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MILLER v. JOHNSON
115 S.Ct. 2475 (1995)

FACTS

The Voting Rights Act of 1965 (the Act) designated Georgia a covered jurisdiction under section 4 (b) of the Act[1] because of past racially discriminatory actions such as the imposition and maintenance of tests and devices that limited voting rights.[2] Under section 5 of the Act, Georgia must obtain "preclearance review" from the Attorney General or approval of a three judge panel of the United States District Court for the District of Columbia for any change in voting standards, practices, or procedures.[3] Review is intended to ensure that racial minorities do not suffer setbacks in the effective exercise of their voting rights.[4] Congressional redistricting plans are also subject to review.[5]

Georgia became entitled to another representative as a result of the 1990 census, bringing its total to eleven representatives.[6] The Georgia General Assembly submitted a congressional redistricting plan to the Department of Justice (DOJ) for preclearance review.[7] The plan had two majority-minority[8] districts and a third in which African-Americans composed 35.37% of the voting age population.[9] The DOJ rejected the plan, noting that it limited African-American voting potential to two majority-minority districts.[10] Georgia had one majority-minority congressional district prior to 1990.[11] The DOJ had made an American Civil Liberties Union (ACLU) created "max-black"[12] plan their "guiding light" for approval of Georgia redistricting plans.[13]

After the DOJ's action, the Georgia General Assembly submitted a second plan.[14] The second plan had two majority-minority districts and a third district in which African-Americans were 45.01% of the voting age population.[15] The DOJ rejected this plan, noting that a three county area that was not included in any majority-minority district had the second largest concentration of African-Americans in Georgia.[16]

The General Assembly then submitted a third plan that had three majority-minority congressional districts: the Second, Fifth, and Eleventh districts.[17] The African-American voting age populations of the districts were 52.33%, 57.47%, 60.36% respectively.[18] This plan received DOJ approval.[19]

African-Americans were elected to represent Georgia's Second, Fifth, and Eleventh Congressional Districts.[20] Five white residents of Georgia's Eleventh Congressional District filed suit challenging the district on January 13, 1994.[21]

A three judge district court panel decided that the Eleventh District was invalid under the Equal Protection Clause as interpreted in Shaw.[22] The district court relied upon evidence of communication between the ACLU, the DOJ, and the State of Georgia to establish that the overriding purpose of the State in drawing the Eleventh District was to satisfy DOJ demands.[23] DOJ demands were found to have been based on the max-black plan created and promoted by the ACLU.[24]

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[1] *Miller v. Johnson*, 115 S.Ct. 2475, 2483 (1995), citations by Justice Kennedy omitted.

[2] *See* 42 U.S.C. § 1971(a) and § 1973a and § 1973b.

[3] *See* 42 U.S.C. § 1973c (1988) the State of Georgia has the option of submitting a redistricting plan to the Attorney General or filing for judgment by the U.S. District Court for the District of Columbia to gain approval of a redistricting plan. When a plan is submitted to the Attorney General the Attorney General can either approve, or reject the plan. If no response is made in 60 days the plan is to be considered approved. An action can be brought in the U.S. District Court for the District of Columbia for declaratory judgment in lieu of, or alternate to, submission and approval of a congressional redistricting plan by the Department of Justice. Pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284, a three judge panel must hear challenges to congressional redistricting plans in areas covered by the Act.

[4] 28 U.S.C. § 2284, and *Beer v. United States*, 425 U.S. 130, 141 (1976).

[5] 42 U.S.C. § 1973c, and Beer, 425 U.S. at 133.

[6] *Johnson v. Miller*, 864 F.Supp. 1354, 1360 (S.D. Ga. 1994).

[7] Submitted October 1, 1991; *See* Johnson v. Miller, 1363.

[8] "Majority-minority," means that more than 50% of the voting age population in such a district was African-American.

[9] *Johnson v. Miller*, at 1363, n. 5.

[10] Letter dated January 21, 1992; *See Id.* at 1363.

[11] 115 S.Ct 2475, 2483.

[12] "Max-black" refers to a plan devised in large part by Ms. Kathleen Wilde, an attorney with the ACLU, that created a congressional redistricting plan with three majority-minority districts. The plan was supposedly designed to maximize African-American voting power. *See* generally 864 F.Supp. 1354, 1362 - 69.

[13] *Id.* at 1363 - 64.

[14] Submitted March 3, 1992; *See Id.* at 1364.

[15] *Id.* at 1364.

[16] Letter dated March 20, 1992; counties mentioned, Screven, Effingham, and Chatham; *Id.* at 1364-1365.

[17] *Id.*

[18] *Id.* at 1366 - 68.

[19] Approved April 2, 1992; *See Id.* at 1367.

[20] *Id.* at 1369.

[21] Miller, 115 S.Ct. at 2485.

[22] *Id.*

[23] *Johnson*, 864 F.Supp. 1354 at 1360 - 63.

[24] *Id.* at 1360 - 61, and 1368.

The district court decided that the plaintiffs had suffered no individual harm, and that the redistricting had no adverse impact upon them.[25] The district court held that "[the] harms are systemic ones, rooted in social perception of state-sanctioned racial classifications."[26]

The district court concluded that strict scrutiny was the applicable standard of review for the redistricting plan because race was the substantial or motivating consideration in creating the district.[27] "Substantial or motivating consideration" as defined by the district court meant, (a) "consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district's shape, race was the overriding, predominant force determining the lines of the district."[28] The district court also indicated that "motivating" meant that "race was the most prominent element driving the legislature's planning," rather than one of equal force with others.[29]

Direct and indirect evidence of racial motivation found by the district court subjected the Eleventh District to strict scrutiny.[30] Indirect evidence of racial motivation based on the shape and segregationist[31] character of the district's boundary subjected the district to strict scrutiny.[32] Direct evidence of racial motivation found by the district court also subjected the Eleventh District to strict scrutiny.[33]

The district court considered compliance with the Voting Rights Act, if constitutionally interpreted, to be a compelling state interest.[34] The specific application of the Act, however, was held to be incorrect and unconstitutional in this case.[35] The district court enjoined Georgia from holding congressional elections in the challenged district and the State appealed.[36] The Supreme Court granted a stay of the district court's order,[37] and noted probable jurisdiction.[38]

HOLDING

In a five to four decision, the Court held that the creation of Georgia's Eleventh Congressional District gave rise to an equal protection claim because the redistricting plan had race as "the predominant, overriding factor . . . ."[39] The Court also held that the redistricting plan was not narrowly tailored to serve a compelling governmental interest.[40] The Court affirmed the decision of the district court and remanded the case for proceedings consistent with the opinion.[41]

ANALYSIS/APPLICATION

An analysis of *Miller v. Johnson* must begin with a brief discussion of *Shaw v. Reno*.[42] Shaw held that bizarre congressional voting districts whose shape could not be explained by reasons other than race are subject to strict scrutiny analysis. Shaw established that such districts were vulnerable to challenge.[43] What remained to be determined was whether a congressional district that did not have such irregular bounds, but was drawn to establish a majority-minority district, would be vulnerable to challenge. The question is answered affirmatively by the United States Supreme Court in *Miller v. Johnson*.

The Court defined the issue of *Miller* as "whether Georgia's new Eleventh District gives rise to a valid equal protection claim under the principles announced in *Shaw*, and, if so, whether it can be sustained nonetheless as narrowly tailored to serve a compelling government interest."[44] The Court explained that equal protection principles apply to congressional redistricting[45] and restated the holding in *Shaw*: "[W]e held that a plaintiff states a claim under the Equal Protection Clause by al-

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[25] *Id.* at 1370.

[26] *Id.*

[27] *Id.* at 1372.

[28] *Id.*

[29] *Id.* at fn. 19.

[30] *Johnson*, at 1374 - 78.

[31] "Segregationist" meaning district lines that appear to have as their goal segregation of voters of different races. The court did not use this term, but rather it is intended as a shortened expression of the recitation of the geo-demographic acrobatics that were referred to at length in the district court opinion.

[32] *Johnson*, 864 F.Supp. 1354 at 1374 - 77. Indirect evidence is drawing an inference as to the intent of the legislature via circumstantial evidence.

[33] *Id.* at 1377 - 78. Direct evidence can include recorded statements or letters that make racial intent clear.

[34] *Id.* at 1381 - 83, if the Act was properly interpreted, compliance would be a compelling state interest because failure to comply would mean that ultimately a district court panel would draw the districting map for the state. Compliance with the Act if interpreted improperly could not be a compelling interest because the actions related to such a improperly construed interpretation would be unnecessary.

[35] *Id.* at 1384 - 93, where the district court indicates that section 5 of the Act mandates non-retrogression of the position of minorities to the effective exercise of the elective franchise (no back sliding in the free exercise and power of minority voting) and that the first two plans submitted met the non-retrogression principle, and that the third plan was not "reasonably necessary to comply with the Act." *See Id.* at 1385.

[36] *Id.* at 1393.

[37] *Miller*, 115 S.Ct. 36 (1994).

[38] *Miller*, 115 S.Ct. 713 (1995), *See* 28 U.S.C. § 1253, appeal from a three judge district court panel lies directly to the Supreme Court.

[39] *Miller*, 115 S.Ct. 2475, 2490.

[40] *Id.* at 2490 - 93.

[41] *Id.* at 2494.

[42] *Shaw v. Reno*, 113 S.Ct at 2816 (1993).

[43] *Id.* at 2827, citing Karcher v. Daggett, (J.) Stevens, concurring.

[44] *Miller*, 115 S.Ct. 2475, 2482.

[45] *Id.* The Court cited a progression of equal protection principles and a source or sources for each. *See, e.g.*, U.S. Const., Amend. 14, § 1. (no state shall deny a person in its jurisdic-

leging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race."[46]

The Court affirmed the district court's determination that race was the predominating motivating factor in drawing of the Eleventh Congressional District was not clearly erroneous.[47] The shape and demographics of the Eleventh District were compelling evidence of a racial gerrymander.[48] The Court explained that the shape and demographics of the district were not the sole indicators of the predominant, overriding racial motivation of the Georgia General Assembly.[49]

The Court held strict scrutiny is satisfied by a state showing that its districting is narrowly tailored to achieve a compelling state interest.[50] The state must have convincing evidence that remedial action is necessary before implementing affirmative action.[51] The Court also held that the DOJ determination that race-based districting is required for compliance with the Act does not command judicial deference.[52]

The Court held that the congressional redistricting plan failed strict scrutiny analysis because the plan was not required by the compelling state interest (compliance with the Act), and was found to be not narrowly tailored to match the requirements of the Act.[53] The first two redistricting plans submitted by Georgia for preclearance review were ameliorative and did not violate section 5 of the Act's non-retrogression principle.[54] What the DOJ demanded of Georgia was beyond the call of the Act.[55] Any compelling state interest in compliance with the Act cannot withstand challenge once it is determined that the Act does not require that the actions actually taken were necessary for compliance.[56]

I. LAW DEVELOPED

In sum, the Court confirmed that a Shaw claim does not require that a district be irregular in shape, but rather that shape combined with demographics can be persuasive circumstantial evidence of racial motivation.[57] In a *Shaw* claim, a plaintiff has the burden of showing that race was the predominant factor motivating a state decision to place a significant number of voters within or without a voting district.[58] This can be shown by proof that race took precedence over traditional districting principles.[59] Traditional districting principles were listed as compactness, contiguity, respect for political subdivisions, and communities defined by actual shared interests.[60] The Court noted that the list was not exclusive.[61] When traditional districting principles or other race neutral considerations are the basis for districting legislation, and are not subordinated to race, a state can defeat a racial gerrymandering equal protection claim.[62] A state's districting legislation cannot be saved by "mere recitation of purported communities of interest."[63]

Justice Kennedy relied upon the Act's non-retrogression provision to stake out the bounds of his view of the constitutional limits of the Act.[64] Justice Kennedy quoted, "'Ameliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution.'"[65] Justice Kennedy thus hinted that anything more than the minimum aggregation of minorities into majority-minority districts to avoid retrogression would be unconstitutional in his eyes.[66]

Justice Kennedy signaled a willingness to apply strict scrutiny to all redistricting cases: "When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question."[67] Justice Kennedy provided further hope for potential plaintiffs, "Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it can-

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tion equal protection of the laws); Loving v. Virginia, 388 U.S. 1,11 (1967) (central mandate of Fourteenth Amendment is race neutral government decision making); Regents of the University of California v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.) (racial and ethnic distinctions are inherently suspect and call for strict scrutiny); Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (strict scrutiny applies regardless of the race burdened or benefited); Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2114 (1995) (laws classifying citizens by race can not be upheld unless narrowly tailored to achieve a compelling state interest).

[46] *Miller*, 115 S.Ct. 2475, 2482.

[47] *Id.* at 2488.

[48] *Id.* at 2489 - 90.

[49] *Id.* at 2489.

[50] *Id.* at 2490.

[51] *Id.*

[52] *Id.* at 2491.

[53] *Id.* at 2491 - 92.

[54] *Id.* at 2492.

[55] *Id.* at 2493.

[56] *Id.* at 2490 - 91.

[57] *Id.* at 2486.

[58] *Id.* at 2488.

[59] *Id.*

[60] *Id.*

[61] *Id.* also note, protecting incumbents. *See* Johnson, 864 F.Supp. 1354 at1369.

[62] *Miller*, 115 S.Ct. 2475 at 2488.

[63] *Id.* at 2490 (indicating that where shape and demographics have established a strong circumstantial case, post hoc justifications will be viewed, if at all, with a jaundiced eye).

[64] *See Miller*, 115 S.Ct. 2475 at 2492.

[65] *Miller*, 115 S.Ct. 2475 at 2492, citing Days, Section 5 and the Role of the Justice Department, in B. Grofman & C. Davidson, Controversies in Minority Voting 56 (1992).

[66] *Miller*, 115 S.Ct. 2475 at 2491-2492.

[67] *Id.* at 2492 citing Bakke, 438 U.S. at 291 (opinion of Powell, J.).

not do so here."[68] Justice Kennedy may be merely avoiding the statement of a position on an issue that had not been presented, but he may be inviting potential plaintiffs to bring suits challenging a more typical district created because of the Act's non-retrogression principle.

II. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor voted without exception with the majority opinion but also included a brief but important concurrence in light of the five - four vote. Justice O'Connor made clear that she understands "the threshold standard the Court adopts— 'that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,' to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices."[69]

Justice O'Connor indicated that she intends the reach of *Shaw* and *Miller* to be limited. She wrote, "Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles."[70] Justice O'Connor apparently is looking for more than mere consideration of race in combination with other districting factors.[71]

Justice O'Connor concluded, "[A]pplication of the Court's standard helps achieve Shaw's basic objective of making extreme instances of gerrymandering subject to meaningful judicial review."[72] Presumably, Justice O'Connor will be in the position for some time to decide which instances where racial considerations in districting are extreme enough to be subject to strict scrutiny. Justice O'Connor does not hold out much hope for future race-based districting plaintiffs by stating that only "extreme instances of gerrymandering" will draw application of strict scrutiny.[73]

III. JUSTICE GINSBURG'S POSITION

Justice Ginsburg, joined by Justices Stevens, Breyer, and in part by Justice Souter, would have allowed the Eleventh District to remain undisturbed.

Justice Ginsburg detailed the historical circumstances that led to the Voting Rights Act of 1965 and Georgia's subjection to it.[74] From this starting point, Justice Ginsburg highlighted the difference between the extreme irregularity embodied in the district in *Shaw v. Reno* and Georgia's Eleventh District.[75]

Attacking the majority's position, Justice Ginsburg wrote of the localized traditional ethnic districts and loyalties that have persisted in the political landscape of many areas of our nation.[76] Justice Ginsburg assailed the reasoning of the majority's opinion because it comes from "contexts distinctly unlike apportionment."[77]

Justice Ginsburg argued that districting is unique both in character and in historical and modern justifications, and that redistricting should qualify for special solicitude from the High Court. Districting is unique according to Justice Ginsburg, because people are not treated as individuals during districting, but instead are always aggregated into groups.[78]

Quoting from Justice Stevens' dissent in *Adarand Constructors, Inc. v. Pena*,[79] Justice Ginsburg added to his sentiment that there is a fundamental constitutional difference between laws that seek to continue racial discrimination and laws that seek to eradicate such practices.[80] Justice Ginsburg wrote that "[s]pecial circumstances justify vigilant judicial inspection to protect minority voters— circumstances that do not apply to majority voters."[81]

Justice Ginsburg concluded by rejecting the *Shaw* majority's assurance that "'[t]raditional districting principles such as compactness, contiguity, and respect for political subdivisions . . . are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.' In view of today's decision, that is no longer the case."[82] Justice Ginsburg asserted that now only after litigation will states know whether districting plans that are conscious of race are secure.[83]

IV. THE STANDING DILEMMA

The Court articulated what appears to be the minimum standing requirements necessary to bring an equal protection challenge to a racially gerrymandered voting district. Residence in such a district is required.[84]

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[68] *Miller*, 115 S.Ct. 2475 at 2490 - 91.
[69] *Id.* at 2497, internal citation to 2488 omitted.
[70] *Id.* at 2497.
[71] *Id.* at 2497 generally.
[72] *Id.* at 2497.
[73] *Id.*
[74] *Id.* at 2500 - 2502.
[75] *Id.* at 2502 - 2504.
[76] *Id.* at 2504 - 2505.
[77] *Id.* at 2505.
[78] *Id.* at 2506.
[79] *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2091 (1995).
[80] *Miller*, 115 S.Ct. 2475 at 2506.
[81] *Id.*
[82] *Id.* at 2507 (Ginsburg (J.) (dissent) citing Shaw, 113 S.Ct. at 2827. Some internal punctuation omitted).
[83] *Id.* at 2507.
[84] *Id.* at 2485, citing *United States v. Hays*, 115 S.Ct. 2431, 2436 (1995) (people living outside of a district did not have standing, and noting that harms caused by racial classifications threaten to, stigmatize individuals, incite racial hostility and

Justice Stevens joined with Justice Ginsburg in her dissent, and wrote separately to raise the issue of standing.[85] Justice Stevens did not believe that respondents in this case have suffered any legally cognizable injury.[86] Justice Stevens held the position that in neither *Shaw* nor Miller did the Court articulately define what injury the cases were redressing.[87]

Justice O'Connor, writing for the Court in *United States v. Hays*[88] explained the Court's standard of standing:

> It is by now well settled that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact -an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and conduct complained of.... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[89]

Justice O'Connor's explication of the Court's standing doctrine asserted that consideration of harm is the first step in consideration of the justiciability of a claim. If Justice Stevens is correct in his analysis then the claims brought by both *Shaw* and *Miller* plaintiffs were not justiciable, or the Court has quietly changed the law of standing to include amorphous "injuries." Justice Stevens was explicit about the flaw he saw in the majority decisions. "White voters obviously lack standing to complain of the other injury the Court has recognized under *Shaw*: the stigma blacks supposedly suffer when assigned to a district because of their race."[90]

The district court's articulation of the issue is in partial harmony with Justice Stevens', "[i]n both *Shaw* and the instant case, the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters."[91] The district court added, "[the] harms are systemic ones, rooted in social perception of state-sanctioned racial classifications."[92]

Justice Stevens continued to batter the *Shaw* and *Miller* decisions when he wrote:

> Although the *Shaw* Court attributed representational harms solely to a message sent by the legislature's action, those harms can only come about if the message is received—that is, first, if all or most black voters support the same candidate, and, second, if the successful candidate ignores the interests of her white constituents. Respondents' standing, in other words, ultimately depends on the very premise the Court purports to abhor: that voters of a particular race "'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[93]

The facts seem to bear out Justice Stevens' allegation that the *Miller* plaintiffs suffered no harms. The only plaintiff to testify at trial said, "that since he had never attempted to contact his Member of Congress, he found his representative neither responsive nor unresponsive."[94]

CONCLUSION

The *Miller v. Johnson* decision extended the principle of *Shaw* to its logical conclusion. The decision is appropriate based on a correct interpretation of the Court's equal protection jurisprudence and *Shaw*. The fundamental problems of standing and whether or not *Shaw* was properly decided provide the dissenters and future defenders of majority-minority districts with their best arguments. Any future application of the Voting Rights Act districting commands must be respectful of "traditional districting principles."[95]

The *Miller* decision was appropriate because the law cannot tolerate a standard as arbitrary and subjective as the relative aesthetics of a political district. Indeed, a district most pleasing to the eye could embody the greatest injustices if it were to divide political subdivisions, communities of interest, and racially discriminate. The standard the Court appears to have settled on is overriding racial motivation which can be proven both circumstantially and by actual express intent.

The problem that remains with the *Shaw*, *Hayes* and *Miller* line of cases is simply that the decisions do not have strong foundations. It is difficult, if not impossible, to put faith in "systemic," "social perception" harms to

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also cause representational harms, whereby a Representative is more likely to believe their prime obligation is to represent the members of the dominant racial group when the district was obviously created solely to effectuate the perceived interests of one racial group); (*Hays* cites to *Shaw* at 113 S.Ct. 2816, 2825 for the explanation of representational harms, further cites omitted).

[85] *Miller* at 2497 (Stevens, J., dissenting).

[86] *Id.* at 2497 (Stevens, J., dissenting).

[87] *Id.*

[88] *United States v. Hayes*, 115 S.Ct. 2431 (1995).

[89] *Miller*, 115 S.Ct. 2431, 2435 citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 - 61 (1992), (footnote, citations, and internal quotation marks omitted by Justice O'Connor) internal quotation marks omitted.

[90] 115 S.Ct. 2475, 2498 (Stevens, J., dissenting).

[91] *Johnson*, 864 F.Supp. 1354, 1370.

[92] *Id.*

[93] *Miller*, 115 S.Ct. 2475 at 2497 - 2498, ((internal quote to majority at 2486), citing *Shaw* at 2827).

[94] 1995 WL 217634 ((U.S. Ga. Reply Brief), citing, T. Vol. V, 30).

[95] *Miller*, 115 S.Ct. 2475, 2489 (Kennedy, J., majority), 2497 (O'Connor, J., concurrence), 2507 (Ginsburg, J., dissent).

satisfy the "harm" aspect of standing when such ephemeral harms are evidently incapable of being proven on a concrete or individual basis. If the harm suffered is a "systemic" harm *Hayes* immediately becomes suspect. Social perception harms would apply not only to the district with a segregationist boundary but also to the entire political entity that drew the boundary.

Representational harms should be required to be proven or substantiated in some way. Phone calls and letters that go unanswered, locations of district offices and community meetings can all be proven. Representational harms should not be presumed in a district that when drawn, subrogated traditional districting principles to consideration of race, when apparently the same harm is not presumed for a district where traditional principles were not subrogated to race, despite the fact that each district may contain identical statistically anomalous percentages of racial groups when compared to the state as a whole. The intent of a state legislature is not credibly relevant to a Congressional representative when deciding upon whose behalf she will expend her greatest efforts. Political realities in a representative democracy cause elected representatives to serve who is in their district. How people in a district came to be there is unlikely to be more than a passing interest for a representative.

African-Americans in districts that have minority populations that are statistically below the state wide average may have claims for presumed representational harms, but only if they can show that race was subrogated to other traditional districting practices. The result is districts that are manipulated to be underinclusive of minorities can often be justified as incumbency protection, or based upon socio-economic "communities of interest." Meanwhile districts that are statistically overinclusive of minorities will often be susceptible to being attacked as a "racial gerrymander." Where minorities presently hold office they can be protected as incumbents. Perhaps some majority-minority districts could still be created where a concentration of minority populations appear to share socio-economic communities of interest.

Justice Ginsburg and the minority's position is best summarized in her words, "The reapportionment plan that resulted from Georgia's political process merited this Court's approbation, not its condemnation."[96] Although it represents a skewed reading of the facts[97] it is the minority's position to the core. The minority would have approved the districting plan as drawn, and would presumably approve more tempered applications of the Act.

Miller presents a difficult paradox in that it allows a plaintiff to point to the compelled action of a state covered by the Act as expressive of "racial intent." This paradox may prove the genesis for future redistricting litigation. States are called to court to defend districting plans that were forced upon them. This curious situation bodes well for plaintiffs facing state defendants who are likely wishing the plaintiff every success. Georgia did not want to draw the map that resulted in *Miller*. Georgia cannot be faulted for not wanting to defend what had been forced upon it by the DOJ.

When a state, named defendant, or intervenors can establish a *prima facie* case of transferred intent from the DOJ to the state via the Voting Rights Act, the DOJ should be named the primary party responsible for defending the suit. This difference might seem small, but it would allow the DOJ to organize as effective a defense as possible for what are, in reality, the DOJ's actions.

The caveat to minority aggregation is that the minority voting age population in the non-majority-minority districts will be artificially low. States will have districts that are recognized and defined by racial compositions. At no time would a political observer find that race is unimportant in such a setting. This result must be balanced against the possibility that without deliberate minority aggregation into majority-minority districts African-Americans and other minorities may be left with as ineffective a voice as before the Act.

The practice of assuring race neutral districting is, in our time, a sisyphean labor. Rather than undertake what is perhaps an unattainable goal, should the United States instead default to striving for proportional representation for discrete subgroups of the population? This too is a task without end, as each division will reveal beyond it another articulate segment that cries out for "recognition."[98]

The hope is that racial identification will one day cease to be interlocked with political interests. When social forces no longer force the economic, political, and social fortunes of large pluralities of racial groups into rather homogeneous categories, the bond between race and political interests will be broken. The desire of any ethnic group to be concentrated in a district with other people of the same ethnicity will fade when individuals in the group no longer find it politically advantageous to be grouped with others based on common inherited traits. The push for real equality of opportunity in education, economics, politics, and social spheres must make significantly greater progress before the drive for racial group aggregation in political districts will cease.

Summary and Analysis Prepared by:
Peter Murphy

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[96] *Id.* at 2507.

[97] The deep involvement of the DOJ in the redistricting plan is not normally considered part of the ordinary affairs of any state's "political process."

[98] *See Johnson v. Degrandy*, 114 S.Ct. 2647 (1994), (where plaintiffs were both African-Americans and Latino-Americans); *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144 (where plaintiffs identifying characteristic was their common Jewish faith and culture). It is easy to imagine strong cases that can be made for more groups that will Seek "recognition."