Redistricting and the Voting Rights Act: A Legal Analysis of *Georgia v. Ashcroft*

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Summary

In *Georgia v. Ashcroft*, the Supreme Court found that a three-judge federal district court panel did not consider all of the requisite relevant factors when it examined whether the 2001 Georgia senate redistricting plan resulted in retrogression of black voters' effective exercise of the electoral franchise in contravention of Section 5 of the Voting Rights Act of 1965, as amended (VRA). Section 5, which only applies to those states or political subdivisions that are considered "covered" under Section 4(b) of the VRA, requires that before any change in voting procedure can take effect, it must be precleared by the U.S. District Court for the District of Columbia or the U.S. Attorney General. Preclearance is contingent upon whether the change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." The Court held that the district court analysis was incorrect "because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the [safe] districts," without giving proper consideration to other factors such as the state's creation of additional influence and coalition districts. Accordingly, the Supreme Court vacated and remanded the case to the district court to examine the facts using the new standard announced in its opinion.

Background: Summary of the Voting Rights Act

Section 5 of the Voting Rights Act of 1965 (VRA), as amended,[1] is a statutory mechanism designed to eliminate possible future denials or abridgements of the right to vote based on racial discrimination. It is limited in scope as it applies only to those states or political subdivisions that are considered "covered" under Section 4(b) of VRA.[2] Specifically, it requires that before any new voting "standard, practice, or procedure" can take effect, it must be precleared by the U.S. District Court for the District of Columbia or the U.S. Attorney General. In order to obtain preclearance, the jurisdiction must meet the burden of demonstrating that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[3] According to Supreme Court precedent, determining whether a voting related change can be precleared is contingent upon whether the change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[4] Similar to eight other states (and a number of counties in seven states), the state of Georgia is a covered jurisdiction under Section 5 of the VRA.[5]

In contrast to Section 5, Section 2 of the VRA applies to all jurisdictions in the U.S. It prohibits any voting qualification or prerequisite to voting, or standard practice or procedure applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[6] In *Thornburg v. Gingles*,[7] the Supreme Court stated that the critical question for a court, in deciding if vote dilution in violation of Section 2 has occurred, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[8] In addition to a review of objective factors from the legislative history of Section 2,[9] the Court also held that in order to prevail in a Section 2 vote dilution claim, a plaintiff must

[1] 42 U.S.C. § 1973c.

[2] 42 U.S.C. § 1973b(b).

[3] 42 U.S.C. § 1973c.

[4] Beer v. U.S., 425 U.S. 130, 141 (1976).

[5] The states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered in their entirety under Section 5 of the VRA. In addition, specific counties in Arizona, California, Michigan, New Hampshire, New York, North Carolina, South Dakota are covered individually. *See* 28 C.F.R. Pt. 51, Appendix. (2003). Section 4(b) of the VRA requires that such jurisdictions be subject to Section 5 preclearance requirements because they maintained a "test or device" as a condition to voter registration (*e.g.*, tests regarding literacy, educational achievement, qualification, or good moral character)on November 1 of 1964, 1968, or 1972; and either less than 50 percent of citizens of legal voting age were registered to vote or less than 50 percent of such citizens voted in the presidential election held in the year in which it used such a test or device. 42 U.S.C. § 1973b(c).

[6] 42 U.S.C. §§ 1973, 1973b(f).

[7] 478 U.S. 30 (1986).

[8] *Id.* at 44.

[9] The following factors could be used to establish a violation of Section 2 of the VRA: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivisions is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. Senate Comm. on the Judiciary, (continued...)

prove that: (1) the 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 minority group must be able to demonstrate that the white majority will vote as a bloc–in the absence of special circumstances, such as the minority candidate running unopposed–to defeat the minority's preferred candidate.[10]

Case History

In April 2002 a three-judge federal district court panel held that a Georgia state 2001 senate redistricting plan violated Section 5 of the VRA, and was therefore not entitled to preclearance, because it reduced black voting age population in three districts.[11] The Attorney General, representing the U.S. government, argued that Georgia's 2001 state senate redistricting plan should not be precleared under Section 5 of the VRA because the plan, which was supported by the Democrats in the state legislature, reduced the black voting age population in District 2 from 60.58% to 50.31%; in District 12 from 55.43% to 50.66%; and in District 26 from 62.45% to 50.80%. In addition, the government submitted evidence indicating that in all three senate districts the percentage of black registered voters dropped to just under 50% and that racially polarized voting occurred.[12]

Bearing the burden of proof in this proceeding, the state of Georgia argued that, notwithstanding the reduction in black voting age population and black registered voters in the three senate districts, the redistricting plan was not retrogressive in either intent or in effect. In addition to submitting detailed evidence documenting the total population, total black population, black voting age population, percentage of black registered voters, and the percentage of Democratic votes (i.e., the likelihood that voters in a particular district would vote Democratic), Georgia also submitted testimony from persons who had participated in designing the plan, which indicated that it was designed to increase black voting strength throughout Georgia, and to assist in ensuring a continued Democratic majority in the state senate.[13]

Unpersuaded by the state of Georgia's arguments, the three-judge district court panel found that the three senate district plans at issue were retrogressive because each district presented a lesser opportunity for the black candidate of choice to win election under the new plan as compared to the earlier, benchmark plan. Moreover, the court determined that the reductions in black voting age population would diminish African-American voting strength in those districts and that the retrogression was not offset by gains in other districts. Hence, the three-judge panel held that Georgia had failed to demonstrate by a preponderance of the evidence that the state senate redistricting plan would not have a retrogressive effect on African-American voters and refused to grant Section 5 preclearance.[14]

(...continued)

Report on S. 1992, S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177.

[10] Thornburg, 478 U.S. at 50-51.

[11] Georgia v. Ashcroft, 195 F. Supp. 2d 25 (D.D.C. 2002).

[12] *See* Georgia v. Ashcroft, 123 S. Ct. 2498, 2507-08 (2003).

[13] *See id.* at 2507.

[14] *See id.* at 2508.

After the court refused to grant preclearance, Georgia enacted a similar senate redistricting plan that added black voters to Districts 2, 12, and 26, which the district court subsequently precleared.[15] No party contested the propriety of the district court granting preclearance to the second plan and the U.S. Supreme Court noted probable jurisdiction to consider whether the district court should have granted preclearance to the redistricting plan as originally enacted by Georgia.[16] Georgia has asserted that it will use the originally enacted redistricting plan if preclearance is ultimately granted.[17]

Supreme Court Ruling

Vacating and remanding the district court ruling, the Supreme Court in *Georgia v. Ashcroft* held that the district court failed to consider all requisite relevant factors when it determined that the original Georgia redistricting plan resulted in retrogression of black voters' effective exercise of voting rights and refused to grant preclearance under Section 5 of the VRA. In its 5 to 4 opinion, with Justice O'Connor writing for the majority, the Court first rejected Georgia's argument that a plan should be precleared under Section 5 if it would satisfy Section 2 of the VRA, holding that while some parts of a Section 2 analysis may overlap with a Section 5 inquiry, the two sections of law "differ in structure, purpose, and application."[18] According to the Court, the "essence" of a Section 2 vote dilution claim is that "a certain law, practice or structure ... causes an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[19] In contrast, a Section 5 retrogression inquiry "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan."[20] Further, the Court stated that it has previously held that a violation of Section 2 "is not an independent reason to deny preclearance under Section 5."[21]

Next the Court turned to Georgia's alternative argument that even if compliance with Section 2 does not result in preclearance under Section 5, the plan should nevertheless be precleared because it does not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[22] Acknowledging the necessity in this case to determine the meaning of "effective exercise of the electoral franchise," the Court found that it clearly includes the ability of minority voters to elect a candidate of their choice through the creation of "safe" districts where minority voters constitute well over 50% of eligible voters.

Notably, however, in the Court's view, the effective exercise of the franchise can also be achieved by spreading out minority voters over a greater number of districts, thereby creating more districts in which minority voters can have the opportunity–but not a near certainty–of electing candidates of their choice. Such a strategy has the potential to increase "substantive representation" in more districts "by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group."[23] According to the Court, Section 5

[15] *See* 204 F. Supp. 4 (D.D.C. 2002).

[16] Georgia v. Ashcroft, 123 S. Ct. 964 (2003).

[17] Georgia v. Ashcroft, 123 S. Ct. 2498, 2509 (2003)

[18] *Id.* at 2510 (quoting Holder v. Hall, 512 U.S. 874, 883 (1994)(plurality opinion)).

[19] *Id.* (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

[20] *Id.* (quoting Reno v. Bossier Parish School Board (Bossier Parish I), 520 U.S. 471, 478 (1997)).

[21] *Id.*

[22] *Id.* (quoting Beer v. U.S., *supra,* at 141).

[23] *Id.* at 2512.

affords the states the flexibility to choose one theory of representation over the other: "[e]ither option 'will present the minority group with its own array of electoral risks and benefits' and presents 'hard choices about what would truly 'maximize' minority electoral success.'"[24]

In addition to the comparative ability of a minority group to elect a candidate of its choice, the Court determined that the other "highly relevant factor" in a retrogression inquiry is the extent to which a new redistricting plan modifies the ability of a minority group to "influence" the political process and is not limited to just "winning" elections. Hence, the Court held that under Section 5, a court must consider whether a new plan adds or subtracts "influence districts" where minority voters may not be able to elect a candidate of choice, but can nonetheless play a "substantial, if not decisive" role in the election.[25]

The Court also found that comparing the level of legislative leadership, influence, and power of representatives supported by minority voters, with the level of such power existent in the benchmark plan, is another method of assessing the minority group's opportunity to participate in the political process. Since a lawmaker in a leadership position has a greater ability to exert control over the legislative process, maintaining or increasing leadership positions for minority voters' representatives of choice, while not dispositive alone, can be an important factor indicating a lack of retrogressive effect under Section 5.[26] It is also significant, though similarly not dispositive, the Court determined, to consider whether the representatives elected from the very districts created and protected by the VRA support the new redistricting plan.[27]

Finding that the district court did not consider all of the requisite relevant factors when it examined whether the Georgia senate redistricting plan resulted in retrogression of black voters' effective exercise of the electoral franchise in contravention of Section 5, the Court vacated and remanded the case to the district court to examine the facts using the new standard announced in its opinion. The district court analysis was incorrect "because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the [safe] districts," without giving proper consideration to other factors such as the state's creation of additional influence and coalition districts, according to the Court.

The dissenting opinion written by Justice Souter argued that before a state can change from safe majority black districts to coalition districts, the state has the burden of proving that non-minority voters will vote reliably with the minority voters.[28] Noting that the dissent's analysis appears to presume that the Court had decided that the Georgia senate plan is not retrogressive, the Court

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[24] *Id.* at 2511-12. The Court elaborates stating that on the one hand, a smaller number of safe districts with a majority of minority voters may virtually guarantee the election of the minority group's preferred candidate, while on the other hand, spreading out minority voters over a greater number of districts may create greater opportunity to elect candidates of choice. *Id.*

[25] *Id.*

[26] *Id.* at 2513.

[27] *Id.* Since a retrogressive inquiry asks "how voters will probably act in the circumstances in which they live," according to the Court, the representatives of districts that were created with the purpose of ensuring continued minority participation in the political sphere have knowledge about how voters will most likely behave and more specifically, whether the proposed change in districts will decrease minority voters' effective exercise of the electoral franchise. *Id.*

[28] *Id.* at 2518 (citing, e.g., Reno v. Bossier Parish School Board (Bossier Parish I), 520 U.S. 471, 478 (1997)). According to the dissent, a state must not just show that minority voters in new districts may have some influence, but that such minority voters will have "effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme." *Id.*

expressly disagrees stating that its holding is limited to determining only that the district court did not engage in the correct analysis. Indeed, the Court readily acknowledges that the district court "is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression."[29]

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[29] *Id.* at 2514-17.