Voting Districts and Minority Representation

In 1872, in the first congressional reapportionment after African-Americans won the right to vote everywhere in the country, white North Carolina Democrats packed blacks into a strangely-shaped, over-populated, predominantly black congressional district in a racially discriminatory and partisan effort to minimize the influence of black Republican voters. Neither this nor any of the myriad of other nineteenth century anti-black racial gerrymanders was challenged in court. 120 years later in 1992, an interracial Democratic coalition in North Carolina, under pressure from the U.S. Department of Justice, drew a congressional map designed to simultaneously enhance the chances of black voters to elect candidates of their choice and preserve the seats of other Democratic members of Congress. This time white voters sued, and a "conservative" Republican majority on the U.S. Supreme Court, ironically basing its decisions on the 14th Amendment, ruled that district lines were unconstitutional if they appeared to track racial population concentrations too closely. Manipulating electoral district boundaries to take in minority neighborhoods, the 5-4 Supreme Court majority asserted, was a violation of "traditional districting principles."

Because of racially polarized voting and class differentials in registration and turnout, African-Americans have historically required majorities in voting districts, sometimes substantial majorities, to be able to elect candidates of their choice. But it has always mattered who else was in the district and what the characteristics of the candidates for each party were. And partisan concerns have never been separate from racial ones, in voting or districting. In the idealistic aftermath of the Civil War, a scattering of blacks were elected in the North in overwhelmingly white constituencies. More recently, high-profile black politicians who could

raise substantial campaign funds could sometimes successfully appeal to enough whites or Latinos to gain election even in minority-black districts. It is preferable, therefore, to refer to seats in which African-American or Latino voters have a good chance to elect candidates of their choice, of whatever ethnic group, as "minority opportunity districts."

At the height of the First Reconstruction in the South in the 1872 elections, newly-enfranchised freedmen took advantage of such opportunities to elect over 300 black candidates to Congress and the state legislatures, nearly always from majority-black constituencies. When white Democrats used force and fraud to defeat the Republican Reconstruction governments, one of their first legal actions was always to gerrymander black voters into a minimum of seats, often drawing extremely irregular boundaries to do so. Along with poll taxes, registration laws, secret ballot acts (which operated as literacy tests for the largely illiterate ex-slaves), at-large elections, and other similar devices to curtail and dilute the African-American vote, these statutory means reduced the political power of blacks and their white Republican and Populist allies. With the political and racial opposition weakened, Democrats could insert more permanent literacy and property qualifications for voting into state constitutions and engage in such massive administrative discrimination as to effectively disfranchise many poor whites and the vast majority of blacks. Thus, vote dilution, including widespread racial gerrymandering, was a key step along the road to black disfranchisement and white Democratic supremacy in the early 20th century.

As African-Americans moved north and west, where they could vote much more freely than in the South, they successfully sought political offices, almost always from constituencies that concentrated the black vote, usually forming the majority in a district. These black

officeholders led efforts to end discrimination in public accommodations, schools, housing, jobs, and nationally, in voting.

To make the 15th Amendment guarantee of a right to vote without discrimination a reality in the South, civil rights advocates passed national legislation in 1957 and 1960 and filed suit against particularly egregious practices, such as the notorious racial gerrymander in Tuskegee, Alabama. When these rather timid measures failed to produce quick results and when southern campaigns for voting rights met with massive and often violent resistance, the Johnson Administration responded with the 1965 Voting Rights Act. Aimed principally at suspending literacy tests and other laws that lent themselves to biased administration, the Voting Rights Act also included a clause, Section 5, which gave the U.S. Attorney General the duty of approving any changes in voting laws in states and counties where discrimination was thought to be particularly bad. The purpose was to prevent such "covered jurisdictions" from substituting new discriminatory laws or practices for those banned by the Voting Rights Act. In the 1969 case of *Allen v. Board of Elections*, the U.S. Supreme Court ruled that Section 5 applied to changes in electoral structures, such as at-large elections and redistricting.

The Supreme Court's "one person, one vote" decisions earlier in the 1960s had mandated judicial oversight of every redistricting. During the ensuing redrawing of boundaries, however, black and Latino areas throughout the country were often split so that those reliably Democratic voters could help to elect more white Democrats. And although outside the South, the white Democrats elected from such districts were usually responsive to their minority constituents, in Dixie, white Democratic legislators often made only token gestures toward black and Latino supporters. The conjunction of increased minority voting and political assertiveness, on the one

hand, and heightened judicial scrutiny of reapportionment, on the other, pressured Congress and the courts to insure that minority rights were adequately protected in the redistricting process, as well as in the voting booth.

Despite the opposition of the Reagan Administration and an adverse Supreme Court decision in the 1980 case of *Mobile v. Bolden*, overwhelming majorities of both houses of Congress passed far-reaching amendments to the Voting Rights Act in 1982. Opponents argued that the redistricting process could in reality be "colorblind" or that, if race did matter, it was always preferable to fragment ethnic minorities in order to increase their ability to elect sympathetic white candidates, rather than to concentrate them so that minorities would have an opportunity to make their own choices. Explicitly rejecting these views, Congress insured that redistricting in the 1990s would differ from the experiences in earlier, more discriminatory decades. And in its major interpretation of the 1982 amendments, in the 1986 case of *Thornburg v. Gingles*, a majority of the Supreme Court, led by liberals William Brennan and Thurgood Marshall, backed the vigorous application of the Voting Rights Act to redistricting.

Pressured by the amended law and favorable judicial decisions, redistricters in the 1990s substantially increased the number of minority opportunity districts. As a result, five southern states, including North Carolina, elected their first African-American members of Congress in the twentieth century and the number of blacks in Congress grew by more than after any redistricting since the 1870s. In order to preserve the seats of white incumbents while increasing the chances for blacks and Latinos, many districts of every ethnic composition were given peculiar shapes.

Led by Reagan appointee Sandra Day O'Connor, a 5-4 majority of the Supreme Court

signaled its displeasure at these results in the 1993 case of *Shaw v. Reno*. Since the 1970s, minorities who challenged a law or practice as racially discriminatory under the 14th Amendment had had to show not only that the law had a discriminatory purpose, but that it had an adverse effect on them. O'Connor waived proof of effect for whites in districting cases by characterizing the 14th Amendment as banning discrimination between persons, not just discrimination against some of them, and by treating line-drawing as if it classified individuals, instead of the areas in which they lived. Appropriating the language of the civil rights movement, O'Connor termed the two 57 percent African-American congressional districts "segregated," based on "stereotypes," and likely to lead to "apartheid." Black legislators from such districts, she predicted, would ignore their white constituents. She provided no evidence for such predictions, and social scientists who examined them in detail found her assertions, which had no basis in either statutory or constitutional law, to be untrue or misleading. After deriding the shape of the 12th district, which followed Interstate 85 from Charlotte to Durham, O'Connor casually endorsed an earlier Republican-proposed district that was longer and much more difficult to traverse.

Although the Court seemed to draw back in two 1994 cases interpreting the Voting Rights Act, the same five-person majority dramatically extended *Shaw* in the 1995 Georgia case of *Miller v. Johnson*. In his majority opinion, another Reagan appointee, Justice Anthony Kennedy, ruled that shape should be only one consideration in the larger inquiry into whether race was the "predominant factor" in drawing a district. Only if a minority opportunity district were unintentionally drawn was it safe from strict constitutional scrutiny. And in setting the boundaries of any districts, whatever the percentage of blacks or Latinos, race could not be used,

Kennedy said, as a “proxy” for other traits -- most obviously, for voting Democratic. Thus, not only opportunity districts, but minority “influence districts” were at risk. Moreover, a desire to adhere to the Voting Rights Act or to avoid a lawsuit under that Act could not serve as a “compelling state interest” to justify taking race into account in drawing district lines. Only an intent to follow “traditional districting principles,” such as compactness, the preservation of county or municipal boundaries, and the recognition of non-racial “communities of interest,”in the majority’s view, satisfied the 14th Amendment.

A series of other, less important opinions by the same five-person majority in racial gerrymandering cases between 1993 and 1997 emphasized the Court’s return to the “traditional districting principle” of diluting African-American and Latino political power and disadvantaging the political party with which minorities primarily identified. Openly packing huge numbers of blacks and Latinos into districts passed constitutional muster with the *Shaw* majority if, as in Ohio and California, it benefitted Republicans, but a desire to remedy a century of discrimination in boundary-setting was insufficient to justify race-conscious redistricting that helped Democrats in North Carolina. Overwhelmingly white Republican districts in Texas could have extremely jagged edges, but minority opportunity districts in the same state had to be almost maximally compact. Georgia’s frequently ignored practice of anchoring a congressional district in each of the state’s four corners outweighed any responsibility the Deep South state had to try to guarantee blacks an equal right to representation. Section 5 of the Voting Rights act became a ceiling on minority political power, instead of a floor, when Justice O’Connor interpreted it to mean that the percentage of a minority group in a minority opportunity district could not be increased, and that to win a Section 5 case, minorities had to show not only that a

legal change made them worse off, but also that it was intended to do so. And in a case challenging Democratic efforts to use scientific sampling to reduce the undercount of minorities in the 2000 census, the *Shaw* justices construed the somewhat ambiguous census law the way the suburban Republican plaintiffs wished, almost certainly reducing the influence of minorities in the 2001 redistricting and the subsequent decade's elections.

See: Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: University of North Carolina Press, 1999)