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Opinion analysis: A small victory for minority voters, or a case with “profound” constitutional implications?

It is easy to read the Supreme Court’s five-to-four decision in *Alabama Legislative Black Caucus v. Alabama* and *Alabama Democratic Conference v. Alabama* as a mostly inconsequential case giving a small, and perhaps only temporary, victory for minority voters in a dispute over the redrawing of Alabama’s legislative districts after the 2010 census. Indeed, although the Supreme Court sent this “racial gerrymandering” case back for a wide and broad rehearing before a three-judge court, Alabama will be free to junk its plan and start over with one that may achieve the same political ends and keep it out of legal trouble. But Justice Antonin Scalia in his dissent sees the majority as issuing “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.” Time will tell if Justice Scalia’s warning against the implications of what he termed a “fantastical” majority opinion is more than typical Scalian hyperbole. And we may know soon enough as these issues get addressed in racial gerrymandering cases from Virginia, North Carolina and elsewhere.

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As explained in this case preview, this case concerns a challenge to state legislative districts drawn by the Alabama legislature after the 2010 census. The legislature, newly controlled by Republicans, drew a redistricting plan that contained the same number of majority-minority Senate districts and one additional majority-minority House district compared to the 1990s plan drawn by a court and the 2000s plan drawn by a Democratic legislature. Because of population shifts and declines, as well as the composition of the original 2001 districts, the African-American districts were the most underpopulated of all the districts, meaning that many voters had to be shifted into these districts to comply with “one person, one vote” requirements.

The state legislative leaders in charge of redistricting set as a goal a deviation in population of no more than two percent across districts. Further, the leaders instructed the consultant charged with redistricting to maintain not only the same number of majority-minority districts in the two state houses but also the same percentage of African Americans *within* each district. The leaders and consultant indicated they kept the same percentage of African-American voters in each majority-minority district in order to comply with the non-retrogression principle of Section 5 of the Voting Rights Act.

The result of these two commands led to the shifting of many more African Americans into these majority-minority districts. The upshot of these changes in the context of Alabama was to pack more of the state’s African Americans, the state’s most reliable Democratic voters, into fewer districts, thereby strengthening Republican voting power in districts throughout the rest of the state.

Black and Democratic legislators, voters, and groups brought a number of challenges to the state redistricting plan, including a vote dilution challenge under Section 2 of the Voting Rights Act and racial and partisan gerrymandering claims. A three-judge federal court divided two to one on the racial gerrymandering claim, the only claim currently before the Supreme Court. To win on a racial gerrymandering claim, the plaintiffs need to show that race was the “predominant factor” in redistricting, more important than traditional redistricting principles. If the state can show it complied with traditional districting principles or even that its intention was purely partisan, not racial, the state would win.

The lower court majority sided with Alabama, stating that the Republican post-2010 census plan was just partisan politics no different than what the Democrats did in the 2000 round of redistricting. On the specific question whether the Alabama redistricting plan was an unconstitutional racial gerrymander, the lower court majority held it was not: the state’s predominant motive in redistricting was complying with the two-percent population deviation maximum as part of the “one person, one vote” principle, not dividing voters on the basis of race. Further, the court held that any division of voters on the basis of race was justified by the state’s requirement to comply with the non-retrogression principle of Section 5 of the Voting Rights Act.

The dissent disagreed on all counts, arguing that race was the predominant factor in redistricting, and Section 5 did not require the maintenance of the same percentage of minority voters in each majority-minority district. Further, since the Supreme Court’s 2013 decision in *Shelby County v. Holder,* holding the preclearance formula unconstitutional, eliminated the preclearance requirement for Alabama, compliance with Section 5 could no longer be a compelling interest to justify a racial gerrymander.

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In the Supreme Court, Justice Anthony Kennedy sided with the more liberal Justices, over the objections of the four more conservative Justices, to rule against Alabama and send the case back for a do-over. Much of the dispute between the majority and the dissent concerned issues likely to be unimportant in other voting cases: whether one of the sets of plaintiffs had standing and whether a key argument of the parties was preserved on appeal. Justice Breyer’s majority opinion even included an appendix to show where an argument was raised in the court below.

The majority said that the lower court erred in considering whether Alabama's legislative redistricting plan *as a whole* was an unconstitutional racial gerrymander. The majority sent the case back to a lower court to consider the issue on a *district-by-district* basis. It said that the lower court could consider new evidence as well as other claims which the Supreme Court did not reach, such as the "one person, one vote" challenge.

But the Supreme Court majority did more than simply send the case back for a new hearing. It very strongly suggested that at least some of the districts were unconstitutional gerrymanders. It began by taking away two of the state's strongest arguments.

First, the Court said Alabama was wrong to the extent it believed that Section 5 of the Voting Rights Act required Alabama to pack more African-American voters into districts in order to keep the same percentage of African Americans in each majority-minority district. This was a misreading of what Section 5 required and such a reading could actually hurt minority voters.

Second, the Court said that Alabama could not point to its desire to have more equally populated districts as its real predominant factor in redistricting. In other words, the majority rejected the argument that the state could not engage in racial gerrymandering if its first order of the day was to maintain equally populated districts. The majority took compliance with "one person, one vote" out of the equation, saying this was something that was a "background" rule to be considered *before* determining whether race is a predominant factor. It calls into mind Daniel Lowenstein's critique of the predominant factor test from *Shaw v. Reno* as nonsensical when it comes to how legislatures decide how to redistrict.

In the end, the majority all but instructed the lower court to find that at least some of the districts were unconstitutional racial gerrymanders: "For example, once the legislature's 'equal population' objectives are put to the side—i.e., seen as a background principle—then there is strong, perhaps overwhelming evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26, the one district the parties have discussed here in depth."

The Court then left open the question whether compliance with Section 5 could be a compelling interest to justify what would be an otherwise unconstitutional racial gerrymander and, no doubt at the urging of Justice Kennedy, added this sentence: "Finally, we note that our discussion in this section is limited to correcting the District Court's misapplication of the 'predominance' test for strict scrutiny discussed in *Miller*, 515 U. S., at 916. It does not express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny. See *Vera*, 517 U. S., at 996 (KENNEDY, J., concurring)."

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Justice Scalia, who wrote the principal dissent, argued mostly on the question of standing and on whether the district-by-district issue was preserved on appeal. He believed that the case was not properly litigated or the issues preserved: "This disposition is based, it seems, on the implicit premise that plaintiffs only plead legally correct theories. That is a silly premise. We should not reward the practice of litigation by obfuscation, especially when we are dealing with a well-established legal claim that numerous plaintiffs have successfully brought in the past." Despite his opening hyperbolic statement, Justice Scalia offered very little to explain what parade of horribles would result from the interpretation of the racial gerrymandering claim in this way. Justice Thomas, while joining (along with the Chief Justice and Justice Alito) in Justice Scalia's dissent, dissented separately as well, to express his disagreement more broadly with Voting Rights Act jurisprudence and the permissible consideration of race in redistricting.

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What is the significance of today's *Alabama* ruling? It seems likely on remand that at least some of Alabama's districts will be found to be racial gerrymanders. This means that some of these districts will have to be redrawn to "unpack" some minority voters from these districts. But do not be surprised if Alabama preempts the lawsuit by drawing new districts which are less racially conscious but still constitute a partisan gerrymander which helps the Republicans have greater control over the Alabama legislative districts. As I have noted, lurking in the background of this case is the "race or party" problem: with most Democrats in Alabama being African Americans and most Republicans being white, how does one determine whether a predominant factor in gerrymandering is race or party?

On that score, the case may have somewhat broader implications even if not the earthshattering ones promised by Justice Scalia. Although Republican states which pack minority voters into districts can no longer claim to do so to comply with Section 5 of the Voting Rights Act (thanks to the *Shelby County* case), they still may claim to do so to comply with Section 2 of the Act. Indeed, as Professor Justin Levitt has shown, minority packing and reliance on the Voting Rights Act have become a familiar tool for Republican legislatures looking to gain advantage by packing likely Democratic voters into a smaller number of districts. Many Democrats and minority voters have challenged such plans as unconstitutional racial gerrymanders.

Today's decision gives these challengers a new tool, making it harder for states to use compliance with the Voting Rights Act as a pretext to secure partisan advantage. All in all, this may help stop some egregious gerrymanders, but there will still be plenty of ways for states to draw district lines for partisan advantage without running afoul of the Voting Rights Act. And depending upon how the Court decides the Arizona redistricting case later this Term, states may have even a freer hand to draw lines for nakedly political purposes.

So chalk this up as a small, albeit real, victory not only for minority voters but also for irony. The "racial gerrymander" cause of action, which was the basis for conservatives to challenge the creation of extra majority-minority districts under the Voting Rights Act, has now become a tool by those who hate the cause of action to protect minority voting rights.

Posted in *Alabama Democratic Conference v. Alabama*, *Alabama Legislative Black Caucus v. Alabama*, Featured, Merits Cases

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