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*Fourteenth Amendment — Equal Protection Clause — Racial  
Gerrymandering — Alabama Legislative Black Caucus v. Alabama*

Following the Voting Rights Act of 1965<sup>1</sup> (VRA), Congress required a number of states — particularly Southern ones with a history of disenfranchising blacks — to gain preclearance from the Department of Justice (DOJ) before enacting voting-law changes.<sup>2</sup> But in 2013 with *Shelby County v. Holder*,<sup>3</sup> the Supreme Court struck down section 4, the VRA’s preclearance coverage formula, ending preclearance’s reign.<sup>4</sup> Consequently, many previously covered or partially covered jurisdictions — including Alabama, North Carolina, and Virginia — pushed forward voting laws that had been stalled in preclearance or rejected by federal courts and the DOJ for their impact on racial minorities.<sup>5</sup> Last Term, in *Alabama Legislative Black Caucus v. Alabama*,<sup>6</sup> the Supreme Court held that Alabama’s goal of roughly equal populations across voting districts — purportedly motivated by the ideal of “one person, one vote” — is not one of the “traditional” factors to be weighed against the State’s use of race in determining whether race impermissibly predominates redistricting decisions.<sup>7</sup> The Court logically extended its precedent and then vacated lower court decisions in North Carolina<sup>8</sup> and Virginia,<sup>9</sup> demonstrating that the Court’s decision will require lower courts to police redistricting plans more carefully.<sup>10</sup> This development, however, pales in comparison to the great harm to voting rights in the South resulting from *Shelby County* and from the difficulty in separating race- and party-based motivations in policing gerrymandering.

The ideal of “one person, one vote” has been central to the constitutional requirements of American election law since *Baker v. Carr*<sup>11</sup> and

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<sup>1</sup> 52 U.S.C.A. §§ 10101, 10301–10313, 10501–10702 (West 2015), *invalidated in part* by *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

<sup>2</sup> See GARY MAY, BENDING TOWARD JUSTICE 251 (2013).

<sup>3</sup> 133 S. Ct. 2612.

<sup>4</sup> *Id.* at 2631.

<sup>5</sup> Kara Brandeisky, Hanqing Chen & Mike Tigas, *Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), <http://www.propublica.org/article/voting-rights-by-state-map> [<http://perma.cc/Q27H-YJFU>].

<sup>6</sup> 135 S. Ct. 1257 (2015).

<sup>7</sup> *Id.* at 1270–71.

<sup>8</sup> *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (mem.).

<sup>9</sup> *Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) (mem.).

<sup>10</sup> For a compelling account of many states’ flawed interpretations of the VRA’s requirements, see Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 42 FLA. ST. U. L. REV. (forthcoming 2015).

<sup>11</sup> 369 U.S. 186 (1962) (holding that plaintiffs had standing and raised a justiciable constitutional cause of action in challenging an apportionment plan, *id.* at 237).

*Reynolds v. Sims*.<sup>12</sup> The Equal Protection Clause's requirements have created a complex balance among achieving districts of roughly equal population, ensuring minority voting power through concentrated majority-minority districts as required by the VRA, and preventing "packing" or gerrymandering too many minority voters into one district to dilute their overall voting strength.<sup>13</sup> The Equal Protection Clause requires that laws that expressly distinguish among citizens based on race or that are unexplainable on other grounds be narrowly tailored to further a compelling government interest.<sup>14</sup> However, traditional districting principles such as "'compactness, contiguity, [. . .] respect for political subdivisions or communities defined by actual shared interests,' incumbency protection, and political affiliation"<sup>15</sup> "may serve to defeat a claim" of racial gerrymandering by offering an alternative explanation for a redistricting plan's disproportionate racial effect.<sup>16</sup> Conversely, claims of partisan gerrymandering are generally nonjusticiable because there is no standard for separating unconstitutional partisan gerrymanders from proper considerations of party.<sup>17</sup>

In 2012, Alabama reapportioned its 105 House and 35 Senate single-member voting districts,<sup>18</sup> as required by its constitution after each decennial census.<sup>19</sup> The State emphasized two major objectives in its redistricting plan: to minimize any district's deviation from the ideal of precisely equal population to no more than 1% and to ensure compliance with the VRA's requirement of nonretrogression of minori-

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<sup>12</sup> 377 U.S. 533 (1964) (holding that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters" in elections and that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights," *id.* at 566).

<sup>13</sup> See generally Richard L. Hasen, Essay, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. (forthcoming 2015).

<sup>14</sup> *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). The Court has explained that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to . . . the doctrine of equality,'" *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)), because they "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *id.*

<sup>15</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1270 (omission in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

<sup>16</sup> *Shaw*, 509 U.S. at 647.

<sup>17</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

<sup>18</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

<sup>19</sup> ALA. CONST. art. IX, §§ 199–200. Between 2000 and 2010, Alabama's population grew 7.5%, and while the white non-Hispanic population grew 2.5%, the black population grew 7.7% and the Hispanic or Latino population grew 144.8%. See *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1240 (M.D. Ala. 2013). Because of massive growth in Alabama's minority populations, the percentage of the population composed of white non-Hispanic residents decreased 3.3%. *Id.* This population growth meant that 80 of the 105 House districts and 24 of the 35 Senate districts "deviated from the ideal population by more than 5 percent." *Id.* at 1241. Based on the 2010 census data and to satisfy "one person, one vote," an ideal Senate district would contain 136,564 people, and an ideal House district would contain 45,521 people. *Id.*

ty voting power.<sup>20</sup> Balancing these two objectives presented a quandary for Alabama. Many of the thirty-five preexisting majority-black districts were underpopulated such that the State needed to enlarge them. Alabama is a Republican-controlled state that sought to dilute Democratic voting power by concentrating additional minority voters into already–safely Democratic districts.<sup>21</sup> The State asserted that it needed to maintain at least the same black population percentage in these districts to comply with section 5.<sup>22</sup> For example, to meet the State’s equal-population ideal of less than 1% deviation, the State needed to add about 16,000 individuals to Senate District 26, where the population was 72.75% black.<sup>23</sup> To meet this need, the State added 15,785 individuals to the district, 94% of whom were black.<sup>24</sup>

The Alabama Legislative Black Caucus (the Caucus) and the Alabama Democratic Conference (the Conference) separately brought various claims, including claims of racial gerrymandering, against the State of Alabama in the U.S. District Court for the Middle District of Alabama.<sup>25</sup> The Caucus alleged that the State’s redistricting plan violated the Equal Protection Clause by discriminating on the basis of race in drawing the districts to “preserve the existing percentages of blacks in the majority-black districts.”<sup>26</sup> The Conference similarly alleged that the Alabama Legislature “subordinated traditional redistricting criteria to racial criteria when it [redrew] the majority-black districts.”<sup>27</sup> The district court consolidated their actions.<sup>28</sup>

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<sup>20</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263. As a “covered jurisdiction” under the VRA, Alabama had to ensure that any redistricting plan would not reduce minority voters’ “ability . . . to elect their preferred candidates of choice.” *Id.* (quoting 52 U.S.C. § 10304(b) (West 2015)). The no-more-than-1%-deviation standard was more stringent than precedent required. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) (reaffirming that a 10% deviation is permissible).

<sup>21</sup> Tarini Parti, *High Court Reasserts Voting Rights Act in Alabama Decision*, POLITICO (Mar. 26, 2015, 8:23 AM), <http://www.politico.com/story/2015/03/supreme-court-alabama-redistricting-ruling-116384.html> [<http://perma.cc/VG8X-FD2Y>].

<sup>22</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263; *see also Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1247.

<sup>23</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

<sup>24</sup> *Id.*

<sup>25</sup> Specifically, the Caucus brought three claims: failing to ensure the guarantee of “one person, one vote,” in violation of the Fourteenth Amendment’s Equal Protection Clause; diluting and isolating black voting strength, in violation of section 2 of the VRA; and engaging in partisan gerrymandering, in violation of the First Amendment. *See Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1237. After a hearing on several of the Caucus’s motions, the Conference brought three claims: violating section 2 of the VRA; engaging in racial gerrymandering, in violation of the Fourteenth Amendment’s Equal Protection Clause and the Fifteenth Amendment; and violating 42 U.S.C. § 1983 by infringing the rights guaranteed by the VRA and the Fourteenth and Fifteenth Amendments. *See id.*

<sup>26</sup> *Id.* at 1239.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1237.

After a bench trial before a three-judge panel, the Middle District of Alabama found in favor of Alabama.<sup>29</sup> Over Judge Thompson's dissent, the two-judge majority<sup>30</sup> found that the plaintiffs had failed to prove their racial gerrymandering claims.<sup>31</sup> First, the majority understood the Caucus's argument to be that the redistricting plan constituted a racial gerrymander of the state *as a whole*, rather than of specific districts;<sup>32</sup> the court found that the Caucus failed to prove this claim.<sup>33</sup> Second, the court concluded that the Conference lacked standing to make any racial gerrymandering claims because it did not establish that it contained individual members from any district involved, and dismissed the Conference's district-specific claims.<sup>34</sup> Third, the court concluded that race was not the predominant motivation in the redistricting decisions because the State's goal of achieving equal-population districts balanced against its use of race.<sup>35</sup> Fourth, the court held that any consideration of race was "narrowly tailored" to the State's compelling interest in avoiding retrogression in the black population's percentage, per the VRA.<sup>36</sup> The plaintiffs appealed the decision directly to the Supreme Court based on 28 U.S.C. § 1253,<sup>37</sup> and the Supreme Court noted probable jurisdiction.<sup>38</sup>

The Supreme Court vacated and remanded.<sup>39</sup> Writing for the Court, Justice Breyer<sup>40</sup> held that the district court's four conclusions constituted reversible error, and remanded for the district court's reconsideration.<sup>41</sup> First, the Court held that the district court's analysis of the racial gerrymandering claims erroneously referred to the state "as a whole" rather than district-by-district.<sup>42</sup> The Court emphasized that its precedent has consistently described racial gerrymandering as a claim that race was improperly used to draw the boundaries of specific electoral districts.<sup>43</sup> While the plaintiffs relied on statewide evidence, the Court concluded that their arguments "embody the claim"

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<sup>29</sup> *Id.* at 1312.

<sup>30</sup> The majority author, Circuit Judge William Pryor, was joined by Chief Judge Watkins.

<sup>31</sup> *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1312.

<sup>32</sup> *Id.* at 1287.

<sup>33</sup> *Id.* at 1288–90.

<sup>34</sup> *Id.* at 1292.

<sup>35</sup> *Id.* at 1294.

<sup>36</sup> *Id.* at 1311.

<sup>37</sup> Under 28 U.S.C. § 1253, "any party may appeal to the Supreme Court . . . [the grant or denial of an] injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." *Id.*

<sup>38</sup> *Ala. Democratic Conference v. Alabama*, 134 S. Ct. 2697 (2014) (mem.).

<sup>39</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1274.

<sup>40</sup> Justice Breyer was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan.

<sup>41</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1274.

<sup>42</sup> *Id.* at 1268.

<sup>43</sup> *Id.* at 1265.

that specific districts were racially gerrymandered.<sup>44</sup> The Court found that the district court ignored evidence of racial gerrymandering in individual districts in finding no viable racial gerrymandering claim.<sup>45</sup>

Second, the Court held that the district court's decision that the Conference lacked standing erroneously determined that the record did not identify districts where individual members resided.<sup>46</sup> The Court found that the statement of a Conference representative<sup>47</sup> and a post-trial brief<sup>48</sup> supported the inference that the organization had members in all majority-black districts.<sup>49</sup> The Court noted that, while a district court has an independent obligation to confirm standing in a case, the Conference was entitled to an opportunity to provide evidence of member residence based on elementary principles of procedural fairness.<sup>50</sup> Thus, the Conference might have satisfied standing requirements and had a viable racial gerrymandering claim.<sup>51</sup>

Third, the Court held that the district court's calculation of race as a predominant factor erroneously considered legislative efforts to create equal-population districts.<sup>52</sup> The Court explained that, to prevail on racial gerrymandering claims, plaintiffs "must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."<sup>53</sup> However, the Court emphasized that such principles do not include equal-population goals,<sup>54</sup> which play a different role: the ideal of "one person, one vote" always operates in the background, but the "traditional" principles determine "*which* voters the legislature decides to choose" in order to equalize populations across districts.<sup>55</sup> Because there was "strong, perhaps overwhelming, evidence" that Alabama's use of race predominated in at least Senate District 26, the Court concluded that the district court's error caused it to incorrectly examine the redistricting plan for racial gerrymandering.<sup>56</sup>

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<sup>44</sup> *Id.* at 1266.

<sup>45</sup> *Id.* at 1267–68.

<sup>46</sup> *Id.* at 1268–70.

<sup>47</sup> *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1292 (M.D. Ala. 2013) (noting Dr. Joe Reed's testimony that the Conference "has members in almost every county in Alabama").

<sup>48</sup> Newton Plaintiffs Proposed Findings of Fact & Conclusions of Law at 3–4, *Ala. Legislative Black Caucus*, 989 F. Supp. 2d 1227 (No. 2:12-CV-01081).

<sup>49</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1269.

<sup>50</sup> *Id.* at 1269–70.

<sup>51</sup> The Court remanded this issue and required that the district court reconsider the Conference's standing "by permitting the Conference to file its list of members and permitting the State to respond, as appropriate." *Id.* at 1270.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (omission in original) (emphasis omitted) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1271; *see also id.* at 1270.

<sup>56</sup> *Id.* at 1271.

Finally, the Court held that the district court's conclusion that the redistricting plan would satisfy strict scrutiny erroneously interpreted section 5 of the VRA to require that a covered jurisdiction maintain a particular percentage of minority voters.<sup>57</sup> The Court noted that the VRA requires that a jurisdiction instead maintain the minority voters' ability to elect their candidate of choice, regardless of the specific percentage of minority voters.<sup>58</sup> Because the district court asked the wrong question, it "may well have led to the wrong answer," and therefore the Court concluded that the State's redistricting plan was not narrowly tailored to achieve the compelling interest of ensuring minority voters' ability to elect their preferred candidates.<sup>59</sup>

Justice Scalia dissented,<sup>60</sup> proclaiming that the majority's opinion produced "a sweeping holding that will have profound implications for the constitutional ideal of one person, one vote, [and] for the future of the Voting Rights Act of 1965."<sup>61</sup> Justice Scalia never explained the "profound implications" of the decision, instead principally criticizing the majority for "act[ing] as standby counsel for sympathetic litigants" by filling in gaps in the plaintiffs' trial strategy.<sup>62</sup> Justice Scalia argued that the majority improperly allowed the Conference's "more-likely-than-not" standing and erroneously overlooked the trial counsel's failure to plead that the Conference had members in each majority-black district.<sup>63</sup> Justice Scalia argued that, even if the Conference did have standing, it had not actually brought a district-by-district claim of racial gerrymandering because its comments about specific districts arose only in the context of section 2 of the VRA.<sup>64</sup> Treating the plaintiffs as separate litigants rather than as a litigation team, Justice Scalia noted that, while the Caucus advanced a theory of district-by-district gerrymandering after trial,<sup>65</sup> it cited particular districts only as to its other claims.<sup>66</sup> To Justice Scalia, the appellants' arguments were "pleaded with such opacity that, squinting hard enough, one can find them to contain just about anything," as the majority had done.<sup>67</sup>

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<sup>57</sup> *Id.* at 1272.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1274. The Court refrained from deciding whether compliance with section 5 of the VRA remained a compelling interest that could justify use of race as a predominant factor. *Id.*

<sup>60</sup> Justice Scalia was joined by Chief Justice Roberts and Justices Thomas and Alito.

<sup>61</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1274 (Scalia, J., dissenting).

<sup>62</sup> *Id.* at 1275; *see also id.* at 1275-76.

<sup>63</sup> *Id.* at 1276.

<sup>64</sup> *Id.* at 1277-78.

<sup>65</sup> *Id.* at 1280.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Justice Thomas separately dissented in order to criticize the Court's voting rights jurisprudence, which he saw as "infected with error." *Id.* at 1281 (Thomas, J., dissenting). Justice Thomas focused his criticism on the very existence of a "racial quota" in districting, rather than at

The Supreme Court's holding in *Alabama Legislative Black Caucus* comported with its precedent in finding equal population not to be a traditional districting principle, and the holding will further protect minority voters in redistricting litigation. Despite these positive developments, however, the plaintiffs' victory failed to shut the door on gerrymandering along partisan lines that strongly correlate with race.

The equal-population ideal has never been one of the Court's traditional districting principles because the ideal concerns only *how many* individuals should live in each district, not *which* individuals.<sup>68</sup> Alabama's Senate District 26 presents a useful illustration of this logic. Although the State needed to add approximately 16,000 individuals to the district to equalize district populations, the requirement of "one person, one vote" did not mandate the legislature's decision to add 14,806 blacks and 36 whites to a district that was already 72.75% black.<sup>69</sup> The majority hinted that it could not locate a race-neutral principle to explain why the legislature chose this lopsided ratio.<sup>70</sup> More broadly, although the pool of people located outside of majority-black districts was only about 17% black, the proportion of individuals added to the already majority-black districts was 64% black.<sup>71</sup> The legislature rejected several options that would have satisfied equal-population goals without concentrating blacks to such an extent.<sup>72</sup>

Justice Breyer's definitive rejection of Alabama's flawed rationale will require courts to more closely police states' redistricting plans. Last year, in *Dickson v. Rucho*,<sup>73</sup> the North Carolina Supreme Court rejected a trial court's determination that a redistricting plan for twenty-six of the thirty State Senate districts was necessarily motivated predominantly by race, noting that "legitimate considerations" such as compactness, contiguity, respect for political subdivisions, and compliance with "one-person, one-vote" standards might have justified the redistricting

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what percentage it should be. *Id.* at 1281, 1288. In his view, the policy of maintaining the same percentage of black voters in each district "forces States to segregate voters into districts based on the color of their skin," *id.* at 1282, and aims at a "vision of maximized black electoral strength, often at the expense of the voters [it] purport[s] to help," *id.* at 1288.

<sup>68</sup> *Id.* at 1271 (majority opinion).

<sup>69</sup> *Id.* at 1263; *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1318 (M.D. Ala. 2013) (Thompson, J., dissenting).

<sup>70</sup> *Ala. Legislative Black Caucus*, 135 S. Ct. at 1271–72.

<sup>71</sup> Brief for Appellants at 6–7, *Ala. Legislative Black Caucus*, 135 S. Ct. 1257 (No. 13-895).

<sup>72</sup> "[F]ramers of the 2012 plan candidly testified that they would not accept [proposals from black legislators that featured lower black populations in already majority-black districts] because they did not add enough blacks . . ." *Id.* at 10. One black state senator asked that more white voters be added to her district because she wanted to represent white voters too; her request was rejected. *Id.*

<sup>73</sup> 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015).

plan.<sup>74</sup> The North Carolina Supreme Court must now reevaluate that decision in light of *Alabama Legislative Black Caucus*.<sup>75</sup> Similarly, in *Page v. Virginia State Board of Elections*,<sup>76</sup> the U.S. District Court for the Eastern District of Virginia relied on multiple specific factors to determine that race predominated.<sup>77</sup> After the Supreme Court vacated and remanded the decision in light of *Alabama Legislative Black Caucus*,<sup>78</sup> the district court again concluded that Virginia's plan was unconstitutional based on the Court's logic<sup>79</sup> and the evidence that Virginia considered race over traditional redistricting principles.<sup>80</sup> The fact that the Court saw fit to vacate and remand in *Page* demonstrates the potential effect of its holding on lower courts' analyses of racial predominance.

While the Court's main holding will prevent states from using "one person, one vote" as a pretext for racial gerrymandering, it does not resolve the overarching concern that state legislatures will gerrymander on partisan lines that correlate strongly with race, a concern that became more pressing after *Shelby County*. Section 5 of the VRA bars "covered" jurisdictions (determined based on a formula in section 4) from enacting any change affecting voting without obtaining preclearance from either the DOJ or the U.S. District Court for the District of Columbia.<sup>81</sup> When the Court struck down the preclearance formula in *Shelby County*, it denied the DOJ the ability to preemptively block racially discriminatory changes to voting laws in previously covered jurisdictions. After *Shelby County*, section 2 of the VRA remained, providing a cause of action against state and local governments that institute voting practices resulting in discrimination against racial minorities.<sup>82</sup> Nonetheless, many predicted that *Shelby County* would seriously impede the cause of combating racial discrimination in voting.<sup>83</sup> Congressman John Lewis, who had led the march from Selma

<sup>74</sup> *Id.* at 246; *see also id.* at 254 ("[A] host of other factors were considered in addition to race, such as . . . one-person, one-vote requirements . . .").

<sup>75</sup> *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (mem.).

<sup>76</sup> 58 F. Supp. 3d 533 (E.D. Va. 2014), *vacated sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

<sup>77</sup> *Id.* at 541 (relying on statements by legislators about considering race; creation of non-compact, oddly shaped districts; and disregard for city limits, local election precincts, and voting tabulation districts).

<sup>78</sup> *Cantor*, 135 S. Ct. 1699.

<sup>79</sup> *See Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at \*5–6 (E.D. Va. June 5, 2015).

<sup>80</sup> *Id.* at \*7–15.

<sup>81</sup> *Statutes Enforced by the Voting Section*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/vot/overview.php> [<http://perma.cc/Q8KL-HVYE>] (last updated Aug. 8, 2015).

<sup>82</sup> *Id.*

<sup>83</sup> *See, e.g., Paul M. Wiley, Note, Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2117 (2014) (describing President Obama's "deep disappointment" and Attorney General Holder's labeling of *Shelby County* as "a serious setback for voting rights").

that spurred the VRA's passage, described the decision as "a dagger in the very heart" of the VRA.<sup>84</sup>

The *Shelby County* Court "tout[ed] the bounty" of section 2 in striking down section 4 and rendering section 5 inapplicable.<sup>85</sup> But section 2 and section 5 are very different. The easier-to-satisfy section 5 "employs a 'retrogression' standard, which essentially prevents election changes that constitute backsliding for minority voters in a particular jurisdiction, such as reducing the number of majority-black congressional districts."<sup>86</sup> Also, section 5 offers a "prophylactic function that allows enforcement before an unpalatable law or practice is implemented."<sup>87</sup> Through section 5, the DOJ and federal courts prevented a number of potentially unconstitutional redistricting plans from ever coming to fruition.<sup>88</sup> In contrast, section 2 requires that plaintiffs pursue lengthy litigation that will likely not be resolved until years after the challenged legislation has gone into effect.<sup>89</sup> Also, section 2 "requires a rather extensive evidentiary finding of racially polarized voting in the area in question as well as a geographically compact minority population."<sup>90</sup> By functionally nixing section 5 and emphasizing section 2 and the Equal Protection Clause, the Supreme Court made claims of unconstitutional racial gerrymandering much more difficult.

That decision struck a huge blow to the potency of the VRA and sent an "unmistakable signal" to the Southern states previously covered based on section 4's formula.<sup>91</sup> Within days of the Court's decision, five Southern states — Texas, Florida, Georgia, Mississippi, and North Carolina — signaled their intentions to bring back legislation that the DOJ had previously refused to preclear.<sup>92</sup> Because section 2 is not a perfect substitute for section 5 and requires heightened evidentiary proof, even the Supreme Court's more promising scrutiny of race as a predominant factor after *Alabama Legislative Black Caucus* may fail to eliminate voting rights hurdles that the DOJ would have easily rooted out in preclearance before *Shelby County*.

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<sup>84</sup> *Id.* at 2128.

<sup>85</sup> Sarah Kellogg, *Voting Rights Act Post-Shelby County*, WASH. LAW., Dec. 2013, at 20, 23.

<sup>86</sup> Michelle L. Davis, *The Voting Rights Act in the Wake of Shelby*, PUB. LAW., Winter 2014, at 12, 13.

<sup>87</sup> *Id.*

<sup>88</sup> Since *Shelby County*, both Texas and Mississippi have moved forward with voter ID laws that had been blocked by a federal court and under DOJ review, respectively, under the preclearance regime. Zachary Roth, *Voting Rights in Danger One Year After Shelby County Supreme Court Ruling*, MSNBC (June 25, 2014, 5:07 PM), <http://www.msnbc.com/msnbc/voting-rights-danger-one-year-after-shelby-county-supreme-court-ruling> [<http://perma.cc/V2QZ-PJN8>].

<sup>89</sup> See Dale E. Ho, *Voting Rights Litigation after Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 683–84 (2014).

<sup>90</sup> Davis, *supra* note 86, at 13.

<sup>91</sup> Kellogg, *supra* note 85, at 22.

<sup>92</sup> *Id.* at 23.

Also, partisan gerrymandering and other partisan voting restrictions present an easy pretext for racial discrimination, especially in Southern states where race correlates strongly with partisan affiliation.<sup>93</sup> For example, in defending its 2011 redistricting plan, Texas argued that the districts were “designed to help Republicans at the expense of Democrats, some of whom happen to be minorities.”<sup>94</sup> Because “race . . . [can] correlate[] closely with political behavior,”<sup>95</sup> the Court’s holding in *Alabama Legislative Black Caucus* represents a small victory against racial gerrymandering but leaves the door wide open for partisan gerrymandering with a clear racial effect. In the last five presidential elections, African Americans have voted for the Democratic presidential candidate more than 84% of the time, whereas white voters tended to favor the Republican candidate.<sup>96</sup> Because of this strong correlation, partisan gerrymandering “will often result in voting rights inequity along racial lines.”<sup>97</sup> Indeed, it remains to be seen whether Alabama will comply with *Alabama Legislative Black Caucus*, or whether it will feel “free to junk its plan and start over with one that may achieve the same political ends and keep it out of legal trouble.”<sup>98</sup> Such partisan gerrymandering with clearly racial effect could have been addressed easily in the DOJ’s preclearance stage, but litigating these cases under the Equal Protection Clause or section 2 of the VRA after *Shelby County* will prove difficult, encouraging more Southern legislatures to enact additional voter restrictions.

Thus, the Supreme Court achieved only a minor victory in correcting states’ flawed interpretations of the legal prohibition against using race as a predominant factor in redistricting decisions. The Court’s holding in *Alabama Legislative Black Caucus* did not fix a pressing problem: the ability of state legislatures to use partisan gerrymandering as a pretext for racial discrimination.

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<sup>93</sup> See Stephen D. Shaffer et al., *An Introduction to Southern Legislative Coalitions*, in *POLITICS IN THE NEW SOUTH* 1, 2 (Charles E. Menifield & Stephen D. Shaffer eds., 2005) (“As African Americans gained greater influence over Southern Democratic parties, state Republican parties benefited by conversions of white conservatives and ‘Dixiecrats’ to their ranks . . . [,] with Southern legislatures polarized between liberal African American Democrats and the ‘lily-white’ Republicans . . .”). See generally Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014).

<sup>94</sup> Defendants’ Response to Plaintiffs & the United States Regarding Section 3(c) of the Voting Rights Act at 23, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex. Aug. 5, 2013).

<sup>95</sup> See *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

<sup>96</sup> Conner Johnston, Comment, *Proportional Voting Through the Elections Clause: Protecting Voting Rights Post-Shelby County*, 62 UCLA L. REV. 236, 256 (2015).

<sup>97</sup> *Id.* at 258.

<sup>98</sup> Richard Hasen, *Opinion Analysis: A Small Victory for Minority Voters, or a Case with “Profound” Constitutional Implications?*, SCOTUSBLOG (Mar. 25, 2015, 12:33 PM), <http://www.scotusblog.com/2015/03/opinion-analysis-a-small-victory-for-minority-voters-or-a-case-with-profound-constitutional-implications> [<http://perma.cc/522T-QH54>].