AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Voting/Regulating Elections

**Andino v. Middleton, \_\_\_ U.S. \_\_\_** (2020)

*Kylon Middleton was a candidate for the Charleston City Council in the November 2020 election. In May 2020 Middleton and others filed a lawsuit against Marci Andino, the Executive Director of the South Carolina State Election Commission claiming that the state requirement that all absentee ballots be signed by a witness unduly burdened voting rights during the COVID pandemic. The lower federal court agreed and issued an injunction prohibiting Andino from enforcing that voting law. The Court of Appeals for the Fourth Circuit refused to stay that order while an appeal was pending before that tribunal. Andino appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States issued a stay order, but made an exception for ballots cast while the injunction was in effect. Justice Brett Kavanaugh’s concurring opinion emphasized the importance of legislative control and not changing voting rules immediately before an election. Kavanaugh insists legislatures determine voting rules. Suppose the injunction had been issued by a state court in South Carolina on the basis of the state constitution. Would a stay still be in order? Consider also the timing of various changes. The federal district court issued a preliminary injunction in May 2020 and then ruled in favor of Middleton on September 18. The Supreme Court vacated that stay on October 5. At what point, was the effort to change the rules too late?*

The application for stay presented to THE CHIEF JUSTICE and by him referred to the Court is granted in part, and the district court's September 18, 2020 order granting a preliminary injunction is stayed pending disposition of the appeal in the United States Court of Appeals for the Fourth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. . . .

The order is stayed except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement.

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=If1893f4a072c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If1893f4a072c11ebbea4f0dc9fb69570), Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=If1893f4a072c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If1893f4a072c11ebbea4f0dc9fb69570), and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=If1893f4a072c11ebbea4f0dc9fb69570&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If1893f4a072c11ebbea4f0dc9fb69570) would grant the application in full.

Justice Kavanaugh concurring in grant of application for stay.

The District Court enjoined South Carolina's witness requirement for absentee ballots because the court disagreed with the State's decision to retain that requirement during the COVID–19 pandemic. For two alternative and independent reasons, I agree with this Court's order staying in part the District Court's injunction.

First, the Constitution “principally entrusts the safety and the health of the people to the politically accountable officials of the States.”  *South Bay United Pentecostal Church v. Newsom* (2020). “When those officials ‘undertake[ ] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad.’”  It follows that a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily “should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.”  The District Court's injunction contravened that principle.

Second, for many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents.