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Redistricting 2011

Redistricting, Minorities, and the Voting Rights Act

The redistricting process that takes place in the states every ten years is universally understood to be a legislative prerogative, political in nature and therefore not generally suitable for judicial attention. However, for the past 45 years, two recurring issues have rendered the legislatively driven process susceptible to what has often been high-profile intervention by the judiciary.

The first of the two issues is the requirement that political districts fashioned by state legislatures demonstrate a high degree of population equality when compared one with another. The second is the requirement that political districts be drawn in such a way that minority groups are given a fair chance of effective participation in the electoral process.

Both issues have their roots in the U.S. Constitution; both are reflective of a desire to ensure the fairness of the electoral process. Of the two, however, the minority rights issue has proved to be the most resistant to enduring judicial resolution.

Equality Proves Elusive

In theory, the right of racial minorities in this country to equal participation in the electoral process has been guaranteed since 1870, when the Fifteenth Amendment to the United States Constitution was ratified. Under the Fifteenth Amendment, it is unlawful for the government of the United States, or of any state, to deny anyone the right to vote "on account of race, color, or previous condition of servitude."

In practice, the constitutional protection envisioned by the Fifteenth Amendment proved elusive in some areas of the country for years as states instituted mechanisms such as poll taxes, literacy tests, and the so-called "grandfather clause," which served to deny African Americans the right to vote. Not until almost 100 years after the guarantee of voting rights for all races was added to the Constitution, did Congress use its authority under the Fifteenth Amendment to "enforce this article by appropriate legislation."

The 1965 Voting Rights Act

That legislation—the Voting Rights Act of 1965—focused at the outset on simply securing the right of African Americans to cast their ballots without impediment. It targeted for corrective action those states that comprised the Confederacy during the Civil War.

As time has passed, the impact of the Voting Rights Act has been felt throughout the nation due to amendments and judicial decisions. Additionally, voting rights protections have been extended to "language minorities," defined to include Native Americans, Asian Americans, Alaskan Natives, and Hispanics.

Section 5

The two principal parts of the Voting Rights Act—Sections 2 and 5—are closely intertwined with the historical development of redistricting jurisprudence. However, the majority of states, including Nebraska, are not even subject to the provisions of Section 5.

Only designated states, or parts of states, that have had a history of racially discriminatory election laws or practices are subject to Section 5 of the Act. These states, currently 16 in number, must get federal approval before changes in their election laws can take effect—a procedure known as "preclearance." Among the changes that must be precleared are alterations made in the boundaries of political districts during redistricting.

While most of the 16 states that are subject to preclearance today are in the South, not all are. Alaska, for example, is one of eight states that are covered in their entirety. Among the states where only certain designated political subdivisions are subject to Section 5 are California, New York, South Dakota, Michigan, and New Hampshire.

Section 2

Section 2 of the Voting Rights Act is more far-reaching than Section 5 in that it prohibits *any* state or political subdivision from instituting a standard or practice that denies or abridges an individual's right to vote based on race, color, or membership in a language minority group. In general, lawsuits brought under Section 2 are based on claims that the electoral process is not open to minorities, often because political districts have been drawn using techniques that minimize the voting strength of minority populations.

Two such techniques have been subject to enhanced scrutiny by the courts. They are known as "fracturing" and "packing."

Fracturing occurs when district boundary lines are drawn so that a sizeable and geographically concentrated minority group is fragmented into smaller groups, each of which is then assigned to a different political district dominated by the majority racial group. If, as a result of that fragmentation, there are fewer districts containing a minority-race voting majority—known in redistricting parlance as "majority-minority" districts—the voting strength of that minority-race population may have been illegally "diluted." Stated simply: Fracturing results when a minority population is split up and then submerged within multiple districts that are dominated by the majority race.

Packing, on the other hand, results if a large minority population is confined to a single district when it could have more voting impact if it were divided up. In such a case, the minority group that is packed into a single district comprises a super voting majority (one vastly in excess of 51 per cent) in that district. Were the group divided up instead and placed into more than one district, its voting strength could be maximized. A court might find that the failure to do that causes an illegal dilution of the group's voting strength. Packing, then, is a tactic that concentrates the influence of minority-group voting in such a way that the smallest possible number of candidacies is affected by it.

Discriminatory Results Enough

Prior to 1982, the U.S. Supreme Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that plaintiffs challenging redistricting plans on the basis of vote dilution had to prove that map makers *intended* to discriminate as they drew district boundaries. Congressional disapproval of this approach led directly to the passage, in 1982, of amendments to Section 2 of the Voting Rights Act that eliminated the intent requirement.

The U.S. Supreme Court gave its imprimatur to the 1982 amendments in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In that decision, the Court held that anyone challenging a redistricting plan on the basis of vote dilution under Section 2 of the Act did not have to prove discriminatory intent, but merely discriminatory results.

The "Effective Voting Majority"

In determining whether a redistricting plan's configuration results in illegal vote dilution, one thing the court must decide is how large the affected minority population needs to be in order to constitute an *effective voting majority*. If the minority population in a geographic area is not large enough to constitute an effective voting majority under any circumstance, a vote-dilution challenge to the redistricting plan will not succeed.

The effective-voting-majority concept is difficult to pin down, and the courts have eschewed the use of a predetermined percentage in describing what it is. Instead, they have looked at a variety of factors involved in each case. For example, the courts have typically considered the total minority population, the age breakdown of that population, and its voter-registration and voting patterns.

More specifically, a plaintiff challenging a redistricting plan under Section 2 of the Voting Rights Act, must prove three things, based on the ruling in *Gingles*:

- ❖ First, the plaintiff must prove that "the minority is sufficiently large and geographically compact to constitute a majority in a single-member district."
- ❖ Second, the plaintiff must prove that the minority group is politically cohesive.
- ❖ Third, he or she must prove that candidates preferred by the minority group are usually defeated as a result of bloc voting by the majority.

In a decision handed down just last year, the U.S. Supreme Court addressed what it means by "majority" in the first prong of the *Gingles* test. It declined to require the State of North Carolina to include a minority population in a single district when that population would comprise less than 50 per cent of the *voting-age* population in the district. *Bartlett v. Strickland*, 556 U.S. ____ (2009).

In so doing, the Court rejected the idea that Section 2 protects "crossover districts"—districts in which, although it does not comprise a majority of the voting-age population, a minority group has the potential to elect its preferred candidates by attracting cross-over votes by some members of the majority group. The Court observed, "Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of §2 to require, by force of law, the voluntary cooperation our society has achieved. Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met."

Justices Ginsburg, Breyer, and Stevens joined in a vigorous dissent, authored by now-retired Justice Souter, to the plurality opinion in *Strickland*. In signing onto the dissent, Justice Ginsburg called on the U.S. Congress to "clarify beyond debate the appropriate reading of §2."

"Influence," "Coalition" Districts

The Court in *Strickland* reiterated its 2006 ruling that Section 2 does not protect so-called "influence districts." These are districts in which a minority population has enough voting strength to influence the outcome of elections but not to elect its preferred candidates.

Finally, in *Strickland*, the Court specifically chose not to address the issue of "coalition districts"—districts in which two minority groups form a coalition in order to elect agreed-upon candidates. Whether such districts will be afforded the protection of the Voting Rights Act will have to await further analysis by the Court.

Race-Neutral Redistricting

Following the 1990 round of redistricting, a series of decisions by the U.S. Supreme Court made it clear that a redistricting plan created primarily with an eye towards race-neutral "traditional districting principles" such as compactness and contiguity may well withstand a challenge based on alleged discrimination against a minority population. The topic of traditional districting principles and how they interact with considerations of race will be discussed in an upcoming redistricting newsletter.

A Final Consideration

Apart from the legal issues discussed above, legislators charged with developing nondiscriminatory redistricting plans must keep in mind another important fact: The redistricting process must be open to minority participation. If a state's plan should be challenged under the Voting Rights Act, the court will look at the redistricting process that took place in that state.

It will inquire as to whether or not minorities were included in the process, and whether or not information was freely shared with interested members of minority groups. And it will want to know whether or not the opinions of minority groups were given due consideration as the redistricting plan was developed. ❖

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This is the third in a series of newsletters to be released by the Legislative Research Office in conjunction with the 2011 redistricting process. The newsletters are designed to provide interested parties with information about the history of and some of the principal legal issues related to redistricting. If you would like additional information, please contact the Legislative Research Office at 402.471.2221.