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Legal Sidebar

Racial Gerrymandering: Past Cases and the Supreme Court's Upcoming Decision in *Bethune-Hill II*

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On March 18, 2019, the Supreme Court is set to hear argument in *Virginia House of Delegates v. Bethune-Hill (Bethune-Hill II)*, a case raising the question of whether the Commonwealth of Virginia violated the Fourteenth Amendment's Equal Protection Clause by using race as the determinative factor in drawing its state legislative map. This case is not the Court's first encounter with Virginia's legislative map. Barely two years ago, the Court issued its decision in *Bethune-Hill v. Virginia State Board of Elections (Bethune-Hill I)*, where it reviewed a district court's determination that all of the challenged districts passed constitutional muster. Holding that the lower court had applied an incorrect legal standard for all but one of the challenged districts, the Court remanded the case for reconsideration. During the March 18 argument, the Court will review the district court's second decision, which concluded that all of the challenged districts are unconstitutional racial gerrymanders. While *Bethune-Hill II* only concerns Virginia's legislative map, it illustrates the challenges governments often face in determining the manner in which race may (or must) be taken into account in drawing district maps.

This Sidebar begins by providing an overview of the Supreme Court's racial gerrymandering jurisprudence, before discussing the Court's decision in *Bethune-Hill I* and the issues currently before the Court in *Bethune-Hill II*. The Sidebar concludes by exploring possible implications of the Court's upcoming decision on racial gerrymandering.

The Supreme Court's Racial Gerrymandering Jurisprudence

Racial gerrymandering claims are primarily based on the Fourteenth Amendment's Equal Protection Clause. That provision prohibits governments from passing laws that differentiate between persons on the basis of race without a compelling justification. The Supreme Court first recognized a claim of racial

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gerrymandering under the Equal Protection Clause in its 1993 decision of *Shaw v. Reno*. That case involved North Carolina's efforts to redraw its congressional map after the 1990 census, which entitled it to an additional seat in the U.S. House of Representatives. North Carolina's revised congressional map included two districts composed of a majority of black voters. These districts, however, were "unusually shaped," winding in "snakelike fashion" across vast swaths of the state and branching off with "finger-like extensions." Residents of these districts sued, claiming that North Carolina violated the Equal Protection Clause by drawing district boundaries with the goal of separating voters on the basis of race.

The Supreme Court agreed. Noting that the Equal Protection Clause's "central purpose" is to "prevent the States from purposefully discriminating between individuals on the basis of race," the Court concluded that this provision prohibits government entities from drawing district lines with the goal of segregating voters based on race. The Court acknowledged that it may often be difficult to prove that district lines have been drawn for this purpose, particularly as non-racial districting principles—such as compactness, contiguity, and respect for political subdivisions—may often explain the district's boundaries. At the same time, a government's failure to abide by traditional districting principles may be persuasive evidence that race was the government's primary motivator in drawing a district's lines as it did. And, at some point, district boundaries may be "so highly irregular" that they "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." In other words, the Court stated, "reapportionment is one area in which appearances do matter."

Over the years, the Court has expounded on the parameters of a racial gerrymandering claim. In 1995 in *Miller v. Johnson* and again a year later in *Shaw v. Hunt*, the Court clarified the relevance of a district's shape to a racial gerrymandering claim. While the irregularity—"bizarreness," to use the Court's word—of a district's shape may be circumstantial evidence of racial gerrymandering, the Court explained that irregularity of shape is not necessary to make out a racial gerrymandering claim. Instead, whether proven by direct evidence of legislative purpose or by circumstantial evidence—such as a bizarrely shaped district or an alternative map demonstrating that the government's non-racial goals could have been achieved with less consideration of race—the ultimate constitutional question is whether "race for its own sake" was "the legislature's dominant and controlling rationale in drawing its district lines."

Proving that racial concerns predominate is no mean feat. Redistricting, the Court has explained, is a "most difficult subject for legislatures" in light of the various "competing interests"—including racial considerations—that must be balanced in drawing legislative maps. As a result, the Court has directed that governments be accorded "discretion to exercise the political judgment" needed to accomplish this task and that courts show "extraordinary caution" before concluding that race was a government's primary motivator in drawing district boundaries. That task is made all the more difficult where there is a significant correlation between race and political affiliation—*i.e.*, where a large portion of a racial group aligns with the same political party. Where that is so, proving that race was the government's dominant motivator will be an uphill battle because the government can always identify legitimate political reasons for drawing the district's boundaries as it did. Addressing this conundrum, the Court has explained that when there exists a significant correlation between race and political affiliation in a given district, a plaintiff must prove "that the legislature could have achieved its legitimate political objectives in alternative ways" that are "comparably consistent with traditional districting principles," and would "have brought about significantly greater racial balance."

If considerations of race did predominate in drawing a district's boundaries, then the state acted unconstitutionally unless the government can identify a compelling interest justifying its use of race and show that its use of race was narrowly tailored to serve that interest. In most cases, states have relied on the need to comply with § 2 or § 5 of the Voting Rights Act (VRA) in order to justify their use of race. In the redistricting context, § 2 of the VRA prohibits changes to district boundaries that weaken minority voters' ability to elect the candidate of their choice (*i.e.*, vote dilution). VRA § 5 separately prohibits redistricting plans that reduce the "number of districts in which minority groups can elect their preferred

candidates" relative to the existing map (*i.e.*, retrogression), though § 5 was rendered inoperative by the Supreme Court's 2013 decision in *Shelby County v. Holder*. However, despite governments' repeated reliance on these provisions in the redistricting context, the Court has consistently assumed, but declined to squarely decide whether compliance with the VRA is a compelling interest.

The *Bethune-Hill* Cases: Challenges to Virginia's Legislative Map

Bethune-Hill I

This legal framework was in place when Virginia set out to redraw its state legislative districts following the 2010 census. Because Virginia was at the time subject to § 5 of the VRA, it was required to maintain the preexisting number of state legislative districts in which minorities were able to elect their preferred candidates. To satisfy this requirement, Virginia adopted a legislative map with twelve districts containing a black-voting-age population (BVAP) of at least fifty-five percent.

These districts were challenged as racial gerrymanders. A three-judge district court held a 4-day trial and concluded that race was not the primary motivator behind eleven of the twelve districts. Underlying that decision was the court's determination that considerations of race should only be found to predominate when there is an "actual conflict" between a district's boundaries and traditional districting principles and that a court's inquiry into whether racial considerations predominated should focus only on those portions of the district's boundaries that conflict with traditional districting principles. As to the remaining district (House District 75), the Court concluded that race was Virginia's primary motivator. But it also found that the Commonwealth's use of race was justified by its need to avoid retrogression under § 5 of the VRA and that its use of race was narrowly tailored to achieve that goal.

In a 2017 8-1 opinion authored by Justice Kennedy, the Supreme Court reversed the district court's decision with respect to the first eleven districts. The Court concluded that the lower court misread *Miller* and other Supreme Court precedent in holding that race should be found to predominate only where a district's boundaries conflict with traditional districting principles. Non-compliance with these principles, the Court explained, is "persuasive circumstantial evidence" that race was the legislature's primary motivator in drawing the district's boundaries, but it is not a "threshold requirement or a mandatory precondition" to prove that fact. The Court acknowledged the difficulty of showing that race predominated when traditional districting principles are respected, conceding that none of its prior decisions found that racial considerations predominated when traditional districting principles were applied. At the same time, the Court recognized that districting principles are "numerous and malleable," and that a government could "construct a plethora of potential maps" that comply with these principles while still using race as the predominant factor in drawing district boundaries.

The Court also concluded that judicial analysis of whether racial considerations predominated should not be limited to those portions of a district's boundaries that depart from traditional districting principles. Because racial gerrymandering claims proceed on a district-by-district basis, the only way of ensuring that all relevant evidence is examined is to "consider all of the lines of the district at issue."

Finally, as to House District 75, the Court agreed that Virginia's use of race was necessary to maintain compliance with § 5 of the VRA and that it was narrowly tailored to that goal. Because the parties agreed that compliance with § 5 is a compelling interest, the Court once again assumed that it was and focused its discussion on whether Virginia's use of race was narrowly tailored to that objective. In holding that Virginia had sufficient reason to conclude that a BVAP of fifty-five percent was necessary to avoid retrogression, the Court emphasized that states are not required to "determine precisely what percent minority population" is needed to comply with the VRA; instead, states need only have "good reasons" to support their identified targets. A stricter requirement, the Court observed, would not give governments the "breathing room" needed to navigate the competing aims of the VRA and the Equal Protection Clause.

Bethune-Hill II

On remand, in 2017, the district court conducted another trial on the eleven remaining districts and found that race was Virginia's dominant motivator in drawing each. It then concluded that the Commonwealth lacked sufficient evidence to support its position that a fifty-five percent BVAP was necessary to comply with § 5 of the VRA. All eleven districts were thus deemed unconstitutional.

Though the Attorney General of Virginia (representing the named defendants) declined to appeal the district court's ruling, the Virginia House of Delegates (which intervened in the case) appealed to the Supreme Court. (Plaintiffs and the Virginia Attorney General have filed briefs in the Supreme Court challenging the Virginia House of Delegate's standing to pursue an appeal.) Unlike in *Bethune-Hill I* where the district court's legal analysis was at the heart of the appeal, the arguments in *Bethune-Hill II* are focused primarily on the district court's factual findings, which involve detailed district-by-district analyses regarding the factors—political, practical, and racial—that underlie Virginia's legislative map.

Given these fact-intensive issues, the Court's decision in *Bethune-Hill II* is unlikely to significantly alter the Court's racial gerrymandering jurisprudence. It is also unlikely to resolve whether compliance with the non-retrogression mandate of § 5 is a compelling interest because both parties agree that it is and because that provision is no longer operative (except in narrow circumstances) because of the Court's decision in *Shelby County*. Still, the Court's decision could shed some light on the level of deference owed to states and other governments in drawing legislative maps. In its brief, the Virginia House of Delegates contends that the district court ignored the Supreme Court's admonition that courts must "exercise extraordinary caution" in evaluating whether race was the dominant motivator behind a district's boundaries, particularly as states are "always aware" of race when redistricting. By contrast, the plaintiffs argue that the district court complied with Supreme Court precedent to the letter. However the Court resolves this dispute, its decision could provide lower courts with concrete guidance on the level of deference federal courts must accord states navigating the redistricting process.

The Court's decision could also clarify when a government entity may rely on compliance with the VRA to justify its use of race in redistricting. With regard to *Bethune-Hill I*'s holding that a state need only have "good reasons" to believe that its use of race was necessary to comply with the VRA, the district court found that Virginia fell short of this standard because it did not conduct a sufficiently individualized analysis for each of the eleven remaining districts on whether a fifty-five percent BVAP target was necessary for VRA compliance. Now on appeal, the Virginia House of Delegates claims that the district court applied an excessively stringent evidentiary standard that does not give governments the "breathing room" *Bethune I* said they are entitled to in determining what racial composition is needed to avoid retrogression. The Court's decision could give additional guidance on how likely a VRA violation must be before a government may elevate race over other redistricting principles in drawing district boundaries.

More generally, *Bethune-Hill II* illustrates the difficulties states face in drawing legislative maps that comply with both the VRA and the Equal Protection Clause's limitations on the use of race in redistricting. These are not, however, the only hurdles they face. In addition to avoiding VRA and racial-gerrymandering liability, states must comply with the Constitution's requirement that legislative districts contain roughly the same number of persons (one person one vote), while simultaneously balancing the various political objectives—such as protecting incumbents or maintaining a partisan balance in a congressional delegation—that have traditionally played a role in redistricting. All of this, moreover, must often be accomplished swiftly (sometimes under extreme time pressure) to ensure that a lawful legislative map is in place for the post-census elections. And these complexities do not only impact state legislative maps. While *Bethune-Hill II* involves a challenge to Virginia's state legislative map, the Supreme Court's racial gerrymandering jurisprudence also applies to congressional district maps, which are predominantly prepared by state legislatures.