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Heading Back to the Thicket

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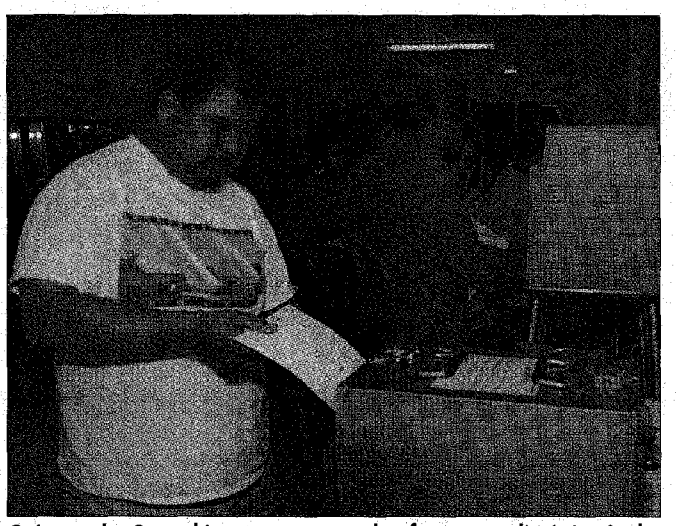
Voting district cases pose politically and racially charged questions

BY RICHARD C. REUBEN

The late Justice Felix Frankfurter once referred to the thorny constitutional questions raised by legislative districting as a "political thicket" the Supreme Court ought to avoid.

Frankfurter offered the advice in 1946, and it has been ignored ever since. Rather, the Court has plunged right into that thicket in recent years with a heavy docket of voting rights cases. The pattern is continuing in this election year.

"After several years of cases, we still have no clear sense of where the Court is heading, and in areas as politically and racially charged as redistricting, the Court's indecisiveness only encourages politics at its ugliest," laments Richard H. Pildes, a voting rights scholar at the University of Michigan Law School in Ann Arbor.



Going to the Court this term are cases that focus on redistricting in the Dallas and Houston areas to create Hispanic majority districts.

The difficulties in this area are exemplified by a blockbuster opinion issued at the close of the 1994-95 term. Writing for the 5-4 Court in *Miller v. Johnson,* 115 S. Ct. 2474, Justice Anthony M. Kennedy said that race-based districting would be subject to strict judicial scrutiny, and that districts drawn with race as a "predominant factor" were presumptively unconstitutional.

Many experts maintain that the Court's attempted bright-line ruling is clear as mud. It did not define "predominance" or say how strict scrutiny would be satisfied as more whites challenge minority districts. (See "A 'Simple Command' Creates Confusion," September 1995 *ABA Journal,* page 18.)

Even the Court's expressed commitment in *Miller* to the notion of constitutional colorblindness has drawn some criticism. Some deride the idea as the triumph of hope over reality because it mixes group-based rights with individual-based rights.

"It's difficult to think of a voting rights claim without thinking of a group claim rather than an individual claim," says Gerald Gunther, a leading constitutional scholar at Stanford Law School in Palo Alto, Calif. Voting rights claims essentially assert that voter influence is being diluted, he notes, not that a single individual is being denied the franchise.

"The Court purports to hold on to that notion, while at the same time supporting the ideal that individuals ought not be treated differently because of their race," Gunther says. "But when you put them together, something doesn't quite add up."

Dissenting in *Miller,* Justice Ruth Bader Ginsburg said the decision was not "the last word" on voting rights.

Sure enough, just hours after announcing its decision in *Miller,* the Court agreed to review a cluster of voting district cases from Texas and North Carolina.

The North Carolina cases, consolidated as *Shaw v. Hunt,* No. 94-923, revisit a district struck down two years ago because of its "bizarre" shape. The Texas cases, consolidated as *Bush v. Vera,* No. 94-805, focus on redistricting in the Dallas and Houston areas to create Hispanic majority districts.

High Interest in an Election Year

Both sets of cases, which were argued Dec. 5, raise issues left unresolved by *Miller,* including the meaning of predominance and what is required to prove a compelling government interest.

Earlier this term, the Court accepted a trio of related cases that challenge the results of the 1990 census. Experts say these Court rulings could upset thousands of federal, state and local political districts.

All these cases are expected to be decided by the end of the term early next summer, and politicians are joining scholars and practitioners in watching the cases with interest because the rulings could have an immediate political impact, especially with elections approaching later this year.

"If the Court strikes down a bunch of districts, then the affected states will have to redraw their electoral districts in time for the 1996 elections," says Pamela S. Karlan, a voting rights litigator and a professor at the University of Virginia School of Law in Charlottesville. "This could be incredibly disruptive, forcing candidates to raise money and run for election without even knowing what their district is."

The key vote on the Supreme Court may belong to Justice Sandra Day O'Connor, who wrote a separate concurrence in *Miller* cryptically suggesting the main opinion should not be read too broadly. Her vote likely will determine whether, and how, lower courts will be guided on the meaning of *Miller* or whether voting rights law is destined for case-by-case Court review that assures continuing uncertainty over the legitimacy of many of the country's political districts. ■

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