City of Sacramento

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Title:
Minority Interests in the Redistricting Process

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Receive and file.
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Attachments:
1-Description/Analysis
2-Presentation

Description/Analysis

Issue Detail: Every ten years, after the U.S. Census, the City of Sacramento must re-establish the boundaries for City Council districts. The resulting council district boundaries must be balanced in population in accordance with local, state, and federal rules governing the redistricting process.

A. Equal Protection Clause, the Voting Rights Act, and Minority Vote Dilution

In addition to satisfying the constitutionally required “equal population” standard, a redistricting

plan must not result in an improper dilution of a minority group's voting strength. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits redistricting that intentionally dilutes the voting strength of a minority group, while the federal Voting Rights Act prohibits redistricting that has either the *intent* or the *effect* of minority vote dilution. A redistricting plan can improperly minimize the voting strength of a minority group in various ways. With respect to single-member districting plans (such as the City's), minority group voting strength can be diluted if the plan wastes minority votes by packing more minority voters into a district than is necessary to elect a representative of their choice. Vote dilution can also occur if a plan splits a geographically compact minority population among two or more districts, thereby reducing the group's ability to elect a representative in any district. (See *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990).)

1. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment was historically used by minority voters to attack apportionment plans that diluted minority voting strength. This was not an easy task since the courts established a "discriminatory purpose" test. To pass that test, plaintiffs must establish that the redistricting jurisdiction "was either motivated by racial considerations or in fact drew the districts on racial lines." (*Wright v. Rockefeller*, 376 U.S. 52 (1964).)

2. The Voting Rights Act

In 1980, the Supreme Court applied the above-described Fourteenth Amendment's "discriminatory purpose" standard to the then-existing provisions of the Voting Rights Act. (*Mobile v. Bolden*, 446 U.S. 55 (1980).) Congress responded to that decision by amending the Voting Rights Act in 1982 to eliminate the "discriminatory purpose" test.

Under the 1982 amendment to the Voting Rights Act, a plaintiff can establish a "Section 2 violation" by showing that, based on all of the circumstances, the electoral process is "not equally open to participation by the members of a [racial, color, or language minority] in that its members have fewer opportunities than other members of the electorate to participate in the political process and to elect representatives of their choice." (52 U.S.C.A. § 10301(b).) Thus, the Act can be violated by either intentional discrimination in the drawing of district lines or by facially neutral schemes that have the effect of diluting minority votes.

The United States Supreme Court has identified three threshold conditions for establishing a Section 2 violation:

1. The minority group allegedly harmed is sufficiently large and geographically compact to constitute a majority in a single district;

2. The minority group is politically cohesive; and

3. The majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate.

(*Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).)

These are commonly referred to as the "*Gingles* preconditions." Although necessary, satisfying the three *Gingles* preconditions is not, by itself, sufficient to establish vote dilution; Section 2 further requires that the "totality of the circumstances" substantiates that a minority group possesses less relative opportunity to elect candidates of its choice. (*League of United Latin American Citizens v. Perry*, 548 U.S. 399, 424 (2006).) This determination is peculiarly dependent upon the facts of each case and requires a comprehensive canvassing of relevant facts. (*Gingles*, *supra*, 478 U.S. at 46-47; *Johnson v. DeGrandy*, 512 U.S. 997 (1994).)

Since a Section 2 claim requires a showing of discriminatory effect, a districting plan that creates districts in which a minority group forms an effective majority roughly in proportion to its share of the voting age population will likely survive a challenge even if the three *Gingles* preconditions are present. In *De Grandy*, a group of Hispanic voters claimed that a reapportionment plan for the Florida state legislature unlawfully diluted their voting strength. In the Dade County area, the plan created 9 out of 20 house districts and 3 out of 7 senate districts, figures roughly proportional to the 50% Hispanic share of the population. The district court found a violation of the Voting Rights Act after concluding that additional majority-Hispanic Senate districts could have been drawn in Dade County. On appeal, the Supreme Court reversed, holding that even assuming that the plaintiffs had established all of the *Gingles* factors and there was evidence of discrimination, no violation occurred because the number of majority-Hispanic districts roughly mirrored that group's proportion of the County population.

On the other hand, in *League of United Latin American Citizens v. Perry*, after looking at the "totality of the circumstances," the Supreme Court found Texas' plan violated Section 2 because it diluted the vote of a group (Latinos) that was apparently on the cusp of overcoming prior electoral discrimination. In that case, Texas District 23 had a pre-redistricting Latino citizen voting age population of 57.5%. But the incumbent had been losing Latino support and had recently captured only 8% of the Latino vote. So the legislature acted to protect the incumbent by shifting 100,000 people from District 23 to another district, and adding voters from counties comprising a largely Anglo, Republican area in central Texas. The Court's approach under the "totality of the circumstances" began with the "proportionality inquiry" discussed in *DeGrandy*, i.e., by comparing the number of districts that were Latino opportunity districts with the group's population percentage. However, the apparent lack of proportionality (16% Latino opportunity districts versus 22% of the population) was only one factor leading to the Court's conclusion. The Court concluded that the legislature had responded to the increasingly politically active and cohesive Latino community - one that was increasingly voting against the incumbent - by dividing that community in one county and sending them into another district that already was a Latino opportunity district. "Even assuming [the

plan] provides something close to proportional representation for Latinos, its troubling blend of politics and race - and the resulting vote dilution of a group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination - cannot be sustained." (548 U.S. at 442.)

B. Racial Gerrymandering

In a series of cases commencing with *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court has recognized a cause of action under the Fourteenth Amendment for "racial gerrymandering." In these cases, the Supreme Court has applied a strict scrutiny standard to strike down a series of reapportionment plans on the grounds that the plans arbitrarily and discriminatorily used race as the sole, primary, or predominant basis for redistricting without adequate justification for use of race as the key criteria. Under the theory of "racial gerrymandering," the courts have held unconstitutional redistricting plans that resulted in additional majority-minority districts. There is the potential for tension, if not conflict, between the obligation to avoid minority vote dilution while, at the same time avoiding claims of racial gerrymandering.

In *Shaw v. Reno*, the Supreme Court stated that the Equal Protection Clause restricts racial distinctions in redistricting legislation. It explained that a piece of legislation that contains explicit racial distinctions or that is facially neutral but unexplainable on grounds other than race is subject to strict scrutiny. Applying this rule in the context of redistricting legislation, the Court stated that a redistricting plan that segregates voters on the basis of race and disregards traditional redistricting principles constitutes an unlawful racial gerrymander:

> "[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."

(509 U.S. at 649.)

Citing the extremely irregular shape of the challenged districts, the Supreme Court concluded that the North Carolina districting plan could only be rationally viewed as an effort to segregate the races for purposes of voting without regard for traditional redistricting principles. The district court was instructed to determine whether the plan was narrowly tailored to achieve a compelling governmental objective.

The Supreme Court subsequently explained that the shape of an electoral district merely provides circumstantial evidence of a racial gerrymander. In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court announced the following framework for a racial gerrymander claim:

> "The plaintiff's burden is to show, either through circumstantial evidence of a

> district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, *a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations*. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can defeat a claim that a district has been gerrymandered on racial lines [citation]."

(*Id*. at 916 [emphasis added].)

Although race cannot be a predominant factor, the Court recognized that there is a distinction between being aware of racial considerations and being motivated by racial considerations. It explained that "discriminatory purpose" implies the selection of a particular action or course of conduct at least in part because of, not merely despite, its adverse effects.

> "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."

(*Id*. at 915-916.)

Even though the challenged district appeared to comply with traditional districting principles, the Supreme Court determined that race was the predominant factor. The plan was thus subject to a strict scrutiny analysis.

Under a strict scrutiny analysis, when a challenger succeeds in establishing racial predominance, the redistricting authority then bears the burden to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling government interest." (*Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 801 (2017), quoting *Miller v. Johnson*, *supra*.) The Supreme Court presumes compliance with the Voting Rights Act is a compelling government interest. And while the Court does not require redistricting authorities to compile a comprehensive administrative record, there must be a "strong basis in evidence" in support of any race-based decision, which strong basis may be found when there is "good reason to believe" that race must be used to satisfy the Voting Rights Act. (*Bethune-Hill*, *supra*, 137 S.Ct. at 801; *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015).) Put another way, there might be good reason to believe that the Voting Rights Act demands drawing a majority-minority district if there is evidence supporting a belief a plaintiff can establish all *Gingles* preconditions. (*Cooper v. Harris*, 137 S.Ct. 1455, 1470 (2017).)

A redistricting plan that is based on both racial and political considerations must satisfy the strict scrutiny standard if race has the greater influence. In *Bush v. Vera*, 517 U.S. 952 (1996), a group of voters attacked a plan creating three majority-minority congressional districts that had received Department of Justice preclearance. A three-judge district court panel found that the districts contained highly irregular boundaries that were created without regard for traditional districting criteria. In a fragmented decision, the Supreme Court affirmed: there was ample evidence to show that racially motivated gerrymandering had a greater influence on the redistricting plan than motives of political gerrymandering. (*Id*. at 969-971.) Applying the *Gingles* preconditions, it found that the districts were not narrowly tailored to comply with Section 2 because the dispersion of the minority population prevented the creation of reasonably compact majority-minority districts. The Court explained that Section 2 does not require the creation of non-compact majority-minority districts. (*Id*. at 979; see also *Cooper v. Harris*, 137 S.Ct. 1455, 1472 (2017) [Section 2 does not mandate drawing a majority-minority district simply because it can be drawn].)

And one more note: a racial gerrymandering claim may not be brought to challenge a jurisdiction's map *as a whole*; rather, a viable claim must assert that race was improperly used in the drawing of one or more specific electoral (i.e., council) districts. (*Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262-263 (2015).)

C. Summary

The commission, as a redistricting authority, must maneuver between two federal requirements that are, to some extent, in tension with each other. On the one hand, a redistricting plan must not abridge or deny a minority group's ability to participate in the electoral process. This requirement contemplates consideration of racial factors. On the other hand, a redistricting plan that forsakes traditional districting principles for racial considerations will be struck down as an unconstitutional racial gerrymander.

As the United States Supreme Court has recently summarized:

> "Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.' [Citations.] In an effort to harmonize these conflicting demands, we have assumed that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed. In technical terms, we have assumed that complying with the VRA is a compelling state interest [citations], and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA. [Citation.]"

(*Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018).)

In sum, under federal law, the commission's adopted map must:

(i) Comply with "one person, one vote," by creating districts substantially equal in population;
(ii) Avoid purposeful discrimination against racial minorities;
(iii) Not subordinate traditional race-neutral principles to racial considerations;
(iv) Not have the intent or effect of diluting minority voting strength.

To ensure the adopted map balances the Equal Protection Clause and the Voting Rights Act, the following principles provide some guidance:

(i) Race may be considered as one factor among others. As long as the plan does not subordinate traditional criteria to race, there may be created majority-minority districts without coming under strict scrutiny;
(ii) However, just because a majority-minority district *can* be drawn does not mean that it *must* be drawn;
(ii) Majority-minority districts may be required where the three *Gingles* preconditions (compactness, cohesion, white bloc voting) are satisfied;
(iii) Bizarrely shaped districts are not unconstitutional per se, but the bizarre shape may be evidence that race was the predominant consideration in the redistricting process;
(iv) The interest in avoiding Voting Rights Act liability can be a compelling governmental interest;
(v) A plan drawn to avoid Voting Rights Act liability must be narrowly tailored; that is, a district so drawn must not deviate substantially, for predominately racial reasons, from the sort of district a court would draw to remedy a Voting Rights Act violation.

Policy Considerations: The Sacramento Independent Redistricting Commission must comply with the U.S. Constitution and the Voting Rights Act of 1965 when establishing new council district boundaries.

Economic Impacts: Not applicable.

Environmental Considerations: Not applicable.

Sustainability: Not applicable.

Commission/Committee Action: Not applicable.

Rationale for Recommendation: The SIRC has exclusive authority to redraw council district boundaries and must establish the process to accomplish this task in accordance with local, state,

and federal rules governing the redistricting process.

Financial Considerations: Not applicable.

Local Business Enterprise (LBE): Not applicable.