DRAWING LINES: RACIAL GERRYMANDERING IN *BETHUNE-HILL V. VIRGINIA BOARD OF ELECTIONS*

SCOTT REED*

INTRODUCTION

The Supreme Court has held that legislative district-drawing merits strict scrutiny when based predominantly on race.[1] In *Bethune-Hill v. Virginia Board of Elections*,[2] the Supreme Court had to decide whether twelve Virginia challenged legislative districts, in which a one-size-fits-all 55% black voting age population ("BVAP") floor was imposed, withstood constitutional scrutiny. In particular, it had to decide whether the court below erred in: (1) concluding that the admitted use of the BVAP percentage to draw the challenged districts does not amount to racial predominance; (2) employing a standard for racial predominance that requires the use of race result in "actual conflict" with traditional districting criteria; and (3) concluding that the Virginia legislature's predominant use of race in drawing House District 75, a district in question, satisfies strict scrutiny by being narrowly tailored to serve a compelling governmental interest.[3] The Court ultimately held that the district court incorrectly applied the predominance test, but declined to hold that race predominated in the eleven districts, instead remanding the case to the district court for reexamination.[4] The Court also affirmed the district court's ruling on House District 75.[5]

This commentary will argue that the stated prioritization of the 55% BVAP percentage above all other criteria in the redistricting

* J.D. Candidate, Duke University School of Law, Class of 2018.

1. Miller v. Johnson, 515 U.S. 900, 920 (1995).
2. 137 S. Ct. 788, 800 (2017).
3. Question Presented Report, Bethune-Hill v. Va. State Bd. of Elections, 136 S. Ct. 2406, No. 15-680 (2016).
4. *Bethune-Hill*, 137 S. Ct at 800.
5. *Id.* at 800–01.

process, satisfies the predominance test set forth by the Court in *Miller v. Johnson*.[6] Accordingly, the Court should have held that race predominated in the formation of all twelve challenged districts, and remanded the case to the district court solely for strict scrutiny analysis on the eleven districts apart from House District 75. The Court should also have vacated the lower court's ruling that House District 75 passed the strict scrutiny test, and stated that the use of a BVAP number requires more than anecdotal testimony from a district's incumbent representative. Throughout its analysis, the Court should also have been mindful of substantial policy considerations that weigh in favor of increased judicial oversight of blanket BVAP targets.

I. FACTS

Following the 2010 census, the Virginia state legislature attempted to redraw the legislative districts for the Virginia House of Delegates and the Virginia Senate.[7] Delegate Chris Jones led the effort in redrawing the districts for the Virginia House.[8] During the formulation of the new districting plan ("the 2011 plan"), the House Committee on Privileges and Elections adopted a resolution with the criteria that the committee would follow in evaluating redistricting plans—those criteria were: (1) population equality among the districts; (2) compliance with the Voting Rights Act, in particular by protecting against retrogression or dilution of racial or ethnic minority voting strength; (3) contiguity and compactness of each district; (4) creating single-member districts; and (5) basing districting on factors that can create or contribute to communities of interest.[9] The resolution provided that each of the five categories would be considered, but that population equality among districts and compliance with the Voting Rights Act would be given priority.[10]

Since the Commonwealth of Virginia was a covered jurisdiction under the Voting Rights Act ("VRA") at the time the redistricting legislation was passed,[11] any new districting plan had to comply with Section 5 of the VRA. This required that any new districting plan not result in a "retrogression in the position of racial minorities with respect

6. 515 U.S. 900, 916 (1995).
7. Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505, 511 (E.D. Va. 2015).
8. *Id.*
9. *Id.* at 518.
10. *Id.*
11. *Id.* at 511.

to their effective exercise of the electoral franchise."[12] Using the previous districting regime, which contained twelve majority-minority districts, as a benchmark in an attempt to comply with Section 5 of the VRA, Delegate Jones created a House plan with twelve majority-minority districts—the twelve districts eventually challenged by Appellants.[13]

Under the pre-existing districting plan, the twelve challenged districts had BVAPs between 46.3% and 62.7%.[14] Under the 2011 plan, the BVAPs in the twelve majority-minority districts exceeded 55%,[15] ranging from 55.2% to 60.7%.[16] The 55% BVAP figure was used expressly in drawing the twelve districts.[17] Although testimony at trial was contradictory as to the source of the 55% BVAP floor, the district court found that the number was based on concerns relating to the re-election of a delegate of one of the challenged districts and on feedback from three other delegates of challenged districts.[18]

The redistricting plan was enacted into law when the Governor signed House Bill 5005 in April 2011.[19] To comply with the commands of the VRA, Virginia submitted the enacted districting plan to the Department of Justice, which pre-cleared the plan in June 2011.[20] The first election using the new districting plan was held on November 8, 2011.[21]

In December 2014, Respondents (twelve individual plaintiffs, each a citizen of one of the twelve districts) filed a complaint seeking declaratory judgment and injunctive relief prohibiting the Virginia State Board of Elections from implementing the redistricting or from conducting further elections based on those districts.[22] Respondents alleged that the twelve districts were racial gerrymanders in violation of the Equal Protection Clause.[23] The case was heard by a three-judge

12. *Id.* (citing Beer v. United States, 425 U.S. 130, 141 (1976)).
13. *Id.* at 511–12.
14. *Id.* at 519.
15. *Id.* at 520.
16. Brief for Appellants at 11, Bethune-Hill v. Va. State Bd. of Elections, 136 S. Ct. 2406 (No. 15-680) (2016) [hereinafter Brief for Petitioners].
17. *Bethune-Hill*, 141 F. Supp. 3d at 519.
18. *See id.* at 522.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 512.
23. *Id.*

district court panel, pursuant to 28 U.S.C. § 2284(a).[24] The Virginia House of Delegates and Virginia Speaker of the House William Howell intervened.[25] The case was heard by a three-judge panel for the Eastern District of Virginia in July 2015.[26]

The three-judge panel rejected the plaintiffs' claim and held that all twelve of the challenged districts satisfied the scrutiny of the Equal Protection Clause.[27] It determined that predominance requires a showing of "actual conflict" between the use of race and other criteria.[28] It determined that, under *Alabama*, evidence of BVAP threshold use suggested, but did not prove, racial predominance.[29]

To evaluate racial predominance, the majority examined, district by district, circumstantial evidence of compliance with traditional, neutral-districting criteria, including the following: contiguity, compactness, existing political subdivisions, natural geography, "nesting," precinct locations, communities of interest, and state criteria.[30] It held that the plaintiffs had proven that race was the predominant factor in the formation of only one of the twelve challenged districts—House District 75.[31] Applying a strict scrutiny test to the formation of House District 75, the majority held that Virginia's interest in compliance with the VRA was a compelling interest at the time the 2011 plan was enacted.[32] Finding that there was a "strong basis in evidence" for the use of race in drawing the districts, the majority concluded that the predominant use of race was narrowly tailored to further a compelling governmental interest.[33] The majority ultimately held that each of the twelve challenged districts withstood the Equal Protection Clause challenge and found for defendants.[34]

---

24. *Id.*
25. *Id.*
26. *Id.*
27. Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505, 571 (E.D. Va. 2015).
28. *Id.* at 524.
29. *See id.* at 532. ("*Alabama* . . . holds that racial thresholds constitute evidence, but not dispositive proof of, racial predominance.")*.*
30. *Id.* at 535–39.
31. *Id.* at 510–11.
32. *Id.* at 547.
33. *See id.* at 559 (holding that Virginia's actual compliance with the Voting Rights Act constituted a compelling state interest at the time the redistricting plan was enacted, and that the action was narrowly tailored because there was a "good reason" for the legislature to believe that the BVAP percentage employed was necessary for compliance with the VRA).
34. *Id.* at 571.

After the panel ruled in favor of the defendants, the plaintiffs filed their notice of appeal on October 26, 2015.[35] The Supreme Court granted certiorari on June 6, 2016.[36]

II. LEGAL BACKGROUND

A. The Right to Vote and the Equal Protection Clause

While the original Constitution did not explicitly protect the right to vote, subsequent amendments contained language indicating that such a right did exist.[37] In 1964, the Supreme Court expressly stated that there was a right to vote in *Wesberry v. Sanders*.[38] A contemporaneous decision, *Reynolds v. Sims*,[39] established that the Fourteenth Amendment's Equal Protection Clause required states to draw legislative districts in a way that equally weighed each citizen's vote.[40] The Court famously declared "one person, one vote" in *Gray v. Sanders*,[41] saying that a "conception of political equality" existed in the Constitution.[42]

B. Racial Gerrymandering

Gerrymandering, or district-drawing done for partisan gain, that is based on race, triggers strict scrutiny review. In *Alabama Legislative Black Caucus v. Alabama*,[43] the Court held that strict scrutiny applies if race was the "predominant" consideration in deciding to place a

35. Brief for Petitioners, *supra* note 16, at 1.

36. Bethune-Hill v. Va. State Bd. of Elections, 136 S. Ct. 2406 (2016).

37. *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex."); *id.* amend. XXIV, § 1 ("The right of citizens of the United States to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax."); *id.* amend. XXVI, § 1 ("The rights of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age.").

38. *See* 376 U.S. 1, 17–18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws . . . [o]ther rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

39. 377 U.S. 533 (1964).

40. *See id.* at 568 (holding that seats in both houses of a bicameral state legislature must be apportioned by population).

41. 372 U.S. 368 (1963) (holding that a state's county unit system which, while giving every qualified voter in a statewide election one vote, employed system which in end result weighted rural votes more heavily than urban votes, and weighted some smaller rural counties heavier than other large rural counties, violated, *inter alia*, the Equal Protection Clause).

42. *See id.* at 381.

43. 135 S. Ct. 1257 (2015).

significant number of voters within or without a given district.[44] In *Miller v. Johnson*,[45] the Court said that race predominates if the legislature "subordinated traditional race-neutral districting principles" to racial considerations.[46] These traditional districting principles include, but are not limited to, district compactness, district contiguity, and respect for current political subdivisions or communities.[47] An equal population goal is not a factor to consider in a predominance analysis, but instead is in the background of the redistricting process.[48] Evidence of racial predomination may be either circumstantial evidence of a district's shape and demographics, or direct evidence of legislative purpose.[49]

If race predominated in the drawing of district lines, a state must show that the use of race is narrowly tailored to achieve a compelling governmental interest.[50] Where VRA compliance is cited as a compelling interest, the legislature must have a "strong basis in evidence" for the use of race.[51]

C. The Voting Rights Act

Section 5 of the VRA required that a state prove that its new district lines do not cause a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[52] The Supreme Court said in *Alabama* that Section 5 of the VRA requires a state to ensure that minority voters "retain the ability to elect their preferred candidates," but not necessarily maintain the same population percentages in majority-minority districts as the prior districting plan.[53] The Court held that the coverage formula in Section 4b of the VRA is unconstitutional in 2013.[54]

Taking into account the dueling requirements of the VRA and the Equal Protection Clause, a state such as Virginia must consider race in drawing legislative districts in order to devise a plan complying with

44. *Id.* at 1264.
45. 515 U.S. 900 (1995).
46. *Id.* at 916.
47. *Id.*
48. *Alabama*, 135 S. Ct. at 1270.
49. *Miller*, 515 U.S. at 916.
50. *Alabama,* 135 S. Ct. at 1262 (citing Shaw v. Hunt, 517 U.S. 899, 907–08 (1996)).
51. *Id.* at 1274.
52. *Miller*, 515 U.S. at 906 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).
53. *Alabama*, 135 S. Ct. at 1273.
54. Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013).

Section 5 of the VRA[55]—but at the same time a state cannot subordinate traditional, race-neutral principles of district-drawing to racial considerations in drawing the district boundaries.[56]

III. ARGUMENTS

A. Petitioners' Arguments

Petitioners argue that the "actual conflict" standard used by the lower court is incorrect—since the standard for racial predominance under *Miller* and *Alabama* is merely that the legislature prioritizes race above traditional districting principles, there is no need to show any actual conflict between those principles and race.[57] According to Petitioners, by disregarding direct evidence, such as statements by Delegate Jones as to the importance of the BVAP percentage and official criteria indicating that compliance with the VRA was a priority,[58] the lower court ignores Supreme Court statements that racial targets (such as a BVAP percentage) were "strong, perhaps overwhelming evidence" of racial predomination.[59] Petitioners then argue that the majority "systematically disregarded" the role of race in the legislature's decision to structure each individual district.[60]

Petitioners contend that the direct evidence that Respondent had prioritized the 55% BVAP percentage, together with circumstantial evidence of race-based districts, proved racial predominance and merited strict scrutiny.[61] According to Petitioners, the lower court either ignored such evidence or failed to give it the proper weight under *Alabama*.[62]

Petitioners contend that none of the twelve challenged districts would satisfy strict scrutiny.[63] Petitioners argue first that the lower court used an incorrect legal framework in addressing whether the use of race

55. *See Miller,* 515 U.S. at 916 (stating that the VRA requires that any proposed change not result in the retrogression in the position of racial minorities with respect to their electoral franchise).

56. *See id*. (stating that plaintiffs in a racial gerrymandering case must show that the legislature subordinated traditional criteria to racial considerations).

57. Brief for Petitioners, *supra* note 16, at 16.

58. *Id.* at 20–29.

59. *Id.* at 12 (quoting Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1263, 1267, 1271 (2015)).

60. *See id.* at 30–56 (discussing each of the twelve districts individually).

61. *Id.* at 9.

62. *Id.* at 12.

63. *Id.* at 59.

in drawing House District 75 was narrowly tailored to avoid retrogression. Instead of simply asking whether the legislature had a "strong basis in evidence" for using race, the majority invented a wholly new standard, which required showing whether a legislature could reasonably believe that deviations were not substantial.[64] Second, Petitioners argue that the lower court erred in finding that the only "strong basis" for using the BVAP figure was testimony from the representative of HD 75, advocating for more minority voters so that they could elect a candidate of their choice—an insufficient interest, according to Petitioners, to satisfy strict scrutiny.[65]

B. Respondents' Arguments

Respondents argue that the district court panel correctly assessed predominance, based on language in *Alabama* stating that strict scrutiny should apply only if Petitioners prove that BVAP targets had a "direct and significant" impact on the lines as drawn.[66] Respondents concede that a BVAP target can be evidence of race-based decision-making, but state that, under *Alabama*, predominance turns on whether a legislature neglected other districting principles in order to achieve a racial goal.[67]

Respondents argue that while the Court in *Alabama* treated the use of BVAP targets as evidence of race-conscious decisions, it did not hold that the use of a BVAP target necessarily merited strict scrutiny.[68] Respondents also argue that a BVAP target is not even necessarily strong evidence of race-based decision-making, as such a target could be consistent with other traditional districting principles.[69]

Respondents also argue that the use of the BVAP percentage in drawing HD 75 was narrowly tailored, as it satisfies strict scrutiny for legislators to have had "good reasons" with "a strong basis in evidence" to make the race-based decision;[70] they additionally argue that there were good reasons to believe that maintaining a 55%+ BVAP was necessary to prevent minority retrogression.[71] They also emphasize

64. *Id.* at 56–57 (quoting *Alabama*, 135 S. Ct. at 1274).
65. *Id.* at 57–58.
66. Brief for Appellees at 20, Bethune-Hill v. Va. State Bd. of Elections, 136 S. Ct. 2406 (No. 15-680) (2016) (quoting *Alabama*, 135 S. Ct. at 1271) [hereinafter Brief for Respondents].
67. *Id.*
68. *Id.*
69. *Id.* at 22–23.
70. *Id.* at 51 (quoting *Alabama*, 135 S. Ct. at 1273).
71. *Id.* at 54.

Delegate Jones' functional analysis, using metrics such as census data, voter registration, and meetings with delegates, to argue that requiring any more from the legislature would create a demanding standard and a burden on states.[72]

IV. HOLDING

The Supreme Court announced its decision in *Bethune-Hill v. Virginia Board of Elections* on March 1, 2017.[73] The Court agreed with Petitioners that the "actual conflict" standard used by the district court was incorrect.[74] The Court stated that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or mandatory precondition in order to establish a claim of racial gerrymandering" – though it also stated that such a conflict or inconsistency could be persuasive evidence of racial predomination.[75] The Court also agreed with Petitioners that the district court gave insufficient weight to the 55% BVAP target and other evidence of racial predominance.[76] However, the Court declined the opportunity to hold that race predominated in the eleven districts, stating that the district court is best suited to determine racial predomination and, if race did predominate, to perform strict scrutiny analysis.[77] It vacated the district court's ruling with respect to eleven of the twelve challenged districts and remanded the case to the lower court.[78] With respect to House District 75, the Court affirmed the lower court's ruling that the district survived strict scrutiny, holding that the functional analysis done by Delegate Jones showed that the legislature had a strong basis in evidence to believe that a 55% BVAP floor was necessary to prevent retrogression under Section 5 of the VRA.[79]

V. ANALYSIS

This case provided the Court with an opportunity to review the application of the *Alabama/Miller* standard for racial predominance. The Court rightly criticized the lower court's use of an "actual conflict" standard for racial predominance. However, rather than simply

72. *Id.* at 55.
73. Bethune-Hill v. Va. Board of Elections, 137 S. Ct. 788 (2017).
74. *Id.* at 798.
75. *Id.* at 799.
76. *Id.*
77. *Id.* at 800.
78. *Id.* at 795.
79. *Id.* at 801.

vacating the lower court's decision and remanding, the Court should have gone further and held that the stated prioritization of the 55% BVAP percentage above all other criteria in the redistricting process showed that race predominated. Accordingly, the Court should have held that race predominated in the formation of all twelve challenged districts and remanded the case to the district court solely for strict scrutiny analysis on the eleven districts apart from House District 75. As to House District 75, the Court should also have vacated the lower court's ruling that House District 75 passed strict scrutiny, and held that anecdotal testimony from a district's incumbent representative is not a "strong basis in evidence" that a BVAP number is required. Throughout its analysis, the Court should also have been mindful of substantial policy considerations that weigh in favor of increased judicial oversight of blanket BVAP targets.

A. The BVAP Percentage as Used Here Satisfies the "Predominance" Test from Alabama *and* Miller

The stated prioritization of the BVAP percentage clearly satisfies the racial predomination test from *Alabama* and *Miller*. *Miller* stated that race predominates if it subordinates all other criteria.[80] Here, direct statements from Delegate Jones as well as officially adopted criteria for the redistricting process plainly indicate that the use of the BVAP percentage for VRA compliance predominated over all other districting criteria. The House resolution explicitly prioritized (1) equal population among districts and (2) VRA compliance; since *Alabama* has clarified that an equal population goal is not to be weighed as a factor but rather exists in the background, the adopted resolution indicates that VRA compliance was the predominant factor to be considered.[81] In addition, statements by Delegate Jones, the architect of the enacted redistricting plan, that VRA compliance was "the most important thing" and that VRA compliance "trumped everything" clearly show that race predominated.[82] There is no plainer evidence that race predominated in drawing districts than direct statements and adopted criteria that explicitly prioritize racial targets over other decision-making criteria. The Court has already said that blanket racial targets such as a fixed BVAP percentage are strong and perhaps

80. Miller v. Johnson, 515 U.S. 900, 916 (1995).
81. *See* Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1262 (2015).
82. Brief for Petitioners, *supra* note 16, at 26–27.

overwhelming evidence that race predominated.[83] Here is such a case. Accordingly, the Court should have held that a stated prioritization of racial targets above all other criteria is racial "predominance" and triggers strict scrutiny.

B. A "Strong Basis in Evidence" for the Use of a Fixed Racial Threshold for VRA Compliance Requires More Than Anecdotal Testimony from a District's Representative

As to the strict scrutiny analysis, the Court should have held that a "strong basis in evidence" for the use of race requires more than anecdotal conversations with incumbent representatives. The Court has previously required that a demanding standard be met for the government to classify based on race. In *City of Richmond v. Croson*,[84] the Court held that findings including testimony from community leaders and statistical evidence about discrepancies in minority contractor representation were insufficient to provide a strong basis in evidence that a 30% minority quota was necessary.[85] Here, the district court seemed to think that conversations with incumbent representatives, together with census data, were sufficient to justify the 55% BVAP figure. The Court should have held that this is not the case and order the district court to be more demanding in its strict scrutiny analysis.

C. Substantial Policy Considerations Weigh in Favor of Judicial Oversight

Finally, the Court should have been mindful that are also substantial policy considerations in play: the dilution of minority power in state legislatures and Congress by "packing" minority voters into a smaller number of districts and an increase in partisan gridlock due to gerrymandering merit increased scrutiny in gerrymandering cases when race is a priority in district-drawing.

The first policy consideration is that gerrymandering, intended to increase the share of minority voters in a given district, can have the effect of diluting minority power in a legislature.[86] By mandating that a

83. *Alabama*, 135 S. Ct. at 1263 (2015).
84. 488 U.S. 469 (1989).
85. *Id.* at 499–500.
86. *See* Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016), https://www.washingtonpost.com/news/wonk/wp /2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/?utm_term=.507509fa05c0.

district have a certain percentage of minority voters, a legislature can effectively dilute the power of minority voters by consolidating them into fewer districts.[87] Such practices can undermine any intended effect to increase minority representation in positions of political influence, and runs afoul of the Court's long-held belief in a "conception of political equality" within the Constitution,[88] warranting closer attention to gerrymandering based on race.

The second policy consideration is that racial gerrymandering can have the effect of polarizing statehouses and Congress itself, leading to increased gridlock and a dysfunctional political system. In many states race, while not a perfect proxy for party affiliation, is highly correlated with it.[89] Any attempt to "pack" minority voters into certain districts likely results in more "safe" electoral districts for each party, which could lead to an entrenchment of partisan gridlock, as there is no electoral incentive for representatives to moderate or cooperate with the other side. Such institutionalized polarization undermines the norms of cooperation and collaboration necessary for a functional representative democracy. The Court should have been mindful of these policy objectives when making its decision.

CONCLUSION

This case was yet another in a long line of redistricting cases. The Court did well to clarify the test for racial predominance – but should have held that the facts of this case satisfy the test. Accordingly, it should have held that race predominated in all twelve districts. As to the strict scrutiny analysis, it should also have demanded a higher standard for a "strong basis in evidence" that the 55% BVAP was needed. Additionally, in order to protect the rights of minority groups and guard against political polarization and gridlock, the Court should have placed a stronger limit on racial gerrymandering.

87. *Id.*

88. *See* Gray v. Sanders, 372 U.S. 368, 381 (1963).

89. *See Election 2016 Exit Polls, Virginia–President*, CNN (Nov. 9, 2016) http://www.cnn.com/election/results/exit-polls/virginia/president.