered principles included not only compactness and protecting incumbents, but also, for instance, the much-broken habit of drawing separate districts in Georgia’s four corners and, according to one district judge, preserving the power of various white ethnic “communities of interest.” By contrast, Justice Anthony Kennedy dismissed the notion that African-Americans might form a community of interest as “offensive and demeaning.” And strikingly unlike its treatment of pro-Democratic race-conscious districting plans, the Supreme Court sustained the deliberate, openly-admitted packing of African-Americans into state legislative districts by Ohio Republicans. [*Voinovich v. Quilter* (1993, 1996)] Why *Miller’s* “predominant reason” or “race as a proxy” tests did not apply to Republicans, the Court did not explain.

In a biting dissent in *Bush v. Vera* (1996), Justice John Paul Stevens accused the majority of using race as an indirect means of attacking political gerrymanders. After seeming to open the door to challenges to partisan gerrymanders by ruling them justiciable in *Davis v. Bandemer* (1986), the Court set the standard of proof so high as practically to foreclose such cases, and it rejected without comment legal assaults on bipartisan gerrymanders and on the whole notion that legislators should influence the shape of their districts. [*Miller v. Ohio* (1996); *Bush v. Vera* (1996)] It also allowed the Bush Administration to block efforts to use statistical sampling to insure that minority group members and other predominantly poor people were not missed by the census, a decision that skewed the allocation of congressional seats toward the predominantly white, Republican suburbs.

Thus, as always before in American history, party politics suffused the redistricting of the 1990s, and it promised to in the 2001 redistricting, as well, but this time it disguised itself behind

the mask of race. Racial dividing lines, long the most deep and consistent in the country's politics, increasingly split Republicans from Democrats. Since any indication that race has been considered in the drawing of district lines can be used in the inevitable legal challenges to every major redistricting in 2001, there will be a strong incentive to conduct such discussions in secret or in coded language. Ironically, then, the Rehnquist Court has twisted the Fourteenth Amendment into a barrier to the equal participation of minorities in allocating political power, one which operates differentially against the political party to which they overwhelmingly adhere, and it has so judicialized the redistricting process as to hamper popular participation and open, frank deliberations concerning the key cleavage in American politics. It is hardly an outcome that the Warren Court could have foreseen when it strode self-confidently into the political thicket in *Baker v. Carr* (1962).

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