Chapter 3

Allen v. Milligan on Alabama's Congressional Redistricting Plan and the Voting Rights Act

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Abstract

In the final month of its 2022 term, the Supreme Court surprised many observers by striking down Alabama's congressional districting plan in *Allen v. Milligan*. The highly anticipated decision rejected Alabama's invitation to revisit long-standing precedent and to limit the reach of the Voting Rights Act in future cases. Instead, the Supreme Court affirmed the enduring relevance of the VRA in combating racial discrimination in voting, and affirmed a lower court judgment that Alabama redraw its congressional districts to give Black voters an equal opportunity to elect candidates of their choice in the state.

One sentence summary:

In this case the Supreme Court upheld the central tenets of the Voting Rights Act and struck down Alabama's congressional districts because they dilute the voting rights of Black citizens.

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Introduction

In the final month of the 2022 term, the Supreme Court surprised many observers by striking down Alabama's congressional districting plan in *Allen v. Milligan.* By a vote of 5-4, the Court affirmed a lower court ruling that Alabama had violated Section 2 of the Voting Rights Act (VRA) by diluting the voting power of Black Alabamians when it redrew its congressional districts after the 2020 Census. In many ways, the majority opinion, authored by Chief Justice Roberts, was unremarkable as it merely validated long-standing precedent and affirmed the lower court's faithful application of this precedent.

The Court's opinion was a surprise however, because every one of the six conservative Justices have, at one point or another, expressed skepticism about the constitutionality of the VRA. Election law scholars thus suspected that the Court might use the case to overturn the Act or neuter it in some way. This suspicion was rooted in the very decision by the Court to take the case in the first place. The lower court opinion, written by a panel of two Republican-appointed judges and one Democratic-appointed judge, was 225 pages long, and carefully reasoned based on a set of very straight-forward facts set out over a seven-day trial. The opinion did not split from prior cases nor did it raise new legal arguments. However, Alabama urged the Supreme Court to overturn it, arguing that the lower court's conception of the VRA "raised serious constitutional questions." Not only did the Supreme Court agree to hear the appeal, but it ordered that the lower court opinion be stayed or paused until the appeal could be resolved. In practice this meant Alabama was be able to conduct elections in the contested districts in 2022, a signal that the Court did not think the districts violated the rights of Black Alabamians.

A second surprise was the authorship of Chief Justice Roberts whose opinion defended the VRA and endorsed the Supreme Court's approach to its enforcement. Among the conservative Justices, Roberts is perhaps one of the most vocal critics of the VRA. He authored the majority opinion in *Shelby County v. Holder* that struck down the most powerful and effective section of the VRA, he voted to make Section 2 cases harder to win in several other cases, and he has criticized the VRA's role in redistricting cases more broadly, writing in a 2006 dissent that "it is a sordid business, this divvying us up by race." Even before joining the Court, a younger John Roberts advised President Reagan to reject the very language in Section 2 that he endorsed in *Milligan*, arguing that it exceeded Congress's authority under the Fifteenth Amendment. It was therefore somewhat of a surprise when Roberts authored an opinion that saved the Voting Rights Act from the very fate he advocated forty years ago.

Legal Background

At its core, the dispute in *Milligan* revolves around the statutory language of Section 2 of the VRA. In its original form, as enacted in 1965, Section 2 prohibited states and their political subdivisions from imposing any voting qualifications or policies "to deny or abridge the right of any citizen of the United States to vote on account of race or color." The statute was light on definitions—what counts as a "qualification" for voting? what does it mean to "abridge" the right to vote?—and courts were left to determine evidentiary standards on their own. In

practice, courts engaged in broad evaluations of electoral practices to determine if the rights of racial minorities to meaningfully participate in political life had been infringed in any way. This "totality of the circumstances" approach often relied on evidence of electoral outcomes and other racially disparate effects of state and local policy. In 1980, the Supreme Court held in *Mobile v. Bolden* that these results-oriented inquiries were not faithful to the intent of the enacting Congress. According to the Court, Section 2 was enacted to protect minority voting rights from intentional discrimination by states, and not from every standard, practice, or procedure that might have a disparate impact by race.

Congress responded to Mobile two years later by amending the language of Section 2 to clarify that states and their political subdivisions were prohibited from imposing electoral policies "which result[] in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." It was this language, this "results test," that then-DOJ attorney John Roberts criticized in 1982, predicting that it would lead to quotas and establish a right to proportional representation. Indeed, in response to conservative criticism that a results test would guarantee certain electoral outcomes, language was added to the amended Section 2 to clarify that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." In addition, the amended language noted that "a violation of §2 is established if, based on the totality of the circumstances, members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

While the 1982 amendments overrode *Mobile* and clarified that the Voting Rights Act protected against more than just intentional discrimination, there were still questions about how courts might determine that a particular group has less opportunity than others to participate in the electoral process. More specifically, there remained a baseline problem: when a group argues that its voting rights have been diluted, a court must answer the question "diluted compared to what?" The amended language in Section 2 rules out proportionality but does not provide an alternative. In the first Section 2 case to reach the Supreme Court after 1982, the Court established a process to direct lower courts in this inquiry. *Thornburg v. Gingles* established a set of preconditions that plaintiffs must satisfy before courts engage in a totality of the circumstances inquiry. In particular, plaintiffs must show that (1) the racial or language minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the majority votes as a bloc in a way that usually prevents minority-preferred candidates from being elected. These preconditions serve two purposes. The first is that they provide some preliminary evidence to the court that the alleged harm is redressable; that it is possible for the court to draw new districts in which minority-preferred candidates could potentially win. The second purpose relates to the baseline problem. The illustrative maps that plaintiffs provide to satisfy the first *Gingles* precondition serve as the baseline against which the current voting strength of a minority group is compared. In most cases, this baseline falls short of proportionality. With this background in hand, we now turn to Alabama's redistricting process and the facts of *Allen v. Milligan*.

Case Facts and Background

According to the 2020 Census, Alabama's population is approximately 65% White, 27% Black, and 8% Other. This demographic data was released in August 2021 and by November the Alabama state legislature had drawn new congressional districts to be used for the next decade. As it had in prior decades, Alabama drew one Black opportunity district (with 55% Black voting age population) among its seven congressional districts. Plaintiffs challenged this districting plan in federal court, alleging that it diluted the voting power of Black Alabamians by packing more Black voters than necessary into one district and cracking Black communities in the remaining districts. Evidence of this argument is visible in Figure 1, from the report of Plaintiff's expert Dr. Moon Duchin. The state's enacted congressional districts are marked with dark black lines and overlaid on a map of Alabama's precincts, color-coded by the percent of Black voting age population (darker colors represent a higher percent of BVAP).

Plaintiffs submitted illustrative maps that showed it was possible to draw two majority-Black districts out of seven. Compared to this baseline of 2/7 (or 28.6%) of the seats, the map that Alabama drew afforded Black voters, who comprise approximately 27% of the population, the chance to elect a candidate of their choice in just 1/7 (or 14.3%) of the seats. In addition to these illustrative maps that addressed the first *Gingles* prong, plaintiffs produced evidence that voting was racially polarized in Alabama as required under the second and third *Gingles* prongs. In other words, plaintiffs were able to show that black voters and white voters strongly preferred different candidates, and that candidates preferred by Black voters usually lose due to White oppositional voting. Accordingly, the lower court conducted a totality of the circumstances inquiry and issued a preliminary injunction based on its view that plaintiffs were "substantially likely to prevail on their claim under the Voting Rights Act" that "Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress." The court enjoined the state from holding elections in these districts and ordered the state legislature to draw new maps. The court acknowledged that "the Legislature enjoys broad discretion and may consider a wide range of remedial plans" but ultimately directed the legislature that, based on the evidence of racially polarized voting, "any remedial plan will need to include two districts in which Black voters either comprise a voting-age majority or something quite close to it."

Alabama appealed this decision to the U.S. Supreme Court and argued that it had not relied on race when drawing the new districts but instead had focused on the requirements that districts be compact, have an equal population, and split as few counties and towns as possible. (Notably, illustrative maps produced by plaintiffs were more compact and split fewer counties than the state's map, while still producing two Black opportunity districts). The Supreme Court not only agreed to hear the appeal, but stayed the lower court opinion. Justice Kavanaugh concurred in the judgment and flagged his concern that changing district boundaries so close to an election might confuse voters and stifle nascent political campaigns. Kavanaugh's reasoning was criticized by plaintiffs on account that the 2022 primary election was still three months away (and the general election still nine months out) as well as the fact that no prior elections had ever been conducted in the new districts so the risk of confusing voters was small.

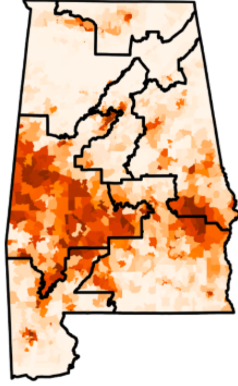

Figure 1: Congressional districts enacted by Alabama's legislature in Nov. 2021. Districts marked by dark black lines overlaid on a map of Alabama's precincts, color-coded by the percent of Black voting age population (darker colors represent a higher percent of BVAP).

Nevertheless, the Supreme Court set a briefing calendar for the spring and summer of 2022 and heard oral argument on October 4, 2022. In their appeal, Alabama raised a new argument that it had not made when defending their plan in the lower court. While Alabama had defended its mapdrawing process in the lower court as fair and not related to race, the state asked the Supreme Court to revisit the baseline problem in all VRA cases. More specifically, Alabama asked the Court to overturn Gingles and instead adopt a race-blind baseline against which all future maps in all states should be compared. According to Alabama, liability under Section 2 of the VRA should not turn on whether a state's plan deviates from some illustrative maps drawn by plaintiff groups, but instead whether a state's plan deviates from the median of an ensemble of hundreds of thousands (or even millions) of randomly-drawn computer-generated maps.

The introduction of this race-blind baseline was targeted to the conservative Justices on the Supreme Court who are openly uncomfortable with statutes and policies that treat people differently by race, whether or not the differential treatment is intended to harm or to benefit racial minority groups. See, for example, the Court's opinion in *Students for Fair Admissions v. Harvard* in chapter 2. While it was unclear at the outset whether the Court would formally adopt Alabama's proposed race-blind baseline, the impact of doing so was clear: because minority opportunity districts do not appear by chance, a randomized redistricting process would rarely generate such districts if at all. The result would be that districting plans with no minority opportunity districts would survive a VRA challenge, even in states like Alabama with a sizeable minority population. Indeed, in a study that generated two million maps for each of the nineteen states with at least 15% Black population, the median number of Black opportunity districts was zero in fourteen of the nineteen states. Alabama pointed to this study in its briefs, highlighting that in the ensemble of two million randomly drawn Alabama maps, not a single one included two majority-Black districts. Alabama did not highlight that the median number of majority-Black districts among those two million maps was zero, and that if the Supreme Court adopted Alabama's proposed race-blind baseline, Alabama would not only have been off the hook from drawing a second Black opportunity district, but could redraw their map and eliminate the one opportunity district they had already drawn!

The Opinion and its Fallout

The Court voted 5-4 in favor of the original plaintiffs and against Alabama. The majority opinion, authored by Chief Justice Roberts, defended the *Gingles* preconditions and rejected the race-blind baseline for determining whether minority voting rights have been diluted. In the words of Chief Justice Roberts, "we find Alabama's new approach to §2 compelling neither in theory nor in practice. We accordingly decline to recast our §2 case law as Alabama requests." The majority concluded that the lower court had faithfully applied the *Gingles* factors and affirmed the lower court's preliminary injunction that Alabama draw a new map. The majority opinion did more than merely affirm the lower court, however. The majority also affirmatively endorsed Section 2 as a constitutional exercise of congressional authority. Alabama argued that Congress had no authority under the Fifteenth Amendment to enact a disparate impact statute with a race-based remedy. The majority explicitly rejected this argument. Citing to prior caselaw, the majority held that "even if §1 of the Fifteenth Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to §2 of the Fifteenth Amendment outlaw voting practices that are discriminatory in effect." The majority continued that race-based remedies had been authorized by the Supreme Court and lower federal courts for four decades. This language in the majority opinion is one of the strongest and clearest defenses of the constitutionality of Section 2 (as amended in 1982) ever made by the Court. Justice Thomas wrote the principal dissenting opinion. In the part of his opinion that was joined by Justices Gorsuch, Barrett, and Alito, he argued that because the first *Gingles* prong required plaintiffs to show that an additional majority-Black district could be drawn, plaintiffs' maps were thus drawn with race as the predominant factor in violation of "our color-blind Constitution."

Six weeks after the Supreme Court's opinion, the Alabama state legislature passed, and the Governor signed, a remedial map that retained one majority-Black district and created a second district with 40% Black voting age population. The state conceded that this second district would not give Black voters an equal opportunity to elect a candidate of their choice, prompting the lower court to reprimand the state, writing "we are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires. We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy." The lower court ordered a special master and cartographer to draw a new map. At the time of this writing, the state of Alabama has appealed this new order to the U.S. Supreme Court and the Court has asked parties for briefing.

Conclusion

Allen v. Milligan underscores the legal complexities tied to redistricting while also reaffirming the enduring relevance of the VRA in combating racial discrimination in voting. The Supreme Court declined to revisit its precedent and rejected the invitation to limit the reach of the VRA in future cases. However, by endorsing the status quo, the highly anticipated opinion in *Allen v. Milligan* will likely become but a footnote in the voting rights jurisprudence.