

North Carolina “tax cap” held unlawful due to racial gerrymandering



David M. Kall | Thursday, March 7, 2019

Last summer we [reported](#) about a then-proposed amendment to the North Carolina Constitution that would cap the state income tax rate at 7 percent. At the Nov. 6, 2018, election, voters in the Tar Heel State approved the amendment to institute the tax rate cap. But then last week a state court judge [struck down](#) the amendment because the North Carolina General Assembly did not have the power to place the amendment on the ballot in the first place due to gerrymandered districts. More developments are sure to follow.

The Tax Cap Amendment

In 2018 both the North Carolina Senate and House of Representatives approved Senate Bill 75 which replaced the then 10 percent income tax cap with a 7 percent cap. The cap, which took effect on January 1, constrains the North Carolina General Assembly from raising the income tax rate above 7 percent without voter approval. The income tax rate in North Carolina has been consistently lower than the cap for the past several years. In 2018 the income tax rate was 5.499 percent, down from 5.75 percent in 2017. North Carolina law additionally provided that the income tax rate would drop even further in 2019 to 5.25 percent.

Racial Gerrymandering

In 2011, the North Carolina General Assembly redrew the legislative districts for both the Senate and the House of Representatives. Quickly thereafter, in November 2011, the North Carolina NAACP and various

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other organizations and individuals filed a collective state court action that raised several state and federal claims challenging the new districts as unconstitutional. Four years later, on May 19, 2015, a parallel challenge in federal court was brought that alleged that twenty eight districts were unlawful racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. In August 2016, a three-judge federal district court panel unanimously held that “race was the predominant factor motivating the drawing of all challenged districts,” and struck down all twenty-eight districts.

The U.S. Supreme Court summarily affirmed the lower court’s ruling but vacated a special election that had been offered as the remedy and ordered the lower court to provide a “fuller explanation of its reasoning.” On remand, the General Assembly was given the opportunity to propose a new redistricting plan. However, when the General Assembly submitted the new remedial map, which was drawn by the same mapmaker that drew the original unconstitutional districts, the same three-judge panel determined that its remedial plan failed to remedy the unconstitutional racial gerrymander. As a result, the panel adopted remedial districts proposed by a court-appointed special master, which the U.S. Supreme Court later affirmed.

How Does Racial Gerrymandering Void the Tax Cap?

Even though the amendment to cap the state income tax received 57 percent of the popular vote, Judge G. Bryan Collins, Jr. of the Wake County Superior Court held that “an illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state’s Constitution.” Judge Collins referred to the 2017 U.S. Supreme Court decision affirming that twenty-eight districts in North Carolina were drawn as a result of unlawful racial gerrymandering.

On August 6, 2018, after the North Carolina General Assembly passed resolutions to place the tax cap amendment and three other constitutional amendments on the ballot, the North Carolina NAACP and others filed suit challenging all four proposed amendments. Despite multiple requests by the Plaintiffs for injunctive relief and partial summary judgment, the four constitutional amendments were included on the November 2018 ballot. Two of the proposed amendments failed, but a voter identification amendment and the tax cap amendment were successful. The November election was the first to be held under the new remedial maps that were adopted to correct the 2011 unconstitutional racial gerrymander.

After the election, the NAACP and other plaintiffs withdrew several claims related to the two failed constitutional amendments. However, they maintained their challenge to the two successful amendments on the grounds that the illegally-constituted General Assembly lacked the authority to propose them. On January 15, 2019, Judge Collins heard oral argument on the matter.

The NAACP claimed that “the tax cap constitutional amendment harms the [organization], its members, and the communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy.” The NAACP further asserted that the tax cap would favor white households and would disadvantage people of color.

Judge Collins referenced Article 1 Section 3 of the North Carolina Constitution that states that the people of North Carolina “have the inherent, sole, and exclusive right of regulating the internal government and...of altering...their Constitution and form of government whenever it may be necessary to their safety and happiness.” The Constitution further states that “this may be accomplished only when a three-fifths

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supermajority of both chambers of the General Assembly vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment....The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.”

Judge Collins wrote that after the U.S. Supreme Court determined that the General Assembly was an illegally gerrymandered body that “the General Assembly lost its claim to popular sovereignty.” Therefore, because the racial gerrymander “tainted” the three-fifths majority that is required under the state’s constitution, the “requisite chain of popular sovereignty between North Carolina citizens and their representatives” was broken. Ultimately, Judge Collins held that the “illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state’s Constitution” and as such that the tax cap and the voter id amendments were void *ab initio*.

“An Appeal is Absolutely Coming”

Although a victory for the NAACP and others, the new ruling has received strong criticism. In a statement to the [News & Observer](#), Martin Warf, an attorney representing the General Assembly, said that “an appeal is absolutely coming.” Similarly, Senate leader Phil Berger stated “We are duty-bound to appeal this absurd decision. The prospect of invalidating 18 months of laws is the definition of chaos and confusion. Based on tonight’s opinion and others over the past several years, it appears the idea of judicial restraint has completely left the state of North Carolina.”

Republican legislative leaders requested that the ruling be stayed but that request was swiftly denied by Judge Collins on March 1. According to [WNCT](#), a local news station in North Carolina, Senate leader Phil Berger’s office said “GOP legislators would now seek the stay from the Court of Appeals.”



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[Team member bio](#)