Leadership Conference Education Fund

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INSIDE...

SUPREME COURT ISSUES IMPORTANT DECISIONS IN CIVIL RIGHTS CASES

The 1994-1995 term of the Supreme Court was a fateful year for civil rights. Among the decisions issued by the Court were the following:

In all of the 5-4 decisions in the contracting, school and voting cases the lineup was the same with Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Scalia and Thomas voting in the majority and Justices Stevens, Souter, Ginsburg, and Breyer dissenting.

SUPREME COURT GRANTS REVIEW OF VOTING RIGHTS CASES FOR 1995-1996 TERM

Civil Rights Monitor

ADARAND v. PENA

In Adarand, the Supreme Court by a 5-4 vote ruled for the first time that all federal laws that create racial classifications, whether meant to burden or benefit minorities, when challenged, must be tested by the same stringent standard i.e., strict scrutiny, this meaning that the government must show that the program was established to meet a compelling state interest and that it is narrowly tailored to achieve that purpose. The decision establishes that federal race-conscious programs will be reviewed by the courts under the due process requirement of the Fifth Amendment, in the same manner that all local and state racial classifications have been reviewed under the Fourteenth Amendment since Croson v. City of Richmond (1989). Prior to Croson, the court tended to apply a more lenient standard to racial classifications that sought to benefit minorities. It is worth noting that in Adarand, the majority states that the opinion does not address Congress' authority under the Enforcement Clause of the 14th Amendment to establish programs to address problems of race.

In its Croson decision, the Court distinguished between that decision and its earlier decision in Fullilove v. Klutznick (1980), in which the Court had upheld a congressional program requiring that 10 percent of certain federal construction grants be awarded to minority contractors, emphasizing that Congress had broader power to adopt such programs than do state and local governments. The Croson opinion states that Congress has been given "special constitutional mandate" to enforce the protections of the 14th Amendment, whereas section 1 of the 14th amendment is an "explicit constraint on state power and the state must undertake any remedial efforts in accordance with that promise.... Correctly viewed sec. 5 [of the 14th amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the 14th Amendment."

In Adarand, however, the majority effectively overruled Fullilove and Metro Broadcasting (a 1990 case sustaining federal set-asides in broadcasting licenses) as these decisions used a more lenient standard.

Background

Adarand Constructors appealed a decision of the U.S. Court of Appeals for the Tenth Circuit that affirmed a district court order upholding the constitutionality of the U.S. Small Business Act, which authorizes federal agencies to establish specific goals to encourage government contractors to use disadvantaged small businesses as subcontractors. Specifically, Adarand challenged a Department of Transportation program that encouraged prime contractors to subcontract with disadvantaged business enterprises (DBEs), through financial incentives, i.e., payment of up to an additional 1.5 percent of the original contract amount for utilization of one DBE or up to two percent for using two or more DBEs. The prime contractors can accept or reject the option. Members of certain minority racial and ethnic groups and women are presumed socially and economically disadvantaged unless it is established that they are not so. Small businesses that are not minority or female-owned may be included in the program if they can establish that they are socially and economically disadvantaged.

The Opinions

The Court outlines three principles for the examination of all racial classifications: skepticism, consistency -- strict scrutiny should be applied to race conscious programs that burden minorities as well as those that benefit minorities --, and congruence -- the limits on federal race conscious programs are the same as the limits on state and local government programs.

Justice O'Connor asserts in the opinion that strict scrutiny need not be fatal to such programs. She states:

> "Strict scrutiny is strict in theory, but not fatal in fact.... The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."

Justices Scalia and Thomas wrote separate concurring opinions in which they expressed the view that government race conscious programs can never survive constitutional muster and thus are fatal in fact.

Justice Stevens in dissent points out the perversive results of using the same standard to examine race-conscious efforts to remedy discrimination as is used to judge classification that are designed to discriminate. In this respect, he says, the Court's principle of consistency is similar to ignoring the difference between a no-trespassing sign and a welcome mat. He further states that the principle of congruence is seriously misguided and that "Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality."

Justice Stevens also notes that the majority's principle of consistency may result in programs to remedy discrimination against women being easier to justify than programs to remedy discrimination against African-Americans even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. [To date, programs that exclude women have been reviewed under the so-called intermediate standard, i.e., does the exclusion serve an important governmental interest and is it substantially related to the achievement of that objective.]

Justice Ginsburg in her dissenting opinion, joined by Justice Breyer, outlines "the considerable field of agreement -- the common understandings and concerns -- revealed in opinions that together speak for a majority of the Court." First, a majority recognizes the history of segregation and discrimination and the persistence of inequality. Secondly, there is acknowledgment of "Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects." Third, a majority agrees that the strict scrutiny standard is "fatal" for classifications that burden groups that have suffered from discrimination, but not fatal for classifications that seek "to hasten the day when 'we are just one race.'" And finally, there is agreement that the decision "usefully reiterates that the purpose of strict scrutiny is precisely to distinguish legitimate from illegitimate uses of race in decisionmaking...to differentiate between permissible and impermissible governmental use of

race...to distinguish between a 'No Trespassing' sign and a welcome mat."

For further discussion of the case, see CIVIL RIGHTS MONITOR, vol.7, no.6, February, 1995.

MISSOURI v. JENKINS

In Jenkins the Court held that salary increases for instructional and noninstructional staff ordered as part of a desegregation remedy went beyond the authority of the Court. These initiatives, the Court reasoned, sought to increase the "desegregation attractiveness" of the school district in order to attract non-minority students not enrolled in the system. Since the lower courts had previously ruled that the only violation was within the district and that there was no interdistrict violation, the court held that the remedy exceeded the scope of the violation. In addition, the 5-4 decision, written by Chief Justice Rehnquist, cast doubt on the use of achievement data to determine whether educational disparities caused by segregation had been remedied.

Background

The Supreme Court's June 12, 1995, decision was the latest action in an ongoing school desegregation case that has been before the federal courts since 1977 and in which the state of Missouri had been held in part responsible for the segregation of the Kansas City, Missouri school district (KCMSD). The district court in 1984 had found that action of the state and the KCMSD had caused a systemwide reduction of achievement.

In 1985, the district court fashioned a far-reaching plan that included high-quality educational programs designed to remedy the education harm the court found was caused by segregation. A secondary consideration was "to attract majority students to KCMSD schools in order to provide minority students with a multiracial educational experience."

In the same year, however, the district court rejected a claim by plaintiffs that segregative violations had been interdistrict in scope and thus called for a metropolitan remedy.

The 1985 remedy included the development of magnet schools and other high quality educational programs to improve the students' achievement levels as measured by national achievement tests, and a salary scale to increase the pay of teachers and administrators "to aid in the recruitment and retention of staff at all levels and areas of responsibility."

The state challenged the scope of the District Court's remedial authority.

The Opinions

The opinion states:

> "A district court seeking to remedy an intradistrict violation that has not 'directly caused' significant interdistrict effects...exceeds its remedial authority if it orders a remedy with

an interdistrict purpose....

"The District Court's pursuit of 'desegregative attractiveness' cannot be reconciled with our cases placing limitations on a district court's remedial authority."

The Court held that:

"The District Court's pursuit of the goal of 'desegregative attractiveness' results in so many imponderables and is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court. In this posture, we conclude that the District Court's order of salary increases, which was 'grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD,'...is simply too far removed from an acceptable implementation of a permissible means to remedy previous legally mandated segregation....

"Similar considerations lead us to conclude that the District Court's order requiring the State to continue to fund the quality education programs because student achievement levels were still 'at or below national norms at many grade levels' cannot be sustained....

"Insistence upon academic goals unrelated to the effects of legal segregation unwarrantably postpones the day when the KCMSD will be able to operate on its own....

"It may be that in education, just as it may be in economics, a 'rising tide lifts all boats,' but the remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior de jure segregation.... Minority students in kindergarten through grade 7 in the KCMSD always have attended AAA-rated schools; minority students in the KCMSD that previously attended schools rated below AAA have since received remedial education programs for a period of up to seven years.

"On remand, the District Court must bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."

In sending the case back, the majority suggested that the lower courts consider the "incremental effect that segregation has had on minority student advancement or the specific goals of the quality education programs."

Justice Thomas in a concurring opinion asserts that "the federal courts...should avoid using racial equality as a pretext for solving social problems that do not violate the Constitution.... The District Court sought to bring new funds and facilities into the KCMSD by finding a constitutional violation on the part of the State where there was none. Federal courts should not lightly assume that States have caused 'racial isolation' in 1984 by maintaining a segregated school in 1954. We must forever put aside the notion that simply because a school district today is black, it must be educationally inferior."

Justice Souter in a dissenting opinion that was joined by Justices Stevens, Ginsburg and Breyer asserts that the majority's disposal of two of the District Court's remedial orders (salary increases and quality education programs) by declaring them interdistrict remedies for intradistrict violations (and thus beyond the court's remedial authority) addresses an issue that the Court did not accept and that was not properly briefed, and on which the Supreme Court denied certiorari in 1989.

Justice Souter states that the questions presently before the Court focused "on two discrete issues: the extent to which a district court may look at students' test scores in determining whether a school district has attained partial unitary status as to its...educational programs, and whether the particular salary increases ordered by the District Court constitute a permissible component of its order." Thus, Justice Souter states, the majority's consideration of the magnet school remedy and its limitation on the district court's remedial authority has rendered "an opinion anchored in neither the findings and evidence contained in the record, nor in controlling precedent, which is squarely at odds with the Court's holding today."

Justice Souter also criticizes the Court's assertion that the magnet program and other measures were an improper interdistrict remedy for a intradistrict violation.

> "We did not hold, however, that any remedy that takes into account conditions outside of the district in which a constitutional violation has been committed is an 'interdistrict remedy,' and as such improper in the absence of an 'interdistrict violation.' To the contrary, by emphasizing that remedies in school desegregation cases are grounded in traditional equitable principles...we left open the possibility that a district court might subject a proven constitutional wrongdoer to a remedy with intended effects going beyond the district of the wrongdoer's violation, when such a remedy is necessary to redress the harms flowing from the constitutional violation.
>
> "The Court, nonetheless, reads Milliken I quite differently. It reads the case as categorically forbidding imposition of a remedy on a guilty district with intended consequences in a neighboring innocent district, unless the constitutional violation yielded segregative effects in that innocent district....Today's decision therefore amounts to a redefinition of the terms of Milliken I and consequently to a substantial expansion of its limitation on the permissible remedies for prior segregation."

Justice Souter continues that the Court has "not only rewritten Milliken I" but also Hills v. Gautreaux. In that case, an interdistict remedy (federally subsidized low-income housing) for an intradistrict violation was permitted because it did not override local control by requiring action by "uninvolved governmental units."

Thus the Souter dissent concludes:

> "The District Court's remedial measures go only to the operation and quality of schools within the KCMSD, and the burden of those measures accordingly falls only on the two proven constitutional wrongdoers in this case, the KCMSD and the State. And insofar as the District Court has ordered those violators to undertake measures to increase the KCMSD's attractiveness to students from other districts and thereby to reverse the flight

attributable to their prior segregative acts, its orders do not represent an abuse of discretion, but instead appear 'wholly commensurate with the 'nature and extent of the constitutional violation' [quoting Milliken]"

For further discussion, see CIVIL RIGHTS MONITOR, vol. 7, no.6, February 1995.

CITY OF EDMONDS v. OXFORD

On May 15, 1995, the Court ruled that a zoning ordinance provision regulating areas for single-family dwelling units that defined family as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons" was not exempt from the Fair Housing Act's prohibition of discrimination against persons with disabilities.

Background

The Federal Fair Housing Act (FHA) Amendments of 1988 added persons with disabilities to the classes protected against discrimination. A provision of the Act allows for "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The FHA also requires that "reasonable accommodations be made in rules, policies, practices, or services, when such accommodations may be necessary to afford [disabled persons] equal opportunity to use and enjoy a dwelling." The question before the Court was whether the City of Edmonds' family composition rule qualified as "a restriction regarding the maximum number of occupants permitted to occupy a dwelling" as defined by the Fair Housing Act. The Court found that the ordinance did not fall within the exemption stating that it did not set a maximum number of occupants but rather sought to define a family unit so as to "foster the family character of a neighborhood."

In 1990, the Oxford Home was opened to provide residence for a group of 10-12 adults recovering from alcoholism and/or drug addiction. The Home was located in an area zoned for single family homes. Edmonds filed suit in federal court claiming that the location of the Home violated the city's zoning ordinance. The Oxford Home countersued claiming that the city had refused to make reasonable accommodations as required by the Fair Housing Act. The U.S. Department of Justice filed a separate action in support of Oxford House.

The District Court ruled in favor of the City, stating that the city's restriction as to number of nonrelated persons who could occupy a dwelling in an area zoned as single-family was exempt under the FHA's provision allowing "reasonable restriction regarding the maximum number of occupants permitted to occupy a dwelling." The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the FHA's exemption was inapplicable, and remanded the case for further consideration of the claims brought by Oxford House and the U.S. The Ninth Circuit's ruling conflicted with an Eleventh Circuit decision in Elliott v. Athens, and the Supreme Court granted review to resolve the conflict.

The Opinions

Justice Ginsburg wrote the Court's 6-3 opinion which was joined by Chief Justice Rehnquist, and Justices Stevens, O'Connor, Souter, and Breyer. Justice Ginsburg discusses the difference between municipal land use restrictions and maximum occupancy restrictions. She states that the former commonly designate areas as for single-family, multi-family, commercial or industrial structures so as to prevent "the pig in the parlor instead of the barnyard." In such provisions, a definition of family must be included. In contrast, Justice Ginsburg argues, maximum occupancy restrictions set a maximum number of occupants per dwelling, usually in relation to the available floor space or number and type of rooms. Such limits, Justice Ginsburg says, are set for health and safety reasons to prevent overcrowding and usually apply to all residents of all dwellings.

The opinion asserts that the Fair Housing Act exemption applies to maximum occupancy restrictions:

> "In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling 'plainly and unmistakably'...fall within [the FHA's] absolute exemption from the FHA's governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not....
>
> "The parties have presented, and we have decided, only a threshold question: Edmonds' zoning code provision describing who may compose a 'family' is not a maximum occupancy restriction exempt from the FHA...It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's prohibitions against discrimination...For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is affirmed."

Justice Thomas wrote a dissenting opinion joined by Justices Scalia and Kennedy which asserts that the majority failed "to give effect to the plain language of the statute."

> "To my mind, the rule that 'no house...shall have more than five occupants'...readily qualifies as a 'restriction regarding the maximum number of occupants permitted to occupy a dwelling.' In plain fashion, it 'restricts' - to five- 'the maximum number of occupants permitted to occupy a dwelling.' To be sure, as the majority observes, the restriction imposed by petitioner's zoning code is not an absolute one, because it does not apply to related persons...But [the FHA exemption] does not set forth a narrow exemption only for 'absolute' or 'unqualified' restrictions regarding the maximum number of occupants. Instead, it sweeps broadly to exempt <u>any</u> restrictions <u>regarding</u> such maximum number. It is difficult to imagine what broader terms Congress could have used to signify the categories or kinds of relevant governmental restrictions that are exempt from the FHA....
>
> "The sole relevant question is whether petitioner's zoning code imposes 'any...restrictions regarding the maximum number of occupants permitted to occupy a dwelling.' Because I believe it does, I respectfully dissent."

MCKENNON v. NASHVILLE BANNER PUBLISHING CO.

The Supreme Court ruled unanimously that an employer cannot use so-called "after-acquired evidence" to avoid liability for discrimination. The question before the Court was "whether an employee who was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds."

This decision was reported on in the CIVIL RIGHTS MONITOR, vol. 7, no. 6, February 1995.

MILLER v. JOHNSON

The Court on June 29, 1995, found that "race was...the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black population...As a result, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." The Court went on to hold that compliance with the Voting Rights Act 'standing alone' was not sufficient to establish a compelling state interest and affirmed the decision of the three-judge district court that held the plan unconstitutional.

Background

The state of Georgia gained an additional congressional district during the 1990 reapportionment process bringing its number to 11. In the process of redrawing its congressional map, the state legislature drew a second majority-African American district (11th) which included the city of Macon, the existing majority African-American district (5th) being in the Atlanta area. A third district (2nd) had an African-American voting age population of more than 35 percent. Because the state of Georgia is covered by the Voting Rights Act it was required to submit its redistricting plan to the Department of Justice or the U.S. District Court for the District of Columbia for preclearance. The Department of Justice refused to preclear the first plan as well as a second state-drawn plan arguing that the State could create a third majority African-American district and that such was required by the Voting Rights Act. The legislature complied and submitted a third plan that included three majority African-American districts, the 2nd, 5th, and 11th. The new eleventh district dropped the city of Macon, but picked up African-American communities in Savannah and extended across the state to pick up African-American communities in Atlanta. The 2nd district included African-American communities in Macon and the southwest part of the state. The 5th district was centered in Atlanta. DOJ precleared the third plan. The constitutionality of the 11th district was challenged.

On September 12, 1994, the district court panel ruled that the 11th district was unconstitutional, holding that race was the predominant factor in drawing the lines. The court held that compliance with the Voting Rights Act may be a compelling state interest but that the creation of three districts was not required to comply with the Act and thus the redistricting plan was not narrowly tailored.

The Opinions

Justice Kennedy wrote the Court's opinion. The majority found that the State's assertion that for the plaintiffs to state a claim under Shaw the district's shape must be bizarre was a misreading of Shaw.

> "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district. The logical implication, as courts applying Shaw have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting."

The opinion then discusses the evidence presented in this case and agrees with the District Court's finding that race was the "predominant, overriding factor" explaining the creation of the 11th district, and that the "legislature subordinated traditional race-neutral districting principles, including...compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Thus, the Court states, the plan cannot be upheld unless it satisfies strict scrutiny, i.e., is narrowly tailored to meet a compelling state interest.

The opinion adds that compliance with the Voting Rights Act standing alone may in some cases provide a compelling state interest but it does not do so in this case because creation of the 11th district was not required to comply with the Voting Rights Act notwithstanding DOJ's insistence on its creation.

> "The Justice Department refused to preclear both of Georgia's first two submitted redistricting plans. The District Court found that the Justice Department had adopted a 'black maximization' policy under section 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State made the 'Macon/Savannah trade' and created a third majority-black district.... It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Voting Rights Act....
>
> "...the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under section 2 of the Fifteenth Amendment...into tension with the Fourteenth Amendment...Congress' exercise of its Fifteenth Amendment authority even when otherwise proper still must 'consist with the letter and spirit of the constitution.'.... We need not, however, resolve these troubling and difficult constitutional questions today. There is no indication Congress intended such a far-reaching application of section 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises."

Justice Ginsburg wrote a dissenting opinion which was joined by Justices Stevens, Breyer and in part by Justice Souter. She asserts that the majority's opinion expands the role of the

judiciary in redistricting.

> "Today the Court expands the judicial role, announcing that federal courts are to undertake searching review of any district with contours 'predominantly motivated' by race: 'strict scrutiny' will be triggered not only when traditional districting practices are abandoned, but also when those practices are 'subordinated to' - given less weight than - race.... Applying this new 'race-as-predominant-factor' standard, the Court invalidates Georgia's districting plan even though Georgia's Eleventh District, the focus of today's dispute, bears the imprint of familiar districting practices. Because I do not endorse the Court's new standard and would not upset Georgia's plan, I dissent."

Justice Ginsburg then outlines the entire Court's points of agreement:

1). As a rule, the task of redistricting should remain the province of state legislatures.

2). In addressing voting discrimination against African-Americans, "federal courts now respond to Equal Protection Clause and Voting Rights Act complaints of state action that dilute minority voting strength."

3). "...to meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines."

4). "...state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together."

5). "To offend the Equal Protection Clause...the legislature had to do more than consider race. How much more, is the issue that divides the Court today."

The opinion then briefly recounts the history of the disenfranchisement of African-Americans and states that prior to the Shaw decision, the Court had invoked the Equal Protection Clause to intervene in legislative redistricting in only two circumstances, to enforce one-person one-vote and to prevent dilution of a minority group's voting strength. In Shaw the Court identified a third basis: "if a district is 'so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." In Shaw, she says that finding was made in that "traditional districting practices were cast aside...with race alone steering placement of district lines."

In contrast, Justice Ginsburg says, in this case "race did not crowd out all other factors as was found in Shaw." She notes that the 11th district is not bizarre in shape, its lines do not "disrespect the boundaries of political subdivisions," and "considerations other than race went into determining the Eleventh District's boundaries."

Justice Ginsburg also criticizes the Court's finding that there was not a community of interest in the Eleventh District.

"...ethnicity itself can tie people together, as volumes of social science literature have

documented -- even people with divergent economic interests. For this reason, ethnicity is a significant force in political life....

"To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character -- Chinese, Irish, Italian, Jewish, Polish, Russian, for example....The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation."

The dissent also questions the Court's determination that "judicial review of the same intensity, i.e., strict scrutiny," is in order whether the redistricting plan dilutes or enhances minority voting strength.

"Special circumstances justify vigilant judicial inspection to protect minority voters -- circumstances that do not apply to majority voters...The majority, by definition, encounters no such blockage. White voters in Georgia do not lack means to exert strong pressure on their state legislature. The force of their numbers is itself a powerful determiner of what the legislature will do that does not coincide with perceived majority interests."

She concludes that:

"The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require States to consider race when drawing district lines.... But today's decision is a counterforce; it opens the way for federal litigation if 'traditional...redistricting principles' arguably were accorded less weight than race. Genuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under Shaw, to provide a safe harbor...This enlargement of the judicial role is unwarranted. The reapportionment plan that resulted from Georgia's political process merited this Court's approbation, not its condemnation. Accordingly, I dissent."

As the MONITOR went to press, the Georgia legislature had failed to agree on a revised plan and adjourned the special session that was called by Governor Zel Miller for the purpose of redrawing the congressional plan. The task now falls to the three-judge federal district panel.

For further discussion, see CIVIL RIGHTS MONITOR, vol. 7, no. 6, February 1995.

U.S. v. HAYS

The Court ruled 9-0 that the appellees lacked standing to bring the lawsuit because they "do not live in the district that is the primary focus of their racial gerrymandering claim and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification."

Background

This case involves a challenge to the creation in Louisiana of a majority-minority district, in this case, the fourth congressional district represented by Cleo Fields (D). A three-judge district court panel ruled that the district was unconstitutional because the specific intent of the legislature was to draw a majority African-American district. The panel reasoned that the "bizarre and irregular shape" of the district "can only be explained credibly as the product of race-conscious decision making" and thus the plan must be judged by the strict scrutiny standard, which the court found the plan failed to meet.

The Opinion

Justice O'Connor wrote the opinion of the Court which was joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, Souter, Thomas and Breyer. Justice Breyer filed a concurring opinion joined by Justice Souter. Justices Stevens and Ginsburg concurred only in the judgment and wrote separately to so indicate.

Justice O'Connor outlines the three elements that must be present for a plaintiff to have standing:

o an injury in fact that is concrete and particularized and actual or imminent,

o a causal connection between the injury and the conduct complained of, and

o it must be likely that the injury will be redressed by a favorable decision.

Justice O'Connor states that the Court rejects the appellees position that "anybody in the state has a claim," and continues:

> "Where a plaintiff resides in a racially gerrymandered district...the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action....
>
> "Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment'...may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits."

Thus, the Court vacated the decision of the District Court and remanded the case with instructions to dismiss it.

Justice Ginsburg concurred in the judgment of the Court. Justice Breyer wrote a separate concurrence, joined by Justice Souter, to state that he joined the Court's opinion "to the extent that it discusses voters, such as those before us, who do not reside within the district that they challenge."

Justice Stevens in a separate concurrence expressed a broader view of the plaintiffs' lack of standing:

"Because the Court does not recognize standing to enforce 'a personal right to a government that does not deny equal protection of the laws...it holds that the mere fact of respondents' Louisiana residency does not give them standing. I agree with that conclusion. What I do not understand is the majority's view that these racially diverse respondents should fare better if they resided in black-majority districts instead of white-majority districts. Respondents have not alleged or proved that the State's districting has substantially disadvantaged any group of voters in their opportunity to influence the political process. They therefore lack standing to argue that Louisiana has adopted an unconstitutional gerrymander."

For further discussion, see CIVIL RIGHTS MONITOR, vol. 7, no. 6, February 1995.

SUPREME COURT GRANTS REVIEW OF VOTING RIGHTS CASES FOR 1995-1996 TERM

On June 29, 1995, the Supreme Court noted probable jurisdiction in voting rights redistricting cases from Texas and North Carolina.

The cases from Texas, Bush v. Vera, No. 94-805, Lawson v. Vera, No. 94-806, and U.S. v. Vera, No. 94-988 were consolidated and one hour allocated for oral argument. Similarly, the North Carolina cases, Shaw v. Hunt, No. 94-923 and Pope v. Hunt, No.94-924 were consolidated for a one hour oral argument. Oral arguments have been scheduled for Tuesday, December 5, at 10:00 a.m. for the Texas cases and at 11 a.m. for the North Carolina cases.

The Shaw case is the latest appeal in a case that was initially decided by the Supreme Court in June 1993. The Court concluded that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." On remand from the Supreme Court, the three-judge panel of the U.S. District Court for the Eastern District of North Carolina ruled 2-1 that the challenged majority African-American congressional districts "did not violate any rights of the plaintiffs or their supporting intervenors." The panel reasoned that the North Carolina plan met a compelling state interest because it was developed in compliance with the Voting Rights Act, and apart from the Voting Rights Act, its purpose was to eradicate the effects of past and present racial discrimination in North Carolina's political process. The panel further found that the plan was narrowly tailored to achieve that goal. That decision is now back before the Supreme Court.

For further discussion, see CIVIL RIGHTS MONITOR, vol. 7, nos. 3, 4, and 6.

In the Texas cases, a three-judge panel of the U.S. District Court, Southern District of Texas, ruled on August 17, 1994 that majority-minority congressional districts 18, 29, and 30 were unconstitutional. The court stated:

"[The districts] were conceived for the purpose of providing 'safe' seats in Congress for

two African-American and an Hispanic representatives. They were scientifically designed to muster a minimum percentage of the favored minority or ethnic group; minority numbers are virtually all that mattered in the shape of those districts. Those districts consequently bear the odious imprint of racial apartheid, and districts that intermesh with them are necessarily racially tainted....

"We do not hold that the state may only draw Congressional boundaries with a blind eye toward race, a goal which would be impossible, nor that it is altogether prohibited from creating majority-minority districts. But when the State redraws the boundaries of Districts 18, 29, and 30 and contiguous districts, it can and must exhibit respect for neighborhoods, communities, and political subdivision lines. As the Supreme Court put it, appearances do matter. In appearance and in reality, these three districts were racially gerrymandered."

On the same day that it announced that it would hear the North Carolina and Texas cases, in a redistricting case from California, DeWitt v. Wilson, No. 94-275, the Court affirmed, without opinion, a three-judge District Court panel's grant of the State's motion for summary judgment in a challenge to the State's 1992 redistricting plan. The challenge alleged that the State's 1992 redistricting plan relied on "race-conscious" reapportionment and diluted white voter strength in violation of the Equal Protection Clause of the 14th Amendment and the 15th Amendment to the U.S. Constitution.

On the redistricting issue, the three-judge panel distinguished this case from Shaw, finding that in drawing the California redistricting plan the special masters appointed by the State Supreme Court balanced traditional redistricting principles including the requirements of the Voting Rights Act.

The panel concluded:

"the Masters' redistricting plan, as approved by the California Supreme Court, is not racial gerrymandering, but rather a thoughtful and fair example of applying traditional redistricting principles, while being conscious of race. Thus, we find that the plaintiffs have failed to state a claim of racial gerrymandering. We conclude that in the context of redistricting, where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, that strict scrutiny is not required. However, if it were required, we conclude that this California redistricting plan has been narrowly tailored to meet a compelling state interest."

In another redistricting matter, on September 8, 1995, the Supreme Court granted a stay of orders issued by the U.S. District Court for the Northern District of Ohio directing the State of Ohio to redraw state legislature districts that were declared unconstitutional by the court. The stay was granted until further order of the Court. The State has appealed the district court's orders, Voinovich v. Quilter, No. 95-378 and No. 95-132.

This case was previously before the Supreme Court in 1993 when the Court reversed the district court panel's decision that the State's legislative plan which created a number of majority-minority districts was violative of Voting Rights Act, Sec. 2 and also violated the Fifteenth

Amendment to the U.S. Constitution. The district court had additionally held that the plan violated the Fourteenth Amendment because it "departed from the requirement that all districts be of nearly equal population." The Supreme Court remanded this claim "for further proceedings on whether the plan's deviation from equal population among the districts violated the Fourteenth Amendment."

On remand the district court allowed the plaintiffs to amend their complaint to raise the question whether Ohio's race-conscious plan violated the Fourteenth Amendment in light of the Supreme Court's decision in Shaw v. Reno. On the first issue the district court found that the reapportionment plan "survived strict scrutiny under the one-person one-vote guarantee of the Equal Protection Clause of the Fourteenth Amendment."

On the second issue, the district court panel held 2-1 that "the Ohio Apportionment Board's consideration of race in its 1992 redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment." The panel reasoned that the establishment of "demonstrated white and African-American coalitional voting for legislative seats in Ohio," and the failure of the state to establish a compelling state reason for "using race as the predominant factor in drawing the legislative lines" were sufficient to find certain districts unconstitutional. The State has filed two jurisdictional statements before the Court, and the appellees have filed two motions to dismiss the appeal. The State's jurisdictional statements to the Court raise several technical questions and the following:

> Did the district court err in allowing this action to be maintained with respect to those electoral districts in which no plaintiff suffered any cognizable injury?
>
> Did the district court err by (a) ruling that a plaintiff may establish a prima facie case of racial gerrymandering without establishing that the state redistricting officials relied on race in substantial disregard of customary and traditional districting principles, and if not, (b) by ruling that, on the evidence before it, the defendants had given less weight to traditional districting principles than to racial considerations?
>
> If the district court did not err in holding that plaintiffs had made out a prima facie case requiring strict scrutiny of defendants' actions, did the court err in concluding that the defendants had failed to establish a compelling interest justifying those actions.

COMMENTARY

In the 1994-1995 term, a conservative five-member majority came into its own, inflicting serious damage on civil rights remedies. A common tread runs through the Adarand (contracting), Jenkins (education), and Miller (voting) decisions: constitutional wrongs that are grievously racial must be addressed only by remedies that take little or no account of race.

There is scant evidence that the nation is becoming color-blind. Indeed it appears to be going in the opposite direction. And it hardly seems likely that the goal of color-blindness will be served by decisions that leave racial wrongs unredressed and racial wounds open.

In any event, the majority's excursions into legal theory ignore entirely the harm that curbs on remedies will do to aspiring minority entrepreneurs, children who may be consigned again to racially and economically isolated schools and citizens seeking a voice in the political process.

The only potentially consoling aspects of the three decisions are that in each, the majority's message is a bit blurry. In Adarand, Justice O'Connor tells us that strict scrutiny of set-aside programs is not necessarily "fatal in fact." In Jenkins, Chief Justice Rehnquist, an opponent of the principles of Brown v. Board of Education since the 1950s, suggests that government officials may still have to address racial disparities in educational outcomes if they are traceable to unlawful segregation. In voting, the Court takes new cases every term, presumably to clarify its opaque opinions.

Whether this means that one or more members of the majority has compunctions about repudiating the most honorable work the Court has done in this century -- the opinions in Brown and its progeny giving content to the Thirteenth, Fourteenth, and Fifteenth Amendments -- is hard to tell. But one thing is clear: the Court is perilously close to the brink.

William L. Taylor
Senior Editor

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