

The Supreme Court's Election and Redistricting Law Reconsidered

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The Supreme Court 2016-2017 term saw a flurry of election, redistricting, and voting rights cases with the potential for remaking important rules governing political participation. With the passing of Justice Antonin Scalia, the decisions in these cases were made by an eight-member Court, in which the dynamic did not foreshadow the likely direction of the full court after the Gorsuch confirmation. The effect of the 2016 term is anyone's guess, but one thing is clear: it is playing out at a time when Nation's politics, impacted by race and hyper-partisanship, are in important ways framed by the Court's rulings.

The Court's 2013 holding in *Shelby County v. Holder*¹, which invalidated §4's coverage formula of the Voting Rights Act as amended in 2006², effectively rendered §5's preclearance

¹ 570 U.S. 2 (2013).

² The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. §5 of

requirements null and void. Thus, the prophylactic provision that required jurisdictions with a history of racial discrimination in electoral politics to seek approval of electoral changes from the U.S. Attorney General or a federal court in Washington, D.C. was effectively eliminated. Chief Justice John Robert's 5-4 majority opinion in *Holder* observed that "[n]early 50 years [after the adoption of the Voting Rights Act], things have changed dramatically"³. Roberts rejected the argument by respondents in *Holder* that much of the improvement in political participation "can be attributed to the deterrent effect of §5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should §5 be struck down".⁴ The problem with that theory, according to Roberts, was that "§5 would be effectively immune from scrutiny: no matter how 'clean' the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for good behavior."⁵ In *Shelby County* the Chief

the 1965 Voting Rights Act was directed at the states that had maintained regimes of racial discrimination in their electoral systems. Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, were covered in their entirety, while Arizona and North Carolina were partially covered. Other states- Alaska, Arizona, and Texas in whole and California, Florida, Michigan, New York, North Carolina, and South Dakota in part- were brought under coverage by the 1975 Amendments enacted to prohibit discrimination against language minority groups. In 2006 Congress extended the life of §5 without changing §4's coverage formula.

³ 570 U.S. at ____.

⁴ *Id.*, at ____.

⁵ *Id.*

Justice of the Supreme Court, joined by four others, simply did not believe that in the exercise of the ballot, discrimination against African Americans continued to exist in a manner and at a level that warranted federal departure from the ordinary deference due the states⁶. Unlike §2 of the Voting Rights Act, which is permanent, §5 is a temporary provision, and neither it nor its coverage formula, found in §4, was meant to exist in perpetuity. Thus, Congress was required to demonstrate a record that justified continued extension of §5 coverage of jurisdictions with ongoing conditions that justified departure from the ordinary deference due the states under “our federalism”. Congress thought it had done so. The Supreme Court, in *Shelby County v. Holder*, thought otherwise.

In the aftermath of *Holder*, a number of states and subdivisions that had been subject to §5 review, pursuant to the now-invalidated §4 coverage standard, enacted new voting provisions that would have required preclearance under the old regime. Some states eliminated early voting, preregistration of teens in anticipation of their age 18 eligibility, Sunday “souls to the polls” early voting, same day registration, out-of-precinct voting, and other measures that encouraged minority voter participation, and some enacted voter i.d. requirements purportedly aimed at the virtually non-existent phenomenon of in-person voter fraud and voter roll purges. Numerous local jurisdictions that had been subject to §5 pre-clearance adopted

⁶*Id.*, at ____ . “[T]he Act authorizes federal intrusion into sensitive areas of state and local policymaking ... and represents an extraordinary departure from the traditional course of relations between the States and the Federal Government”. (Internal quotations omitted).

electoral schemes, such as at-large districting, that diluted minority voting strength.⁷ Texas reacted to *Holder* by immediately enacting a voter photo i.d. law and other measures that would have previously required preclearance. And in an instance of local reactions to *Holder*, after the decision, Fayette County, Georgia, moved to adopt an at-large voting scheme in a special election for its board of commissioners. Arizona, Ohio, and Wisconsin passed laws restricting voter participation. Other states enacted laws aimed at increasing voter participation.

In sum, *Shelby County v. Holder* unleashed a series of actions in states previously covered by §5 and its now defunct coverage formula. Other states that were not covered also moved to adopt voter i.d. requirements that made voting more difficult.

In 2011 Alabama enacted a photo i.d. law, but never submitted it for preclearance under § 5. The day after the Supreme Court's decision in *Shelby County*, Alabama announced that it would implement the voter i.d. law. for Its 2014 elections. In 2015, after implementing the voter i.d. law, for which a driver's license is one of the primary accepted forms of identification, Alabama proposed to close thirty-one drivers' license offices in the "Black Belt" rural areas of the state. Challenged by civil

⁷ A compilation of post- *Shelby County, Alabama v. Holder* measures is available from the NAACP Legal Defense and Educational Fund, Inc.. [Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder](http://www.naacpldf.org/files/about-us/states-responses-2.11.17.pdf), www.naacpldf.org/files/about-us/states-responses-2.11.17.pdf . Also see [Thomas Lopez, Brennan Center for Justice: Shelby County: One Year Later](http://www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf), www.brennancenter.org/sites/default/files/analysis/Shelby_County_One_Year_Later.pdf .

rights advocates, the state then proposed to keep the offices open one day a month. Alabama's Republican controlled legislature drew new state legislative districts that Democrats claimed packed African American voters in a manner that significantly reduced their electoral power. In 2015 the U.S. Supreme Court, by 5-4 vote, vacated and remanded a lower court opinion on the grounds that it misapplied §5 of the Voting Rights Act by requiring a certain percentage of black voting population within a district as opposed to determining whether minority voters had an opportunity to elect representatives of choice⁸. The Alabama case also found that the district court erred when it ruled that the Alabama Democratic Caucus lacked standing to sue, and that the appropriate analysis was on the district-by-district level as opposed to the state-wide level.

Alabama Legislative Black Caucus focused on the VRA's animating purpose- to protect and guarantee political participation against racial discrimination that excluded or marginalized voters on the basis of race. Vote dilution schemes or other mechanisms that negated meaningful participation in democratic processes were squarely within the targeted wrongs contemplated by the Act's prohibitions. Legislative schemes, such as those enacted by the Alabama legislature, that "packed" minority voters in districts in order to leave adjacent districts' voter population more white, thereby limiting political influence of minority voters, can violate constitutional and statutory law just as do schemes that "cracked" minority voters to dilute their political strength.

⁸ *Alabama Legislative Black Caucus, et al. v. Alabama*, 575 U.S. (2015).

During its October 2016 Term, the Supreme Court considered several cases challenging restrictions to voting and redistricting from Virginia and North Carolina. In each instance, as it did in Alabama⁹ in the previous term, the Court has reined in redistricting efforts that packed black voters into districts where they already had, even without a majority, an opportunity to elect representatives of choice. The current raft of cases represents a change from the Voting Rights litigation of the 1980's and '90's, when, using §2 of the Voting Rights Act, black and Latino voting rights proponents pushed for majority-minority legislative districts on state and federal levels in order to elect representatives of choice¹⁰. Republicans in many jurisdictions, seizing advantage of the close relationship between race and partisanship, subsequently drew districts that packed black voters in a race-conscious manner to create districts far and above the BVAP necessary for their candidates of choice to have an opportunity to prevail. Critics of "majority-minority" districts alleged that the consequential reduction of black voter presence in adjoining districts that are left them overwhelmingly white. Republican- controlled legislatures have argued that these electoral maps are drawn on account of partisanship, and not race, while Democrats and racial minorities have argued that they are the result of racial gerrymanders.

¹⁰ *Gingles v. Thornburgh*, 476 U.S. 30, 1986.

In *Bethune Hill v. Virginia State Board of Elections*¹¹, plaintiffs, invoking the Fourteenth Amendment, challenged twelve state legislative districts drawn after the 2010 census and designed to ensure a minimum 55% BVAP in each. A three-judge federal court rejected the challenges as to all but one district on the grounds that plaintiffs did not prove, as required under *Miller v. Johnson*¹², that as the districts were drawn, race predominated over all other considerations. It was uncontested that for some time the twelve districts had been majority BVAP and satisfied the “opportunity-to-elect” VRA concerns. However, after the 2010 census many of them did not meet apportionment standards and required placement of significant numbers of new voters. The legislature, charged with satisfying the “one person, one vote” mandate and compliance with the VRA, adopted its 55% BVAP in all twelve districts in spite of variances in their racial composition. The plan, enacted with bipartisan support, was the product of negotiations between the leaders of the General Assembly and members of the legislative Black Caucus. Following litigation which invalidated a congressional redistricting plan that used the 55% BVAP scheme, twelve voters spread across the twelve state legislative districts at issue in *Bethune* districts filed suit. The three judge court divided, ruling that race did not predominate unless there is an actual conflict between the traditional redistricting criteria and race that leads to the subordination of the former.”¹³ The trial court thus analyzed the districts to determine aspects of their

¹¹ 580 U.S. (2017)

¹² 515 U.S. 900, 916 (1995).

¹³

lines that departed from traditional criteria, and upheld eleven of the twelve challenged districts. It found that in the twelfth, District 75, race predominated, but upheld it because it was designed to satisfy §5 of the VRA and it was narrowly tailored. The Court, Justice Kennedy writing, ruled that the trial court erred in applying its “actual conflict between traditional criteria and race” requirement. It reasoned that *Miller* clarified *Shaw*; if race predominates, strict scrutiny may apply even where the State respects traditional districting principles. And the Court rejected the argument that if the same lines could have been drawn using traditional districting principles, the legislature’s plan survives strict scrutiny.

Turning its attention southward from Virginia, the Supreme Court ruled in several North Carolina voting rights/redistricting cases during the October 2016 Term.

North Carolina v. North Carolina State Conference of the NAACP

In 2013, North Carolina’s Republican-controlled legislature and its then-Republican governor enacted an omnibus voting law that required voter identification, shortened the early voting period, eliminated same day registration and voting, eliminated pre-registration for teenagers before they turned eighteen, and eliminated out-of-precinct voting. In *North Carolina NAACP v. State of North Carolina*, these laws were challenged in federal district court by the NAACP and by the U.S. Department of Justice under §2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, as well as the Fourteenth and Fifteenth Amendments. Following trial, in a five- hundred- page opinion the federal

district court dismissed plaintiffs' claims, finding that they proved neither discriminatory intent nor effect¹⁴. The U.S. Court of Appeals for the Fourth Circuit reversed, finding that the North Carolina General Assembly, with "surgical precision" enacted the omnibus voting law with racially discriminatory intent.¹⁵ Together, the State, its then-Governor, the Board of Elections, and individual members of the Board in their official capacities, all sought Supreme Court review during the 2016 Term.

On May 15, 2017, the U.S. Supreme Court denied certiorari in the case, *sub nom. North Carolina, et al. v. North Carolina State Conference of the NAACP, et al.*. Chief Justice Roberts, in a statement respecting the denial of certiorari, noted that in January of 2017 a new governor and attorney general assumed office in North Carolina and subsequently moved to dismiss the pending cert. petition, before filing a supplemental motion on behalf of all petitioners. The General Assembly objected on the grounds that the State A.G. could not dismiss the petition, and that the General Assembly could hire private counsel to pursue it. Other state actors, specifically the Speaker and President *pro tempore* of the Assembly, moved to intervene to defend the legislation. Chief Justice Roberts pointed to the contest over authority with respect to the petition and admonished all to remember that "the denial of a writ of certiorari imports no expression of opinion on the merits of the case."¹⁶ Roberts wanted to be clear that the victory by the plaintiffs in *NAACP*

¹⁴ *North Carolina State Conference of NAACP v. McCrory*, 182 F. Supp. 3d 320 (2016).

¹⁵ 831 F.3d 204, 215 (2016).

¹⁶ *North Carolina v. North Carolina State Conference of the NAACP*, U.S. , (2017).

State Conference did not signal anything about the Court's direction on the voting issues presented in the case.

North Carolina v. Covington

In a *per curiam* opinion, the Supreme Court summarily affirmed a lower federal court ruling that the 2011 North Carolina General Assembly redistricting plan drawn after the 2010 census was an unconstitutional racial gerrymander. In 2016 the federal district court ruled that race was the predominant factor in drawing nineteen state house districts and nine state senate districts¹⁷. The court further found that in none of these districts was the use of race supported by a strong basis in evidence that they were necessary to comply with the VRA; nor were they narrowly tailored. The trial court refused to order new maps for the November 2016 elections, but ordered the State to draw new maps for any subsequent General Assembly elections. Several weeks after the November elections the court ordered the State to draw new maps by March 1, 2017 for a special election in the fall of 2017, and ordered adjustments to be made in the terms of state representatives elected. Residency requirements for the special elections would be suspended. North Carolina appealed the remedial order, arguing that the trial court did not adequately weigh any equitable considerations. The Supreme Court agreed and vacated the order and remanded for further proceedings, noting that the court below failed to adequately grapple with the interests on both sides of the remedial question.

¹⁷ 316 F.R.D. 117, 176(MDNC 2016).

Cooper v. Harris

In *Cooper*, the Supreme Court ruled 5-3, with Justice Kagan writing for the majority (Thomas, Ginsburg, Breyer and Sotomayor), that North Carolina excessively used race in drawing two congressional districts following the 2010 census. The State needed to add 100,000 people to District 1 to comply with the one-person, one vote principles established by the Court in *Baker v. Carr*¹⁸ (ruling that reapportionment claims are justiciable) and its progeny¹⁹. It drew those persons from heavily black Durham, increasing BVAP from 48.6% to 52.7%. District 12 BVAP was increased to 50.7% from 43.8%. A three-judge district court found that racial considerations predominated in drawing both districts, and rejected the State's VRA justification as to District 1. In drawing District 1, the State wrongly proceeded, in the face of the Supreme Court's recent precedent²⁰, on the assumption that in order to comply with §2 of the Voting Rights Act, it had to create a majority-minority district. It further found that the State did not proffer a justification for considering race in constructing District 12. The Court rejected the argument that the Legislature increased the number of black voters and decreased the number of white voters in District 12 in order to comply

¹⁸ 396 U.S. 186 (1962).

¹⁹ *Wesberry v. Sanders*, 376 U.S. 1 (1964) (one person, one vote applied to congressional redistricting); *Reynolds v. Sims*, 372 U.S. 533 (1964) (state legislative redistricting); *Gray v. Sanders*, 372 U.S. 368 (1963) (state county districts).

²⁰ *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. at ___ - ___ (slip op., at 1-18).

with §5 of the Voting Rights Act²¹. Nor did the Court accept the argument that where partisan and racial reasons were advanced for district lines, plaintiffs were required to proffer a map that would achieve the partisan purposes while improving racial balance.

The State further argued that a similar suit in state court²², in which the N.C. Supreme Court affirmed a lower court ruling rejecting racial gerrymandering allegations, barred the *Cooper* federal court action. The Supreme Court, however, ruled that the State failed to show that the parties in the two action were the same, rejected the State's preclusion arguments and, applying Fed. R. Civ. P.52 (a) (6), found that the federal trial court did not commit clear error. Although the state supreme court applied its own clear error rule to affirm the North Carolina trial court's rejected gerrymander claim, the federal three-judge court was not bound by the State's factual findings, and the federal court's factual findings were reasonable. The Supreme Court in *Cooper* upheld findings that North Carolina drew its Twelfth Congressional District in violation of the Equal Protection Clause.

In its consideration of N.C. Congressional District 1 the Court rejected the argument that that the State had good reason to believe that the VRA required a majority-minority district in spite of the fact that black voters repeatedly had been able to elect their candidate of choice without being a majority of

²¹ The Supreme Court noted that "[b]y further slimming the district and adding a couple of knobs to its snakelike body", North Carolina added 35,000 African Americans and subtracted 50,000 whites, turning District 12 into a majority-minority district. *Cooper* Slip Op at 21.

²² *Dickson v. Rucho*, 368 N.C.481500,781 S.E. 2d 404, 419 (2015), modified on denial of reh'g, 368 N.C. 63, 789 S.E. 436 (2016), cert. pending , No. 26-24.

voting age persons within the district. In fact, the State could not demonstrate its ability to satisfy the third prong of the Supreme Court’s §2 test in *Gingles v. Thornburgh*²³: the existence of racially polarized voting, here white bloc voting. “Thus, North Carolina’s belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a ‘strong basis in evidence’, but instead on a pure error of law”.²⁴” The Court concluded:

Although States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA, that latitude cannot rescue District 1. We by no means “insist that a state legislature, when redistricting, determine *precisely* what percent minority population [§2 of the VRA] demands.” But neither will we approve a gerrymander whose necessity is supported by no evidence and whose *raison d’être* is a legal mistake. Accordingly, we uphold the District Court’s conclusion that North Carolina’s use of race as the predominant factor in designing District 1 does not withstand strict scrutiny.²⁵

Justice Thomas joined the *Cooper* majority, but wrote a short concurrence stating, *inter alia*, that §2 of the VRA does not

²³ *Thornburgh v. Gingles*, 478 U.S. 30 (1986). Where minority population is large enough, compact enough, cohesive enough, and where the majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate, §2 of the Voting Rights Act of 1965 may require the creation of majority-minority district.

²⁴ *Cooper v. Harris*, 581 U.S. (2017) (slip op.at 17.

²⁵ *Cooper*, 581 U.S. (2017), Slip op at 1-18.

apply to redistricting. Justices Alito, Chief Justice Roberts, and Kennedy dissented, believing that *Cooper* should have been barred by *Dickson*, the state court case which had ruled against plaintiffs' claims on summary judgment grounds.

Neither District 1 nor District 12 had a majority black voting age population (BVAP) prior to the redistricting that followed the 2010 census; yet in both black voters had been able to elect candidates of their choice. The 12th Congressional District had been the subject of *Shaw v. Reno*²⁶, in which the Court, in 1993, found that (white) voters had “an analytically distinct” cognizable theory of standing to challenge congressional districts intentionally drawn on the basis of race in disregard of traditional redistricting principles. Justice O'Connor, writing for the majority, wrote that “we believe that reapportionment is one area in which appearances do matter.”²⁷ A bizarrely shaped district that eschewed compactness, ignored geographic divisions, and prioritized race above other factors, was constitutionally suspect because it “bears an uncomfortable resemblance to political apartheid”.²⁸ North Carolina's Twelfth was the subject of additional litigation and Supreme Court decisions.²⁹ *Cooper* represented the district's fifth trip to the

²⁶ 509 U.S. 603 (1993).

²⁷ *Id.*, at 647.

²⁸ *Id.*

²⁹ *Shaw v. Hunt*, 517 U.S. 899 (1996), striking down the 1992 boundaries of North Carolina's Twelfth Congressional District; *Hunt v. Cromartie*, reversing three-judge court's summary judgment decision finding that the redrawn boundaries in 1997 were drawn with race dominating all other considerations; *Easley v. Cromartie*, 532 U.S. 234 (2001), reversing as clearly erroneous the district court's finding that the 1997 redrawn boundaries violated the Equal Protection Clause.

Supreme Court, including *Shaw*. When it comes to redistricting in North Carolina, given the unsettled nature of the politics and the law, it is far from certain that this is the last time the U.S. Supreme Court will see the State's Twelfth Congressional District.

Many Americans support voter i.d. restrictions, accepting arguments that they are required to board planes, enter public buildings, and for a range of other activities.³⁰ President Trump, arguing that he lost the popular vote in the November 2016 election only because of hundreds of thousands of illegal votes, has established an electoral commission charged with looking into in-person voter fraud, which experts have concluded is virtually non-existent.

In yet another development, late in the 2016 Term, on June 19, 2017, the Court noted jurisdiction in *Gil v. Whitford*, No. 16-1161. It will hear oral argument on October 3rd of the 201 Term. The Wisconsin case presents a challenge to partisan redistricting, an issue which the court has been reluctant to consider. The Question Presented reads as follows:

- 1) Did the district court violate *Vieth v. Jubelir*, 541 U.S> 267 (20014), when it held that it had the authority to entertain a statewide challenge to Wisconsin's

³⁰ https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/release_116.xml?tid=a_inl&uuid=E1kPqQQZEeGJ93biOpgtBg;https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/?utm_term=.e02b56bc2280

redistricting plan, instead of requiring a district-by-district analysis?

- 2) Did the district court violate *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles?
- 3) Did the district court violate *Vieth* by adopting a watered down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986)?
- 4) Are Defendants entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed?
- 5) Are partisan gerrymanders justiciable?

The consequences of the case, should the Court rule favorably on a jurisdictional challenge and reach the merits, may be far-reaching. The Court, however, with the addition of Justice Gorsuch, remains in the same balance as it was before the passing of Justice Antonin Scalia. It is still a conservative court, in which although every vote counts, everyone is watching Justice Kennedy. At oral argument, however, Justice Breyer, more often than not in the Court's "liberal" camp, posed a number of difficult questions concerning whether there exists a manageable test for determining the constitutionality of partisan gerrymanders. It is not clear that a majority of the Court will even vote to reach the merits. The Court spent a significant amount of oral argument time wrestling with

questions of standing and justiciability. Chief Justice Roberts was especially vexed by the specter of the Pandora's box the Court would open by applying a partisan gerrymander test. An "efficiency gap" ratio test, for example, which would measure the degree of "wasted votes", i.e., votes cast which have no chance of making a difference in election outcomes because partisan gerrymandered redistricting plans predetermine the outcome throughout the entire ten-year life of each redistricting cycle, was, to the Chief Justice, "sociological gobbledygook". Robert's concern is that every election would be challenged before federal three judge panels subject to mandatory review that would ultimately embroil the Supreme Court in a line of partisan decisions that would squander its credibility and legitimacy.

Counsel for Appellees, *i.e.*, challengers to legislative redistricting scheme, urged that the Court is already in the business of reviewing racial gerrymander, Voting Rights Act, and other redistricting claims, and that American democracy is up for grabs at a time of deep national divisions, if the Court does not step into the fray.

If *Gill v. Whitford* places limits on extreme partisan redistricting, it may cause a seismic shift in American jurisprudence and politics. Or, if the Court rules the issue to be nonjusticiable, or finds that plaintiffs lack standing, it may be a fizzle, leaving partisan gerrymanders where they are now-beyond the reach of law. Anything can happen, and it often does.