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Resurrection:

*Cooper v. Harris and the Transformation of Racial
Gerrymandering Into A Voting Rights Tool*

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RESURRECTION:
COOPER V. HARRIS AND THE TRANSFORMATION OF RACIAL
GERRYMANDERING INTO A VOTING RIGHTS TOOL

RICHARD L. HASEN*

The United States Supreme Court, like the Lord, sometimes works in mysterious ways.

Back in the 1990s, a group of conservative activists convinced a majority of conservative Justices on the United States Supreme Court to create a new cause of action under the Fourteenth Amendment's Equal Protection Clause for "racial gerrymandering." Unlike claims of "vote dilution"—where redistricting authorities draw lines for electing members of Congress, or state or local legislators in order to diminish someone's political power—"racial gerrymandering" was said to be about an "expressive harm," or the message sent by government action. In the 1993 case, *Shaw v. Reno*,¹ the Court held that the "bizarre" shape of two North Carolina congressional districts sent a message to the public that the government was separating voters on the basis of race without adequate justification. The Court later refined the claim to focus less on a district's shape and more on a legislature's "predominant motive" in taking race into account in constructing districts. Some liberals and others objected that the racial gerrymandering claim made no sense either as an empirical matter, because people did not get any "message" from the shape of district lines in these racially integrated districts, or normatively, because "expressive harms" were not real harms. For a variety of reasons, racial gerrymandering claims mostly disappeared after the early 2000s.

More than two decades after *Shaw*, the racial gerrymandering claim has been resurrected, but in a form almost beyond recognition. By the 2016 Supreme Court term, minority voters and Democrats regularly used the racial gerrymandering cause of action to attack Republican gerrymanders in states with large minority populations. It had become another tool for voting rights activists. The transformation became complete in the Supreme Court case of *Cooper v. Harris*,² where the Court recognized that a state's strong use of race in districting to achieve partisan ends or suppress minority voters' power violated the Constitution.

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¹ 509 U.S. 630 (1999).

² 137 S. Ct. 1455 (2017).

Harris reveals the malleability of Supreme Court constitutional doctrine, especially in the area of election law. But again, like the Lord, what the Supreme Court giveth, it could also taketh away, and it would not be surprising to see a new, more conservative Supreme Court revert to its original treatment of the gerrymandering claim as a tool to limit minority voting power.

In the Beginning³

The use of race in drawing district lines is nothing new. Redistricting authorities (such as state legislatures) sometimes “pack” or “crack” a group of voters to minimize the number of districts in which they can elect representatives of their choice.⁴ When white voters and minority voters prefer different sets of candidates (a condition called “racially polarized voting”) and there are enough minority voters living closely enough together that it is possible to draw another district where minority voters can elect a candidate of their choice (a “majority-minority” or “minority opportunity” district), redistricting authorities can violate Section 2 of the Voting Rights by failing to draw that district.⁵ And if redistricting authorities pack or crack minority voters intentionally, such conduct also may violate the Equal Protection Clause of the Fourteenth Amendment.⁶ Whether it is about intent or effect, these “vote dilution” claims affect how much political power groups of voters have in a system of representatives elected through districts.

In *Shaw v. Reno*, the Supreme Court explained that the “racial gerrymandering” claim it created in that case is “analytically distinct” from vote dilution claims.⁷ The case arose from the 1990s-round of state legislative redistricting by the Democratic-controlled legislature in North Carolina, a jurisdiction then partially covered by Section 5 of the Voting Rights Act. Section 5 of the Act (which the Supreme Court later effectively killed in the 2013 case, *Shelby County v. Holder*⁸) required jurisdictions with a history of racial discrimination in

³ Parts of this section draw from Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 57 ALABAMA L. REV. 365, 369-72 (2015) [hereinafter Hasen, *Racial Gerrymandering*] and Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WILLIAM & MARY L. REV. ____ (forthcoming 2018) [hereinafter Hasen, *Three Uneasy Approaches*].

⁴ See DANIEL H. LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI, & NICHOLAS S. STEPHANOPOULOS, *ELECTION LAW—CASES AND MATERIALS* 144 (6th ed. 2017) (“[A]ll partisan gerrymandering takes place either by *cracking* the opposing party’s voters among a large number of districts in which their preferred candidates lose by relatively narrow margins, or by *packing* these voters in a few districts in which their preferred candidates win overwhelming majorities.”).

⁵ See generally *id.*, ch. 5 (describing and analyzing in detail minority vote dilution claims under the Voting Rights Act and the U.S. Constitution).

⁶ *Rogers v. Lodge*, 458 U.S. 613 (1982).

⁷ *Shaw*, 509 U.S. at 652.

⁸ 133 S. Ct. 2612 (2013).

voting to get approval from the United States Department of Justice or a three-judge court in Washington, D.C., before making changes to any voting rules. The jurisdiction bore the burden of proving that the change would not make protected minority voters worse off; but at the time of *Shaw*, the Department of Justice was reading Section 5 to require the creation of more majority-minority districts when it was possible to do so.⁹

The Department of Justice demanded that North Carolina create another majority-minority district to gain preclearance. Democrats responded by passing a plan that created the required number of such districts, protected Democratic incumbents, and maximized the number of Democratic seats.¹⁰ Its plan included some “bizarre”-shaped districts, including a new Congressional District 12 that tied together disparate populations of African-American voters along the I-85 freeway corridor. Republicans initially challenged the plan as a partisan gerrymander, claiming that district lines discriminated against Republican voters. The claim failed, following the fate of other partisan gerrymandering claims.¹¹ Opponents then argued that the redistricting was an unconstitutional racial gerrymander.¹² Importantly, the claim was not that the plan diluted the white vote or anyone else’s vote.¹³ The claim instead was that the *consideration* of race in drawing lines is constitutionally suspect and sometimes outright unconstitutional, despite the fact that the Voting Rights Act *required* such consideration of race, and even if the line drawing had no effect on anyone’s political power.

In *Shaw v. Reno*, the Supreme Court agreed with the challengers, creating a cause of action for an unconstitutional racial gerrymander.¹⁴ Justice Sandra Day O’Connor’s decision held that the odd shape showed voters being separated on the basis of race, in violation of the Constitution’s Equal Protection Clause of the Fourteenth Amendment.¹⁵ The Court held such separation, which the Court

⁹ Hasen, *Racial Gerrymandering*, *supra* note 3, at 368-69.

¹⁰ LOWENSTEIN, HASEN, TOKAJI, & STEPHANOPOULOS, *supra* note 4, at 337-38.

¹¹ Pope v. Blue, 809 F. Supp. 392, 399 (W.D.N.C.), *aff’d*, 506 U.S. 801 (1992).

¹² 509 U.S. 630, 636 (1993).

¹³ *Id.* at 641. On the motivations of Duke Law School professor Robinson O. Everett to bring the first racial gerrymandering lawsuit, see Daniel P. Tokaji, *The Story of Shaw v. Reno: Representation and Raceblindness*, in RACE LAW STORIES ch. 14 (Rachel F. Moran & Devon W. Carbado, eds., 2008); Robinson O. Everett, *Redistricting in North Carolina – A Personal Perspective*, 79 N.C. L. REV. 1301, 1310 (2001) (“My own motivation for initiating a court action to overturn the gerrymander was my firm belief that use of data about the racial composition of census blocks in the creation of congressional districts appeared to give governmental approval to the use of racial stereotypes and racial quotas.”).

¹⁴ *Shaw*, 509 U.S. at 647-48.

¹⁵

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political

analogized to “political apartheid,”¹⁶ could not be sustained unless it showed that the division was justified by a compelling interest and narrowly tailored to meet that interest under the “strict scrutiny” standard of review that the Court applied to many race-based classifications.¹⁷ Justice O’Connor explained in a later case that the new claim protected against “expressive harms” in which the government sends an unconstitutional message by separating voters on the basis of race without adequate justification.¹⁸

Cases in the 1990s fleshed out the theory and workings of the new racial gerrymandering claim. Although Justice O’Connor continued to focus on the shape of these challenged districts, other Court conservatives shifted the focus of the new cause of action to legislative motive. In *Miller v. Johnson*,¹⁹ the Court held that race could not be the “predominant factor” in redistricting without compelling justification. The *Miller* Court concluded that the Democratic-led Georgia legislature had an impermissible predominant racial motive, and it remanded under the strict scrutiny standard to determine whether the state’s apparent decision to make race predominate the redistricting process was justified by a compelling state interest.²⁰ The harm in *Miller* appeared to be the same as in *Shaw*, but the proof of a racial gerrymander moved from district shape to legislative motive.

boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 647-48 (citations omitted).

¹⁶ *Id.* at 647.

¹⁷ *Id.* at 657-58.

¹⁸ See *Bush v. Vera*, 517 U.S. 952, 984 (1996) (“We are aware of the difficulties faced by the States, and by the district courts, in confronting new constitutional precedents, and we also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available.”). The idea originated with Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993).

¹⁹ 515 U.S. 900 (1995).

²⁰ See *id.* at 923-27.

The Georgia legislature's real "predominant" motive, however, appeared to be not separating voters on the basis of race but complying with the demands of the Department of Justice to obtain preclearance while still maximizing partisan advantage.²¹ The Court found race to be the predominant factor. In these and other cases, the Court assumed that complying with dictates of the Voting Rights Act could serve as a compelling interest, but it generally interpreted the Voting Rights Act as not requiring the creation of these districts.

Some liberals and others attacked the racial gerrymandering cause of action as being neither empirically nor theoretically well-grounded. First, the Supreme Court's search for predominant motivations in redistricting without proof of vote dilution is nonsensical.²² Legislators engaged in redistricting face constraints, such as the Voting Rights Act and one-person, one-vote requirements, and they then design plans conforming to these constraints to reach their political goals. Naked self-interest may fairly be said to predominate in most legislative redistricting exercises, subject to legal and political constraints.²³ Further, far from being reminiscent of "political apartheid," as Justice O'Connor put it in *Shaw*, these districts were among the most integrated in the country.²⁴ Third, the Court never justified why "expressive harms" were worth protecting by judicial intervention, when the claims concededly had no effect on political power within these states.²⁵

Racial gerrymandering cases continued throughout the 1990s. One of the key cases arose again out of a fight over North Carolina's congressional District 12. In the 2001 case, *Easley Cromartie*,²⁶ Justice O'Connor and the four more liberal members of the Court, in an opinion by Justice Stephen Breyer, rejected a challenge to North Carolina's latest redistricting plan for District 12 after concluding that party dominance, not race, was the predominant factor in drawing the challenged district lines. (In all of the cases before *Easley*, the conservatives on the Court voted in favor of racial gerrymandering holdings and all the liberals opposed.) The issue was especially tricky given "conjoined polarization," the huge overlap of race and party, especially in the American South.²⁷ When over 90 percent of African-American voters support the Democratic Party, and about two-

²¹ For an excellent analysis on these points, see Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 798-801 (1998).

²² See *id.*

²³ *Id.* at 806-07

²⁴ Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 282; see also A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1603 (1994).

²⁵ Hasen, *Racial Gerrymandering*, *supra* note 3, at 384.

²⁶ 532 U.S. 234 (2001).

²⁷ See Hasen, *Three Uneasy Approaches*, *supra* note 3; Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016).

thirds of white voters support the Republican Party, saying whether race or party “predominated” in the drawing of district lines appeared an impossible exercise.²⁸

After *Easley*, racial gerrymandering cases became far less frequent. Likely, redistricting authorities got smart and started drawing more compact majority-minority districts (and hiding any evidence in emails or other discoverable correspondence of a predominant motive in using race in redistricting). The Department of Justice also no longer pressured jurisdictions to create more of them.²⁹ Jurisdictions therefore more easily could avoid both Department of Justice objections as well as potential problems in the courts through the creation of too many of these districts.³⁰

Born Again

In the Supreme Court’s 2016 term, the Court in *Cooper v. Harris* considered whether two North Carolina congressional districts were unconstitutional racial gerrymanders. One of the districts, District 12, remarkably made its fifth appearance before the Supreme Court since the 1993 *Shaw v. Reno* decision. But while the Court in *Shaw* used the racial gerrymandering cause of action to limit the creation of too many majority-minority districts, by *Harris* the Court had transformed racial gerrymandering into a tool to limit Republican gerrymanders in states with conjoined polarization.

To understand *Harris*, analysis must begin with the 2010 round of redistricting. With Republicans in charge of redistricting in many state legislatures, it became a common tactic to pack or crack reliably Democratic African-American or Latino voters in congressional and state legislative districts. The aim was to gain political advantage while not overstepping the line so much as to create a viable vote dilution claim under Section 2 of the Voting Rights Act. This strategy minimized voting strength of likely Democratic voters while attempting to avoid Section 2 liability, and it depended greatly upon (perhaps intentional) misreading of the Voting Rights Act to require the concentration of minority voters in fewer districts.³¹

In response, Democrats and groups representing minority voters sued these jurisdictions claiming that the use of race in drawing district lines constituted an unconstitutional racial gerrymander. (Some of these suits also raised Section 2 vote dilution claims, but these claims were mainly unsuccessful.) States then defended

²⁸ See generally Hasen, *Three Uneasy Approaches*, *supra* note 3.

²⁹ Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 200 n. 105 (2007).

³⁰ Hasen, *Racial Gerrymandering*, *supra* note 3, at 372.

³¹ For a careful and detailed analysis, see Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573 (2016).

their district lines either by claiming the districts had to be drawn the way they were in order to comply with Section 2 or Section 5 of the Voting Rights Act, or that they were political, not racial, gerrymanders under *Easley*.

Two significant cases in this line preceded *Harris* at the Supreme Court. In a 2015 case, *Alabama Legislative Black Caucus v. Alabama*,³² the four liberals on the Court and Justice Anthony Kennedy agreed with Democrats and minority voters that Alabama could not justify its concentration of Black voters in districts under set quotas as required by Section 5 of the Voting Rights Act (which was still operative against Alabama at the time of its redistricting). The Court remanded the Alabama case to determine which districts were unconstitutional racial gerrymanders. The Court's opinion by Justice Kennedy strongly suggested that the Alabama legislature's heavy focus on racial data in drawing district lines for some districts constituted an unconstitutional racial gerrymander.³³

In the 2017 case, *Bethune-Hill v. Virginia State Board of Elections*,³⁴ the Court majority considered whether a Virginia state redistricting plan included racial gerrymanders. The same five-Justice majority as in *Alabama* rejected a lower court determination that a challenger must show that there was an actual conflict with traditional redistricting principles (such as adherence to municipal boundaries) to establish a racial gerrymander; such a conflict likely would be persuasive evidence of a racial gerrymander, but it is not strictly required.³⁵ The Court remanded the case to the trial court to reconsider claims of racial gerrymandering in eleven of twelve districts,³⁶ instructing that the district court should focus on the shape of each district as a whole, and not just a portion of district lines.³⁷

Harris raised racial gerrymandering challenges to two of North Carolina's congressional districts redrawn after the 2010 census, District 1 and District 12,

³² 135 S. Ct. 1257 (2015).

³³ *Id.* at 1264-68, 1274. On remand, the trial court found that 14 of the challenged districts were racial gerrymanders, but upheld two under strict scrutiny. The partially dissenting judge found an additional 12 districts were racial gerrymanders. *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (M.D. Ala. 2017) (majority opinion); 231 F. Supp. 3d at 1355 (partial concurrence and dissent).

³⁴ 137 S. Ct. 788 (2017).

³⁵ *Id.* at 798-99.

³⁶ However, as to one state legislative district, District 75, the Court held the use of a 55 percent black voting age population in the district was justified by the state's interpretation of Section 5 of the Voting Rights Act. *Id.* at 800-02. The state's interpretation of Section 5 must be based on a "good reason" and have a "strong basis in evidence," but need not be a correct interpretation. Importantly, the challengers conceded that compliance with Section 5 of the Voting Rights Act would be a compelling interest justifying racial predominance in districting, disagreeing only on the question of narrow tailoring. *See id.* at 801, 803 (Alito, J., concurring).

³⁷ *Id.* at 799-802.

each with substantial African-American populations.³⁸ The Court, in an opinion by Justice Elena Kagan for herself, the Court's other liberals, and conservative Justice Clarence Thomas (but not Justice Kennedy, who had joined the liberals in *Alabama* and *Bethune-Hill*, but who partially dissented here), recounted the Court's repeated examinations of earlier versions of these districts, beginning in the 1993 *Shaw* case.³⁹ In the 2010 round of redistricting, North Carolina shifted large numbers of African-American voters into each of the districts:

The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the State needed to place almost 100,000 new people within the district's boundaries. [Republican state legislative leaders Robert Rucho and David] Lewis, and [their expert, Dr. Thomas] Hofeller chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line. With that addition, District 1's BVAP [black voting age population] rose from 48.6% to 52.7%. District 12, for its part, had no need for significant total-population changes: It was overpopulated by fewer than 3,000 people out of over 730,000. Still, Rucho, Lewis, and Hofeller decided to reconfigure the district, further narrowing its already snakelike body while adding areas at either end—most relevantly here, in Guilford County. Those changes appreciably shifted the racial composition of District 12: As the district gained some 35,000 African-Americans of voting age and lost some 50,000 whites of that age, its BVAP increased from 43.8% to 50.7%.⁴⁰

Plaintiffs challenged the two districts as racial gerrymanders. A three-judge district held that both districts were unconstitutional, with one district court judge dissenting on the question whether race or party predominated in drawing District 12.⁴¹

After disposing of the argument that a ruling for plaintiffs was somehow precluded by a contrary state court ruling on the same issue,⁴² the Supreme Court turned to the merits, beginning with District 1. Noting uncontested evidence that the state established a "racial target" so that African-American voters "should make

³⁸ "In its current incarnation, District 1 is anchored in the northeastern part of the State, with appendages stretching both south and west (the latter into Durham). District 12 begins in the south-central part of the State (where it takes in a large part of Charlotte) and then travels northeast, zig-zagging much of the way to the State's northern border." 137 S. Ct. at 1465.

³⁹ *Id.*

⁴⁰ *Id.* at 1466 (citations omitted).

⁴¹ *Id.* (discussing *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016)).

⁴² *Id.* at 1467-68.

up no less than a majority of the voting-age population” of the district,⁴³ and that this target was the top instruction to the state’s redistricting expert, the Court concluded that the lower court did not clearly err in finding that race predominated in the drawing of District 1.⁴⁴

That finding of racial predominance triggered strict scrutiny. And although the Court continued its policy of assuming that compliance with the Voting Rights Act could be a compelling reason to justify using race as the predominant factor in drawing district lines,⁴⁵ it held that Section 2 of the Act did not require North Carolina’s packing of African-American voters into District 1. The reasons are complex,⁴⁶ but to simplify slightly, a challenge to the old District 1 arguing that the district had to be drawn with a larger Black voting age population would have failed. In the old District 1, there were enough white voters “crossing over” to vote for the African-American preferred candidate so that there would be no Section 2 liability for failure to redraw the district. Given the absence of sufficient racially polarized voting in the old District 1, thanks to this crossover voting, the new District 1 could not be justified as necessary to remedy a Voting Rights Act violation.⁴⁷ The Court was unanimous in concluding that District 1 was unconstitutional.⁴⁸

The Court’s unanimity as to District 1 contrasted sharply with its bitter divisions over District 12. North Carolina did not argue that the changes to District 12 were compelled by the Voting Rights Act. Instead, it argued that District 12 was a partisan, not racial, gerrymander, meaning that political considerations, not race, predominated. The state claimed it was a “strictly” partisan gerrymander.⁴⁹ While partisan gerrymandering sounds bad, the Supreme Court has repeatedly decided not to police it, making claims of partisan intent in redistricting a defense.⁵⁰

⁴³ *Id.* at 1468.

⁴⁴ *Id.* at 1469 (“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. Indeed, as all three judges recognized, the court could hardly have concluded anything but. See 159 F.Supp.3d, at 611 (calling District 1 a ‘textbook example’ of race-based districting).”).

⁴⁵ *Id.* at *12.

⁴⁶ For more in-depth analysis, see LOWENSTEIN, HASEN, TOKAJI, & STEPHANOPOULOS, *supra* note 4, at 373; Nicholas Stephanopoulos, *Further Thoughts on Cooper*, ELECTION L. BLOG, May 22, 2017, <http://electionlawblog.org/?p=92717>.

⁴⁷ 137 S. Ct. at 1470-72.

⁴⁸ *Id.* at 1487 n. 1 (Alito, J., concurring in the judgment in part and dissenting in part) (“I concur in the judgment of the Court regarding Congressional District 1. The State concedes that the district was intentionally created as a majority-minority district. And appellants have not satisfied strict scrutiny.”) (citation omitted).

⁴⁹ *Id.* at 1473.

⁵⁰ *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opn.).

Harris thus posed the same question—and about a later incarnation of the same district—as the Supreme Court first faced in *Easley v. Cromartie*.⁵¹ In *Easley*, the trial court had found that race, not party, predominated when the Democratic-controlled legislature drew that version of District 12.⁵² The Court in *Easley* held that such a conclusion could be overturned only if it was “clearly erroneous,” a very hard standard to meet.⁵³ Nonetheless, in an opinion offering a lengthy examination of the evidence, Justice Breyer for the Court majority held that the trial court’s finding *was* clearly erroneous, and that politics, not race, had predominated.⁵⁴

The opinion further offered a test to distinguish racial from partisan intent under conditions of conjoined polarization:

We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) 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.⁵⁵

Justice Thomas dissented in *Easley*, for himself, Chief Justice William Rehnquist, and Justices Antonin Scalia and Justice Kennedy, arguing that under the deferential clearly erroneous standard, the Supreme Court should have sustained the trial court’s conclusion that race predominated.⁵⁶

In *Harris*, Justice Kagan noted the difficulty in ferreting racial from partisan motivation in areas of conjoined polarization, and that this difficulty necessitated a “sensitive inquiry” for the trial court.⁵⁷ But the task was “generally easier” for the Supreme Court because the clearly erroneous standard of review meant that the Court had to be very deferential in reviewing the trial court’s finding that race, rather than politics, predominated in drawing the current version of District 12.⁵⁸

⁵¹ 532 U.S. 234 (2001).

⁵² *Id.* at 243.

⁵³ *Id.*

⁵⁴ *Id.* at 243-58.

⁵⁵ *Id.* at 258.

⁵⁶ *Id.* at 259-67 (Thomas, J., dissenting).

⁵⁷ 137 S. Ct. at 1473 (quoting *Easley v. Cromartie*). As I discuss below, Justice Kagan made it considerably easier to prove racial, as opposed to political, motive in gerrymandering in jurisdictions with conjoined polarization.

⁵⁸ *Id.* at 1474.

Justice Kagan recounted the facts that led the trial court to conclude that race predominated: the movement of 35,000 African-American voters in, and 50,000 white voters out, of District 12;⁵⁹ the public statements of legislative leaders Rucho and Lewis that “racial considerations lay behind District 12’s augmented BVAP;”⁶⁰ expert Hofeller’s statements that he was concerned with voting rights issues in drawing the district;⁶¹ the state’s racial explanations for the district in materials submitted to the Department of Justice in favor of preclearance;⁶² and the testimony of Congressman Mel Watt (who had represented the district) about a conversation with Rucho in which Rucho said that the plan was to get District 12 above 50 percent BVAP to purportedly comply with the Voting Rights Act.⁶³ The Court noted that the trial court found the state’s contrary explanations, and the explanations of Hofeller’s motives and actions, less credible.⁶⁴

Finally, the Court rejected North Carolina’s argument that under *Easley* the challengers were required to produce an alternative map showing how the state’s political aims could have been achieved, but with greater racial balance.⁶⁵ While conceding that such an alternative map could provide “key evidence” in a “race-versus-politics dispute,”⁶⁶ the Court held such evidence was not required where, as here, there was more direct evidence of a racial gerrymander.⁶⁷

Justice Thomas, while joining in the majority opinion, also wrote three separate paragraphs. As to District 1, he noted his longstanding view that the drawing of any majority-minority district triggered strict scrutiny, and that Section 2 of the Voting Rights Act did not apply to redistricting and therefore could not justify the drawing of such a district.⁶⁸ As to District 12, Justice Thomas agreed with the result given the considerable deference afforded to the trial court’s factual finding under the clearly erroneous standard. He noted that the *Harris* majority opinion “does not repeat” the error the Court made in failing to defer in *Easley*.⁶⁹

⁵⁹ *Id.*

⁶⁰ *Id.* at 1475.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1476; *see also id.* at n. 10 (“Watt recalled that he laughed in response because the VRA required no such target. And he told Rucho that ‘the African–American community will laugh at you’ too. Watt explained to Rucho: ‘I’m getting 65 percent of the vote in a 40 percent black district. If you ramp my [BVAP] to over 50 percent, I’ll probably get 80 percent of the vote, and[] that’s not what the Voting Rights Act was designed to do.’” (citations omitted).) Justice Alito’s dissent not only tried to explain away this testimony. *Id.* at 1499–1500 (Alito, J., concurring in the judgment in part and dissenting in part). The dissent also dismissed it as “double hearsay.” *Id.* at 1499 n. 18.

⁶⁴ *Id.* at 1477.

⁶⁵ *See supra* note 55 and accompanying text (quoting *Easley*).

⁶⁶ 137 S. Ct. at 1479.

⁶⁷ *Id.* at 1479–82.

⁶⁸ *Id.* at 1485 (Thomas, J., concurring).

⁶⁹ *Id.* at 1486 (Thomas, J., concurring).

Justice Samuel Alito, while agreeing with the majority's conclusion on District 1,⁷⁰ vehemently dissented as to the Court's conclusion in District 12. To begin with, Justice Alito believed the Court was bound by its earlier statement in *Easley* requiring the plaintiffs to produce an alternative map to show that race not party predominated. "A precedent of this Court should not be treated like a disposable household item—say, a paper plate or napkin—to be used once and then tossed in the trash. But that is what the Court does today in its decision regarding North Carolina's 12th Congressional District: The Court junks a rule adopted in a prior, remarkably similar challenge to this very same congressional district."⁷¹ To the dissenters, the *Harris* plaintiffs' failure to produce an alternative map should have been fatal to their claim.⁷²

Like the majority, Justice Alito noted the extreme difficulty in ferreting out race and party motivation given the Court's decision not to police partisan gerrymanders⁷³ and the fact of conjoined polarization: "If around 90% of African-American voters cast their ballots for the Democratic candidate, as they have in recent elections, a plan that packs Democratic voters will look very much like a plan that packs African-American voters."⁷⁴ He also stressed the considerable leeway the Constitution grants states to redistrict⁷⁵ and a presumption of good faith he believed should apply to a state's redistricting decisions.⁷⁶

Given these presumptions and levels of deference, which the *Harris* majority derided as "a kind of super-charged, pro-State presumption on appeal, trumping clear-error review,"⁷⁷ the dissenters concluded that the trial court's determination that race not party predominated was 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."⁷⁸ Echoing Justice Breyer's plodding review of the evidence in *Easley* to overturn the trial court's race/party findings under the clearly erroneous standard, Justice Alito's *Harris* dissent offered a lengthy review of the state's evidence, explaining why the dissenters believed it showed the only reasonable explanation for the creation of District 12 was partisan politics, pure and simple.⁷⁹

⁷⁰ *Id.* at 1487 n. 1 (Alito, J., concurring in the judgment in part and dissenting in part).

⁷¹ *Id.* at 1486.

⁷² *Id.* at 1488-91.

⁷³ *Id.* at 1488.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1488, 1503-04.

⁷⁷ *Id.* at 1474 n.8.

⁷⁸ *Id.* at 1491-92.

⁷⁹ *Id.* at 1491-1503.

To Every Thing There is a Season

The technical aspects of the racial gerrymandering cause of action, and its complex interactions with the Voting Rights Act, make it easy to miss the fundamental political significance of the recent resurrection of the racial gerrymandering cause of action. A cause of action that was once used to limit minority voting power is now being used to protect it, and, following *Harris*, to do so in increasingly powerful ways.

Already before *Harris*, in the 2015 *Alabama* case⁸⁰ and the 2017 *Bethune-Hill* case,⁸¹ the Court had allowed minority plaintiffs and Democrats—who once derided these *Shaw* claims as illogical and indefensible—to use racial gerrymandering to police Republican overreach in redistricting. The Court would not allow Republican legislatures to hide behind adherence to the Voting Rights Act to justify attempts to squeeze minority voters and Democrats out of power.

One way to understand this transformation of the racial gerrymandering claim is that it allows minority plaintiffs to bring vote dilution claims which are not strong enough to satisfy the demands of Section 2 of the Voting Rights Act. Indeed, at oral argument in the *Bethune-Hill* case, attorney Paul Clement, who was defending Virginia’s redistricting against a racial gerrymandering charge, argued that “People are bringing junior varsity dilution claims under the guise of calling them *Shaw* claims, and I think it’s really distorted the law.”⁸² He saw the plaintiffs in Virginia as pursuing an opportunistic action to force a new redistricting now that a Virginia’s governor is a Democrat.⁸³

Another way of understanding the transformation of the racial gerrymandering cause of action, as expressed by ACLU attorney Dale Ho at a recent redistricting symposium at the William and Mary Law School, is that the Court in these cases is holding that it is an Equal Protection violation for states to intentionally dilute the influence of minority voters in non-majority-minority districts.⁸⁴

At this point, the Court has not clarified whether either or neither of these understandings comports with the Court’s reasoning. And there is no reason to expect the Court to make things clearer, which would only reveal how much the cause of action has strayed from its origins. Although it is impossible to say what

⁸⁰ 135 S. Ct. 1257 (2015).

⁸¹ 137 S. Ct. 788 (2017).

⁸² *Bethune-Hill v. Va. State Bd of Elections*, No. 16-680, Trs. Oral Arg. at 43.

⁸³ *Id.* at 54.

⁸⁴ Dale E. Ho, *Something Old, Something New, or Something Really Old? Understanding Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WILLIAM & MARY L. REV. ____ (forthcoming 2018). Dilution as to majority-minority districts can violate Section 2 of the Voting Rights Act as well.

the racial gerrymandering cause of action stands for today, it does not appear to be any longer about the “expressive harm” that purportedly comes from separating voters on the basis of race. None of the recent racial gerrymandering decisions discusses the nature of the harm in terms of messages being sent;⁸⁵ instead the language is more about harm to minority voters.

Whatever the explanation for the shift and its scope, it appears that *Cooper v. Harris* has greatly expanded the scope of the racial gerrymandering cause of action as a voting rights tool by helping minority plaintiffs in “race or party” cases like ones involving North Carolina’s congressional District 12. Indeed, as I argue more fully elsewhere,⁸⁶ in three footnotes of great significance, Justice Kagan in *Harris* moved racial gerrymandering law significantly in the direction of collapsing the distinction between race and party under conditions of conjoined polarization, allowing a “race as party” proxy argument. Under this argument, if a state uses racial information to achieve partisan ends, it is engaged in an act of racial discrimination or predominance.

In one *Harris* footnote, the Court declared that a plaintiff can show racial predominance “even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other political goals.”⁸⁷ The Court explained in the second footnote that “the sorting of voters on grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.”⁸⁸ Finally, the court in the third footnote described reasons why redistricting authorities might choose to employ race as a predominant redistricting factor. Justice Kagan offered two reasons aside from misunderstanding Voting Rights Act requirements: “[Authorities] may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and political behavior to advance their partisan interests. Or, finally—though we hope

⁸⁵ The harm gets no mention in Justice Kagan’s exceptionally clear exposition of the racial gerrymandering cause of action at the beginning of *Harris*. *Harris*, 2017 WL 2216930, *6-7.

⁸⁶ See Hasen, *Racial Gerrymandering*, *supra* note 3, Part IV. The next few paragraphs draw from that discussion. For more on the variety of proxy arguments, see Michael Parsons, *Cooper v. Harris: Proxy Battles and Partisan War*, MODERN DEMOCRACY (blog), May 23, 2017, <https://moderndemocracyblog.com/2017/05/23/cooper-v-harris-proxy-battles-partisan-war/>.

⁸⁷ 137 S. Ct. at 1464 n. 1. The full footnote reads:

A plaintiff succeeds at this stage even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. See *Bush v. Vera* (plurality opinion) (holding that race predominated when a legislature deliberately “spread[] the Black population” among several districts in an effort to “protect[] Democratic incumbents”); *Miller v. Johnson* (stating that the “use of race as a proxy” for “political interest[s]” is “prohibit[ed]”).

(Citations partially omitted.)

⁸⁸ *Id.* 1473 n. 7.

less commonly—they may simply seek to suppress the electoral power of minority voters.”⁸⁹

Things have come a long way in the racial gerrymandering cases from *Shaw*’s “political apartheid” to the Court expressing deep concern about minority voter suppression. With courts recognizing that race can be a “proxy” to advance “political goals,” based on “leveraging” conjoined polarization, then it will be much easier to argue that race, rather than party, predominates in these cases. Partisanship will be no safe harbor, and race *consciousness* seems easier to equate with racial *predominance* even when the underlying motivation is partisan.

Finally, Justice Kagan’s jettisoning of the requirement that plaintiffs in “race or party” racial gerrymandering cases produce alternative maps also helps minority plaintiffs win these cases. Justice Alito seemed to have the stronger argument that *Easley* required plaintiffs in a case like *Harris* to produce such maps (and perhaps this is why Justice Kagan did not have Justice Kennedy’s vote in *Harris*.) But the alternative map requirement from *Easley* would have doomed the claim in *Harris* and in many other “race or party” cases, because there are not enough white voters to go around to be able to create such an alternative map.

Justice Alito misleadingly cast the debate over alternative maps as simply about litigation resources and effort. He claimed that the “sophisticated litigants” in these cases could bring in experts to produce the alternative maps,⁹⁰ and that the problem in *Harris* was simply a failure to offer proof.

But the real problem in *Harris* was not lazy or cheap plaintiffs. It is that the alternative map test does not work well when there are not enough white Democrats to go around. Imagine a part of the state where nearly 100% of African-American voters voted for Democrats and nearly 100% of white voters voted for Republicans. If a Republican-dominated state legislature moves only African-American voters across districts to achieve its aims, it would be impossible to produce an alternative map with “greater racial balance.” But it could well be reasonable, based upon all the facts, to conclude that race, rather than party, predominated.⁹¹

End Times

The Court’s transformation of the racial gerrymandering claim appears to be on a collision course with the Court’s conservatives, and given expected future changes in Court personnel which could bring the Court a solid and reliable conservative majority, what began as dust for voting rights plaintiffs may well return to dust.

⁸⁹ *Id.* 1480 n. 15.

⁹⁰ *Id.* at 1491.

⁹¹ The best conclusion, as I have argued, is that the entire exercise to choose one or the other is nonsensical, but that’s beside the point for a court instructed to choose one or the other.

To begin with, Justice Alito's dissent in *Harris* appears to reject the "race as party" proxy argument that Justice Kagan offered in her *Harris* footnotes. Justice Alito cited to contrary statements in *Hunt v. Cromartie*⁹² and *Bush v. Vera*⁹³ indicating "that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."⁹⁴ *Harris*'s footnotes could easily be explained away with a conservative Court majority granting renewed leeway for states to gerrymander.

Justice Alito's opinion also seems to indicate his belief that any creation of a majority-minority district (for whatever reason) triggers strict scrutiny.⁹⁵ And there's no reason to believe that, when faced with the question head-on, he would agree (as the Court has been assuming without deciding in these cases) that strict scrutiny would be satisfied by a jurisdiction's compliance with Section 2 of the Voting Rights Act. Section 2 could well fall.

Not only does Justice Alito appear reticent to rein in gerrymandering efforts by Republican legislatures on racial grounds. He also appears unwilling to police partisan gerrymandering directly. Indeed, Justice Alito's opinion oddly stresses the "good faith" of the North Carolina legislature in drawing its district lines when the state, far from applying traditional districting principles, engaged in a deliberate partisan gerrymander to squeeze Democrats out of power. (Those hoping for Justice Kennedy to rein-in partisan gerrymanders should take note that he joined in Justice Alito's *Harris* dissent).

Combined with his views in other cases, Justice Alito's warning in *Harris* against the "danger" that "federal courts will be transformed into weapons of political warfare"⁹⁶ indicates that Court could well be on a path to declining to vigorously protect the rights of political and racial minorities in redistricting and voting cases, regardless of the legal theory offered by complaining plaintiffs against the states.⁹⁷ This judicial exit from the political thicket and adoption of a "to the victor goes the spoils" approach would end federal courts' backstop role they have played protecting minority voting rights.

⁹² 526 U.S. 541 (1999).

⁹³ 515 U.S. 952 (1996).

⁹⁴ 137 S. Ct. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (quoting *Cromartie I* and *Vera*) (citations omitted).

⁹⁵ *Id.* at 1487 n. 1 (Alito, J., concurring in the judgment in part and dissenting in part) ("The State concedes that the district was intentionally created as a majority-minority district. And appellants have not satisfied strict scrutiny.").

⁹⁶ *Id.* at 1490.

⁹⁷ See Hasen, *Racial Gerrymandering*, *supra* note 3, Part IV (describing the potential for the Supreme Court to exit more from the political thicket under a "to the victor goes the spoils" approach in redistricting and voting cases).

As Professor Rick Pildes has argued, the Supreme Court through even the voting rights-friendly *Harris* opinion seems to be signaling that the use of race in redistricting is becoming ever more suspect.⁹⁸ For redistricting authorities to avoid liability in the 2020 round of redistricting, they will stand clear of drawing majority-minority districts unless they have strong legal advice telling them that the Voting Rights Act legally compels their creation.

This signal from *Harris* and the Court's other recent racial gerrymandering cases may help Democrats in the short term, as it will curtail some Republican packing of Democratic-leaning districts ostensibly in the name of protecting voting rights. Perhaps that will somewhat make up for the new freedom many of these states will have in the 2020 round of redistricting thanks to the Supreme Court's 2013 opinion in *Shelby County*. This will be the first redistricting round since the 1970s where covered states they will not have to submit their plans for Department of Justice preclearance.

The skepticism of race-based redistricting could soon come back to bite, however, if and when more Court conservatives come to see even those districts compelled by Section 2 of the Voting Rights Act as unconstitutional. While the future is uncertain,⁹⁹ it is not out of the question for the Court to either hold Section 2's vote dilution rule unconstitutional as a violation of (a colorblind view of) the Fourteenth Amendment's Equal Protection Clause, or, more likely, to so limit Section 2 applicability and legal standard in the name of constitutional avoidance and a post-racial America as to make it a toothless protection for protecting voting rights.

Despite *Cooper*, the end times do not look like good times for voting rights.

⁹⁸ Rick Pildes, *Analysis of the Supreme Court's North Carolina Racial Redistricting Case*, ELECTION L. BLOG, May 22, 2017, <http://electionlawblog.org/?p=92694> ("The main take-away from today's decision is that the Supreme Court is continuing the project of winding down unnecessary racial redistricting.").

⁹⁹ Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn But with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016).