

To Appear in:

Encyclopedia of the Supreme Court, David Schultz (ed.),
Facts on File.

Pre-print. Subject to revision. Do not cite without permission.

Miller v. Johnson, 515 U.S. 900 (1995)

In *Miller v. Johnson*, 515 U.S. 900 (1995), a five-member majority of the court declared that redistricting is presumptively unconstitutional when race has served as the “predominant factor” in the drawing of the district lines.

Such plans, also known as ‘racial gerrymanders,’ are subject to “strict scrutiny” by the Court. They are constitutionally acceptable only if the Court determines that the plan is narrowly tailored to serve a compelling state interest. Strict scrutiny is sometimes called: “strict in theory, fatal in fact.” Plans subject to strict scrutiny are almost always declared unconstitutional.

Applying the ‘predominant factor’, the court struck down the Eleventh Congressional District in Georgia, one of only two districts (out of 11) in Georgia that had a majority of black voters. (At the time, Georgia had a population that was 27% black.) The plan was then sent back to the Georgia legislature to redraw. The legislature subsequently deadlocked, and the district court drew its own plan. The district court’s plan drew only one majority-black district.

Although the legislature appealed, the Supreme Court upheld the lower court plan in *Abrams v. Johnson* 521 U.S. 74 (1997). The Supreme Court affirmed the district court’s conclusion that it would be impossible for two majority-black districts to be created without allowing race to “predominate over other traditional and neutral districting principles” (87).

The majority opinion in *Miller* clearly identifies the essential problem as predominant racial intent. Using this reasoning, a district does not have to be ugly (or more precisely, to violate ‘traditional districting principle’) to violate the constitution. Its appearance is merely *circumstantial evidence* of the intent of the designer. “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 lines.” (913) This theory is in *Shaw v. Hunt* 515 U.S. 900 (1996), decided the following year. Rehnquist, writing for the court states: “The plaintiff bears the burden of proving the race-based motive and may do so either through ‘circumstantial evidence of a district’s shape and demographics’ or through ‘more direct evidence going to legislative purpose.’” (904).

Unusually, Justice O’Connor wrote a concurrence *in addition* to joining in the majority opinion in *Miller*. In it she states that “To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices.” On its face, O’Connor’s concurrence seems to assert a somewhat different principle. This alternative principle is also stated her earlier plurality opinion in *Shaw v. Reno* 509 U.S. 630 (1993), and its later plurality opinion in *Bush v. Vera* 517 U.S. 952 (1996).

In both of these cases, O'Connor's plurality opinions seem to assert that district that violation of traditional principles is an integral part of the problem, and not just circumstantial evidence of intent: "Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotype." (647, emphasis added). And "Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause Constitutional harm *insofar as they convey the message* that political identity is, or should be, predominantly racial. For example, the bizarre shaping of Districts 18 and 29, cutting across pre-existing precinct lines and other natural or traditional divisions, *is not merely evidentially significant; it is part of the Constitutional problem*" (980-981, emphasis added).

Leaving aside the apparent conflict among these decisions, there remains significant uncertainty about how to apply this new predominant intent standard. For example, suppose that:

- A redistricting plan is approved by a legislature by a majority vote. Of that voting majority, more than half of the legislators vote for the plan for purely non-racial reasons. However, a small coalition of legislators makes racial motivation a top priority, and, without their additional votes, the plan could not have passed.
- The first priority of everyone in the legislature voting on the plan is to maximize the chance of keeping their own seat. But everyone's second priority is to maximize the number of majority-white seats.
- The first priority of everyone in the legislature is to ensure at least one majority-black seat, but once ensured they prefer maximizing their chance of capturing the most seats for their party to any other goal, including additional majority-minority seats.
- The original authors of a redistricting plan design it entirely with the motivation of maximizing the number of majority-white seats. The legislature who authorizes the plan, while aware of the original motivation and impact, vote for the plan entirely because it satisfies other goals.

Even if we could look into the heads of each legislator, and know their exact motivations, it is not clear which of these situations is 'predominantly motivated by race.' No precedent or well-established legal theory yet exists to distinguish among these cases

Despite its ambiguities, Miller, and the other recent racial gerrymandering cases are important because they have had a dramatic effect on the way districts are drawn in the United States. Many experts believe that these cases have lead to significant changes in the racial and partisan composition of the U.S. Congress.

For more information see:

Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, Lloyd J. Mercer (2001), *The Law of Democracy: Legal Structure of the Political Process* (2nd ed.), Foundation Press.

J. Morgan Kousser, (1999) *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, North Carolina: University of North Carolina Press.

Micah Altman, *Harvard University*