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ABRAMS v. JOHNSON 117 S. CT 1925 (1996).

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I. FACTS

In *Abrams v. Johnson,*[1] the Supreme Court held that no congressional district may be drawn with race as a predominant factor in its formation. The need for redistricting arose in Georgia in 1990, when population growth resulted in an authorized increase of congressional seats from ten to eleven.[2] The Georgia legislature held a special session in August 1991, and on October 1, 1991, it submitted a plan with two majority-black districts, as required by §5 of the Voting Rights Act of 1965, to the Attorney General of the United States for preclearance.[3] The Attorney General refused to approve the first plan; the legislature then created another plan which was also denied.[4] Instead, the Department of Justice proposed an alternative plan with three majority-black districts that had been drafted by the American Civil Liberties Union (ACLU).[5] The Georgia Legislature adopted the ACLU's plan, and the 1992 November elections were held under this plan.[6] Black candidates were elected from all three majority-black districts.[7]

In 1994, five white voters from Georgia's Eleventh Congressional District alleged racial gerrymandering.[8] "Racial gerrymandering" is the division of a state into political districts in a manner that can be shown to be racially motivated. In this situation, the United States District Court for the Southern District of Georgia found the Eleventh Congressional District invalid: the Supreme Court affirmed in *Miller v. Johnson.* The Court found in *Miller* that race was the predominant factor in drawing the district's configuration and that the Georgia legislature "was driven by its policy of maximizing majority black districts."[9] Abrams stemmed from the rulings on remand.[10] The trial court deferred to the Georgia legislature to draw a new plan.[11] However, the legislature could not reach an agreement.[12] As a result, the court drew its own plan and the 1996 general elections were held under the court's plan.[13] The trial court's plan contained only one majority-black district. Various private voters and the United States brought this suit contending that (1) the trial court must defer to the Georgia legislature's plans and thus cannot create an electoral district; (2) black voting strength in Georgia had been weakened and diluted in violation of the Voting Rights Act of 1965 § 2; (3) the change in voting procedure led to a retrogression of voting position for black voters; and (4) the district court's plan violated Article 1 § 2 of the United States Constitution, which guarantees one person, one vote.[14]

II. HOLDING

The Supreme Court held that the district court was not required to defer to the prior legislative plans which would have created two or three majority-black districts, for, the court would thereby be instating plans that used race as a predominant factor.[15] Further, the Supreme Court held that the black vote was not impermissibly diluted by the district court's choice not to create a second majority-black district. The Court found that the black population was not sufficiently compact for a second majority-black district, and therefore no dilution of black voting strength took place.[16] Moreover, it held that the black voting position was not weakened by the district court's decision not to create a second majority-black district.[17] The Supreme Court believed that the plaintiffs failed to show that an actual retrogression of voting power had taken place since the district court's plan had been implemented.[18] Finally, the Court found that the district court's population deviation of 0.11% is well within the one person, one vote requirement under Article 1, § 2, of the Constitution.[19] The Court held that slight deviations are allowable when legitimate state policies are involved; and, the district court's concern of cutting through Georgia's core districts and communities of interest was found to be legitimate.[20] Further, the Court reasoned that Georgia's fast growing population causes population shifts which account for the deviation and, thus, another reapportionment would be futile.[21]

III. ANALYSIS

The plaintiffs assert that the district court erred by not following the Georgia legislature's intent.[22] The

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[1] 117 S. Ct. 1925, 1927 (1996).
[2] *Id.* at 1929.
[3] *Id.* at 1930.
[4] *Id.*
[5] *Id.* at 1931.
[6] *Id.*
[7] *Id.*
[8] *Johnson v. Miller,* 864 F. Supp. 1354 (1994).
[9] 515 U.S. 900 (1995).
[10] Abrams, 117 S. Ct. at 1927.
[11] *Id.* at 1931.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1933.
[16] *Id.* at 1936.
[17] *Id.* At 1938.
[18] *Id.*
[19] *Id.* at 1940.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 1930.

Supreme Court stated in *Upham v. Seamon*[23] that the court as a general rule "should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."[24] However, the Court held that the legislature's precleared plan was constitutionally flawed because race was a predominant factor in the drawing of the electoral districts.[25] The Court stated that the districts had to high a population deviation and were of such shape to show the racial formation behind the districts creation.[26] Thus, the Supreme Court concluded that the district court did not err by deciding not to create a second majority-black district, for to do so would have violated the Constitution.[27]

In *Abrams*, the plaintiffs stated that the district court's plan also resulted in an impermissible vote dilution, in violation of Section 2 of the Voting Rights Act.[28] This section reaches any prerequisite to voting practice or procedure imposed by any state or political subdivision.[29] Voting dilution, a violation of Section 2, has occurred if it can be shown that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[30] The Supreme Court also concluded that Section 2 of the Voting Rights Act does apply to court-ordered redistricting plans.[31]

In *Thornburg v. Gingles*,[32] the Supreme Court put forth a three-part test which must be met in order to establish a vote dilution claim under Section 2 of the Voting Rights Act.[33] A plaintiff must show that (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the minority group is "politically cohesive;" and (3) the majority votes "sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."[34] If a plaintiff meets these conditions, the court considers whether the minorities have been denied an equal opportunity to participate in the political process.[35]

The Court, when utilizing the *Gingles* test, first examined the contention that to create a second majority-black district in Georgia would allow for race to be a predominate factor in drawing district lines.[36] The Court concluded that race was a predominant factor behind the districting plan.[37] Thus, the districting plan must be narrowly tailored to serve a compelling governmental interest;[38] and, the standard of strict scrutiny must be applied.[39] The Court concluded that compliance with Section 2 of the Voting Rights Act, which is the guarantee of equal participation in the political process, can be considered a compelling state interest.[40] Here, the Court believed that the districting plan was in compliance with Section 2 and therefore a compelling state interest existed.[41] Further, it was found that no vote dilution, in violation of Section 2 of the Voting Rights Act, would occur as a result of the new districting plan.[42] The Court held that none of the three *Gingles* factors which are necessary for a vote dilution claim were established here and therefore the districting plan passes the strict scrutiny test.[43]

The Supreme Court agreed with the district court and held that the black population at issue was not sufficiently compact to warrant the creation of a second majority-black district and thus did not pass the first requirement of the *Gingles* test.[44] The Court held that Section 2 does not require the districting plan to create, on predominantly racial lines, a district that is not "reasonably compact."[45] The Section 2 compactness requirement should take into account the concern of maintaining traditional communities of interest and traditional boundaries and, the district court's redistricting plan took these factors into account.[46]

The district court also found, and the Supreme Court again agreed, that the record failed to show that racially polarized voting had occurred.[47] The most recent elections under the court's plan resulted in all three black incumbents being re-elected, two of whom defeated white candidates in majority-white districts.[48] The Supreme Court concluded that these election results established a general willingness of white voters to vote for black candidates and not to act as a bloc against the minority-preferred candidate.[49] Therefore, the second and third parts of the *Gingles* test were not met.[50]

The plaintiffs further contended that Section 5 of

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[23] 456 U.S. 37 (1982).
[24] *Id.*
[25] *Id.* at 1933.
[26] *Id.*
[27] *Id.* at 1935.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] 478 U.S. 30 (1986).
[33] *Abrams*, 117 S.Ct. at 1935.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1936.
[37] *Id.*
[38] *Id.*
[39] *Bush v. Vera*, 116 S.Ct. 1941 (1996).
[40] *Abrams*, 117 S.Ct. at 1936.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 1937.
[49] *Id.*
[50] *Id.*

the Voting Rights Act was violated.[51] This section requires that jurisdictions obtain preclearance by the Attorney General or approval from the United States District Court for the District of Columbia for any change in procedure with respect to voting and requires that the change have neither the effect nor the purpose of denying or interfering with the right to vote on account of race or color.[52] The purpose of Section 5 is to insure that a change in voting procedure will not lead to a retrogression in the voting position of racial minorities.[53] The Supreme Court looked to the 1982 districting plan, which established one majority-black voting district.[54] The 1982 plan had been in effect in Georgia for a decade and thus served as a needed benchmark to check voting retrogression.[55] A benchmark to measure the proposed voting practice with the existing voting practice is needed in order to determine whether retrogression had occurred.[56] The plaintiffs claimed that under the 1982 plan one of the ten districts was black, while under the district court's proposed plan, there would still only be one majority-black district, but, it would be one of eleven districts.[57] Thus, the plaintiffs asserted, there was a one percent retrogression; as a result blacks, do not have the same voting opportunities under the district court's redistricting plan.[58] However, the Supreme Court reasoned that the Voting Rights Act does not require that a population increase automatically warrants the addition of a new majority-minority district.[59]

Finally, the plaintiffs contended that the district court's plan violated Article I Section 2 of the Constitution, which requires congressional districts to achieve the one-person, one-vote principle, as 'nearly as is practicable.'[60] The one-person, one-vote principle prohibits the state dilution of the right to vote by requiring that the number of persons in each state-created voting district may not vary significantly. Further, court-ordered redistricting plans should have "de minimis variation" and are held to higher standards of population equality than legislative plans.[61] Population deviation is the average of all districts' deviation from the precise one person, one vote allocation.[62] The district court's plan had an average deviation of 0.11%, the lowest of any plan.[63] Further, the district court did not want to split existing counties and instead strove to maintain core districts and communities of interest.[64] Moreover, the population fluctuations which occur consistently make it difficult to be precise.[65] The Supreme Court held that this deviation was acceptable and did not violate the one-person, one-vote requirement.[66]

The Supreme Court believed that redistricting is best done by the legislature.[67] However, when as here, the legislative plans are in violation of the Constitution and the legislature is unable to correct this defect, it is appropriate for the court to step in.[68] The Supreme Court believed that the district court took all the appropriate precautions and thus developed a constitutionally sound plan.

IV. CONCLUSION

The use of racial gerrymandering to create vote dilution and political voting blocs are both dangers which cannot be ignored and which the Court in *Abrams* recognized. Yet, the fact that a court drew up the plan is troublesome. The Court did conclude that redistricting is best done by the legislature.[69] However, the Court further stated that in cases such as this when the legislative plan is in violation of the Constitution, a court may draw up a districting plan.[70] I find this to be too much of an encroachment of the judiciary into the legislature's realm of power.

The election process is one of a purely legislative nature. The judiciary should oversee the electoral process, but, not dominate the process.The Court tries to limit the judiciary's role by stating that intervention should only occur in cases where the legislative plan's constitutional defect cannot be corrected by the legislature.[71] The result of such a decision is an expanded judiciary and a limited legislature. How many tries does the legislature exactly get at drawing up these districts? Does someone actually have to bring suit against the state or can a court, if it see fit, examine every districting plan to determine its constitutional soundness?

The Court leaves open the door for too much judicial activism. I believe that it is the role of the court to decide whether a districting plan passes constitutional muster. However, the legislature should be the branch of government which draws up all the final districts. No where in the Constitution does it give the judiciary the power to draw up electoral districts. This power is neither explicitly granted to the legislature in the Constitution. Yet, elections and electoral districts have to

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[51] *Id.* at 1938.
[52] *Id.*
[53] *Id.*
[54] *Id.*at 1939.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*at 1940.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

be considered within the legislature's realm of power because elections convey the will of the people within the legislature. Constituents can use the power of elections to make their representatives accountable for their actions. Therefore, electoral districts are an integral part of the effective running of the legislative branch and fall within the legislature's realm of power.

To allow courts to draw up these electoral districts, is yet another broad interpretation of the power that the Constitution actually grants to the judiciary. There must be a line drawn to the extent that the Supreme Court can find "implied powers" in the Constitution. There is a very grave danger in allowing the Court to keep reading into the Constitution and using these "implied powers" to upset the delicate balance between the branches.

Summary and Analysis Prepared by:
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