Supreme Court overturns 60 years of Black enfranchisement

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Judicial conservatism used to mean strictly interpreting the law, without regard to a judge's personal views. But in last month's Louisiana vs Callais ruling, the Supreme Court's "conservative" majority bypassed section 2 of the 1965 Voting Rights Act and gave plaintiffs the near-impossible task of proving intentional racial bias in a voting discrimination claim.

I was counsel to Republican Senator Robert Dole, the author of the 1982 amendment to section 2. The whole purpose of his amendment was to reject an "intent" test. Yet, in a blatant display of judicial activism, the Supreme Court has now decided to ignore the law, overturn precedent and walk away from America's long embrace of Black enfranchisement.

The US fought a bloody civil war to end slavery and secure equal rights for Black Americans. Yet for nearly a century state and local authorities found ways to deny them those rights, especially at election time. They contrived no end of policies and practices that were "race-neutral" on their face — poll taxes, literacy tests, "good character" exams — to suppress Black voter registration and participation.

In 1965, Congress passed the VRA, including Section 2's judicially enforceable ban on voting discrimination. The act led to significant increases in Black voter registration. But officials sought out new ways to dilute the Black vote. One was by redrawing voting district boundaries, and either "cracking" Black neighbourhoods — breaking them up and dispersing them among predominantly white ones — or "packing" them, cramming Black areas large enough to constitute two districts into one.

In 1973, the legality of such redistricting practices reached the Supreme Court. In White vs Regester, a Texas "packing" case, the Supreme Court held that proof of intentional discrimination was not necessary under Section 2. The White decision specified a stringent test to make such a case, focusing on the "totality of circumstances," including a history of official racial discrimination. But seven years later, the court reversed itself and concluded in Mobile vs Bolden that Section 2 required proof of intent.

That decision brought vote dilution cases to a near standstill. So Congress stepped in to restore a "results" standard in Section 2. Many conservative Senators argued this would require proportional representation. So Dole offered a compromise which drew directly from the White opinion. It incorporated the "totality of circumstances" test while explicitly stating that Blacks had an equal opportunity to voter participation, but no right to proportional representation. It received overwhelming bipartisan support.

In the following four decades, the Supreme Court repeatedly upheld the results standard. But in Callais, the Court ignored precedent and legislative language to find an implied intent requirement. Worse, it set a high bar for proving intent, minimising the relevance of past discrimination and requiring plaintiffs to "disentangle" racial factors from political motives. Because Black Americans still vote overwhelmingly for Democrats, any action undertaken by Republican officials to dilute their voting strength can now be defended as motivated by partisan advantage, not race.

Dole was a "big tent" Lincoln Republican. He wanted the GOP to compete for the Black vote. In crafting the Section 2 compromise, he was eager to show Blacks that the Republicans fully embraced voting rights. I can only imagine his dismay at the vigour with which some GOP leaders today are moving quickly to dismantle majority Black districts.

The rush to redraw the boundaries of minority-dominated districts adds to the spectacle of partisan redistricting by both parties. We all suffer from the Supreme Court's embrace of gerrymandering, but Black Americans most of all.