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

Cooper v. Harris, __ U.S. __ (2017)

David Harris was a registered voter in North Carolina who claimed that the state legislature had unconstitutionally drawn congressional districts 1 and 12 in that state. General agreement existed that the state legislature had gerrymandered congressional districts. North Carolina claimed that the state legislature had engaged in a constitutional partisan gerrymander. Harris claimed that the state legislature had engaged in an unconstitutional racial gerrymander. He sued the governor of North Carolina, who by the time the case was finally adjudicated was Roy Cooper, claiming that the gerrymander violated the equal protection clause of the Fourteenth Amendment. A federal district court agreed that both districts had been racially gerrymandered. North Carolina appealed to the Supreme Court of the United States.

The Supreme Court of the United States by a 5–4 vote affirmed the District Court's opinion. Both Justice Elana Kagan's majority opinion and Justice Thomas's concurring opinion claim that North Carolina did not establish by clear and convincing evidence that the state legislature engaged only in a partisan gerrymander. Justice Samuel Alito's dissent insisted that the lower federal court was clearly wrong. Justice Alito's dissent emphasizes that litigants seeking to prove facially neutral state actions were racially motivated have to meet a demanding standard of proof. What is the source of that assertion? Is that assertion correct? Does the majority accept that assertion but find the standard met, or does the majority reject that burden? The majority and dissent also dispute whether plaintiffs claiming racial gerrymanders must produce maps demonstrating that a partisan gerrymander would have looked quite different. Whose interpretation of precedent is better? Should such maps be required as evidence of constitutional claims? In previous cases, the conservatives on the court have been far more willing to find racial gerrymanders than the liberals. Why is this case different?

JUSTICE KAGAN delivered the opinion of the Court.

. . .

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans. It prevents a State, in the absence of "sufficient justification," from "separating its citizens into different voting districts on the basis of race." When a voter sues state officials for drawing such race-based lines, our decisions call for a two-step analysis.

First, the plaintiff must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson* (1995). That entails demonstrating that the legislature "subordinated" other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to "racial considerations."

Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny. Two provisions of the VRA—§ 2 and § 5—are involved in this case. §§ 10301, 10304. Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race." . . . Section 5, at the time of the districting in dispute, worked through a different mechanism. Before this Court invalidated its coverage formula, that

section required certain jurisdictions (including various North Carolina counties) to pre-clear voting changes with the Department of Justice, so as to forestall "retrogression" in the ability of racial minorities to elect their preferred candidates.

When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. Or said otherwise, the State must establish that it had "good reasons" to think that it would transgress the Act if it did *not* draw race-based district lines. That "strong basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed.

A district court's assessment of a districting plan, in accordance with the two-step inquiry just described, warrants significant deference on appeal to this Court. . . . [T]he court's findings of fact—most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error. A finding that is "plausible" in light of the full record—even if another is equally or more so—must govern.

. . .

With that out of the way, we turn to the merits of this case, beginning (appropriately enough) with District 1. As noted above, the court below found that race furnished the predominant rationale for that district's redesign. See *supra,* at ——– – ——–. And it held that the State's interest in complying with the VRA could not justify that consideration of race. See *supra,* at ——–. We uphold both conclusions.

Uncontested evidence in the record shows that the State's mapmakers, in considering District 1, purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population. Senator (Robert) Rucho and Representative (David) Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. . . . And that objective was communicated in no uncertain terms to the legislators' consultant. Dr. (Thomas) Hofeller testified multiple times at trial that Rucho and Lewis instructed him "to draw [District 1] with a [BVAP] in excess of 50 percent."

. . . Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites—the District Court did not clearly err in finding that race predominated in drawing District 1. . . .

The more substantial question is whether District 1 can survive the strict scrutiny applied to racial gerrymanders. . . . This Court identified, in *Thornburg v. Gingles* (1986), three threshold conditions for proving vote dilution under § 2 of the VRA. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. Second, the minority group must be "politically cohesive." And third, a district's white majority must "vote[ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." Those three showings, we have explained, are needed to establish that "the minority [group] has the potential to elect a representative of its own choice" in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is "submerg[ed] in a larger white voting population." If a State has good reason to think that all the "*Gingles* preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not.

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting. For most of the twenty years prior to the new plan's adoption, African–Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%. Yet throughout those two decades, . . . District 1 was "an extraordinarily safe district for African–American preferred candidates." . . . Those victories (indeed, landslides) occurred because the district's white population did *not* "vote[ ] sufficiently as a bloc" to thwart black voters' preference, rather, a meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. . . .

. . .

. . . True enough, a legislature undertaking a redistricting must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements. And true too, an inescapable influx of additional voters into a district may suggest the possibility that its former track record of compliance can continue only if the legislature intentionally adjusts its racial composition. Still, North Carolina too far downplays the significance of a longtime pattern of white crossover voting in the area that would form the core of the redrawn District 1. And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1, created without a focus on race but however else the State would choose, could lead to § 2 liability. . . .

. . .

We now look west to District 12, making its fifth(!) appearance before this Court. . . .

Rucho and Lewis had publicly stated that racial considerations lay behind District 12's augmented BVAP (black voting-age population). . . . Hofeller confirmed that intent in both deposition testimony and an expert report. Before the redistricting, Hofeller testified, some black residents of Guilford County fell within District 12 while others fell within neighboring District 13. The legislators, he continued, "decided to reunite the black community in Guilford County into the Twelfth." Why? Hofeller responded, in language the District Court emphasized: "[I]n order to be cautious and draw a plan that would pass muster under the Voting Rights Act." . . . Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Rucho in 2011 about the district's future make-up. According to Watt, Rucho said that "his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law." . . .

Finally, an expert report by Dr. Stephen Ansolabehere lent circumstantial support to the plaintiffs' race-not-politics case. Ansolabehere looked at the six counties overlapping with District 12—essentially the region from which the mapmakers could have drawn the district's population. The question he asked was: Who from those counties actually ended up in District 12? The answer he found was: Only 16% of the region's white registered voters, but 64% of the black ones. See Ansolabehere next controlled for party registration, but discovered that doing so made essentially no difference: For example, only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did. The upshot was that, regardless of party, a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders. Those stark disparities led Ansolabehere to conclude that "race, and not party," was "the dominant factor" in District 12's design. . . .

. . .

. . . When race and politics are competing explanations of a district's lines, argues North Carolina, the party challenging the district must introduce a particular kind of circumstantial evidence: "an alternative [map] that achieves the legislature's political objectives while improving racial balance." . . . We have no doubt that an alternative districting plan, of the kind North Carolina describes, can serve as key evidence in a race-versus-politics dispute. . . . But they are hardly the *only* means. Suppose that the plaintiff in a dispute like this one introduced scores of leaked emails from state officials instructing their mapmaker to pack as many black voters as possible into a district, or telling him to make sure its BVAP hit 75%. Based on such evidence, a court could find that racial rather than political factors predominated in a district's design, with or without an alternative map. And so too in cases lacking that kind of smoking gun, as long as the evidence offered satisfies the plaintiff's burden of proof. . . . The Equal Protection Clause prohibits the unjustified drawing of district lines based on race. An alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim.[15]

North Carolina insists, however, that we have already said to the contrary—more particularly, that our decision in *Easley v. Cromartie II* (2001) imposed a non-negotiable "alternative-map requirement." . . . We there stated:

> In a case such as this one where majority-minority districts ... are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance."

. . .

. . . The Court's opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there. . . . And given the strangeness of that rule—which would treat a mere form of evidence as the very substance of a constitutional claim, we cannot think that the Court adopted it without any explanation. Still more, the entire thrust of the *Cromartie II* opinion runs counter to an inflexible counter-map requirement. If the Court had adopted that rule, it would have had no need to weigh each piece of evidence in the case and determine whether, taken together, they were "adequate" to show "the predominance of race in the legislature's line-drawing process." . . .

Rightly understood, the passage from *Cromartie II* had a different and narrower point, arising from and reflecting the evidence offered in that case. The direct evidence of a racial gerrymander, we thought, was extremely weak . . . . Hence emerged the demand quoted above, for maps that would *actually* show what the plaintiffs' had not. In a case like *Cromartie II*—that is, one in which the plaintiffs had meager direct evidence of a racial gerrymander and needed to rely on evidence of forgone alternatives—only maps of that kind could carry the day.

But this case is most unlike *Cromartie II*, even though it involves the same electoral district some twenty years on. This case turned not on the possibility of creating more optimally constructed districts, but on direct evidence of the General Assembly's intent in creating the actual District 12, including many hours of trial testimony subject to credibility determinations. That evidence, the District Court plausibly found, itself satisfied the plaintiffs' burden of debunking North Carolina's "it was really politics" defense; there was no need for an alternative map to do the same job. And we pay our precedents no respect when we extend them far beyond the circumstances for which they were designed.

JUSTICE GORSUCH took no part in the consideration or decision of this case.

JUSTICE THOMAS, concurring.

. . .

As to District 1, I think North Carolina's concession that it created the district as a majority-black district is by itself sufficient to trigger strict scrutiny. I also think that North Carolina cannot satisfy strict scrutiny based on its efforts to comply with § 2 of the VRA. In my view, § 2 does not apply to redistricting and therefore cannot justify a racial gerrymander.

As to District 12, I agree with the Court that the District Court did not clearly err when it determined that race was North Carolina's predominant motive in drawing the district. . . .

JUSTICE ALITO, with whom CHIEF JUSTICE ROBERTS and JUSTICE KENNEDY join, concurring in the judgment in part and dissenting in part.

. . .

A critical factor in our analysis [in *Easley v. Cromartie* II) was the failure of those challenging the district to come forward with an alternative redistricting map that served the legislature's political objective as well as the challenged version without producing the same racial effects. . . . Now, the challengers' failure to produce an alternative map that meets the *Cromartie II* test is inconsequential. It simply "does not matter." *Ante,* at ——.

. . . We have stressed, however, that courts are obligated to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," and "the good faith of a state legislature must be presumed." . . . [T]he Court has held, "[r]ace must not simply have been *a* motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision." This evidentiary burden "is a demanding one." . . .

. . .

The problem arises from the confluence of two factors. The first is the status under the Constitution of partisan gerrymandering. As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment." . . . The second factor is that "racial identification is highly correlated with political affiliation" in many jurisdictions. This phenomenon makes it difficult to distinguish between political and race-based decisionmaking. . . .

. . .

Cromartie II plainly meant to establish a rule for use in a broad class of cases and not a rule to be employed one time only. We stated that we were "put[ting] the matter more generally" and were describing what must be shown in cases "where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation." We identified who would carry the burden of the new rule ("the party attacking the legislatively drawn boundaries") and what that party must show (that "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" while achieving "significantly greater racial balance"). *Ibid.* And we reversed the finding of racial predominance due to the plaintiffs' failure to carry the burden established by this evidentiary rule.

. . .

This is a problem with serious institutional and federalism implications. When a federal court says that race was a legislature's predominant purpose in drawing a district, it accuses the legislature of "offensive and demeaning" conduct. . . . In addition, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" because "[i]t is well settled that reapportionment is primarily the duty and responsibility of the State." When a federal court finds that race predominated in the redistricting process, it inserts itself into that process. That is appropriate—indeed, constitutionally required—if the legislature truly did draw district boundaries on the basis of race. But if a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.

. . .

. . . But even if there are cases in which a plaintiff could prove a racial gerrymandering claim without an alternative map, they would be exceptional ones in which the evidence of racial predominance is overwhelming. This most definitely is not one of those cases. . . . For challengers like those in the present case, producing a map that meets the *Cromartie II* test should not be hard if the predominant reason for a challenged plan really was race and not politics. Plaintiffs mounting a challenge to a districting plan are almost always sophisticated litigants who have the assistance of experts, and that is certainly true in the present case. Today, an expert with a computer can easily churn out redistricting

maps that control for any number of specified criteria, including prior voting patterns and political party registration. Therefore, if it is indeed possible to find a map that meets the *Cromartie II* test, it should not be too hard for the challengers to do so. The State, on the other hand, cannot prove that no map meeting the *Cromartie II* test can be drawn. Even if a State submits, say, 100 alternative maps that fail the test, that would not prove that no such map could pass it. The relative ease with which the opposing parties can gather evidence is a familiar consideration in allocating the burden of production.

Even if we set aside the challengers' failure to submit an alternative map, the District Court's finding that race predominated in the drawing of District 12 is clearly erroneous. The State offered strong and coherent evidence that politics, not race, was the legislature's predominant aim, and the evidence supporting the District Court's contrary finding is weak and manifestly inadequate in light of the high evidentiary standard that our cases require challengers to meet in order to prove racial predominance.

. . .

. . . Dr. Hofeller assumed that District 12 would remain a "strong Democratic distric[t]." He stated that he drew "the [overall redistricting] plan to . . . have an increased number of competitive districts for GOP candidates," and that he therefore moved more Democratic voters into District 12 in order to "increase Republican opportunities in the surrounding districts."

. . .

. . . Dr. Hofeller's plan required the identification of areas of Democratic strength that were near District 12's prior boundaries. Dr. Hofeller prepared maps showing the distribution of Democratic voters by precinct, and those maps show that these voters were highly concentrated around the major urban areas of Winston–Salem (in Forsyth County), Greensboro (in Guilford County), and Charlotte (in Mecklenburg County). Dr. Ansolabehere, the challengers' expert, prepared maps showing the distribution of black registered voters in these same counties, and a comparison of these two sets of maps reveals that the clusters of Democratic voters generally overlap with those of registered black voters. In other words, the population of nearby Democrats who could be moved into District 12 was heavily black.

The upshot is that, so long as the legislature chose to retain the basic shape of District 12 and to increase the number of Democrats in the district, it was inevitable that the Democrats brought in would be disproportionately black.

. . . While plaintiffs failed to offer any alternative map, Dr. Hofeller produced a map showing what District 12 would have looked like if his computer was programmed simply to maximize the Democratic vote percentage in the district, while still abiding by the requirement of one-person, one-vote. The result was a version of District 12 that is very similar to the version approved by the North Carolina Legislature.

. . .

Finally, it must be kept in mind that references to race by those responsible for drawing or adopting a redistricting plan are not necessarily evidence that the plan was adopted for improper racial reasons. Under our precedents, it is unconstitutional for the government to consider race in almost any context, and therefore any mention of race by the decisionmakers may be cause for suspicion. We have said, however, that that is not so in the redistricting context. . . . If a State ultimately concludes that it must take race into account in order to comply with the Voting Rights Act, it must show that it had a "'strong basis in evidence' in support of the (race-based) choice that it has made." But those involved in the redistricting process may legitimately make statements about Voting Rights Act compliance before deciding that the Act does not provide a need for race-based districting. And it is understandable for such individuals to explain that a race-neutral plan happens to satisfy the criteria on which Voting Rights Act challengers might insist. In short, because of the Voting Rights Act, consideration and discussion of the racial effects of a plan may be expected.

. . .

[E]ven assuming that Congressman Watt's recollection was completely accurate, all that his testimony shows is that legislative leaders *at one point in the process* thought that they had to draw District 12 as a majority-minority district in order to comply with the Voting Rights Act; it does *not* show that they actually *did* draw District 12 with the goal of creating a majority-minority district. . . . Senator Rucho and Representative Lewis stated that they ultimately turned away from the creation of a majority-minority district after consulting with Congressman Watt. "Based in part on this input from Congressman Watt," they said they decided *not* to draw the district as the 1992 Department of Justice had suggested—that is, as a majority-minority district.

. . .

There is no doubt . . . that Dr. Hofeller also made a few statements that may be read to imply that concern about Voting Rights Act litigation was part of the motivation for the treatment of Guilford County. . . . But in order to prevail, the plaintiffs had to show much more—that race was the *predominant* reason for the drawing of District 12, and these few bits of testimony fall far short of that showing.

. . . For reasons similar to those just explained, the majority makes far too much of a statement issued by Senator Rucho and Representative Lewis on July 1, 2011, when the new districting plan was proposed. . . . Rucho and Lewis state: "Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." The majority and the District Court interpret this passage to say that Rucho and Lewis decided to move black voters from Guilford County into District 12 in order to ward off Voting Rights Act liability. . . . The statement could just as easily be understood as "an explanation by [the] legislature that *because* they chose to add Guilford County back into CD 12, the district ended up with an increased ability to elect African–American candidates, rather than the legislature explaining that they chose to add Guilford County back into CD 12 because of the [racial] results that addition created." *Id.*, at 635 (Osteen, J., concurring in part and dissenting in part) (emphasis in original). And because we are obligated to presume the good faith of the North Carolina Legislature, this latter interpretation is the appropriate one.

. . .

There is an obvious flaw in Dr. Ansolabehere's analysis. He assumed that, if race was not the driving force behind the drawing of District 12, "white and black registered voters would have approximately the same likelihood of inclusion in a given Congressional District." But that would be true only if black and white voters were *evenly distributed* throughout the region, and his own maps showed that this was not so. Black voters were concentrated in the cities located at the north and south ends of the district and constituted a supermajority of Democrats in the area covered by District 12. As long as the basic shape of the district was retained, moving Democrats from areas outside but close to the old district boundaries naturally picked up far more black Democrats than white Democrats.

. . . Our cases say that we must "'exercise extraordinary caution'" "'where the State has articulated a legitimate political explanation for its districting decision;'" the majority ignores that political explanation. Our cases say that "the good faith of a state legislature must be presumed;" the majority presumes the opposite.