

# THE SURPRISE RETURN AND TRANSFORMATION OF RACIAL GERRYMANDERING

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*Racial gerrymandering is a doctrine that has had a surprising evolution. It began in controversy in the 1990s with legal challenges brought by white voters to the creation of majority-minority districts. By injecting a deeply skeptical, color-blind requirement into the redistricting process, the Supreme Court's racial gerrymandering jurisprudence looked for much of the 1990s like a serious, and perhaps even fatal, threat to the ability to draw majority-minority districts under the Voting Rights Act. But those fears ultimately were misplaced.*

*This Article argues instead that the doctrine, while suffering from some jurisprudential and analytical complexities, has proven nonetheless to be a remarkably flexible tool for courts to address the intersection of race and politics. This decade, racial gerrymandering has evolved to be both a potent tool to block the packing of African American voters and a means to police at least some forms of partisan gerrymandering.*

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## INTRODUCTION

Racial gerrymandering was born in controversy and through several lives has continued to morph and surprise. This Article argues that the doctrine—which has been criticized for its incoherence—has, in fact, proven to be a useful and flexible tool for the Supreme Court to address a variety of issues of the day, including, most recently, a common form of partisan gerrymandering. This is perhaps surprising.

When racial gerrymandering claims first emerged in the early 1990s, the doctrine came seemingly out of nowhere. The Supreme Court had held previously in *Gomillion v. Lightfoot* that a legislature that “singles out a readily isolated segment of a racial minority for special discriminatory treatment . . . violates the Fifteenth Amendment.”<sup>1</sup> And the Court’s

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<sup>1</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). In *City of Mobile v. Bolden*, the Supreme

subsequent decision in *City of Mobile v. Bolden* had seemingly confirmed that vote dilution claims brought under the Constitution required proof of actual discriminatory intent as well as a discriminatory effect.<sup>2</sup> Before 1993, however, the mere consideration of race without the intent to discriminate had never—in the Supreme Court’s redistricting jurisprudence at least—been held to be constitutionally problematic.

Then, in a series of 5-4 opinions starting with *Shaw v. Reno* in 1993, the Supreme Court shifted course significantly, upending existing redistricting jurisprudence to create what it described as an “analytically distinct” racial gerrymandering claim. In contrast to claims focused on racial discrimination, the new racial gerrymandering claim viewed the mere consideration of race in redistricting with deep suspicion and, by doing so, seemed to be a direct threat to the ability of states to create the minority opportunity districts required under section 2 of the Voting Rights Act.<sup>3</sup> For a while, indeed, the impact was dire for communities of color. During the 1990s, the Supreme Court’s racial gerrymandering cases resulted in virtually every majority-minority district that came up against the doctrine being declared unconstitutional.<sup>4</sup> Many openly wondered about the future ability of legislatures to draw majority-minority districts.<sup>5</sup> Scholars, likewise, despaired about the doctrinal underpinnings of racial gerrymandering,

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Court made the implicit ruling of *Gomillion* explicit, holding that a violation of the Fifteenth Amendment’s right to vote requires intentional discrimination on the basis of race. *See* 446 U.S. 55, 63 & n.10 (1980) (“[I]n the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. . . . [None of] the Court’s Fifteenth Amendment decisions . . . has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.” (citations omitted)).

<sup>2</sup> 446 U.S. at 66–68. In response to *City of Mobile v. Bolden*, Congress amended section 2 of the Voting Rights Act to allow claims under the Act, as opposed to the Constitution, to be brought on the basis of discriminatory effect without an express showing of discriminatory intent. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973aa–6 (1982)).

<sup>3</sup> 509 U.S. 630, 652 (1993) (examining the claim that “a reapportionment plan [was] . . . so irrational on its face that it immediately offend[ed] principles of racial equality”); Voting Rights Act of 1965, § 2 (codified as amended at 52 U.S.C. § 10301 (Supp. V 2018)) (establishing that a violation occurs if the members of a protected class “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” in a given district).

<sup>4</sup> *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 957 (1996) (upholding, in a highly fractured decision, the district court’s assessment that a Texas legislative district had been unconstitutionally racially gerrymandered); *Miller v. Johnson*, 515 U.S. 900, 917 (1995) (upholding the district court’s “finding that race was the predominant factor motivating the drawing of [a Georgia legislative district]” and that the district was thus unconstitutional). *But cf.* *Easley v. Cromartie*, 532 U.S. 234, 237 (2001) (finding a majority-minority district constitutional because it was politically, rather than racially, gerrymandered).

<sup>5</sup> *See, e.g.*, Bernard Grofman, *Shaw v. Reno and the Future of Voting Rights*, 28 PS: POL. SCI. & POL. 27, 31 (1995) (evaluating whether *Thornburg v. Gingles*, 478 U.S. 30 (1986), which upheld the “effects test” from the 1982 Amendments to the Voting Rights Act, might be “on a potential collision course” with *Shaw*).

finding the Supreme Court’s doctrine “both misguided and incoherent.”<sup>6</sup>

But then, the Supreme Court seemed to call a truce with its holding in 2001 in *Easley v. Cromartie* that political advantage could be a justification for considering race.<sup>7</sup> And with that, racial gerrymandering claims almost completely vanished. The round of redistricting after the 2000 census saw few racial gerrymandering claims.<sup>8</sup> Many thought the day of racial gerrymandering claims had come and gone.<sup>9</sup> But that, too, proved premature.

Racial gerrymandering doctrine morphed again and came roaring back in the 2010 round of redistricting—with an important twist. While the first generation of racial gerrymandering claims had been brought by white voters to unwind majority-minority districts,<sup>10</sup> this time, racial gerrymandering claims were being brought by voters of color, usually to challenge having been disadvantageously “packed” into districts.<sup>11</sup>

The reaction of the civil rights community to the return of racial gerrymandering was mixed. The Supreme Court, after all, had become more conservative in the years since the last major racial gerrymandering case in 2001<sup>12</sup> as a result of the replacement of Chief Justice William Rehnquist and Justice Sandra Day O’Connor with Chief Justice John Roberts and Justice Samuel Alito.<sup>13</sup> Many worried that the Roberts Court might expand the color-blind approach of earlier racial gerrymandering cases, perhaps going so far as to invalidate the use of section 2 of the Voting Rights Act to create

<sup>6</sup> *E.g.* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1202 (1996).

<sup>7</sup> 532 U.S. 234.

<sup>8</sup> *See* Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 67 ALA. L. REV. 365, 372 (2015) (noting that “[a]fter *Easley*, racial gerrymandering cases became far less frequent” because of a number of possible factors, including the improved competency of map drawers, the changed role of the DOJ, the Bush Administration’s lack of “appetite” for pursuing such claims, and odd politics at play). One racial gerrymandering case made it to the Supreme Court during this period. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 410 (2006) (rejecting racial and partisan gerrymandering claims).

<sup>9</sup> For example, the official guidance given to lawmakers in 2011 by the Texas Legislative Council was that “the near absence of successful *Shaw* challenges following the 2001 round of redistricting indicates that the [S]upreme [C]ourt has left a significant ‘safe haven.’” TEX. LEGISLATIVE COUNCIL, STATE AND FEDERAL LAW GOVERNING REDISTRICTING IN TEXAS 114 (2011),

[https://redistricting.capitol.texas.gov/docs/reqs\\_2011\\_0819\\_State\\_Federal\\_Law\\_TxRedist.pdf](https://redistricting.capitol.texas.gov/docs/reqs_2011_0819_State_Federal_Law_TxRedist.pdf).

<sup>10</sup> *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 637–38 (1993) (remarking that the lower court “first took judicial notice of a fact omitted from appellants’ complaint: that appellants are white”).

<sup>11</sup> *See, e.g.*, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1282 (2015).

<sup>12</sup> *Easley*, 532 U.S. 234.

<sup>13</sup> *See* Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS (Sept. 27, 2007), <https://www.nybooks.com/articles/2007/09/27/the-supreme-court-phalanx> (remarking on the “ultra-right-wing” appointments of Chief Justice Roberts and Justice Alito and on Justice Kennedy’s new role as the “swing vote” after Justice O’Connor’s retirement).

majority-minority districts.<sup>14</sup>

At the same time, others in the civil rights community saw the new round of cases as a chance, perhaps, to nudge racial gerrymandering jurisprudence away from the color-blind worldview of the earlier *Shaw* cases (where thinking too much about race was the problem) and toward something that saw the true harm of racial gerrymandering as more akin to intentional discrimination.<sup>15</sup> The hope was that by turning the predominance inquiry into a search for evidence of racially discriminatory motive, the Supreme Court could simultaneously solve the problem of distinguishing between race and politics and ease the troubling tension between racial gerrymandering and compliance with the Voting Rights Act that lay just below the surface of the 1990s cases and that had seemingly threatened to make the race-conscious drawing of minority opportunity districts unconstitutional. If this happened, instead of puzzling over whether block-level decisions about how to divide communities were motivated by race or politics—a difficult and at times almost impossible task given the close alignment of race and party in the South—courts could look at the broader context for signs of discrimination, including, in North Carolina, the passage of other racially discriminatory voting laws. At the same time, the frame would shift away from a notion of colorblindness that made all Voting Rights Act districts at least somewhat suspect.

Either way, the expectation was another set of 5-4 opinions, with Justice Kennedy likely being the tiebreaker.<sup>16</sup> In the end, that didn't happen. Instead, the Supreme Court issued a series of cautious opinions that were decided on narrow, often fairly technical grounds, leaving in place the anti-classification framework of the *Shaw* cases but also not expanding it.<sup>17</sup>

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<sup>14</sup> See Richard Hasen, *Argument Preview: Racial Gerrymandering, Partisan Politics, and the Future of the Voting Rights Act*, SCOTUSBLOG (Oct. 30, 2014, 3:02 PM), <https://www.scotusblog.com/2014/10/argument-preview-racial-gerrymandering-partisan-politics-and-the-future-of-the-voting-rights-act> (“Beneath the surface of the briefing in the case . . . is a fear that the Court could . . . strike the Act itself as an unconstitutional race-based statute in violation of the Equal Protection Clause. . . . [This] appears to be making voting rights advocates nervous.”); see also Voting Rights Act of 1965, § 2 (codified as amended at 52 U.S.C. § 10301 (Supp. V 2018)) (authorizing the federal government to enforce voting rights).

<sup>15</sup> See Brief for Amicus Curiae the Brennan Center for Justice at NYU School of Law in Support of Appellees at 3–4, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (No. 15-1262).

<sup>16</sup> See Richard Hasen, *Argument Analysis: Hitting the “Sweet Spot” on Race, Party, and Redistricting?*, SCOTUSBLOG (Nov. 12, 2014, 5:05 PM), <https://www.scotusblog.com/2014/11/argument-analysis-hitting-the-sweet-spot-on-race-party-and-redistricting>.

<sup>17</sup> In addition to *Cooper v. Harris*, this decade the Supreme Court has decided *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272–73 (2015), which decided the case on section 5 grounds by holding that states could not set a uniform black population threshold for districts covered under section 5 of the Voting Rights Act but rather had to determine the threshold needed for African Americans to maintain their ability to elect on a district-specific basis and

But while neither the worst fears nor the highest hopes of observers were realized, the importance of the Court's recent decisions is broader than their narrow holdings suggest. This Article will argue that the Supreme Court's opinion in *Cooper v. Harris*,<sup>18</sup> which dealt with the composition of two districts in North Carolina's 2011 congressional map, is a significant reworking of racial gerrymandering doctrine. The decision marks a tentative transformation of the doctrine into a tool to police, not racial discrimination, but political discrimination—albeit while keeping in place potential future risks for the long-term viability of the Voting Rights Act.

This Article will look first at the history of the early *Shaw* cases and the confusion they caused, suggesting that by the end of the 1990s, the Supreme Court very much wanted a way to put a pause on racial gerrymandering litigation. Unfortunately, the out found by the Court—treating race and politics as two separate things (one impermissible and one permissible)—helped open the door to a spate of aggressive partisan gerrymandering, which often ironically used race as a proxy for politics. The Article then will suggest that the Supreme Court, realizing it had created a politics loophole, took steps to close it in *Cooper*, although the ultimate outcome remains to be seen.

## I

### THE BIRTH OF RACIAL GERRYMANDERING: THE *SHAW* LINE OF CASES

Racial gerrymandering claims have their roots in the redrawing of North Carolina's congressional map after the 1990 census and objections by white voters to the creation of majority-minority districts. In contrast to the earlier generation of race-based claims, racial gerrymandering claims would inject the notion of colorblindness into redistricting jurisprudence.<sup>19</sup> This would be a significant (and surprising and threatening) doctrinal break with earlier cases in the Supreme Court's redistricting canon that had required actual discriminatory motive in order to establish state liability.

Initially, the North Carolina legislature, which at the time was controlled by Democrats, drew a map with one majority African American

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*Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, 799 (2017), which streamlined the test for racial gerrymandering by clarifying language in earlier cases that seemed to imply that a conflict with traditional redistricting principles is not a prerequisite for racial gerrymandering claims. The Supreme Court also dismissed, on standing grounds, an appeal of a racial gerrymandering ruling directing a redraw of Virginia's congressional map. *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

<sup>18</sup> 137 S. Ct. 1455 (2017).

<sup>19</sup> See *supra* note 1 for a discussion of the Supreme Court's decisions in *Gomillion v. Lightfoot* and *City of Mobile v. Bolden*.

district.<sup>20</sup> However, the Bush Justice Department objected to the map and refused to approve it (a step required at the time under section 5 of the Voting Rights Act).<sup>21</sup> In response, the North Carolina legislature redrew the map so that it contained a second majority African American district.<sup>22</sup> The resulting majority African American districts were both oddly shaped, with the newest majority African American district stretching 160 miles across the state to connect pockets of black voters.<sup>23</sup> A group of white voters sued, claiming that the creation of the second majority African American district violated the Equal Protection Clause of the Constitution because it had been drawn solely on the basis of race.<sup>24</sup>

The conservatives on the Court, led by Justice O'Connor, agreed. In a 5-4 decision in *Shaw v. Reno* in 1993, they ruled that while race could be a consideration in the drawing of districts, placing voters together who were “widely separated by geographical and political boundaries, and who may have [had] little in common with one another but the color of their skin” was unconstitutional, and bore “an uncomfortable resemblance to political apartheid.”<sup>25</sup>

Two years later, in another 5-4 opinion, the Supreme Court in *Miller v. Johnson* struck down a congressional redistricting plan in Georgia.<sup>26</sup> The plan included a district stretching between Atlanta and Savannah, and Justice Kennedy, writing for the majority, accepted the lower court’s finding that “there [we]re no tangible ‘communities of interest’ spanning the hundreds of miles” that could justify the district.<sup>27</sup> He thus agreed that “[i]t [wa]s apparent that . . . maximizing the district’s black population” to obtain Justice Department approval, and not anything else, was what drove the Georgia

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<sup>20</sup> See *Shaw v. Reno*, 509 U.S. 630, 633 (1993) (discussing the background of the litigation); Hasen, *Gerrymandering’s Questionable Revival*, *supra* note 8, at 367–71 (discussing the background of the *Shaw* case).

<sup>21</sup> See *Shaw*, 509 U.S. at 634–35. At the time, North Carolina and fourteen other, mostly Southern, states were required by section 5 of the Voting Rights Act to seek preapproval of redistricting plans and other voting law changes either from the U.S. Department of Justice or from a three-judge panel in the U.S. District Court for the District of Columbia before they could be put into effect (a process known as preclearance). This requirement no longer exists following *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013), in which the Supreme Court held that the formula used to determine which jurisdictions, or parts of jurisdictions, were subject to preclearance was unconstitutional. See generally Brian L. Porto, Annotation, *What Changes in Voting Practices or Procedures Must Be Precleared Under § 5 of Voting Rights Act of 1965 (42 U.S.C.A. § 1973c)—Supreme Court Cases*, 146 A.L.R. Fed. 619 (2019) (discussing the preclearance requirements and *Shelby County*’s impact).

<sup>22</sup> *Shaw*, 509 U.S. at 635.

<sup>23</sup> *Id.* at 635–36.

<sup>24</sup> *Id.* at 636–38.

<sup>25</sup> *Id.* at 647.

<sup>26</sup> 515 U.S. 900, 928 (1995).

<sup>27</sup> *Id.* at 902–03, 909, 919 (quoting *Johnson v. Miller*, 864 F. Supp. 1354, 1389–90 (S.D. Ga. 1994)).

General Assembly's decisions about how to draw the new district's boundaries.<sup>28</sup> This, the Supreme Court said, was unconstitutional because it made "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"<sup>29</sup>

The *Shaw* and *Miller* cases put map drawers in a conundrum. The challenge for defenders of majority-minority districts was to show that the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" was not race, despite the fact that the very reason for the creation of the district was to give minority voters an additional electoral opportunity.<sup>30</sup> This proved to be hard in practice, with districts in North Carolina, Texas, and Louisiana being struck down as racial gerrymanders in subsequent cases (in the case of North Carolina repeatedly).<sup>31</sup> It also proved to be a challenge for courts, requiring judges to get into the minutiae of boundary choices.<sup>32</sup> If courts had long been wary of the "political thicket"<sup>33</sup> of redistricting disputes, with the *Shaw* cases, they dove in head first.

But by the end of the 1990s, politics emerged as the perfect race-neutral excuse for racially gerrymandered districts due to the alignment of political parties in the South along racial lines.<sup>34</sup> If map drawers could show that politics rather than race motivated the configuration of a district, the Supreme Court seemed comfortable even with oddly shaped districts.<sup>35</sup> But

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<sup>28</sup> *Id.* at 919–20.

<sup>29</sup> *Id.* at 912 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

<sup>30</sup> *See id.* at 916 (identifying legislatures' difficulties in redistricting and plaintiff's burden of proof in such cases).

<sup>31</sup> *See, e.g.*, *Bush v. Vera*, 517 U.S. 952 (1996) (striking down Texas's redistricting scheme); *Shaw v. Hunt*, 517 U.S. 899 (1996) (holding that North Carolina's 12th District was a racial gerrymander); *Miller*, 515 U.S. 900 (Georgia); *Shaw*, 509 U.S. 630 (North Carolina); *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D.N.C. 1998), *rev'd*, 526 U.S. 541 (1999) (granting summary judgment in favor of plaintiffs on claim that North Carolina's redrawn 12th District was still a racial gerrymander); *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) (holding that creation of two majority African American congressional districts resulted in racial gerrymander), *vacated on other grounds*, 512 U.S. 1230 (1994).

<sup>32</sup> *See, e.g.*, *Vera*, 517 U.S. at 965–66 (reviewing the district court's highly-detailed description of the boundaries of a challenged district).

<sup>33</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (expressing resistance to adjudicating gerrymandering claims on political question grounds).

<sup>34</sup> *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) ("[R]acial identification is highly correlated with political affiliation in North Carolina . . .").

<sup>35</sup> *See, e.g., id.* at 258 (finding no impermissible racial gerrymandering, despite the fact that "racial identification correlate[d] highly with political affiliation," because there was no showing "that the legislature could have achieved its legitimate political objectives in alternative ways that [would have both been] comparably consistent with traditional districting principles" and "brought about [a] significantly greater racial balance"); *see also Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in judgment) ("A determination that a gerrymander violates the law must

in ending the proliferation of *Shaw* cases, the Court would help open the door to aggressive partisan gerrymandering by legislatures.<sup>36</sup>

## II

### *COOPER V. HARRIS*: CLOSING THE POLITICS LOOPHOLE

Flash forward to 2011. By this point, Republicans, rather than Democrats, controlled redistricting in North Carolina, thanks to upset wins in the election of 2010 that saw the GOP take control of both houses of the North Carolina legislature for the first time since Reconstruction.<sup>37</sup>

With the chance to redraw congressional districts, Republican lawmakers carefully “packed Democratic voters into just three of the state’s [thirteen] seats.”<sup>38</sup> Among these were “an African-American majority 1st District covering parts of rural northeastern counties and heavily black neighborhoods in Durham . . . and an even more tightly packed African-American majority 12th District knifing along the I-85 corridor in a strip from Charlotte to Winston-Salem and Greensboro.”<sup>39</sup>

The 2011 map was clearly a partisan gerrymander—and a highly aggressive one at that, giving Republicans a 10-3 advantage in the state’s congressional delegation.<sup>40</sup> But the North Carolina voters who sued to block the map chose to challenge the map on racial rather than partisan grounds, contending that the two heavily African American districts were racial gerrymanders.<sup>41</sup>

North Carolina defended the 1st District on the grounds that the Voting Rights Act required its creation.<sup>42</sup> But for the 12th District, the State argued

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rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”)

<sup>36</sup> This temptation to aggressively partisan gerrymander would be exacerbated by the Supreme Court’s failure in *Vieth* and *League of United Latin American Citizens v. Perry* to establish a constitutional rule against partisan gerrymandering.

<sup>37</sup> See RICHARD E. COHEN ET AL., *THE ALMANAC OF AMERICAN POLITICS 2018*, at 1382 (2017).

<sup>38</sup> *Id.* at 1385.

<sup>39</sup> *Id.*

<sup>40</sup> See LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, *EXTREME MAPS 6–13* (2017),

<https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf> (explaining through statistical data such as average efficiency gaps—the number of “wasted votes” in any given election—that North Carolina had one of “the worst skews, with both of North Carolina’s maps (the initial legislature-enacted plan and the redrawn plan in 2016) hovering around 20 percent in favor of Republicans”).

<sup>41</sup> See *Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017) (reviewing plaintiffs’ argument and the district court’s findings).

<sup>42</sup> See *id.* at 1468 (“Uncontested evidence in the record shows that the State’s mapmakers, in considering District 1, purposefully established a racial target . . . . Senator Rucho and

that Republicans' motivation had been politics (namely a desire to benefit the Republican Party), rather than race.<sup>43</sup> As the State's map drawer explained at trial, his "first and foremost" instruction was "to make the map as a whole 'more favorable to Republican candidates.'"<sup>44</sup> One strategy in this effort "was to pack the historically Democratic District 12 with even more Democratic voters, thus leaving surrounding districts more reliably Republican."<sup>45</sup> The changes to the district were not dramatic; however, they did closely follow racial lines, with the tweaked District 12 gaining 35,000 African American voters while losing 50,000 white voters.<sup>46</sup>

The trial court sided with the challengers. Although conceding that the racial gerrymandering case regarding the 12th District was "not as robust" as the case for the 1st District, the court nonetheless found that there was substantial evidence to suggest that race rather than politics predominated and drove the decision.<sup>47</sup> For one thing, North Carolina Republicans originally justified the configuration of the 12th District on the grounds of a need to obtain preclearance under section 5 of the Voting Rights Act.<sup>48</sup> In addition, the Court took into account the fact that far more African American Democrats ended up in the district compared to white Democrats in the same region.<sup>49</sup>

On appeal, the Supreme Court, on the surface, took a surprising evidentiary out. Rather than delving into the complicated question of whether race or politics predominated in a world of racially polarized voting, the Court simply deferred to the trial court's factual finding, letting it stand because it was not clearly erroneous.<sup>50</sup> The Court acknowledged, with unusual candor, that there was conflicting evidence:

Maybe we would have evaluated the testimony differently had we presided over the trial; or then again, maybe we would not have. Either way—and it is only *this* which matters—we are far from having a "definite and firm conviction" that the District Court made a mistake in

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Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA.").

<sup>43</sup> See *id.* at 1473 ("According to the State's version of events, [the map drawers] moved voters in and out of the district as part of a 'strictly' political gerrymander, without regard to race.").

<sup>44</sup> *Id.* at 1476.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* at 1474.

<sup>47</sup> See *Harris v. McCrory*, 159 F. Supp. 3d 600, 616 (M.D.N.C. 2016).

<sup>48</sup> See *id.* (quoting Senator Rucho and Representative Lewis as saying, "Because of the presence of Guilford County in the Twelfth District [which is covered by section 5 of the VRA], we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District").

<sup>49</sup> See *Cooper*, 137 S. Ct. at 1477 (citing expert testimony that "only 18% of the region's white Democrats wound up in District 12, whereas 65% of the black Democrats did").

<sup>50</sup> See *id.* at 1478 ("The District Court's assessment that all this evidence proved racial predominance clears the bar of clear error review.").

concluding from the record before it that racial considerations predominated in District 12's design.<sup>51</sup>

By taking an evidentiary out, the Court was able to avoid jumping into another round of complicated litigation where it would be called upon to delve into the exceedingly complex, and at some level unsolvable, question of whether race or politics drove a decision. These decisions about predominance had been hard enough for district courts, involving scrutiny of maps at the block level that often stretched to hundreds of pages. At oral argument in *Cooper*, for example, Justice Breyer openly expressed frustration over the prospect that the Court's racial gerrymandering jurisprudence would have the Court "spending the entire term reviewing 5,000-page records."<sup>52</sup> The desire to avoid that thicket alone probably helped the Justices avoid another bitter 5-4 decision.

But reading the Court's opinion just as an evidentiary opinion is too simple because it also took significant steps to quietly walk away from the race-or-politics conundrum it had created in 2001 when it seemingly recognized that politics (and perhaps even political gerrymandering) could be a legitimate defense to racial gerrymandering.<sup>53</sup>

First, it abandoned the requirement set down in *Easley v. Cromartie* that a voter challenging a map produce an alternative map showing that the state could have met its political objectives and still "have brought about significantly greater racial balance."<sup>54</sup> Many had understood the alternative map requirement as the Court's way of essentially ending the assault on majority-minority districts begun in the 1990s by shifting the burden to the (then-white) plaintiffs.<sup>55</sup> But in *Cooper*, the Court backtracked, holding that the ability to create an alternative map was simply one means for showing the predominance of race.<sup>56</sup>

Then, in a pair of footnotes, the Court even more directly pulled back

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<sup>51</sup> *Id.*

<sup>52</sup> Transcript of Oral Argument at 15, *Cooper v. Harris*, 137 S. Ct. 1455 (2016) (No. 15-1262).

<sup>53</sup> See *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) ("The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior . . ."). Although at the time of *Cooper*, the Supreme Court had not clearly walked away from partisan gerrymandering claims, it subsequently did so in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding such claims to be non-justiciable political questions).

<sup>54</sup> *Easley*, 532 U.S. at 258; see *Cooper*, 137 S. Ct. at 1478-79 (abandoning the alternative map requirement of *Easley*).

<sup>55</sup> See, e.g., Katharine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 214-18 (2002) (describing *Cromartie* as offering states a way to evade *Shaw*); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1578 (2018) ("*Cromartie II* provided a safe harbor of sorts for the states when they drew majority-minority districts.>").

<sup>56</sup> See *Cooper*, 137 S. Ct. at 1479.

from its sanction of politics as a defense to racial gerrymandering, explaining that “a plaintiff succeeds . . . even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones” and that “the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.”<sup>57</sup> In other words, although partisan gerrymandering claims are non-justiciable, there still may be limits on partisanship if race is the means of achieving a political result. Race cannot be the instrument for engineering a political advantage *even if* there is no real way to create that advantage without relying on race to a significant degree given the degree of racially polarized voting in a state.<sup>58</sup>

If this limitation remains in place in the next round of redistricting, the Supreme Court’s opinion can be seen as an important, pragmatic step for greater racial as well as greater partisan fairness in redistricting. Packing, or, conversely, dividing communities of color is one of the oldest tools in the book for engineering a partisan advantage—one that both major parties have been guilty of using for decades.<sup>59</sup> If, in fact, *Cooper* ends the ability to argue that political ends excuse disadvantaging minority voters, it will be a major tool for communities of color and, at the same time, a significant check in many states on the ability to do partisan gerrymanders. In many states, especially in the South, tweaking the number of people of color in a district is the easiest way to reliably change how a district performs politically. This is especially so where African Americans are concerned because of how overwhelmingly and consistently African American voters support Democratic candidates. While it is possible to gerrymander on a race-blind basis, it is harder, and electoral results could be less predictable, at least if some effort is made to adhere to traditional districting principles.<sup>60</sup> Outside

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<sup>57</sup> *Id.* at 1464 n.1, 1474 n.7.

<sup>58</sup> The Court’s footnotes sidestep *Cromartie* by turning to anti-stereotyping language from *Miller* that suggested that the problem with using race as a proxy was that it engaged in stereotyping about the political beliefs of individual members of a racial or language minority. *Id.* (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995)). But *Cromartie* had seemingly suggested that there could be exceptions. See *Cromartie*, 532 U.S. at 258 (“[W]here majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that . . . would have brought about significantly greater racial balance.”). *Cooper* returns to the pre-*Cromartie* formulation.

<sup>59</sup> See Michael Kelly, *Segregation Anxiety*, NEW YORKER, Nov. 20, 1995, at 46, <http://archives.newyorker.com/?i=1995-11-20#folio=042> (discussing how Southern white Democrats prior to the 1990s had avoided creating majority-minority districts in order to create a political advantage for white Democrats).

<sup>60</sup> North Carolina offers a prime example. After the state’s 2011 congressional map was thrown out as a racial gerrymander, lawmakers redrew the map to be what they termed a “political gerrymander” without consideration of race. The resulting partisan gerrymander was nearly as extreme as the earlier map in favoring Republicans—but not quite as durable. See LAURA ROYDEN,

of a few liberal pockets, white Democrats in the South simply live among too many white Republicans to make gerrymandering easy. And given that the Supreme Court has now definitively walked away from direct constitutional challenges to partisan gerrymandering, racial gerrymandering claims are the sole remaining federal-level avenue for mitigating excessive partisan effects in redistricting.<sup>61</sup>

The tradeoff for this new anti-gerrymandering tool, however, will be the survival of a doctrine that views the mere consideration of race (as opposed to discrimination on the basis of race) as suspect. That, for better or worse, means that a showdown on the constitutionality of section 2 of the Voting Rights Act could still be in the offing down the road.

Indeed, what remains to be seen is whether the new seeming stasis is permanent or more merely a stop along the way toward further morphing of the doctrine. Racial gerrymandering claims, having already had two lives, may yet transform themselves again, for good or for ill, to have a third.

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MICHAEL LI & YURIJ RUDENSKY, BRENNAN CTR. FOR JUSTICE, *EXTREME GERRYMANDERING & THE 2018 MIDTERM* 25 (2018), <https://www.brennancenter.org/publication/extreme-gerrymandering-2018-midterm>.

<sup>61</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are non-justiciable political questions).