Supreme Court Puts Gerrymandering On Notice

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March 2, 2017

In the 1990s, the Supreme Court established that "a racially gerrymandered redistricting scheme…is constitutionally suspect" under the Equal Protection Clause of the 14th Amendment. Wednesday's more or less unanimous decision in *Bethune-Hill v. Virginia Board of Elections* confirms that the Court is not prepared to back off or cut corners on that principle.

In particular, the High Court unanimously found that a U.S. District Court had been too indulgent in reviewing Virginia officials' race-conscious drawing of lines for legislative districts.

While the High Court permits some race-conscious line drawing in order to meet the requirements of the federal Voting Rights Act, this is not a blank check. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions," warned Justice Sandra Day O'Connor in the first case in this series, *Shaw v. Reno*(Shaw I, 1993).

In that 1993 case, O'Connor and her colleagues were reviewing a set of North Carolina districts so bizarre in shape that their tactical purpose could scarcely be denied with a straight face.

Wednesday's ruling clarifies that there had not been much doubt before and that when there is other evidence of racial motivation, the process does not escape Equal Protection scrutiny just because the shape of districts appears normal and they do not visibly violate other sound principles of districting.

Justice Samuel Alito in a separate concurrence, and Justice Clarence Thomas in a partial one, would have applied even tougher scrutiny. Overall, however, the Court spoke with much unity. And that is not something to take for granted on this subject.

In both *Shaw v. Reno* (1993) and *Miller v. Johnson* (1995), four dissenting justices from the liberal wing disapproved of Equal Protection scrutiny on varying rationales. In a notably vicious editorial after Shaw I, *The New York Times* assailed O'Connor personally over what it saw as "a full-scale assault on the Voting Rights Act" intended to "punish" blacks and "sustain all-white politics."

Today, despite some academic opinion that still yearns to go back to the days when racial gerrymandering was A-OK when done with suitably progressive motives, all eight sitting

members of the Court, the liberal wing included, appear content to apply at least the Shaw-Miller level of scrutiny.

Justice Anthony Kennedy wrote Wednesday's opinion, confirming once more that he stands at the center of gravity of today's Court on redistricting issues. Much of the speculation these days is whether Kennedy is prepared to join the liberal wing in disapproving of gerrymandering done for political (typically party- and incumbent-protective) motives, as distinct from racial ones.

(By coincidence, for those interested in these issues, I have a chapter in the new eighth edition of Cato's Handbook for Policymakers on the topic of political gerrymandering, with advice on how best to reduce its prevalence at the state level.)

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