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Diminished Luster in Escambia County?

by Neal Devins

Escambia County, Florida v. McMillan (Docket No. 82-1295)

To be argued January 10, 1983

ISSUES

When President Reagan signed into law the 1982 amendments to the Voting Rights Act, he proclaimed: "the right to vote is the crown jewel of American liberties, and we will not see its luster diminished." The possibility of such diminution was real, in part, because the Supreme Court ruled in its 1980 *City of Mobile v. Bolden* decision that both constitutional and statutory vote dilution challenges required proof of intentional racial discrimination. (446 U.S. 55 (1980)) In response to this decision, Congress amended section 2 of the Voting Rights Act to prohibit any voting law or practice "imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color [or language minority states]." Such Congressional action led many observers to believe that statutory Voting Rights Act challenges to state and local procedures would supplant constitutional Fourteenth Amendment Equal Protection Clause and Fifteenth Amendment challenges to such procedures. The viability of Fourteenth Amendment voter dilution claims will be addressed by the Supreme Court in *Escambia County, Florida v. McMillan*.

The *Escambia County* case is of great national significance for several reasons. First, it could determine whether proof of intentional racial discrimination can be made through reliance on result-oriented indicators. Second, *Escambia County* calls into question the constitutionality of at-large elections in areas with concentrated minority populations. Third, the case might involve a determination as to the degree of deference which should be accorded to district court fact finding on civil rights matters. In addition to these issues, *Escambia County* raises the issue of whether the Florida Constitution permits unchartered county governments to unilaterally restructure their election procedures.

FACTS

The present lawsuit involves an appeal by the county to rulings that: 1) its at-large system of electing members of the Board of County Commissioners is unconstitutional, and 2) the Board of Commissioners lacks authority to modify its previous election method without voter approval of such modifications. These rulings were made by the United States District Court for the Northern District of Florida and affirmed by the Fifth Circuit United States Court of Appeals.

Escambia County voters elect their five member Board of County Commissioners in accordance with an at-large voting system. Under this system, candidates run for numbered places corresponding to the districts in which they live, but each must be elected by voters of the entire county. Although blacks comprise seventeen percent of the registered voters in Escambia County, none of the four blacks who had run for the county commission had been elected. In 1977, a class action suit was initiated on behalf of black citizens of Escambia County, who claimed that the county's at-large election scheme improperly diluted their votes and thus was infirm under several federal civil rights statutes and various constitutional provisions.

(Note: Also at issue in the 1977 litigation was the propriety of the method of election for the Pensacola City Council and the Pensacola School Board. In both situations, the district court concluded that the method of election was unconstitutional and the court of appeals affirmed that ruling. In regard to the school board, the district concluded that a 1947 Florida statute mandating an at-large system for electing board members was borne from a desire to exclude blacks. Prior to 1945, school board members were elected in single-member district elections. Candidates in these elections were selected through all-white primaries. In 1945, that election scheme was declared unconstitutional. In the next legislative session, Florida switched to at-large school board elections. The Escambia County district concluded that this change purposefully sought to dilute black voting strength through the use of an at-large system. More complex than the school board issue was the Escambia County district court's invalidation of the method of election for the Pensacola City Council. Prior to 1959, the city council consisted of ten members: five were elected from single-member wards and five were elected at-large but with a ward residency requirement. In 1959, an exclusively at-large method of election was adopted

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— apparently in response to the fact that, in 1955, a black ran a very close race against a white for one of the single-member seats. The Escambia County district court concluded that the 1959 change was racially motivated and thus invalidated the at-large method of election.

Black voters contended that both the effect and the purpose of Escambia County's at-large election scheme was to prevent black candidates from attaining a majority of the voters in the county commission elections. In support of their contention, black plaintiffs demonstrated that there had been a consistent pattern of racially polarized voting. Other circumstantial evidence was also introduced by black plaintiffs to demonstrate that the at-large system had been maintained to prevent the election of blacks: "The adverse effects of past discrimination by the state and county governments on blacks' exercise of their suffrage rights and participation in the political system, the depressed economic status of blacks in the county, the tenuousness of the state policy behind the at-large system, and the county commissioner's refusal to submit to voters a proposed referendum that would change the election system from at-large to single-member districts ... " Countering this evidence, Escambia County officials stressed their general reprehensiveness to the needs of black citizens, their opinion that at-large elections would make representative more sensitive to county needs and black plaintiff's failure to introduce any direct evidence which suggests that racial discrimination was the basis of their interest in maintaining the at-large system.

In December of 1979, the U.S. District Court for the Northern District of Florida upheld plaintiff's claims and ordered the Escambia County commissioners to submit a proposal to rectify the constitutional defect. The county commission submitted a mixed single-member/at-large election scheme which they had adopted by ordinance. The voters of Escambia County rejected this proposal in a referendum election, however. Yet, the Escambia County commissioners contended that they had authority to unilaterally pass the ordinance. The district court disagreed and mandated single-member district elections. Supreme Court cases addressing remedies for unconstitutional vote dilution have distinguished between judicially imposed and legislatively adopted plans. While a judicial remedy must employ single-member district, legislative plans may include multi-member district and at-large election components.

In February, 1981, the U.S. Court of Appeals for the Fifth Circuit reversed the district court ruling. The appellate court concluded that the Supreme Court's 1980 *Mobile v. Bolden* decision disapproved of the sort of evidence utilized by the district court in concluding that the at-large election scheme was maintained for racially discriminatory reasons. In September, 1982, the appellate court reversed its 1981 decision in response to the Su-

preme Court's decision in *Rogers v. Lodge*. (102 S.Ct. 3272 (1982))

Rogers v. Lodge, as interpreted by the appellate court, reflects a more favorable view of the circumstantial evidence which was the basis of the district court ruling. *Rogers* also requires appellate courts to defer to district courts' factual findings of intent because such findings "represent ... a blend of history and an intensely local appraisal of the design and impact of the [election system at issue] in light of past and present reality, political and otherwise." In light of *Rogers*, the appellate court concluded that the district court's ruling was within the bounds of its authority.

The appellate court also concluded that the county commission was prohibited from unilaterally restricting its election system under the Florida Constitution. The crux of this holding was that Escambia County Commission was a noncharter government and, under the state constitution, its legislative powers encompassed only those areas specifically provided by state laws. State law would have permitted the Escambia County voters to enact a reappointment scheme. Yet, the appellate court felt that state law did not specifically provide such power to the county commission. Consequently, the appellate court affirmed the district court single-member district remedy since the county commission was without power to implement its self-initiated remedial plan — a plan which would have combined components of at-large and single-member district election schemes.

Defendant Escambia County Commission appealed the appellate court ruling to the Supreme Court. Two issues predominate their appeal, namely: 1) whether the appellate court was too deferential in its review of district court factfinding, and 2) whether the Florida Constitution permits the county commission to unilaterally restructure its election system.

The thrust of the county commission's argument is that the appellate court misunderstood the Supreme Court's *Rogers v. Lodge* decision. First, the county commission contends that *Rogers* did not loosen the *Mobile v. Bolden* criteria for a finding of purposeful discrimination. Instead, *Rogers*, according to the commission, was a fact-specific decision involving a more substantial evidentiary demonstration by black plaintiffs. Second, the commission argues that *Rogers*, because of plaintiff's strong evidentiary record, does not suggest that appellate courts be especially deferential to district court findings of racially discriminatory intent. Third, the commission contends that the Escambia County district court ruling was clearly erroneous and thus should be reversed. In support of this conclusion, the commission suggests that the district court improperly relied on insignificant circumstantial evidence. Contrasting this view, black plaintiffs argue that the district court ruling should be affirmed since the commissioner's good government justification for at-large elections was unbelie-

vable. For black plaintiffs, the fact that each commissioner has special ties to one of five single-districts negates the commissioner's proffered rationale of each commissioner's serving as county — not district — representatives.

In addition to their contention that the district court's ruling on the issue of liability was clearly erroneous, the Escambia County Commission also argues that the district court was in error on the issue of remedy. Rejecting the district court view that the commission was without authority to unilaterally adopt a combined single-member/at-large voting scheme, the commission argued that Florida law authorizes it to unilaterally respond to the courts' invalidation of at-large elections. The commission contends that its authority stems from a Florida constitutional provision that permits county commissions to enact ordinances "not inconsistent with general or special law." Since Florida's requirement that nonchartered county's (which do not change their method of election through Home Rule Act referendum) have at-large elections was invalidated as it applied to Escambia County, the county commission believes that it can now act unilaterally without violating Florida law. Black plaintiffs contend that this argument is spurious. In support of this contention, black plaintiffs refer to an opinion of the state attorney general which concluded that a "[nonchartered] county is without authority under state law to enact a single-member system or other alternatives to a purely at-large election system for county commissioners."

BACKGROUND AND SIGNIFICANCE

The *Escambia County* lawsuit is of potentially great significance to Escambia County, the state of Florida and the nation. In Escambia County, a black candidate is expected to become a county commissioner under the district court ordered single-member district election plan. In Florida, the state legislature — at the suggestion of the state attorney general — is considering the enactment of legislation which could permit (or mandate) nonchartered county governments to switch from at-large to single-member district election schemes. The Florida Attorney General made this recommendation since several Florida nonchartered counties with insubstantial minority representation will incur substantial legal costs as well as have their local elections held up if area blacks challenge their at-large election procedures.

On the national level, *Escambia County* raises two important issues, namely, 1) the narrow issue of whether the Equal Protection Clause of the Fourteenth Amendment is an effective tool in voter dilution challenges, and 2) the more general issue of what constitutes proof of intentional racial discrimination. The common perception that Congress had to incorporate an "effects" or "results" oriented standard in the 1982 amendment of

section 2 of the Voting Rights Act may — to some extent — be limited by the *Escambia County* lawsuit. Excepting proof that at-large elections had a racially disproportionate effect, black plaintiffs in *Escambia County* could introduce very little in the way of hard or substantial evidence that the county commission was maintaining the at-large election system for racially discriminatory reasons. At the same time, black plaintiffs were able to introduce suggestive or circumstantial evidence which called into question the county commission's proffered "good government" rationale for at-large elections.

A Supreme Court ruling in favor of black plaintiffs on constitutional grounds would indicate that Equal Protection Clause voter dilution challenges will be successful if plaintiffs introduce: 1) proof of disproportionate impact, *plus* 2) substantial — but not overwhelming — circumstantial evidence which hints at a racially discriminatory purpose. Although section 2 of the Voting Rights Act might already mandate an identical result on statutory grounds, the constitutional ruling is significant since it establishes a standard which can only be modified by the Supreme Court, rather than the Congress.

A ruling in favor of black plaintiffs also suggests that at-large election schemes with a racially disproportionate impact in communities with a history of purposeful racial discrimination are *per se* unconstitutional. This conclusion is supported by the fact that the most significant piece of "suggestive" evidence introduced by black plaintiffs concerned the history of intentional discrimination in Escambia County and the state of Florida. At the same time, the Supreme Court could limit a holding favorable to black plaintiffs in *Escambia County* by stressing the import of other bits of "suggestive," "circumstantial" evidence.

The most significant aspect of *Escambia County* might be the Court's general ruling on what constitutes intentional racial discrimination since voting is only one context in which invidious racial discrimination might occur and since the 1982 Voting Rights Act amendments protect this right on statutory grounds. *Escambia County* might prove most significant in areas subject to racial discrimination which lack supplemental statutory protections. In the 1977 *Arlington Heights* decision, the Supreme Court set out several factors which indicate discriminatory intent. (429 U.S. 252 (1977)) They are: 1) the effect of the official action; 2) the historical background of the decision; 3) the sequence of events; 4) substantive and procedural departures, and 5) legislative history. Proof of intentional discrimination in *Escambia County* relies primarily on the first two of these five components. Consequently, a ruling in favor of black plaintiffs would suggest that a district court judge has substantial leeway to assess on a case by case basis the contours of the Equal Protection Clause protections. Again, the Supreme Court could seek to modify the

apparent breadth of such a holding by suggesting that black plaintiffs made an especially strong factual showing in *Escambia County*.

ARGUMENTS

For Black Plaintiffs

1. The Escambia County Commission violated the Equal Protection Clause of the Fourteenth Amendment by retaining for race-motivated reasons an at-large election scheme with a racially disproportionate impact.
2. The district court properly relied on substantial circumstantial evidence and thus its finding of purposeful racial discrimination was not clearly erroneous.
3. The Escambia County Commission — as a nonchartered county government — lacked authority to unilaterally implement a combination at-large/single-member election scheme.
4. The district court acted within its authority by ordering a single-member election scheme in Escambia County.

For Escambia County

1. The Escambia County Commission maintained the at-large election scheme for reasons of "good government" — not racial discrimination.
2. By failing to base its determination on "direct" evidence, the district court's finding of purposeful racial discrimination was clearly erroneous.
3. The Escambia County Commission was authorized to

unilaterally adopt a combination at-large/single-member election scheme since its action was not inconsistent with effective Florida laws.

4. The district court transgressed the county commission's legislative authority by mandating the implementation of a single-member election scheme.

AMICUS ARGUMENTS

In Support of Black Plaintiffs

The Lawyer's Committee for Civil Rights Under Law filed an amicus brief which contained an argument identical to that made by black plaintiffs.

In Support of Escambia County

The State Association of County Commissioners of Florida and twenty-one nonchartered Florida counties filed a joint amicus brief. In an effort to buttress the arguments made by Escambia County, this amicus brief stressed that: 1) the district court failed to recognize the fact specific nature of *Rogers v. Lodge* in its determination of purposeful discrimination, and 2) the county commission's authority to unilaterally adopt a combination at-large/single-member voting scheme was also supported by case law and legislative comment not cited in Escambia County's appellant brief. An amicus brief was also filed by Orange County, Florida. This brief limited itself to whether noncharter county government's may unilaterally amend voting procedures.