AMERICAN CONSTITUTIONALISM

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

Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Voting/Reapportionment

**Wisconsin Legislature v. Wisconsin Elections Commission, \_\_ U.S. \_\_** (2022)

*After the 2020 census, the Republican-controlled Wisconsin legislature adopted new maps for legislative districts but the Democratic governor vetoed those maps. The legislature and governor turned to the state supreme court to resolve the impasse. The court chose maps submitted by the governor. The governor proposed the creation of an additional majority-black district compared to the pre-census map, which the court thought was at least compatible with the Fourteenth Amendment of the U.S. Constitution even if not required by the federal Voting Rights Act. The legislature appealed to the U.S. Supreme Court, arguing that the race-based maps violated the equal protection clause. The case arrived on the Court’s emergency docket, and a divided Court issued a decision holding that the state court had incorrectly understood the relationship between the equal protection clause and the Voting Rights Act. In March, the Court returned the case to the state supreme court in hopes that it could adopt new maps in time for the primary election in August. The Court thought the state court had not applied a sufficiently strict standard in assessing the need for creating additional race-based legislative districts.*

PER CURIAM.

. . . .

Under the Equal Protection Clause, districting maps that sort voters on the basis of race “‘are by their very nature odious.’” *Shaw v. Reno* (1993). Such laws “cannot be upheld unless they are narrowly tailored to achieving a compelling state interest.” We have assumed that comply­ing with the VRA is a compelling interest. *Cooper v. Harris* (2017). And we have held that if race is the predominant factor motivating the place­ment of voters in or out of a particular district, the State bears the burden of showing that the design of that district withstands strict scrutiny. . . .

. . . . We have construed §2 [of the VRA] to prohibit the distribution of minority voters into districts in a way that dilutes their voting power. In *Thornburg v.* *Gingles* (1986), we provided a framework for demonstrating a violation of that sort. First, three “preconditions” must be shown: (1) The minor­ity group must be sufficiently large and compact to consti­tute a majority in a reasonably configured district, (2) the minority group must be politically cohesive, and (3) a ma­jority group must vote sufficiently as a bloc to enable it to usually defeat the minority group’s preferred candidate.

. . . .

It is not clear whether the court viewed the Governor or itself as the state mapmaker who must satisfy strict scru­tiny, but the court’s application of *Cooper* was flawed either way. If the former, the Governor failed to carry his burden. His main explanation for drawing the seventh majority-black district was that there is now a sufficiently large and compact population of black residents to fill it – apparently embracing just the sort of uncriti­cal majority-minority district maximization that we have expressly rejected. . . .

. . . . If, on the other hand, the court sought to shoulder strict scrutiny’s burden itself, it fared little better. *First*, it mis­understood *Cooper*’s inquiry. The court believed that it had to conclude only that the VRA *might* support race-based dis­tricting—not that the statute required it. . . .

. . . .

The question that our VRA precedents ask and the court failed to answer is whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity. Answering that question requires an “‘“intensely local appraisal”’ of the challenged district.” When the Wisconsin Supreme Court endeavored to undertake a full strict-scrutiny analysis, it did not do so properly under our precedents, and its judgment cannot stand.

*Reverse and Remand*

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

The Court’s action today is unprecedented. In an emer­gency posture, the Court summarily overturns a Wisconsin Supreme Court decision resolving a conflict over the State’s redistricting, a decision rendered after a 5-month process involving all interested stakeholders. Despite the fact that summary reversals are generally reserved for decisions in violation of settled law, the Court today faults the State Su­preme Court for its failure to comply with an obligation that, under existing precedent, is hazy at best.

. . . .

. . . . *Cooper* . . . arose in a starkly different posture. *Cooper* out­lines the specific, burden-shifting procedure for adjudicat­ing claims brought under the Equal Protection Clause“[w]hen a voter sues state officials for drawing . . . race-based lines.” . . . It is far from clear whether this burden-shifting framework should also apply in the unusual circumstance where, as here, a state court is adopting a map in the first instance with no Equal Protection Clause claim before it.

Even accepting the assumption that this framework con­trols, it remains unclear how a court in the posture below should apply it. Again, the Wisconsin Supreme Court was selecting a map itself, not adjudicating a subsequent challenge in the manner that *Cooper* and other cases have ad­dressed. The court accepted an original action to supervise the redistricting and, with the input of the parties, designed its own process for doing so: accepting proposed maps from litigants rather than “craft[ing its] own map” and determin­ing to “choose the maps that best conform[ed] with [its] di­rectives,” even if those maps were “imperfect,” rather than “modify[ing]” the lines they drew. Alt­hough the Governor reported that he considered race in drawing his Assembly map, the Wisconsin Supreme Court selected the Governor’s map because it scored best on a race-neutral “least change” metric. Our precedents offer no clear answers to the question whose motives should be analyzed in these circumstances (the four justices who selected the map based on the “least change” criteria, the Governor, or some combination) or how. The Court does not purport to answer this question.

The Court also faults the Wisconsin Supreme Court for failing to scrutinize each of the *Gingles* preconditions inde­pendently after the parties agreed that some majority-Black districts needed to be drawn in Milwaukee. But courts generally are not mandated to investigate “‘undisputed’” and nonjurisdictional issues. . . .

This Court’s intervention today is not only extraordinary but also unnecessary. The Wisconsin Supreme Court rightly preserved the possibility that an appropriate plain­tiff could bring an equal protection or VRA challenge in the proper forum. I would allow that process to unfold, rather than further complicating these proceedings with legal confusion through a summary rever­sal.