Will Supreme Court Redistricting Guidance Stick This Time?

Kimberly Strawbridge Robinson

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The U.S. Supreme Court tried yet again to clarify when states have considered race too much during the redistricting process (*Bethune-Hill v. Va. State Bd. of Elections* , U.S., No. 15-680, 3/1/17).

Its March 1 decision was a temporary victory for the black voters challenging Virginia's Republican-led redistricting process.

A lower court used the wrong standard when determining that race wasn't the predominant factor in drawing 11 of the 12 challenged districts, the court said in an opinion by Justice Anthony M. Kennedy. The eight-member court was unanimous in the judgment.

It's not clear the opinion will provide much actual guidance. Even though the case is an important technical one "about how to apply the standards in racial gerrymandering cases," it "breaks little new ground," Richard L. Hasen, of the University of California, Irvine, said on his Election Law Blog.

"The court commits to nothing other than to put the issue off for another day," Hasen told Bloomberg BNA in a message March 1 via Twitter.

But Marc Elias of Perkins Coie LLP, Washington, who argued the case for the black voters challenging the redistricting plan, disagreed.

The court made clear that states can't use mechanical, inflexible thresholds in drawing district lines, Elias told Bloomberg BNA March 1. As a practical matter, the decision will have a "significant impact" on redistricting going forward, he said.

John J. Park Jr. of Strickland Brockington Lewis LLP, Atlanta, seemed to agree. The court made it harder for legislatures to undergo redistricting, he told Bloomberg BNA March 1.

Park represented the state against racial gerrymandering claims in a previous redistricting challenge that reached the Supreme Court.

We likely won't know who's correct until after the next round of redistricting, which will follow the 2020 census.

‘Delicate Balancing.’

The high court has struggled to lay down clear rules that govern racial gerrymandering claims.

It's “exquisitely difficult” for states to draw maps that comply with the Voting Rights Act, the attorney arguing for Virginia said during oral arguments. States have to consider race under the Voting Rights Act, but they can't consider it too much or they risk violating the equal protection clause of the 14th Amendment, he said.

Redistricting is a “delicate balancing of competing considerations,” the court conceded in its opinion.

‘Misshapen Districts.’

But the process isn't only difficult for state legislatures. Courts examining the process for constitutional violations also have a hard hard time determining the proper rules.

In order to make out a successful racial gerrymandering claim, a plaintiff must first show that “race was the predominant factor motivating the legislature's” redistricting decision, the court said. That “requires proving ‘that the legislature subordinated traditional race-neutral districting principles’” to “‘racial considerations,’” it said, quoting *Miller v. Johnson*, 515 U.S. 900 (1995).

Such race-neutral redistricting principles, like compactness and contiguity, often affect the shape of a district. A district's bizarre shape or demographics can therefore be persuasive evidence that the legislature subordinated the traditional criteria for racial ones, the court said.

The court below, however, required that there be a difference between a district that would have been drawn based solely on traditional race-neutral districting principles and one that was actually drawn accounting for racial considerations. That's not the correct standard, the Supreme Court said.

The equal protection clause “does not prohibit misshapen districts,” the Supreme Court said. “It prohibits unjustified racial classifications.”

Circumstantial Evidence

“The fact is that some normal-looking maps were adopted in part from an improper motive to separate voters by race,” Walter Olson, of the libertarian think-tank Cato Institute, Washington, told Bloomberg BNA in a March 1 email.

The issue was really whether you could prove racial predominance through only direct evidence like district shape, or also through other circumstantial evidence, said Park, who was one of the trial attorneys in *Ala. Legislative Black Caucus v. Alabama*, 83 U.S.L.W. 4210, 2015 BL 82479 (2015), which the Supreme Court relied on here.

Plaintiffs can use either, the Supreme Court said. It sent the case back to the lower court to consider the circumstantial evidence.

So long as the plaintiffs can submit separate evidence that racial motivation affected the eventual choice of district lines, "the districts will need to undergo Equal Protection scrutiny," Olson, who wrote about the case on Cato At Liberty, said. That will require the state to show that the use of race was "narrowly tailored" to achieve a compelling interest, known as strict scrutiny review.

Weighty Work

One district, District 75, already underwent that stringent review. The Supreme Court agreed with the lower court that even though race predominated in the redistricting process there, the use of race was justified.

But Elias said the determination that race was justified with regard to one district doesn't mean that it's necessarily justified as to all other districts.

Park agreed, saying the lower court will have to look at the circumstances in each individual district to see if the legislature's use of race predominated but was nevertheless justified.

That's a pretty weighty inquiry, he said.

And it's a weighty burden for states undergoing redistricting too.

It's always easier just to pick one threshold for redistricting and apply it across the board, Elias said.

It's much harder to go district by district to determine what's needed to comply with the state's redistricting goals, he said.

Effect Unclear

The implications of the court's decision beyond the Virginia dispute aren't clear.

The "decision mostly clarified an issue of the standard of court review of a districting plan, and even on that shed only a small amount of new light," Olson said.

But Richard H. Pildes, an election law professor at New York University School of Law, said the decision is "highly consequential."

The case "makes clear how aggressively the federal courts are required to oversee the use of race in districting to make sure unconstitutional racial gerrymanders do not occur," Pildes, who argued *Alabama Legislative Black Caucus* for the challengers of the state redistricting plan, told Bloomberg BNA March 1 in an email.

And the decision "could well have implications for the looming partisan gerrymandering case from Wisconsin," Pildes said, referring to *Whitford v. Gill*, which the Supreme Court was

recently asked to review. The “principles settled in this case are related to crucial issues there,” he said (see related story).

Attorneys from Kirkland & Ellis LLP, Washington, who represented Virginia, didn’t return a request for comment.