



1996

Recent Developments: Bush v. Vera: Subordination of Traditional Districting Principles to Achieve Minority Representation Is Violative of the Fourteenth Amendment

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Recommended Citation

Wilson, Paul J. (1996) "Recent Developments: Bush v. Vera: Subordination of Traditional Districting Principles to Achieve Minority Representation Is Violative of the Fourteenth Amendment," *University of Baltimore Law Forum*: Vol. 27 : No. 1 , Article 5.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol27/iss1/5>

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Bush v. Vera

In the plurality decision of *Bush v. Vera*, 116 S. Ct. 1941 (1996), the Supreme Court of the United States held that three Texas congressional districts violated the Fourteenth Amendment due to racial gerrymandering. In applying the precedent of *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the Court found the use of highly detailed racial data and abandonment of traditional redistricting principles, coupled with a commitment to create majority-minority districts, required the application of strict scrutiny. Further, the Court found that the bizarre district boundaries were the result of racial and not political manipulation, and thus were unconstitutional.

The 1990 national census revealed that an urban population increase entitled Texas to an additional three seats in the House of Representatives. In attempting to comply with the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., the Texas Legislature created two new districts and reconfigured another district. District Twenty-Nine became a majority Hispanic district and Districts Eighteen and Thirty were drawn to be majority African-American districts. The United States Department of Justice approved the plan and Texas employed it in the 1992 congressional elections.

The respondents, six Texas citizens residing in the reconfigured districts, filed suit, claiming that twenty-four of the thirty Texas

**Subordination Of
Traditional
Districting Principles
To Achieve Minority
Representation Is
Violative Of The
Fourteenth
Amendment**

By Paul J. Wilson

congressional districts were racially gerrymandered in violation of the Fourteenth Amendment. The United States District Court for the Southern District of Texas held that Districts Eighteen, Twenty-Nine, and Thirty were unconstitutional. The district court found the Texas Legislature at the outset strove to create majority-minority districts. In addition, the district court found that the use of sophisticated redistricting software to refine political boundaries using racial demographics resulted in a violation of equal protection. The Supreme Court of the United States granted certiorari to determine whether the racial classifications embodied in the challenged districts were narrowly tailored to serve a compelling state interest.

In beginning its analysis, the Court determined whether the respondents had been subjected to any racial classification and therefore had standing to seek relief. *Bush*, 116 S. Ct. at 1951 (citing *United States v. Hays*, 115 S. Ct.

2431, 2436 (1995)(plaintiff residing in racially gerrymandered district was denied equal protection by state legislature)). Applying the *Hays* rationale, the Court found that the Respondents had standing to challenge Districts Eighteen, Twenty-Nine, and Thirty. *Id.*

Next, the Court examined its criteria for establishing whether an election district is subject to strict scrutiny. The Court noted that strict scrutiny applies to redistricting legislation that is so irregular that segregation of the races for voting purposes is the only rational conclusion. *Id.* at 1951 (citing *Shaw v. Reno*, 509 U.S. 630, 642 (1995)). The Court also recognized that strict scrutiny applies when race ““was the legislature’s dominant and controlling rationale in drawing its district lines.”” *Id.* (quoting *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995)). Finally, the Court acknowledged that strict scrutiny does not automatically apply to intentionally created majority-minority districts. *Id.* (citing *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff’d*, 115 S. Ct. 2637 (1995)).

The Governor of Texas, the United States, and private intervenors, as petitioners, argued that the Texas Legislature’s goals included incumbency protection, in addition to creating majority-minority districts. *Id.* The Court, however, upheld the district court’s finding that the “districts at issue ‘have no

integrity in terms of traditional, neutral redistricting criteria.” *Id.* (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1339 (S.D. Tx. 1994)). The Court also agreed with the district court that direct evidence of intent to create majority-minority districts and the use of a computer mapping program to create block-by-block districts further supported the claim of racial gerrymandering. *Id.* at 1953. The Court opined that these findings weighed in favor of application of strict scrutiny, and that each of the three districts must be scrutinized to determine if race was the predominate factor in redistricting decisions. *Id.* at 1953-54.

In examining District Thirty, petitioners claimed that the boundaries had been drawn to “unite communities of interest in a single district and . . . to protect incumbents.” *Id.* at 1955. While acknowledging that a State is free to use certain data to effect political gerrymandering, the Court held that when a racial proxy is substituted for political characteristics, the application of strict scrutiny is required. *Id.* at 1956. The Court noted that, despite the correlation between race and political association, the district maps revealed “that political considerations were subordinated to racial classifications.” *Id.* at 1957. Finding that race had been used as a proxy to protect incumbency and to increase minority population within District Thirty, the Court concluded that District Thirty was subject to strict scrutiny. *Id.* at

1958.

Turning its attention to Districts Eighteen and Twenty-Nine, the Court noted the districts were inexplicably intertwined. *Id.* In affirming the district court’s finding of “utter disregard for traditional redistricting criteria,” the Court opined that the boundaries were based upon racial quotas. *Id.* at 1959-60. Accordingly, the Court upheld the district court’s finding that the district boundaries were subject to strict scrutiny. *Id.* at 1960.

Next, the Court examined whether the racial classifications embodied in the district boundaries were narrowly tailored to serve a compelling state interest. *Id.* Petitioners claimed that they were complying with § 2(a) of the Voting Rights Act, which states that a violation exists if the political processes for nomination and election are not equally open to minority participation. *Id.* (citing 42 U.S.C. § 1973(b)). In refuting this claim, the Court held that a State may not “subordinate traditional districting principles to race” to escape § 2(a) liability. *Id.* at 1961. In addition, the Court held that because the district’s bizarre shapes were dictated by racial and not political considerations, any claim that they were narrowly tailored to avoid § 2(a) liability must be precluded. *Id.* at 1962.

Petitioners next argued that Texas had a compelling interest in remedying past and present racial discrimination. *Id.* The Court noted that two conditions must be satisfied for Texas’ interest in rem-

edying discrimination to be compelling: (1) the discrimination must be identifiable, and (2) the State must have a strong evidentiary reason to conclude that remedial action is necessary. *Id.* at 1962-63. While acknowledging that petitioners were attempting to remedy the problem of vote dilution, the Court held that this situation did “not justify race-based districting unless ‘the State employ[s] sound districting principles.’” *Id.* at 1963 (quoting *Shaw*, 509 U.S. at 657).

The petitioners finally argued that the State had a compelling interest in complying with § 5 of the Voting Rights Act. *Id.* The Court discounted this argument, stating that the aim of § 5 is to prohibit the retrogression of minorities in exercising their voting franchise. *Id.* The Court held that retrogression avoidance does not grant a State freedom to act in any manner necessary to continue minority electoral success. *Id.* Thus, the Court found that District Eighteen “is not narrowly tailored to the avoidance of § 5 liability.” *Id.*

In a dissent joined by Justices Ginsburg and Breyer, Justice Stevens argued that the majority had incorrectly implemented its own racial gerrymandering tests. *Id.* at 1974. Justice Stevens believed that because the districts were the result of Texas’ attempt to comply with the Voting Rights Act, the redistricting plan satisfied strict scrutiny. *Id.* at 1975. Justice Stevens noted that a proper reading of the record would result in the conclusion that the intentional

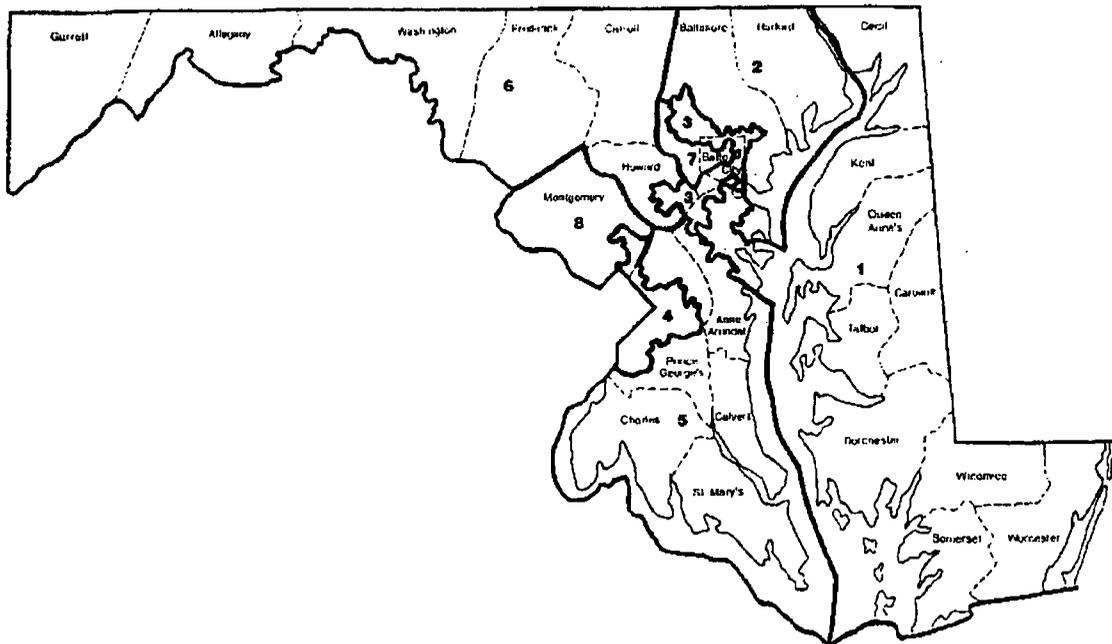
race-conscious design, protection of incumbency, and communities of interest considerations would override any suggestion that race dominated the redistricting. *Id.* at 1980.

In a separate dissent joined by Justices Ginsberg and Breyer, Justice Souter stated that the Court should outline the specific elements necessary to identify an injury distinguishable from proper constitutional conduct. *Id.* at 1997. In addition, Justice Souter argued that the Court's failure to fashion districting criteria inclusive of racial considerations would result in the Court having oversight of all redistricting efforts. *Id.*

at 1998.

The ramifications to Maryland congressional districts if challenged on the basis of *Bush v. Vera* would be felt throughout the Baltimore-Washington metropolitan region. As a result of redistricting in 1991, minority population in Maryland's Second, Third and Fifth Districts diminished, while it greatly increased in the Seventh District and the newly-created Fourth District. Barry Rascovar, *Racial Redistricting Is A Goner. Good Riddance!*, Balt. Sun, June 30, 1996, at E3. While Maryland's districts are not the result of bizarre boundary aberrations similar to the Texas districts, they do display the racial gerrymandering characteristics at issue in *Bush*. A new challenge under *Bush* could possibly succeed.

Editor's Note: Prior to *Bush v. Vera*, the Representatives for Texas Congressional Districts Eighteen, Twenty-Nine, and Thirty were Sheila Jackson Lee, Gene Green, and Eddie Bernice Johnson. Subsequent to redistricting that resulted from *Bush*, Representatives Lee and Johnson won reelection in their redrawn districts in the 1996 Congressional elections.



The Eight Congressional Election Districts of Maryland

