Response:

Alabama Legislative Black Caucus v. Alabama

575 U.S. ___ (2015)

Claims of Racial Gerrymandering Get a Second Chance

Alan B. Morrison[*]

After the 2010 census, Alabama had to revise the lines for both Houses in its state legislature. In doing so, it had to walk somewhat of a tightrope, with the requirements of the Voting Rights Act and the mandate of one person, one vote on the one hand, and the constitutional prohibition against racial gerrymandering on the other. According to the Alabama Legislative Black Caucus and its co-plaintiff the Alabama Democratic Conference, Alabama did not strike the proper balance and, as the case came to the Supreme Court, they charged the State with racial gerrymandering, which is the drawing of district lines with considerations of race as the predominate factor in its decisions. A divided three judge district court ruled that Alabama acted lawfully, and the Supreme Court, in a 5-4 decision written by Justice Stephen Breyer, reversed and remanded with directions for the district court to revisit the re-districting plan, taking into account four legal errors that he identified.[1]

Before turning to the legal issues presented, a little background may be useful. Mainly in the South, legislative boundaries were once drawn so that black voters were widely dispersed, making it difficult for them to elect any black legislators. The Voting Rights Act made line drawing of that kind no longer lawful, and it made it possible for the first time, through the creation of majority-minority districts, often based on segregated housing patterns, for black voters to elect a significant number of black legislators. However, together with one person, one vote, the change in the law created a different incentive for racial line drawing. As a general proposition, black voters favor Democrats over Republicans, and so by moving large numbers of black voters into already heavily minority districts, states could keep the incumbent black officials in office, while at the same time making it harder for white Democrats to win close elections because black voters who would tend to support them would be in districts that were already electing a Democrat, who was black. Thus, moving black

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[1] Alabama Legislative Black Caucus v. Alabama, No. 13-895, slip op. at 1 (U.S. Mar. 25, 2015) (majority opinion).

voters into already majority-minority districts would not change the number of black elected officials, but would decrease the number of Democrats, effectively "wasting" the votes of the transferred blacks. And that is, in essence, what the plaintiffs alleged happened in Alabama.

Despite the high stakes in the case when it was filed, and the significant amount of law that existed on racial profiling, the majority first had to deal with the fact that even they had difficulty with the lack of precision by plaintiffs, or more precisely their counsel, in making and proving certain key legal arguments. Indeed, the dissent of Justice Antonin Scalia, joined by Chief Justice John Roberts and Associate Justices Clarence Thomas and Samuel Alito, concluded that the lawyering was so deficient that they would not have reached the two merits issues that the majority decided because, in their view, the plaintiffs had neither pleaded nor proven the basics of a claim of racial gerrymandering.

In this challenge to racial gerrymandering, the first question that the Court had to decide was whether such a challenge can be made to the plan as a whole or must be only with respect to the specific districts where race was a predominate factor in the line drawing. The justices were unanimous in concluding that a district by district challenge is the only proper one, although evidence of how lines were drawn and which voters were moved around the state as a whole, could be offered on any such challenge. Even then, if a district, or more likely here, several in each House, were found to have been created by improper use of race, other districts would also have to be re-drawn because the principle of one person, one vote still had to be satisfied. The problem for the plaintiffs was that much of their complaints and of the evidence and briefing below treated the case as a challenge to the plan as a whole, rather than on a district specific basis. Ultimately, the majority found enough in the submissions below to conclude that the challenge included objections to specific districts, whereas the dissent reached the opposite conclusion looking at essentially the same parts of the trial court record.

That was only the first procedural hurdle that the plaintiffs had to surmount, with the second made more difficult when the Court ruled that challenges had to be made on a district by district basis, because both plaintiffs were organizational plaintiffs. That does not itself cause a serious problem, so long as the organizations had members in each of the challenged districts. The problem was that the record below on that issue—no doubt caused in part by the plaintiffs' emphasis on their state-wide challenge—was that there were no affidavits or other evidence from a member of either organization saying that he or she resided in each of the challenged districts. Having ruled that challenges can only be made by persons who reside in allegedly unconstitutional districts, it was necessary

for plaintiffs to show that they collectively had members covering all such districts. The problem was, to put it charitably, the allegations and the supporting evidence, were less precise than they should have been. Nonetheless, the majority was willing to accept certain inferences that suggested the residence requirements had been met, in part because the State never objected below, when it would have been easy to supply such proof to the lack of members by the plaintiffs in all of the districts.[2] In his dissent, Justice Scalia chided the majority for failing to assure that plaintiffs prove they had members in each of the challenged districts and, in effect, bailing them out for the failure of their lawyers to submit the required proof. As his dissent noted, the failures of the plaintiffs were "understandable, if not excusable."[3]

Amidst the battle over whether plaintiffs adequately pleaded the proper injury (district versus state) and proved they had members in each challenged district, there is a broader question whether courts should strictly enforce procedural requirements of this kind, as the dissent argued, or, as the majority implicitly suggested, overlook (or broadly interpret pleadings and evidence) in order to reach the merits. Under the Fourth Amendment, there is a long standing debate about whether "if the constable errs, should the criminal go free?" That approach might also apply in at least some civil cases as well: "If the lawyer errs, should the plaintiff lose his claim?" If so, the client in the case would be left only with a damages claim for legal malpractice, hardly an enticing thought in any case, let alone one involving the right to vote on which it is impossible to put a price tag. And, in this case, it would have been the citizens of Alabama as a whole who would be adversely affected by any unconstitutional racial gerrymandering.

In the real world, sometimes the merits of a case (or lack of them) may affect how a court rules on procedural issues like those in this case. Two examples of what Alabama did in its 2012 plan cannot be overlooked in understanding why the majority may have been willing to send the case back for a second look at the finding of lack of racial gerrymandering. As noted above, because of changes in population distribution and the need to maintain one person, one vote, Alabama had to move voters from one district to another. One example of what the majority suggested (but did not hold) was the use of race to draw district lines is this: "Of the 15,785 individuals that the new redistricting laws added to the [already 70%

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[2] The majority also noted that the factual basis for some of the claims was unearthed only when plaintiffs took discovery of the State's redistricting expert. *Id.* at 11 (majority opinion).

[3] *Id.* at 2 (Scalia, J., dissenting).

minority] population of District 26, just 36 were white—a remarkable feat given the local demographics."[4] The majority then continued: "Transgressing their own redistricting guidelines, Committee Guidelines 3–4, the drafters split seven precincts between the majority-black District 26 and the majority-white District 25, with the population in those precincts clearly divided on racial lines."[5] With that kind of evidence before the Court, it is not hard to understand why five Justices wanted to require the district court to re-consider the racial gerrymandering allegations, with the legal errors corrected.

The majority still had two legal issues on the merits to decide before it could remand the case. The district court found that race was not the predominate factor, but the majority held that the finding was based on an error of law which, once corrected, would require the district court to revisit the question. The trial court had found lack of predominance because it said that Alabama included in its calculus the need to maintain the one person, one vote requirement, which offset any focus on race. The majority disagreed because it saw the one person, one vote mandate as a "background rule"[6] or perhaps as a baseline line principle or requirement that must be met before the other factors come into play.[7] Once that rule of constitutional law is taken out of the assessment of the role of race in how the State decided which voters to move to which districts, the majority relied on the "strong, perhaps overwhelming evidence [quoted above] that race did predominate as a factor."[8] The Court did not hold that race predominated, but only that the district court had to reconsider the question using the proper legal standard.[9]

Second, Alabama also justified its movement of large numbers of black voters into existing majority-minority districts in order to satisfy what it concluded was the retrogression prohibition of section 5 of the Voting Rights Act,[10] which was designed to prevent states from making it more difficult for black voters to elect officials of their choosing. As the State and the majority in the district court read that requirement, it forbade states from reducing the percentage of black voters in a district, even if the result of a decrease was to leave the district with a very substantial margin

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4 *Id.* at 17 (majority opinion).

5 *Id.* at 18.

6 *Id.* at 17.

7 Those other factors include "compactness, contiguity, respect for political subdivisions or communities defined by shared interests" as well as political affiliation and protecting incumbents. *Id.* at 16.

8 *Id.*

9 *Id.* at 18.

10 52 U.S.C. § 10304 (2012).

of black voters. Again, the majority disagreed, finding this reading to be a "misperception of the law."[11] Instead, Justice Breyer agreed with the position of the Department of Justice that section 5 "prohibits only those diminutions of a minority group's proportionate strength that strip the group within a district of its existing ability to elect its candidates of choice."[12] Thus, so long as "minority voters retain the ability to elect their preferred candidate," section 5 is satisfied.[13] The Court did not, however, give plaintiffs a victory, but only the right to continue the battle in the district court where the Court made clear that a whole range of claims and defenses are open in light of the clarifications of the law in the majority's opinion.[14]

As is his wont, Justice Scalia's dissenting opinion is laced with strong denunciations of the majority's decision, suggesting it represents a major change in voting rights law, beginning with his opening paragraph.

> Today, the Court issues a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections. If the Court's destination seems fantastical, just wait until you see the journey.[15]

But, it turns out, all of his stated objections are procedural, not substantive, although in this case, if plaintiffs had not prevailed on those issues, the judgment below would have been sustained. While decrying racial gerrymandering as a practice that "strikes at the heart of our democratic process," Justice Scalia concluded that "appellants pursued a flawed litigation strategy" that prevented the Court from deciding the substantive legal issues presented.[16] Moreover, his concerns extended beyond this case to what he feared might happen in its wake:

> But allowing appellants a second bite at the apple invites lower courts similarly to depart from the premise that ours is an adversarial system whenever they deem the stakes sufficiently high. Because I do not believe that Article III empowers this Court to act as standby counsel for sympathetic litigants, I dissent.[17]

His conclusion continues in a similar vein. As he read the record, appellants' arguments were "pleaded with such opacity that, squinting hard

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11 *Alabama Legislative Black Caucus*, slip op. at 19 (majority opinion).

12 *Id.* at 20 (majority opinion) (quoting Brief of the United States at 22–23).

13 *Id.*

14 *Id.* at 23.

15 *Id.* at 1 (Scalia, J., dissenting).

16 *Id.* at 2–3 (majority opinion).

17 *Id.* at 3.

enough, one can find them to contain just about anything."[18] His more fundamental objection was that the majority opinion "discourages careful litigation and punishes defendants who are denied both notice and repose. The consequences of this unprincipled decision will reverberate far beyond the narrow circumstances presented in this case." [19]

Although Justice Thomas joined the Scalia dissent, he also dissented on the merits. His objections are less (or perhaps not even at all) directed at the two substantive rulings of the majority than at the overall direction of voting rights litigation and the Court's jurisprudence which "continues to be infected with error."[20] Broadly stated, his view is that categorizing voters by race is fundamentally wrong and that this error is not new to Alabama following the 2010 census, but is endemic to at least section 5 and perhaps beyond it. The problem is that the "practice of creating highly packed—'safe'—majority-minority districts is the product of our erroneous jurisprudence, which created a system that forces States to segregate voters into districts based on the color of their skin."[21] The majority, quite understandably, did not respond to the Thomas dissent, either in its specifics or more broadly. It is not clear what specific changes in the Voting Rights Act or the Court's related rulings on racial gerrymandering Justice Thomas would like, but he does raise some interesting questions that deserve fuller treatment if only to show where his arguments might lead and what that would do to the goals of obtaining full voting rights for minorities.

Two further points are worth noting. Although Alabama lost the case in the Supreme Court, its redistricting plan is still in effect and may well continue to govern the 2016 elections, even if it loses on remand. There is a substantial likelihood of Supreme Court review regardless of who prevails on remand because the loser has an appeal as of right and is not limited to seeking certiorari.[22] As a result, the case might not be finally resolved and new lines drawn until the 2018 election, when a new census and a new round of redistricting will be on the nearby horizon. Moreover, whatever happens on remand, the majority-minority districts will remain largely in place, with some adjustments around the edges, and hopefully for the plaintiffs, lines that do not worsen the problem beyond what it was in 2010.

Finally, this case was brought because Alabama moved around

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18 *Id.* at 12.

19 *Id.* at 13.

20 *Id.* at 2 (Thomas, J., dissenting).

21 *Id.* at 3 (Thomas, J., dissenting).

22 28 U.S.C. §§ 2284, 1253 (2012).

minority voters in ways that at least strongly suggested racial gerrymandering was behind its decisions. The case was defended on the ground that, whatever racial choices may have been made by the Alabama legislature, did not constitute prohibited racial gerrymandering. Noticeably absent from that defense was a claim that seems more than just plausible, but is likely to have been the actual motive behind the line drawing: to make it harder for Democrats to elect members of the Alabama legislature, whether white or black. If that had been the defense, it has, at least in some situations, the blessing of the Court which has held that political gerrymandering is not subject to the same objections as racial gerrymandering.[23] Moreover, a claim of political party gerrymandering is generally viewed by the majority of the Court as raising political questions making them nonjusticiable.[24] The majority's remand order left it open for Alabama to raise that defense and perhaps it will. In this case, it may be that the choices made were so overwhelmingly racial that they will have violated section 5, to which the defense of "it's just politics" may not be available. But down the road, state legislative majorities that wish to make it harder for their opponents to gain seats through redistricting may look to that approach, implement it with a less heavy racial hand, and still be able to achieve their political goals.[25]

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[23] *Hunt v. Cromartie*, 526 U.S. 541, 551–52 (1999).

[24] *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

[25] On March 30, 2015, the Court vacated a judgment of a Virginia district court upholding the redistricting plan there, which favored Democrats, although judging by the Questions Presented, *see* SCOTUSblog, http://www.scotusblog.com/?s=Cantor&searchsubmit=Blog, it is unclear how the rulings in the Alabama case affected the validity of the Virginia decision. *Cantor v. Personhuballah*, No. 14-518 (U.S. Mar. 30, 2015).