

Birth of a Gerrymander

The Supreme Court can finally bring sanity to voting rights law.

by Abigail Thernstrom

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ON MARCH 1, the Supreme Court will hear arguments in a case involving the Texas congressional redistricting plan engineered in 2003 by former House majority leader Tom DeLay. Appellants charge both that the Texas map was partisan districting run amok and that it violated the right of minority voters, under the Voting Rights Act, to elect the candidates of their choice.

On the first matter, court precedents are sparse; the High Court has been understandably reluctant to tackle partisan gerrymandering, with the result that no constitutional standards (beyond one person, one vote) govern the process. But on the second matter, where precedents are numerous and murky, the Court should seize the opportunity to begin restoring intelligibility and common sense to an area of law that seems to have come unmoored from American principle.

That there is work for the Court to do is obvious to anyone familiar with the Voting Rights Act of 1965 and its subsequent amendments by Congress and interpretations by the Department of Justice and the courts. These have brought us to a pass where fairness to minorities has a legal definition so arcane and counterintuitive as to seem like something out of *Through the Looking Glass*. To underline the need for serious repair work by the High Court, it is worth revisiting one of the key precedents of recent years--*Georgia v. Ashcroft* (2003)--as well as a private, internal Department of Justice memo leaked to the press shortly before Christmas and revealing department staff-attorneys' tortured attempt to apply the *Georgia* precedent to the question of the legality of Texas's 2003 proposed redistricting.

WHEN THE VOTING RIGHTS ACT was originally passed, every provision served the same simple aim: to make sure previously disfranchised southern blacks could register and vote. That simplicity proved unsustainable. The year before the act was passed, the Supreme Court had signaled concern with the "inalienable right" of every citizen to "full and effective participation" and "an equally effective voice" in its landmark one person, one vote decision, *Reynolds v. Sims*. By the early 1970s, protection against the "dilution" of black votes had been incorporated into judicial interpretations of the Voting Rights Act.

When were black votes diluted? In applying the statute, both the Justice Department (the main player) and the U.S. district court for the District of Columbia initially assumed that only black officeholders could fully represent black voters. Thus, black voters had "an equally effective voice" only when a districting plan contained as many safe black seats as could possibly be drawn. That view produced extremes of racial gerrymandering--the infamous spider-shaped districts--that, starting in 1993, ceased to sit well with a majority on the Supreme Court. In *Miller v. Johnson* (1995), for instance, the Court fretted about states' assigning voters to racially separate districts on the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"

In 2003, in *Georgia v. Ashcroft*, the Court added another concern to that of racial stereotyping. Perhaps black votes were being "wasted" in what the ACLU approvingly referred to as "max-black" districts. That is, perhaps the goal should be to concentrate only as many blacks in a district as necessary to elect a black representative, then to assign black voters beyond that number to other districts. The concern applied as well to Hispanic districts, Hispanics having been added as a protected group in 1975.

Potentially wasted votes were the central theme of *Georgia v. Ashcroft*, which involved districting for the Georgia senate. Justice Sandra Day O'Connor's opinion for a majority of five was a classic study in just how lost courts can become when trying to sort out questions of racial fairness and political representation.

In her opinion, O'Connor woke up to the fact that minority "representation" is not so easy to define. Who counts as a "representative"? The question is fundamental, because section 5 of the Voting Rights Act--the provision at issue in the *Georgia* case--protects black voters from any change in electoral rules or district lines that results in representational "backsliding." The object was to prevent states from changing their electoral rules in ways that chipped away at blacks' political strength. Section 5 requires the southern states (with their history of disfranchising blacks), as well as Texas, Arizona, and scattered counties elsewhere identified by a statistical trigger, to obtain approval ("preclearance") from either the Justice Department or the U.S. district court for the District of Columbia for any redistricting.

Georgia's senate districting plan required preclearance. It lowered the percentage of black voters in some districts (although not below 50 percent), but increased the number of districts certain to elect white Democrats. This was an unusual legislative step, but Justice O'Connor explained the logic. "No party contests that a substantial majority of black voters in Georgia vote Democratic," she wrote, and thus any increase in the number of Democratic state senators--even if they were white--would boost minority representation. Correspondingly, the implication was, any decrease in the number of Republican legislators would be good for blacks.

In other words, white Democrats count as minority "representatives." It was a remarkable *legal* conclusion for the Court to reach.

Before *Georgia v. Ashcroft*, majority-black districts were sacrosanct; they couldn't be eliminated in a new map. That's still true. But the logic of O'Connor's opinion makes all existing Democratic districts that contain a significant number of blacks equally untouchable, since the assumption is that Democrats speak for the interests of blacks.

With *Georgia v. Ashcroft*, the Voting Rights Act became not just a charter for black enfranchisement and officeholding but also a statute to protect certain safe seats for white Democrats. Never mind that Georgia is majority-Republican (58 percent of its voters went for George W. Bush in 2004); Democratic districts in which blacks are an "influence" (the Court's term) appear to have become another permanent entitlement.

On the other hand, in trying to figure out whether a new districting map would diminish minority representation, lower courts, Justice Department attorneys, and the states could not simply count heads--those of white and minority officeholders who could be said to "represent" black and Hispanic interests. As O'Connor explained, "The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine." In fact, in calculating the level of "minority representation," there were factors to be weighed even beyond whether a white incumbent was "sympathetic to the interests of minority voters"--factors such as whether a white incumbent occupied a position of legislative power.

Here we have arrived at the equivalent of Justice Potter Stewart's famous definition of pornography: You know minority representation when you see it. The majority opinion in *Georgia v. Ashcroft* is a nightmare;

it provides no coherent legal standards. Within the majority of five, only Justice Clarence Thomas kept his wits about him. He concurred with the Court's bottom line--remanding the case for further consideration in light of the majority opinion. But he reiterated his belief that his colleagues had "immersed the federal courts in a hopeless project of weighing questions of political theory." Even worse, by segregating voters "into racially designated districts . . . [they had] collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation."

THE THICKET OF CONFUSION that the Court created in *Georgia v. Ashcroft* is fully apparent in the Justice Department staff memo written a few months later and leaked to the press in late 2005. It recommended that the attorney general reject the 2003 Texas congressional districting map. The attorney general's subsequent decision to approve that map was resented by the career attorneys, eventually resulting in the leak.

The 73-page memo took up the question of the legality of the Texas map in light of *Georgia v. Ashcroft*. Both Texas and the Justice staff attorneys agreed that a new plan must not reduce the number of districts that sent blacks or Hispanics to Congress. One matter in dispute was whether three districts where white Democrats had been elected could be altered. Texas argued these districts were not sacred--that they were not among the districts that must be protected in calculating fair minority representation. That is, they need not "provide minority voters with the ability to elect candidates of choice." The authors of the memo had a different view.

The first of the three disputed districts--number 24 under the old plan--was majority-white in voting-age population. It had elected Martin Frost, whom the memo depicted as a "candidate of choice" for minority voters because he was "responsive" to their interests. He was also the dean of the Texas congressional delegation and thus a political powerhouse. Here we see the first fruit of *Georgia*: a white Democrat entitled to his seat under the Voting Rights Act because he is said to represent minority voters.

The second of the three districts--number 25--had been represented by Chris Bell. The memo argued that Bell, too, was "responsive" to black and Hispanic interests and therefore that his district should be left as it was, even though the designers of the 2003 plan deemed their new District 9 more likely to elect a black. Time would bear them out: In the 2004 election, held under the new district lines, District 9 elected Al Green, adding a third black congressman to the Texas delegation. Throughout the memo, the career attorneys attempted to read political tea leaves, predicting the race or political sympathies of candidates to be elected from the various districts under the new plan. It was a practice invited by Justice O'Connor's opinion, but, as the example of District 9 suggests, attorneys in Washington were (inevitably) not very good at it.

The third district, number 29, had been represented by Gene Green. But Rep. Green, the memo said, quoting a Houston city councilman, was "basically Hispanic himself." It was an interesting description. In the Jim Crow South, white civil rights workers were often depicted as "black." And there are blacks who are trashed by their political enemies as "white." In the memo, some whites are, well, not really white. It will come as no surprise that according to the staff attorneys, Rep. Henry Bonilla does not count as a Hispanic because he is a Republican.

A disastrous Supreme Court opinion cannot be held entirely responsible for the ideologically driven work of career attorneys in the Justice Department, but it did give those attorneys permission to spin a tale based on highly dubious assumptions about racial identity and minority representation.

THE QUESTIONS before the Court on March 1--arising from several combined cases--are much the same as those discussed in the leaked memo. The brief for the United States filed in the Texas case focuses entirely on race-related questions, on the assumption that some minimum clarity in voting rights law is

desperately needed. The briefs submitted by the NAACP Legal Defense and Educational Fund and other civil rights groups representing minority plaintiffs only confirm the need for a fresh and hard judicial look at the legal standards governing the Voting Rights Act. All players in this drama have strayed far from the bedrock idea of eliminating black disfranchisement. All of them must at some level know what even Justice O'Connor acknowledged: that the race-driven districting that has become pervasive--and accepted by both left and right--is harmful.

"Racial classifications with respect to voting carry particular dangers," Justice O'Connor wrote in 1993. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." Well said, and too soon forgotten.

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