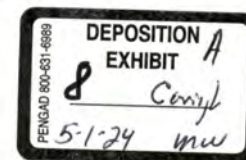


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The Supreme Court's voting rights decision was a missed opportunity - Washington Examiner

Adam Carrington : 5-6 minutes : 6/11/2023



Deuel Ross, center, plaintiff's counsel in *Merrill v. Milligan*, an Alabama redistricting case that could have far-reaching effects on minority voting power across the United States, speaks with members of the press following oral arguments outside the Supreme Court on Capitol Hill in Washington, Tuesday, Oct. 4, 2022. Standing behind Ross are Letetia Jackson, from left, Rep. Terri Sewell, D-Ala., plaintiff Evan Milligan and Janai Nelson, President and Director-Counsel of the NAACP Legal Defense Fund. (AP Photo/Patrick Semansky)

The

Supreme Court

handed down

its decision in *Allen v. Milligan* on Thursday. Chief Justice

John Roberts's

opinion found that Alabama's latest congressional redistricting plan likely violated Section 2 of the 1965 Voting Rights Act. It did so because the map created only one majority black district when two were reasonably possible, thereby "diluting" black political power.

The case concerned not the original act but the statute as amended in 1982, when Congress changed the language to make it so that not only intentional racial discrimination could violate the law. In addition, "the extent to which members of a protected class have been elected to office in the State or political subdivision" might signal an infraction occurred. At the same time, the amended text stated that the preceding could not require racial balancing, wherein elected officials must be proportional to the racial composition of voters.

REPUBLICAN PRIMARY: BIG TENT OR BIG TOP?

In reaching its decision, the court continued a line of precedent at odds with important constitutional principles, contrary to the meaning of the Voting Rights Act, and nearly impossible for judges to adjudicate properly.

First, let us consider constitutional principle. In his dissent, Justice Clarence Thomas pegged the essential dispute as two competing readings of race and the law. One saw the Constitution as "colorblind." This view, Thomas's view, requires the law to treat person as persons, approving no legal distinctions based on skin color. The other view Thomas called "modern-day forms of de jure racial balkanization." It sought to remedy racial injustice, historical or current, by governmental policies focused on race and pursuing race-based outcomes. In this and past decisions, Thomas has thoughtfully and correctly articulated the Constitution's colorblind principles. The majority in this case did not.

Second, we must take up the proper interpretation of the Voting Rights Act. Thomas pointed to the original intent of the law as stopping racially based attempts to undermine or deny certain persons' access to the ballot box. The very title of the law points to this focus, as does the subsequent text of the original statute. Even with the 1982 revisions, electoral results are best seen as evidence of potentially race-based limitations on voting, not a basis for a theory of "diluting" racial groups' voting power.

Third, Thomas also pointed to a practical problem with the court's jurisprudence here. The concept of vote dilution requires some standard, an objective "race-neutral benchmark" by which to compare the claim. What exactly does undiluted look like? Otherwise, judges won't be applying the law so much as using it to incorporate their personal standard of fairness. Yet making one's view of justice legally enforceable is not the job of the judicial branch. Instead, it is the task assigned by the Constitution to the legislative one, itself representing the will of the ultimate human lawmaker: the people. Judges, then, require clear standards in the law and in their approach to that law in order to apply the law rather than to make it.

Yet no such benchmark exists either in court precedent or in the majority opinion. At least not a racially neutral one. The only standard with coherence would require the districting to engage in racially proportional electoral results. To do so would take us back to the first problem, reading the law as furthering race-based distinctions under a Constitution committed to human equality. Such a move not only is unjust, demeaning us all. It also goes against a principle essential to the 14th Amendment's Equal Protection Clause, which enshrines racially neutral requirements against state infringement.

In 2019, the court concluded it did not possess the institutional tools to discern partisan gerrymandering without encroaching into legislative ground. The court essentially removed itself from that debate. It should have greatly limited its intrusion here, on matters of race and redistricting. It has very limited tools to adjudicate these questions properly. In a narrower role, the court should strike down any districting plans based in intentional

racial discrimination. That narrower role it can do, as opposed to figuring out the difference between "diluted" and "undiluted" districts. And this role it should do, protecting our colorblind constitutional principles against any and all government violation.

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Adam Carrington is assistant professor of politics at Hillsdale College.