AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Voting

**North Carolina v. Covington, \_\_\_ U.S. \_\_\_** (2018)

*Sandra Little Covington was one of several North Carolina voters who believed they had been placed by the North Carolina legislature into racially gerrymandered state legislative districts. A lower federal court agreed with their contentions, but their remedial order was vacated by the Supreme Court of the United States. On remand, the federal court asked the North Carolina legislature to redraw legislative districts, but found that some of the redrawn districts, most notably Senate Districts 21 and 28 and House Districts 21 and 57, did not remedy the racial gerrymander, and some redrawn districts in Wake and Mecklenburg counties violated a state constitutional ban on legislative reapportionments. The district court ordered a Special Master to redraw the boundaries for those districts and then approved the districts. North Carolina appealed to the Supreme Court of the United States.*

*The Supreme Court by an 8-1 vote summarily approved the redrawn Senate and House districts, but vacated the order redrawing districts in Wake and Mecklenburg counties. The* per curiam *opinion found that the district court had sufficient evidence to conclude that race remained the predominant factor in determining the boundaries of the four districts in question and that, given that North Carolina had an opportunity to correct the racial gerrymander, the district court did not abuse judicial discretion by drawing the boundaries. The justices, however, maintained that the district court should not have interfered with Wake and Mecklenburg counties because there was no allegation of a racial gerrymander in those jurisdictions. The* per curiam *opinion distinguishes between being aware of race and making a racial gerrymander. What is that distinction? Why does that distinction matter? Is this a real difference or a verbal distinction only?*

PER CURIAM.

. . . .

. . . . [I]n the remedial posture in which this case is presented, the plaintiffs' claims that they were organized into legislative districts on the basis of their race did not become moot simply because the General Assembly drew new district lines around them. To the contrary, they argued in the District Court that some of the new districts were mere continuations of the old, gerrymandered districts. Because the plaintiffs asserted that they remained segregated on the basis of race, their claims remained the subject of a live dispute, and the District Court properly retained jurisdiction.

. . . .

. . . . While it may be undisputed that the 2017 legislature instructed its map drawers not to look at race when crafting a remedial map, what is also undisputed—because the defendants do not attempt to rebut it in their jurisdictional statement or in their brief opposing the plaintiffs' motion to affirm—is the District Court's detailed, district-by-district factfinding respecting the legislature's remedial Senate Districts 21 and 28 and House Districts 21 and 57. That factfinding . . . turned up sufficient circumstantial evidence that race was the predominant factor governing the shape of those four districts. As this Court has previously explained, a plaintiff can rely upon either “circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose” in proving a racial gerrymandering claim.  The defendants' insistence that the 2017 legislature did not look at racial data in drawing remedial districts does little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of those districts—that the districts unconstitutionally sort voters on the basis of race.

. . . [T]he District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections. Here the District Court determined that “providing the General Assembly with a second bite at the apple” risked “further draw[ing] out these proceedings and potentially interfer[ing] with the 2018 election cycle.” We conclude that the District Court's appointment of a Special Master in this case was not an abuse of discretion.

. . . . [T]his Court has long recognized “[t]he distinction between being aware of racial considerations and being motivated by them.”  The District Court's allowance that the Special Master could “consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders,” does not amount to a warrant for “racial quotas.” In any event, the defendants' assertions on this question make no real attempt to counter the District Court's agreement with the Special Master that “‘no racial targets were sought or achieved’ ” in drawing the remedial districts.

All of the foregoing is enough to convince us that the District Court's order should be affirmed insofar as it provided a court-drawn remedy for Senate Districts 21 and 28 and House Districts 21 and 57. The same cannot be said, however, of the District Court's actions concerning the legislature's redrawing of House districts in Wake and Mecklenburg Counties. There the District Court proceeded from a mistaken view of its adjudicative role and its relationship to the North Carolina General Assembly.

The only injuries the plaintiffs established in this case were that they had been placed in their legislative districts on the basis of race. The District Court's remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts. But the District Court's revision of the House districts in Wake and Mecklenburg Counties had nothing to do with that. Instead, the District Court redrew those districts because it found that the legislature's revision of them violated the North Carolina Constitution's ban on mid-decade redistricting, not federal law. Indeed, the District Court understood that ban to apply unless such redistricting was “required by federal law or judicial order.” The District Court's enforcement of the ban was thus premised on the conclusion that the General Assembly's action was not “required” by federal law.

The District Court's decision to override the legislature's remedial map on that basis was clear error. “[S]tate legislatures have primary jurisdiction over legislative reapportionment,” and a legislature's “freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands” of federal law. A district court is “not free ... to disregard the political program of” a state legislature on other bases.  Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I791ea9ac7ad711e8ab20b3103407982a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), dissenting.

I do not think the complicated factual and legal issues in this case should be disposed of summarily. I would have set this case for briefing and oral argument. I respectfully dissent.