RACE OR PARTY, RACE AS PARTY, OR PARTY ALL THE TIME: THREE UNEASY APPROACHES TO CONJOINED POLARIZATION IN REDISTRICTING AND VOTING CASES

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INTRODUCTION

An accidental moment of clarity emerged during Paul Clement's December 2016 oral argument rebuttal in the Supreme Court case of *Cooper v. Harris*.[1] *Harris* was the latest challenge to two North Carolina congressional districts that the Court had repeatedly examined since its 1993 decision in *Shaw v. Reno*.[2] *Shaw* established the cause of action for "an unconstitutional racial gerrymander,"[3] and *Harris* considered whether the North Carolina legislature engaged in such gerrymandering by making race the "predominant factor" in redistricting North Carolina's Congressional District 12, or whether its actions instead could be explained as a constitutionally permissible attempt to gain partisan advantage.[4]

Clement was arguing that the legislature's choice to shift 75,000 African American voters, many living in Guilford County, from neighboring districts into District 12 was not evidence of the legislature impermissibly making race the predominant districting factor, but simply evidence of partisanship:

> First of all, it's all well and good to say they pulled in 75,000 African-Americans or hauled in all these African-Americans. They were all Democrats, as well. And that's why, even there, if you had an alternative map that showed, oh, there's a different way to do Guilford County, and ... bring in Democrats and not bring in African-Americans, then you'd have something.
>
> But just the fact that they brought in a bunch of African-Americans because they were trying to bring in Democrats is about as interesting as the sun coming up in North Carolina, because everybody agrees there's about a 90 percent correlation between race and partisan identity.[5]

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1. Transcript of Oral Argument at 58, Cooper v. Harris, 137 S. Ct. 1455 (2017) (No. 15-1262). At the time it was argued, the case was known as *McCrory v. Harris*. *Id.* at 1. Pat McCrory was North Carolina's governor when the case was argued, *see id.*, and Roy Cooper was governor when the case was decided, *see Cooper*, 137 S. Ct. at 1455.

2. 509 U.S. 630, 633 (1993).

3. *Id.* at 633-34, 658.

4. *Harris*, 137 S. Ct. at 1463; *id.* at 1488 (Alito, J., concurring in part and dissenting in part).

5. Transcript of Oral Argument, *supra* note 1, at 58.

Clement's point was, of course, correct—the most reliable Democratic voters by far in North Carolina are African American[6]—but it subversively undermined not only his argument but also the entire exercise in which the Court engaged. The idea that in southern states, such as North Carolina, it is possible to separate considerations of race from those of party is ludicrous. Not only do white and African American voters in North Carolina tend to prefer different candidates, white voters tend to prefer Republicans and, on an even greater basis, African American voters tend to prefer Democrats.[7] For example, in the final Elon Poll of North Carolina voters before the 2016 presidential election, an astonishing 100 percent of African American voters supported Hillary Clinton, while 67 percent of white voters supported Donald Trump.[8]

Throughout the United States, but especially in the modern American South, the situation is one of "conjoined polarization," as Bruce Cain and Emily Zhang label it: "The more consistent alignment of race, party, and ideology since 1965."[9] As they summarize the social science literature on the phenomenon:

> American politics has become decidedly more polarized in the last two decades. By political polarization, we mean the persistent and growing ideological gap between adherents of the two major political parties....
>
> Democrats and Republicans today can reliably be expected to hold certain policy and ideological positions. Two decades ago, partisan labels were much less predictive of the views that an individual held....
>
> Polarization along partisan lines also has a racial dimension. The campaign, election, and reelection of President Obama spawned significant academic research on the parallel growth of racial and partisan polarization. Such racial polarization is evident in President Obama's election returns: in the 2008 election, he lost the white vote by 20%, but won with a nonwhite margin of 62%.

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6. ELON POLL, NORTH CAROLINA RACES TIGHTEN AS ELECTION DAY APPROACHES 11 (Oct. 23-27, 2016), https://www.elon.edu/e/CmsFile/GetFile?FileID=694 [https://perma.cc/6MDS-E6E2].

7. *Id.*

8. *Id.* at 1.

9. Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 869 (2016).

> The roots of racial polarization run much deeper. The civil rights movement divided the population on racial issues and caused party attachments to form along racial lines. Such racial polarization has not only caused African-Americans and other minorities to more closely associate with the Democratic Party, it has also had an effect on whites. Political scientists have found a notable increase in the effects of racial resentment on white partisanship from 1988 to 2000....
>
> ...
>
> Racial sorting and party sorting trends have been closely intertwined. Civil rights policies gave socially conservative white Democrats reason to defect to the Republican Party. Immigration policies also enabled the nonwhite and non-European population to grow and eventually enter a coalition with liberal whites. At the same time, both parties became more ideologically consistent, with more within-party conformity in social and economic policy. This undercut the ideological heterogeneity that in the immediate post World War II era had limited the polarization of activists, donors, and representatives in both parties. The Democratic and Republican parties became more ideologically consistent and racially distinctive.[10]

Although conjoined polarization emerged most strongly in the last two decades, legal doctrine has not yet found a comfortable way to deal with it, as the *Harris* case illustrates.[11] In this Article, I consider three ways legal doctrine can and does try to approach conjoined polarization, and the problems with each approach. My own preference is for the third approach, but it too has drawbacks.

Race or party is the first approach to conjoined polarization.[12] In this approach, a court's task is to decide whether a case is "really" about race rather than party, with certain legal consequences flowing from the determination.[13] Some of the racial gerrymandering cases fit into this category.[14] Building on an early racial gerrymandering case, *Easley v. Cromartie* (*Cromartie II*), the courts' task has

10. *Id.* at 872-74, 876 (footnotes omitted).

11. *See* Cooper v. Harris, 137 S. Ct. 1455, 1470-72 (2017).

12. *See infra* Part I.

13. Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 71 (2014).

14. *See, e.g.*, Easley v. Cromartie (*Cromartie II*), 532 U.S. 234 (2001).

been to decide whether race or party predominated in drawing district lines.[15] If race predominated, the lines are impermissible unless the state had a compelling reason to rely on race, but if partisanship predominated, the districts are allowed.[16] Beneath the surface, this racial gerrymandering doctrine has allowed for partisan and political fights over redistricting in the guise of discussing racial separation.[17] The race or party divide also appears in some Voting Rights Act section 2 cases; courts looking at discriminatory effects of voting rules sometimes have considered whether minority voters faced less opportunity to participate in the political process because of their race (or ethnicity), or for partisan reasons.[18] In jurisdictions where conjoined polarization is prevalent, a *race or party* analysis can be nonsensical and lead to arbitrary results. It also may undermine enforcement of the Voting Rights Act.

An alternative approach is to treat *race as a proxy for party* under certain conditions.[19] The United States Court of Appeals for the Fourth Circuit used this approach in a recent case involving the constitutionality of a major North Carolina voting law, which imposed a strict voter identification requirement and made cutbacks to other voting rules.[20] The court, in striking the State's law as a violation of section 2 of the Voting Rights Act, held that the state legislature (the same one that drew the lines at issue in *Harris*) acted with a racially discriminatory intent.[21] The court reached this conclusion despite finding no evidence of racial animus.[22] The court wrote that legislators relied upon racial data to achieve partisan ends in designing this law, and that this reliance made party discrimination a form of racial discrimination.[23]

The Supreme Court's most recent racial gerrymandering case, *Cooper v. Harris*, also moved the Court significantly in the direction of *race as party*, especially when there was reliance on racial data

15. *See id.* at 241. *Cromartie I* was *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541 (1999).
16. Hasen, *supra* note 13, at 71.
17. *Id.* at 69.
18. *Id.* at 66.
19. *See infra* Part II.
20. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).
21. *Id.* at 219.
22. *Id.* at 233.
23. *Id.* at 214, 230.

for partisan ends.[24] This approach, while more realistic about conjoined polarization than *race or party*, raises a host of new questions, such as whether Republican legislatures in areas of conjoined polarization could ever roll back earlier easing of voting laws enacted by Democratic legislatures and administrators without risking a court holding that the legislature engaged in intentional race discrimination. It also means that a law that is illegal in North Carolina may be legal in Wisconsin, even if motivated by the same partisan intent, because of the difference in racial makeup between the two states.[25]

A third approach to conjoined polarization, suggested in footnotes in the Fourth Circuit case,[26] but advanced more fully by some scholars, including Sam Issacharoff and me, seeks to de-emphasize a racial focus in these lawsuits.[27] Under the *party all the time* approach, courts shift toward policing partisan election laws more directly. Race still matters in areas with conjoined polarization, but a legal focus on the racial aspects of these disputes can make it even more difficult to adjudicate these delicate disputes.[28] A move toward *party all the time* would prevent states from raising partisanship as a defense to discrimination against minority voters.[29] *Party all the time* has two main drawbacks. First, it can obscure situations in which race is more salient than party and needs direct redress from the courts.[30] Second, the approach injects courts further into the political thicket, potentially leading to more partisanship in judicial decision-making and lack of a principled stopping point for judicial policing.[31]

The problem of conjoined polarization is real, and the three alternatives demonstrate that it is hard to come up with the right set of legal doctrines to properly take it into account. That the Court

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24. *See* 137 S. Ct. 1455, 1476-77 (2017); *infra* notes 273-77 and accompanying text.

25. *Compare Quick Facts: North Carolina (2016)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/NC [https://perma.cc/PPP7-HJ5E], *with Quick Facts: Wisconsin (2016)*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/WI/PST045216 [https://perma.cc/UJE7-HU2M] [hereinafter *Wisconsin*, U.S. CENSUS BUREAU].

26. *See, e.g.*, *N.C. State Conference of NAACP*, 831 F.3d at 226 n.6.

27. *See infra* Part III.

28. *See* Hasen, *supra* note 13, at 61.

29. *See id.* at 62.

30. *See infra* Part III.B.

31. *See infra* Part III.B.

continues to struggle with these issues is demonstrated in the Court's recent decision in the *Harris* case, in which a Court majority, led by Justice Elena Kagan, seemed to move in the direction of the race as party proxy approach,[32] while the dissenters, led by Justice Samuel Alito, doubled down on the race or party approach.[33] *Harris* may prove to be a short-term victory for voting rights plaintiffs, however, and a more conservative Supreme Court could move toward a fourth approach, *to the victor goes the spoils*, in which the Court allows legislative majorities to impose their will despite claims of racial *or* partisan discrimination or intent.

I. RACE OR PARTY

A. Background

The history of race, party, and redistricting in the United States is a long and complex one, so below is a simplified overview to situate the *race or party* approach generally and its manifestation in the racial gerrymandering and voting rights cases in particular.[34]

Consider, for example, a city with a city council made up of seven seats. The city's population is 60 percent white and 40 percent African American, and there is racially polarized voting, with whites preferring one set of candidates and African Americans preferring another set of candidates. The city elects candidates at-large, meaning everyone votes for all seven candidates. In these races, we expect five white-preferred and zero African American-preferred candidates on the council. If the African American voters are at least somewhat geographically concentrated, it would be possible to draw one or two districts ("majority-minority" or "minority opportunity" districts) in which African American voters could elect their preferred candidates. The at-large system could be said to "dilute" minority voters' political power.

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32. Cooper v. Harris, 137 S. Ct. 1455, 1479 (2017).

33. *Id.* at 1496-97 (Alito, J., concurring in the judgment in part and dissenting in part).

34. I first explored the *race or party* question in more general terms in my article, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, Hasen, *supra* note 13.

The passage of the 1965 Voting Rights Act did not initially tackle this problem of at-large voting.[35] The Act's initial aim was more basic, eliminating first-generation barriers to voting such as literacy tests.[36] By 1969, the Supreme Court read section 5 of the Voting Rights Act to require jurisdictions with a history of racial discrimination in voting not to make changes in voting rules that made protected minority voters worse off—the "nonretrogression rule"—including changes to districting rules.[37] These jurisdictions had to submit their changes for "preclearance" to the United States Department of Justice (DOJ) or a three-judge federal district court in Washington, DC.[38] A move from two minority opportunity districts to one or none, for example, would be retrogressive and blocked by the courts and the DOJ.[39] Keeping an at-large voting system would not trigger section 5 review, however, because there would be no change from existing rules to submit for preclearance.[40]

Although constitutional doctrine was beginning to emerge in the 1970s to allow Fourteenth and Fifteenth Amendment challenges to at-large voting systems as unconstitutional vote dilution and to require jurisdictions to create minority opportunity districts,[41] the Supreme Court put a stop to this evolution in the 1980 case, *City of Mobile v. Bolden*.[42] The Court in *City of Mobile* held that, in such constitutional challenges, plaintiffs must prove that an at-large system would have both a discriminatory *effect* on minority voters and that the city chose the system with a racially discriminatory *intent*.[43] Unless plaintiffs could show that the city enacted at-large voting with the purpose to discriminate against minority voters, it was immune from constitutional challenge.[44]

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35. For background and detail, see DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW 143-257 (6th ed. 2017).

36. *See id.* at 215.

37. Allen v. State Bd. of Elections, 393 U.S. 544, 548-50 (1969).

38. *Id.* at 549-50.

39. *See id.*; *see also* Beer v. United States, 425 U.S. 130, 141 (1976).

40. RICHARD L. HASEN, LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW 281 (2014).

41. *See generally* White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* E. Carroll Par. Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

42. 446 U.S. 55, 78 (1980).

43. *Id.* at 67-68.

44. *Id.* After *City of Mobile*, the Court decided *Rogers v. Lodge*, 458 U.S. 613, 627 (1982),

In response to *City of Mobile*, Congress amended section 2 of the Voting Rights Act in 1982 to allow for claims of vote dilution—and other voting claims, discussed below—based solely upon proof of racially discriminatory effects, without requiring proof of racially discriminatory intent.[45] Section 2 allowed challenges to jurisdictions—anywhere in the country, not just in jurisdictions covered by section 5—with racially polarized voting using at-large districts.[46] It also allowed challenges to jurisdictions already using districts, where line-drawers may have "packed" or "cracked" populations of minority voters, diluting their political power.[47] Section 2 of the Voting Rights Act, as interpreted in the Supreme Court's 1986 case, *Thornburg v. Gingles*, required the creation of minority opportunity districts in at least some cases in which plaintiffs could demonstrate racially polarized voting and that the minority group was large and compact enough to be a majority in a single-member district.[48] Further, once a jurisdiction covered under section 5 of the Act created minority opportunity districts, it could not reduce the number of such districts without running afoul of the nonretrogression rule.[49]

Throughout the 1980s and into the 1990s, the DOJ read sections 2 and 5 of the Voting Rights Act broadly to require jurisdictions subject to section 5 preclearance to create many minority opportunity districts.[50] Sometimes the creation of these new districts helped Democrats, but often they helped Republicans by concentrating Democratic voters into a smaller number of districts.[51] At that point in time, strong voting rights enforcement did not consistently line up with the interests of a single political party.[52]

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which seemed to soften the intent requirements.

45. Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C. § 10301 (Supp. III 2016)).

46. *Id.*

47. *Id.*

48. 478 U.S. 30, 44-45, 50-51 (1986). Once a plaintiff meets this threshold test, a court must use a multifactor "totality of the circumstances" test to determine whether there is a section 2 violation. *Id.* at 36-38, 36 n.4.

49. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 548-50 (1969).

50. For a critique, see ABIGAIL THERNSTROM, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 143-66 (2009).

51. Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 365 (2015).

52. *See id.*

In the mid-1990s, the Supreme Court started reining in broad DOJ interpretations of the Voting Rights Act, which were being used to force covered jurisdictions to maximize the number of majority-minority districts.[53] The Court accomplished this reining in both by narrowing statutory constructions of sections 2 and 5 of the Voting Rights Act[54] and by recognizing a new cause of action in *Shaw* for "an unconstitutional racial gerrymander."[55]

B. Unconstitutional Racial Gerrymandering in Times of Conjoined Polarization[56]

In the 1990s round of state legislative redistricting in North Carolina, a jurisdiction then partially covered by section 5 of the Voting Rights Act, self-interested Democrats reacted to the DOJ's demands to create an additional majority-minority legislative district by passing a plan that simultaneously created the required number of such districts, protected Democratic incumbents, and maximized the number of Democratic seats.[57]

To accomplish these goals, the mapmakers drew some very oddly shaped majority-minority districts, including a new Congressional District 12 that tied together disparate populations of African American voters along the I-85 freeway corridor.[58] Republicans initially challenged the legislative districting plan as a partisan gerrymander.[59] The claim failed, following the fate of other partisan gerrymandering claims.[60] Opponents of the redistricting plan then filed a new claim, arguing that the redistricting was an unconstitutional racial gerrymander.[61] Importantly, the claim was not that the plan diluted the white vote or anyone else's vote.[62] The plaintiffs were

53. *See id.* at 365, 368.

54. *See generally* Reno v. Bossier Par. Sch. Bd., 528 U.S. 320 (2000); Reno v. Bossier Par. Sch. Bd., 520 U.S. 471 (1997).

55. Shaw v. Reno, 509 U.S. 630, 633-34 (1993).

56. The next few pages draw from my article, *Racial Gerrymandering's Questionable Revival*. *See* Hasen, *supra* note 51, at 369-72.

57. LOWENSTEIN ET AL., *supra* note 35, at 337-38.

58. *Id.*

59. *See generally* Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court), *aff'd*, 506 U.S. 801 (1992).

60. *See id.* at 399.

61. Shaw v. Reno, 509 U.S. 630, 636 (1993).

62. *Id*. at 641.

pushing a view of a color-blind Constitution and election process, arguing that the plan separated voters on the basis of race in violation of the Equal Protection Clause.[63]

In *Shaw v. Reno*, the Supreme Court accepted the argument, creating a cause of action for an unconstitutional racial gerrymander.[64] Justice Sandra Day O'Connor's decision for the Court stressed the odd shape of the district, and said that the odd shape showed voters being separated on the basis of race, in violation of the Constitution.[65] The Court held such separation could not be sustained unless it satisfied strict scrutiny and remanded the case for further consideration of the justification.[66] 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.[67]

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63. *Id.* at 641-42.

64. *Id.* at 647-49.

65. Here is the key language from *Shaw* establishing the nature of the perceived injury:

> 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 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.
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> 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 (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991); Holland v. Illinois, 493 U.S. 474, 484 & n.2 (1990)).

66. *Id.* at 657-58.

67. *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,

Later 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 the district,[68] other Court conservatives shifted the focus of the new cause of action to motive.[69] In *Miller v. Johnson*, the Court held that race could not be the "predominant ... factor" in redistricting without compelling justification.[70] The *Miller* Court concluded that the Georgia legislature had an impermissible predominant racial motive and 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.[71] The harm in *Miller* appeared to be the same as in *Shaw*, but the proof moved from district shape to legislative motive.[72] It was not a motive to engage in racial *discrimination*, but one of racial *separation*.[73]

To talk of Georgia's "predominant" motive in *Miller* as separating voters on the basis of race was odd, however, because the State was simply drawing the number of majority-minority districts required by the DOJ to obtain section 5 preclearance.[74] If anything, Georgia's predominant motive was to obtain preclearance of its plan by proposing the number of majority-minority districts the DOJ demanded.[75] The placement of the districts appeared motivated not by race but by party and incumbency considerations.[76] Nonetheless, the Court found race to be the predominant factor.[77]

The new test led lower courts to search for an impermissible legislative motive[78]: a difficult, if not impossible, task when examining the votes of a multimember body, but a task made especially

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92 MICH. L. REV. 483, 506-07 (1993).

68. *See* Miller v. Johnson, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring).

69. *Id.* at 916 (majority opinion).

70. *Id.* at 920.

71. *See id.* at 923-28.

72. *Id.* at 923-24.

73. *Id.* at 910-11.

74. 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).

75. *See Miller*, 515 U.S. at 921.

76. *Id.* at 942 (Ginsburg, J., dissenting).

77. *Id.* at 923-27 (majority opinion).

78. *See, e.g.*, Theriot v. Parish of Jefferson, 185 F.3d 477, 484 (5th Cir. 1999).

difficult by the emergence of conjoined polarization between race and party.

Most importantly for our purposes, in 2001, the Court decided *Cromartie II*, the fourth time a North Carolina racial gerrymandering case reached the Supreme Court within a decade.[79] In *Cromartie II*, Justice O'Connor and the four more liberal members of the Court rejected a challenge to North Carolina's latest redistricting plan for Congressional District 12 after concluding that party dominance, not race, was the predominant factor in drawing the challenged district lines.[80]

It is not as though the Court in *Cromartie II* was unaware of the creeping conjoined polarization. Indeed, Justice Stephen Breyer, writing for the Court, noted that "[c]aution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated."[81]

Throwing caution to the wind nonetheless, the Court engaged in an excruciatingly detailed analysis of the trial court's factual findings to see if race or politics predominated in creating the latest incarnation of District 12, an analysis that was necessary if the Court was to overcome the trial court's factual finding of political predominance under the very deferential "clearly erroneous" standard of review.[82] The Court concluded that the trial court clearly erred in analyzing the evidence, and that race rather than politics predominated.[83] It set forth the applicable test in future race or party cases 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

79. *See Cromartie II*, 532 U.S. 234 (2001).

80. *Id.* at 258.

81. *Id.* at 242; *see also id.* at 243 ("'Given the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina, these facts in and of themselves cannot, as a matter of law, support the District Court's judgment.' *See Vera*, 517 U.S., at 968 (O'Connor, J., principal opinion) ('If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify.'")).

82. *See id.* at 241-58.

83. *Id.* at 258.

> 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.[84]

Since *Cromartie II*, racial gerrymandering cases have become far less frequent. One reason may be that redistricters 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). Another key factor is likely the changed role of the DOJ. Because of a number of cases reining in the DOJ's preclearance powers to require the creation of additional majority-minority districts, the DOJ was no longer pushing jurisdictions to create more of them.[85] Without such pressure, jurisdictions could avoid both DOJ liability and potential problems in the courts through the creation of too many of these districts.[86]

By the 2010s, the groups litigating the racial gerrymandering cases switched sides as conjoined polarization became dominant in the American South and as Republican legislatures controlled the latest round of redistricting.[87] Republican legislators drew district lines to pack minority voters into a smaller number of districts to help Republican legislative chances, but they did not always dilute minority votes enough to allow for successful section 2 cases.[88] Democrats and minority voters claimed racial gerrymanders; Republican legislators defended their redistricting maps by arguing either that they had to pack more minority voters in these districts to comply with sections 2 or 5 of the Voting Rights Act, or that they were acting to help their party, not on the basis of race.[89] In the middle of litigation over this round of redistricting, the Supreme Court

84. *Id.*

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

86. *See id.*

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

88. *See id.* at 598-99, 609.

89. *Id.* at 606-07, 609.

essentially killed section 5 preclearance in its 2013 decision in *Shelby County v. Holder*.[90]

The 2014 *Alabama Legislative Black Caucus v. Alabama* case was typical.[91] Black and Democratic legislators, voters, and groups challenged Alabama's state legislative redistricting plan, raising a vote-dilution challenge under section 2 of the Voting Rights Act and racial and partisan gerrymandering claims.[92] Alabama had packed African American voters, and the state defended its packing on grounds it had to do so to comply with section 5 of the Voting Rights Act.[93] The lower court divided 2-1 in rejecting the plaintiffs' claims.[94]

The Supreme Court agreed to hear only the racial gerrymandering claim.[95] It sided with the plaintiffs, rejecting Alabama's argument that it had to pack African American voters into districts to comply with the now-moribund section 5.[96] The majority, in an opinion written by Justice Stephen Breyer for the four more liberal Justices and Justice Anthony Kennedy, held that the lower court erred in considering whether Alabama's legislative redistricting plan as a whole was an unconstitutional racial gerrymander.[97] The majority sent the case back to a lower court to consider the issue on a district-by-district basis.[98] It strongly suggested that the Alabama legislature's heavy focus on racial data in drawing district lines for some districts constituted an unconstitutional racial gerrymander.[99]

In the Supreme Court's most recent case on this question, the Court held that North Carolina's Republican legislature similarly relied impermissibly upon compliance with the Voting Rights Act to

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90. *See* 133 S. Ct. 2612, 2631 (2013).

91. 135 S. Ct. 1257 (2015).

92. *Id.* at 1262.

93. *Id.* at 1263.

94. *See* Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227 (M.D. Ala. 2013) (three-judge court), *vacated*, 135 S. Ct. 1257 (2015).

95. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1262.

96. *Id.* at 1274.

97. *Id.*

98. *Id.* at 1265.

99. *Id.* at 1264-68, 1274. On remand, the trial court found that fourteen of the challenged districts were racial gerrymanders, but upheld two under strict scrutiny. Ala. Legislative Black Caucus v. Alabama, 231 F. Supp. 3d 1026, 1033, 1348-49 (M.D. Ala. 2017) (three-judge court). The partially dissenting judge found an additional twelve districts were racial gerrymanders. *Id.* at 1404 (Thompson, J., concurring in part and dissenting in part).

excuse racial gerrymanders.[100] As discussed in the Conclusion below, although the Court in *Harris* was unanimous that one of the two North Carolina congressional districts failed on these grounds, it divided badly about the other congressional district, which presented a *Cromartie II race or party* question.

The most charitable thing to say about the current state of racial gerrymandering law is that it is a big mess. Thanks to the continued application of section 2 of the Voting Rights Act, states with large minority voting populations and racially polarized voting—that is, all of the states in the American South—*must* take race into account in drawing district lines or face potential Voting Rights Act liability.[101] And since the 1993 *Shaw* case, a state risks constitutional liability when its necessary race *consciousness* slides into race *predominance*.[102]

It would be difficult enough for states with sizable minority populations to achieve this kind of goldilocks nirvana without conjoined polarization, and I would argue—and have argued in earlier scholarship—not worth the candle, because all the Court is protecting is an unproven "expressive harm" that does nothing to protect the actual allocation of political power in the states.[103] But in times of conjoined polarization, the exercise of parsing racial from partisan intent is nonsensical and counterproductive. This explains why courts are dividing on these issues, often with Democratic-appointed judges much more likely to find that Republican legislatures engaged in a racial gerrymander than Republican-appointed judges.

The rational strategy for Republican legislatures is to dilute Democratic voting strength as much as possible without incurring liability under section 2 of the Voting Rights Act—and, before *Shelby County*, to do so while obtaining section 5 preclearance, a requirement that presumably will not be in place for the post-2020 round of redistricting. Packing and cracking groups of minority voters, who are by far the most reliable Democratic voters in the South, and overpopulating and underpopulating districts within

100. Cooper v. Harris, 137 S. Ct. 1455, 1472 (2017).

101. Daniel Tokaji, *Restricting Race-Conscious Redistricting*, REG. REV. (July 31, 2017), https://www.theregreview.org/2017/07/31/tokaji-restricting-race-conscious-redistricting/ [https://perma.cc/DQ5P-A2FD].

102. *Id.*

103. Hasen, *supra* note 51, at 384.

the confines of the one person, one vote rule, helps Republicans achieve legislative dominance.[104] The rational strategy for Democratic legislatures is to spread minority voters strategically to give Democrats the greatest number of seats without running afoul of Voting Rights Act requirements. It is impossible in this heated polarized environment to say precisely when racial consciousness slides into racial predominance. And avoiding race consciousness is impossible for states that want to avoid potential liability under section 2 of the Voting Rights Act.[105]

Chief Justice John Roberts tried to make the point about the difficulty of the predominance inquiry during times of conjoined polarization in the oral argument in a recent Virginia racial gerrymandering case, *Bethune-Hill v. Virginia State Board of Elections*.[106] He asked plaintiffs' attorney Marc Elias a hypothetical question involving the need to nominate people for a board who must come from a city of at least five hundred thousand people and who must come from California.[107] Which factor predominates—the population requirement or the California requirement?[108] The Chief Justice said this is a situation where neither factor predominates, with the suggestion that this hypothetical explained the dilemma in racial gerrymandering claims.[109] The Chief Justice's example is only partially useful because there are many states aside from California with cities containing populations over five hundred thousand.[110] The hypothetical would have been stronger if modified as follows: people nominated for a board must come from a state with at least thirty million people and must come from California. Because California is the only state with at least thirty million people,[111] it

104. *See id.* at 382.

105. The targeting of only Black Democrats when there are enough white Democrats to target could be such evidence, but in these cases there are usually not enough white Democrats to go around.

106. Transcript of Oral Argument at 4-6, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788 (2017) (No. 15-680).

107. *Id.* at 4.

108. *Id.*

109. *See id.* at 4-6.

110. *See Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2016 Population*, U.S. CENSUS BUREAU (2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/RU3W-8KD3].

111. Press Release, U.S. Census Bureau, Florida Passes New York to Become the Nation's

is nonsensical to ask which factor predominates. It is not that there are two criteria that both must be satisfied; it is that they are the same criterion.

The added irony to this debate over predominance is that in the early years of the *Shaw* claims, liberals and minority voting rights advocates rejected the legitimacy of the cause of action, seeing it as a way for conservatives to stall the creation of minority opportunity districts.[112] Now, with the complete partisan transformation in the South, some on the left embrace the cause of action to aim at white Republicans.[113] These cases are battles over vote dilution, one which necessarily affects people by both race and party because of conjoined polarization.[114]

In other words, the racial gerrymandering cause of action has been repurposed for new partisan warfare in cases in which the vote dilution claim under section 2 is not strong enough to stand on its own.[115] As Paul Clement put it at the oral argument in *Bethune-Hill*, "People are bringing junior varsity dilution claims under the guise of calling them *Shaw* claims, and I think it's really distorted the law."[116] He saw the plaintiffs in Virginia as pursuing an opportunistic action to force a new redistricting now that Virginia's governor is a Democrat.[117] The strategy is risky: if the Court agrees with plaintiffs that choosing racial targets in drawing district lines constitutes predominance, this could make it much harder to draw section 2 minority opportunity districts that could withstand racial gerrymandering claims.[118]

Third Most Populous State, (Dec. 23, 2014), http://www.census.gov/newsroom/press-releases/2014/cb14-232.html [https://perma.cc/5DR8-HYL7] (listing California as the most populous state with a population of approximately 38.8 million, followed by Texas with a population of approximately 26.9 million).

112. *See* Hasen, *supra* note 51, at 370.

113. *See* Richard L. Hasen, *Resurrection:* Cooper v. Harris *and the Transformation of Racial Gerrymandering into a Voting Rights Tool*, 1 ACS SUP. CT. REV. 105, 122-23 (2017).

114. *Id.*

115. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455 (2017).

116. Transcript of Oral Argument, *supra* note 106, at 43.

117. *Id.* at 54.

118. *See* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1272 (2015) (declining to "express a view on the question of whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny").

Republicans meanwhile have been disingenuous in defending these districts, feigning adherence to the Voting Rights Act or claiming they are merely acting as partisans and that partisanship has nothing to do with race.[119] To claim that a partisan gerrymander or a packing of minority voters—even if not done to the extent to trigger section 2—only coincidentally affects minority voters is flat wrong; if the Democratic party favors minority interests in these state legislative bodies and in Congress, and if Republicans minimize Democratic power in these bodies, minority power is weakened.

After the three-judge court in *Harris* found the challenged congressional districts constituted a racial gerrymander,[120] the North Carolina legislature drew new district lines, expressly eschewing reliance on any racial data and declaring that they were engaged in a partisan gerrymander.

> As [North Carolina] Representative Lewis stated, "I acknowledge freely that this would be a political gerrymander.... [W]e want to make clear that we ... are going to use political data in drawing this map. It is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood.... I'm making clear that our intent is to use—is to use the political data we have to our partisan advantage."[121]

The State drew ten of thirteen congressional districts to favor Republicans, in a state where party registration is roughly even between Democrats and Republicans.[122]

Plaintiffs then filed a new lawsuit challenging the districts as partisan gerrymanders, a claim the three-judge court rejected,[123] and that is currently pending in the Supreme Court.[124] And so we have come full circle. The first attack on *Shaw* was a failed partisan

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119. *See* Harris v. McCrory, 159 F. Supp. 3d 600, 616 (M.D.N.C. 2016), *aff'd sub nom.* Cooper v. Harris, 137. S. Ct. 1455 (2017).

120. *Id.* at 627.

121. Harris v. McCrory, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016) (per curiam) (three-judge court) (citations omitted), *appeal docketed sub nom.* Harris v. Cooper, No. 16-166 (U.S. Aug. 3, 2016).

122. *Harris*, 159 F. Supp. 3d at 620.

123. *Harris*, 2016 WL 3129213, at *2.

124. *See* Jurisdictional Statement, Harris v. Cooper, No. 16-166 (U.S. Aug. 3, 2016).

gerrymandering claim, followed by a racial gerrymandering one.[125] We now see a racial gerrymandering claim preceding the partisan gerrymandering claim.[126] It blinks reality to see these as two separate and independent claims.

C. Section 2 Vote Dilution Cases in Times of Conjoined Polarization

Although the artificial judicial bifurcation of race and party has been most prominent in the racial gerrymandering cases, bifurcation also has begun to appear in some Voting Rights Act section 2 cases, with the potential to undermine the strength of the Act going forward.[127]

Recall that Congress substantially rewrote section 2 in 1982 as a response to the Supreme Court's decision in *City of Mobile v. Bolden* requiring proof of discriminatory intent in constitutional vote dilution cases.[128] Section 2 created an "effects" test, or "results" test, which aimed to ensure that voting rights plaintiffs would not need to prove discriminatory intent to succeed.[129] Voting rights advocates initially used section 2 against vote dilution, applying the *Gingles* framework.[130] In more recent years, however, voting rights advocates have also brought section 2 suits against strict voter identification and other voting and registration rules, cases involving what Professor Daniel Tokaji has dubbed "the new vote denial."[131]

Section 2 provides in part that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to

125. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court), *aff'd*, 506 U.S. 801 (1992).

126. *See* Cooper v. Harris, 137 S. Ct. 1455, 1478 (2017).

127. *See infra* Part I.D.

128. *See* Act of June 29, 1986, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 52 U.S.C. § 10301 (Supp. III 2016)); 446 U.S. 55, 67-68 (1980).

129. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973).

130. Thornburg v. Gingles, 478 U.S. 30, 36-38 (1986).

131. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

> vote on account of race or color, or in contravention of [language protection] guarantees.[132]

In both the vote dilution and vote denial contexts, there has been some question about the extent to which section 2 required proof of *causation*.[133] The language of the statute itself bars not all vote dilution or vote denial, but only the "denial or abridgement" of voting rights "on account of race."[134] However, what if factors other than race account for the denial or abridgement of the right to vote?

A plurality of Justices in *Gingles* took the position that causation was irrelevant to the section 2 inquiry,[135] meaning it did not matter if other factors, such as political party affiliation, could explain *why* protected minority voters had less opportunity than others "to participate in the political process and to elect representatives of their choice."[136] To the plurality, requiring proof of causation would impermissibly move section 2 closer to the rejected intent test of *City of Mobile*.[137] Other Justices in *Gingles*, across several opinions, took issue with the plurality's causation analysis, leaving the issue somewhat open.[138]

In *League of United Latin American Citizens v. Clements*, a 1993 challenge under section 2 to Texas's use of county-wide (rather than single-member) districts for electing trial judges, the United States Court of Appeals for the Fifth Circuit, sitting en banc, noted the split in the Supreme Court on the issue of causation.[139] The court wrote that a majority of Justices in *Gingles* would not find a section 2 vote dilution violation if partisanship, rather than race, caused white voters and minority voters to prefer different candidates for office.[140]

Following this analysis, the *Clements* court majority rejected vote dilution claims in most of the challenged Texas counties, holding

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132. 52 U.S.C. § 10301(a) (Supp. III 2016).

133. *See* Tokaji, *supra* note 131, at 704-05.

134. 52 U.S.C. § 10301(a).

135. *See Gingles*, 478 U.S. at 63 (plurality opinion).

136. *See* 52 U.S.C. § 10301(b).

137. *See Gingles*, 478 U.S. at 71-73 (plurality opinion).

138. *See* LULAC v. Clements, 999 F.2d 831, 855-59 (5th Cir. 1993) (en banc) (discussing differences among separate opinions in *Gingles* on the causation question).

139. *Id.*

140. *Id.* at 858 n.26.

that partisan affiliation, rather than race, best explained divergent voting patterns in those counties.[141] The Court disagreed with the voting rights plaintiffs who thought that allowing the State to defeat a section 2 claim with partisanship data would bring the intent standard back into vote dilution cases through the back door.[142] The court also rejected the argument that "the Republican and Democratic Parties are proxies for racial and ethnic groups in Texas,"[143] and therefore a "distinction between 'racial vote dilution' and 'political defeat at the polls' should not control, ... [because] 'partisan politics' *is* 'racial politics.'"[144]

Among other things, the court noted that:

> [W]hite voters constitute the majority of not only the Republican Party, but also the Democratic Party, even in several of the counties in which the former dominates. In Dallas County, for example, 30-40% of white voters consistently support Democrats, making white Democrats more numerous than all of the minority Democratic voters combined.[145]

Section 2 "is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[146] The court pointed to this fact, and the support of minority candidates by party members of each party, as a reason for treating race and party as separate categories, even while acknowledging that "[m]inority voters, at least those residing in the contested counties in this case, have tended uniformly to support the Democratic Party."[147]

Since the Fifth Circuit decided the *Clements* case, conjoined polarization has only increased in the State of Texas, rendering the factual premise that race and party can be separated in Texas even more dubious. According to 2010 data from the Cooperative Congressional Election Study, which considered only those registered

141. *Id.* at 861 ("Because the evidence in most instances unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, we conclude that plaintiffs have failed to establish racial bloc voting in most, but not all, of the counties.").

142. *Id.* at 861-62.

143. *Id.* at 860.

144. *Id.* (emphasis added).

145. *Id.* at 861.

146. *Id.* at 854.

147. *Id.* at 860.

voters who identify as a Democrat or a Republican (and excluded those who do not state a party affiliation), 67 percent of white voters in Texas identified as Republican, and 33 percent as Democrat; in Dallas County, the figures were 60 percent Republican and 40 percent Democrat.[148] Even when one takes into account those who did not state a party preference, white support for Democrats in Dallas County falls to 28 percent.[149] In contrast, 10 percent of African American voters and 38 percent of Hispanic voters in Texas identified as Republican, compared to 90 percent of African Americans and 62 percent of Hispanic voters as Democrats.[150] In Dallas County, 13 percent of African Americans and 12 percent of Hispanics identified as Republicans, compared to 87 percent of African Americans and 88 percent of Hispanics as Democrats.[151] Because white voters made up 72 percent of all voters in the State of Texas and 63 percent in Dallas County, it is not surprising that the overall number of white Democrats is larger than the number of Black or Hispanic Democrats. Self-identifying Democratic voters are 54 percent white in Texas and 47 percent white in Dallas County.[152]

While some courts considering section 2 cases have not gone so far as *Clements*, many other courts have considered the reasons for white bloc voting as part of the totality of the circumstances section 2 analysis.[153] Most recently, Fifth Circuit Judge Jerry Smith,

148. *CCES Common Content 2010*, COOPERATIVE CONG. ELECTION STUDY, https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/17705 [https://perma.cc/6H75-29RK].

149. Email from Professor Eitan Hersh to author (Jan. 27, 2017) (on file with author) (providing data generated from Cooperative Congressional Election Study).

150. *Id.*

151. Including registered voters who do not state a party preference, the figures are as follows: 42 percent of white voters in Texas identify as Republican, and 20 percent as Democrat (the rest do not identify as either party); in Dallas County, the figures are 42 percent Republican and 28 percent Democrat. In contrast, 7 percent of African American voters and 25 percent of Hispanic voters identify as Republican, compared to 61 percent of African Americans and 41 percent of Hispanic voters as Democrats. In Dallas County, 9 percent of African Americans and 6 percent of Hispanics identify as Republicans, compared to 60 percent of African Americans and 45 percent of Hispanics as Democrats.

152. *Id.*

153. *See* Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 609-19 (2016); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 670-72, 671 n.138 (2006); Elizabeth M. Ryan, Note, *Causation or Correlation? The Impact of* LULAC v. Clements *on Section 2 Lawsuits in the Fifth Circuit*, 107 MICH. L. REV. 675, 682-86 (2009); *see also* Cain & Zhang, *supra* note 9, at 890 (commenting on *Clements* that "[i]f section 2's prohibition against

dissenting as part of a three-judge district court in a long-running and high profile case involving Texas's 2010 round of redistricting, relied upon *Clements*, and an earlier version of this Article, in concluding that partisanship, not race, explained Texas's gerrymandering of state House districts.[154]

The issue has also gained new traction as section 2 litigation has turned from vote dilution to vote denial cases. The causation issue is especially difficult in the vote denial context, where one cannot simply apply the *Gingles* framework by looking at racially polarized voting and the number of minority voters redistricting authorities could place in reasonably compact districts.[155] The Supreme Court has not yet weighed in on whether and how section 2 may be used in vote denial cases, and it recently turned down a petition to review the Texas voter identification case at an interim stage, a petition that would have helped to clarify the vote denial standards.[156]

Commentators appear to agree that, in the vote denial context, some kind of causation requirement is necessary; otherwise, any voting law that has a disparate impact on minority voters potentially would violate section 2—even a law as basic as one requiring voter registration. Professor Tokaji has suggested "a three-part test [considering] the disparate impact of a challenged burden on voting, its connection to social and historical conditions (including but not limited to intentional discrimination), and the state's asserted interests."[157] On this last step, the state's asserted interests, he argued that "[w]hile fraud prevention and cost savings may be considered,

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vote dilutions of minorities becomes interchangeable with a prohibition against vote dilutions of *Democrats*, it will face strong resistance from the federal judiciary").

154. *See* Perez v. Abbott, No. SA-11-CV-360, 2017 WL 1450121, at *79 (W.D. Tex. Apr. 20, 2017) (three-judge court) (Smith, J., dissenting) ("Professor Hasen presents three possible approaches that the Supreme Court could adopt: (1) 'race or party'; (2) 'party as race'; and (3) 'party all the time.' Professor Hasen is least fond of the first, although, as I will discuss, that is the exegesis most consonant with Texas's electoral landscape and, more importantly, is the methodology that the en banc Fifth Circuit has announced without using that nomenclature.").

155. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial,* 50 HARV. C.R.-C.L. L. REV. 439, 445-46 (2015); *see also* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 595-96 (2013).

156. Chief Justice Roberts, in a statement respecting the denial of certiorari review in the case, noted that both intent and effect issues remained to be litigated in the lower courts and that review might be appropriate when the case concluded. Abbott v. Veasey, 137 S. Ct. 612, 613 (2017).

157. Tokaji, *supra* note 155, at 441.

partisan motivations should not be allowed to justify voting burdens given the correlation between race and party."[158] Professor Tokaji argued against considering partisanship a legitimate interest to justify a potentially discriminatory law because of the problem of conjoined polarization.[159]

Despite Professor Tokaji's warning, the bifurcation of race and party resurfaced in the challenge to Texas's voter identification law. The Fifth Circuit, again sitting en banc, recently held in *Veasey v. Abbott* that the trial court did not abuse its discretion in finding that Texas's strict voter identification law, which imposed greater burdens on minority voters, who tended to be poorer and less likely to have one of the acceptable forms of photographic identification for voting, violated section 2 of the Voting Rights Act because of its discriminatory effects.[160] The court sent the case back to the trial court to reconsider whether the law was passed with discriminatory intent, holding that the trial court looked at too wide a set of evidence in evaluating that claim.[161]

In her partial dissenting position in *Veasey*, joined by four other judges, Judge Edith Jones argued that Texas's enactment of the voter identification law could be explained by partisanship, not race:

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158. *Id.* at 441-42. Professor Pamela Karlan says it is an affirmative reason to strike the law down, as addressed in Part II below. *See* Pamela S. Karlan, *Turnout, Tenuousness and Getting Results in Section 2 Vote Denial Cases*, 77 OHIO ST. L.J. 763, 786 n.123 (2016).

159. Tokaji, *supra* note 155, at 488-89. Tokaji writes:

> As Professor Richard Hasen observes, race and party often coincide, with African Americans, Latinos, and (to a lesser extent) Asian Americans generally leaning Democratic. Given the correlation between race and party, legislators can easily serve *partisan* interests by making it more difficult for a *racial* group to vote. It is therefore wrong to conceive of race and party as mutually exclusive reasons for a voting practice. The overriding concern with voter ID and other barriers to voting is that they make it more difficult for racial minorities to vote, thereby making it easier for Republican candidates to vote. The core problem is that elected officials from one party are suspected of making it more difficult for racial minorities to vote in order to achieve partisan ends, but without leaving a paper trail that would document discriminatory intent. Far from being mutually exclusive, racial motivations for suppressing the vote reinforce, and are practically indistinguishable from, partisan ones where (as is typically the case) the affected racial group tends to favor candidates of one party. In these circumstances, a desire to favor one's party should not excuse voting practices with a discriminatory effect on a racial group.

Id. (footnotes omitted).

160. 830 F.3d 216, 272 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

161. *Id.* at 231-35.

> The legislative history ... shows that the struggle over [the voter identification law] centered on partisanship, not race. Partisanship, however, is not racism, nor is it a proxy for racism on this record....
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> ...
>
> ... The law reflects party politics, not racism, and the majority of this court—in their hearts—know this.[162]

Judge Jones did not directly tie this argument to *Clements*, but it is easy to see how the argument could be extended through a section 2 causation analysis in a vote denial case.

Instead, Judge Jones made the point to refute any potential finding that Texas acted with racially discriminatory intent, and, on this point, she echoed an argument Texas itself made in a recent Texas redistricting case. In that case, *Perez v. Abbott*, a three-judge court, on a 2-1 vote, held that portions of Texas's redistricting plan for congressional and state House districts violated section 2 of the Voting Rights Act and were unconstitutional racial gerrymanders.[163] In briefing for the long-running case, Texas argued its intent for drawing certain district lines stemmed from partisanship, not race, with only an "incidental" effect on race:

> DOJ's accusations of racial discrimination are baseless. In 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and their redistricting decisions were designed to increase the Republican Party's electoral prospects at the expense of the Democrats. It is perfectly constitutional for a Republican-controlled legislature to make partisan districting decisions, even if there are incidental effects on minority voters who support Democratic candidates.[164]

Texas's argument follows a statement the Supreme Court made in a 1999 racial gerrymandering case from *Cromartie I*: "[A] jurisdiction may engage in constitutional political gerrymandering, even if

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162. *Id.* at 302-03 (Jones, J., concurring in part and dissenting in part).

163. No. SA-11-CV-360, 2017 WL 1787454, at *78-79 (W.D. Tex. May 2, 2017) (three-judge court); *see also* Perez v. Abbott, No. SA-11-CV-360, 2017 WL 1450121, at *14 (W.D. Tex. Apr. 20, 2017) (three-judge court).

164. Defendants' Response to Plaintiffs and the United States Regarding Section 3(c) of the Voting Rights Act at 19, Perez v. Texas, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Aug. 5, 2013) (footnote omitted).

it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."[165]

D. Implications and Critiques

Whether considering predominant motive, intent, or effect, in redistricting or vote denial cases, the bifurcation of race and party in the context of conjoined polarization threatens to undermine the Voting Rights Act and voting rights protections. It also obscures concerns about the political power effects of gerrymandering efforts through a quixotic quest for legislative motive.

Bifurcation is based upon a fiction that race and party are uncorrelated.[166] In fact, conjoined polarization means that they are correlated, because the Democratic Party is more responsive to minority voters' interests than the Republican Party.[167]

This is not to say that there are not cases clearly falling on the race or party side of the line. With about a third of white voters being Democrats in states with conjoined polarization, it is sometimes impossible to see if Republican legislative actions targeted only African American (or Latino) Democrats, rather than white Democrats. Even that, however, presents a more difficult case. Witness the supposed attempt of Alabama Republicans to try to eliminate white Democratic officeholders in an attempt to make Alabama voters think of the Democratic Party as the "Black Party."[168] Such a strategy would allow partisan Republicans to piggyback on the private racism of white Alabama voters, and it is impossible to say if such a strategy is really about race or party.[169]

Similarly, a state could supposedly act in a purely partisan way without looking at racial data, but because all know of the high correlation between race and party, it is hard to see how this would avoid race consciousness. Further, states with sizable minority populations *must* be race conscious in passing voting rules to assure

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165. 526 U.S. 541, 551 (1999).

166. *Cf.* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2172-75 (2015) (arguing that a Voting Rights Act section 2 violation may be established presumptively by evidence of an extremely high correlation between race and ideology or partisanship).

167. *See id.* at 2172-73, 2173 n.138.

168. On the dispute over this claim, see Hasen, *supra* note 51.

169. *Id.* at 380.

they are not running afoul of section 2 of the Voting Rights Act. Still, it is possible that going forward, improvements in voter data and technology will allow legislatures to target a political party more directly, and with less reliance on racial data or consciousness.[170]

II. RACE AS PARTY

A. The Race as Party Cases

The Fifth Circuit in the *Clements* case, and Judge Jones in her partial dissent in the Fifth Circuit's *Veasey* case, rejected the view that race and party can be proxies for one another, viewing partisanship and racial discrimination as two discrete categories.[171] In *Veasey*, Judge Jones insisted that the other judges who disagreed with her "in their hearts ... know" that these disputes are all about "party politics, not racism."[172]

The remark prompted a response from Judge Gregg Costa, who issued a separate opinion partially concurring and partially dissenting in *Veasey*:

> A judge who agrees with Judge Jones's dissent that "partisanship, not race," is a likely reason why the Texas Legislature enacted [its voter identification law] can thus still conclude that the law was enacted with a discriminatory purpose. If that desire for partisan advantage (or any other underlying motivation) leads a legislature to select a "course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," that is enough. This different starting point for assessing the discriminatory purpose claim—that is, a mistaken premise that the record has to support a finding of

170. *See* Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1650 ("These datasets have made it possible for campaigns to generate or purchase predictions *for each registered voter* of the probability that the voter will turn out in an election, support a particular candidate or political party, give money, or respond in a specified fashion to a campaign communication.").

171. *See* Veasey v. Abbott, 830 F.3d 216, 302 (5th Cir. 2016) (Jones, J., concurring in part and dissenting in part), *cert. denied*, 137 S. Ct. 612 (2017); LULAC v. Clements, 999 F.2d 831, 861 (5th Cir. 1993).

172. *Veasey*, 830 F.3d at 303.

> outright racism—perhaps explains why today's opinions take such widely divergent views of the evidence.[173]

Judge Costa's statement reflected an alternative view of how to view the fact of conjoined polarization. Instead of *race or party*, it is *race as party*, where the use of race can serve as a proxy for achieving partisan aims. The argument is not that partisanship is equivalent to racism, as Judge Jones (mis)characterized it, but that the two factors are so inextricably linked under conditions of conjoined polarization that to discriminate on the basis of one is to discriminate on the basis of the other. Put in the language of intent, it is to treat *knowledge* that one is acting with the substantial certainty of causing a result as equivalent to acting with *purpose*.[174] And it stands in contrast to the Supreme Court's statement in *Cromartie I* that a state being *conscious* of conjoined polarization is not enough to make the case for racial intent.[175]

The most prominent exposition of the *race as party* position came in *North Carolina State Conference of the NAACP v. McCrory* (*NC NAACP*), the recent Fourth Circuit opinion reviewing North Carolina's strict voting law, commonly known as HB 589.[176] The state legislature passed HB 589 soon after the Supreme Court's *Shelby County* decision freed North Carolina from submitting changes for preclearance.[177] Among other things, the law imposed a strict voter identification requirement, cut back on the days of early voting before elections, eliminated same-day voter registration, banned the counting of votes cast by a voter in the wrong precinct even for those

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173. *Id.* at 336 (Costa, J., dissenting in part) (citations and footnote omitted). The court majority also rejected Judge Jones's argument on race and party being distinct, but it did not go as far as Judge Costa. *Id.* at 241 n.30 (majority opinion).

174. *See* Garratt v. Dailey, 304 P.2d 681, 682 (Wash. 1956) (treating knowledge to a substantial certainty as equivalent to purpose as sufficient intent for an intentional tort); Garratt v. Dailey, 279 P.2d 1091, 1093-94 (Wash. 1955); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(AM. LAW INST. 2010) (defining intent as including purpose or knowledge to a substantial certainty).

175. *See* 526 U.S. 541, 551-52 (1999). That statement was made in the context of a predominant motive analysis of racial gerrymandering, and not a search for racially discriminatory intent. *See id.*

176. *See* HB 589, 2013 Gen. Assemb. Reg. Sess. (N.C. 2013); 831 F.3d 204, 216-17, 216 n.2 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

177. N.C. State Conference of NAACP v. McCrory, 182 F. Supp. 3d 320, 498 (M.D.N.C. 2016), *rev'd*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). Forty of North Carolina's 100 counties were covered jurisdictions. *See id.*

races in which the voter was eligible to vote, and ended the practice of preregistering voters.[178] Voting rights groups and the United States government filed cases in federal court, raising both constitutional and Voting Rights Act claims.[179] Among the arguments plaintiffs raised in the consolidated case was that North Carolina enacted its law with racially discriminatory intent, which violated both section 2 of the Voting Rights Act and the Fourteenth Amendment.[180] Such intent would provide the predicate under section 3 for putting North Carolina, again, under a preclearance regime.[181]

As the cases were pending, North Carolina softened its voter identification law.[182] The district court refused to put any of the challenged provisions on hold pending a trial on the merits, a decision reversed in part by the United States Court of Appeals for the Fourth Circuit, and then reversed again for the 2014 elections by the Supreme Court.[183] The district court then held two trials considering voluminous evidence and issued a mammoth ruling rejecting all of the plaintiffs' arguments, including the argument that North Carolina enacted its law with racially discriminatory purpose.[184] The trial court viewed North Carolina as having a nondiscriminatory, good government purpose in passing the law.[185] It further determined that the fact that North Carolina sought data on the impacts of some provision of the law on different racial groups did not provide evidence of intentional racial discrimination, but instead, was explainable on nondiscriminatory grounds, namely the need to be race conscious to assure compliance with the Voting Rights Act and the Constitution.[186]

The Fourth Circuit in *NC NAACP* reversed the trial court, holding the court committed clear error in rejecting the plaintiffs' argument that North Carolina passed HB 589 with racially discriminatory intent.[187] Rather than seeing the state legislature as

178. *Id.* at 340.
179. *Id.* at 348.
180. *Id.*
181. *Id.*
182. *See id.* at 344-45.
183. *Id.* at 349-50.
184. *Id.* at 527-31.
185. *Id.* at 501-02.
186. *Id.* at 490.
187. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016), *cert.*

passing the law on nondiscriminatory grounds, the appellate court viewed the evidence as suggesting only partisan grounds explained it.[188] And the court then equated partisan grounds to racial grounds: "Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist."[189]

The court gave a detailed explanation for treating partisanship as a proxy for race discrimination. It began by noting that the court could only reverse a finding on intentional discrimination for clear error, citing *Cromartie II*.[190] The court then explained the *Arlington Heights* factors for determining when a government body engaged in intentional racial discrimination, which requires a sensitive, multifactor inquiry into direct and circumstantial evidence of racial intent and a shift of the burden to the government body to give nondiscriminatory reasons for its actions.[191] It noted that racially polarized voting has increased in recent years in jurisdictions previously covered by section 5 of the Voting Rights Act, and while racially polarized voting itself did not prove racially discriminatory intent, "it does provide an incentive for intentional discrimination in the regulation of elections."[192]

The court then set out its views on race as a proxy for party discrimination:

> Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics. A state legislature acting on such a motivation engages in intentional racial

denied, 137 S. Ct. 1399 (2017).

188. *See id.*

189. *Id.* at 214.

190. *Id.* at 219-20 (citing *Cromartie II*, 532 U.S. 234, 243 (2001)).

191. *See id.* at 220-21 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

192. *Id.*

> discrimination in violation of the Fourteenth Amendment and the Voting Rights Act.[193]

The court, citing cases in which other courts found North Carolina engaged in voting rights violations, held the trial court clearly erred in concluding that the evidence of North Carolina's conduct since the 1980s did not demonstrate racially discriminatory intent.[194] Further:

> The district court failed to take into account these cases and their important takeaway: that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day. Only the robust protections of § 5 and suits by private plaintiffs under § 2 of the Voting Rights Act prevented those efforts from succeeding. These cases also highlight the manner in which race and party are inexorably linked in North Carolina. This fact constitutes a critical—perhaps the most critical—piece of historical evidence here.[195]

The court wrote that:

> [W]hether the General Assembly knew the exact numbers, it certainly knew that African American voters were highly likely, and that white voters were unlikely, to vote for Democrats. And it knew that, in recent years, African Americans had begun registering and voting in unprecedented numbers. Indeed, much of the recent success of Democratic candidates in North Carolina resulted from African American voters overcoming historical barriers and making their voices heard to a degree unmatched in modern history.[196]

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193. *Id.* at 222-23.

194. *Id.* at 225.

195. *Id.*

196. *Id.* at 225-26. Further:

> The record makes clear that the historical origin of the challenged provisions in this statute is not the innocuous back-and-forth of routine partisan struggle that the State suggests and that the district court accepted. Rather, the General Assembly enacted them in the immediate aftermath of unprecedented African American voter participation in a state with a troubled racial history and racially polarized voting. The district court clearly erred in ignoring or dismissing this historical background evidence, all of which supports a finding of discriminatory intent.

The Fourth Circuit then turned to the history of the passage of HB 589, seeing evidence that the State enacted the law for partisan reasons, and concluding that "[t]he district court erred in accepting the State's efforts to cast this suspicious narrative in an innocuous light."[197] It viewed the legislature's use of racial data as much more pernicious than the district court did.[198]

The court concluded that North Carolina engaged in intentional racial discrimination in passing the law with a partisan aim, even if it harbored no racial animus:

> Our conclusion does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity toward any minority group. But the totality of the circumstances—North Carolina's history of voting discrimination; the surge in African American voting; the legislature's knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—cumulatively and unmistakably reveal that the General Assembly used [the law] to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.[199]

It concluded that in light of the intentional discrimination, the challenged part of HB 589 could not be enforced.[200] The court then

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Id. at 226-27.

197. *Id.* at 228.

198. The court wrote:

> This data revealed that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting, and disproportionately lacked DMV-issued ID. Not only that, it also revealed that African Americans did *not* disproportionately use absentee voting; whites did. [It] drastically restricted all of these other forms of access to the franchise, but exempted absentee voting from the photo ID requirement. In sum, relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made, ... we cannot ignore the choices the General Assembly made with this data in hand.

Id. at 230 (citations omitted).

199. *Id.* at 233.

200. *Id.* at 239. One judge dissented as to the enforceability of the voter identification

declined to use section 3 of the Voting Rights Act to put North Carolina back under preclearance: "Such remedies '[are] rarely used' and are not necessary here in light of our injunction."[201] The court did not explain whether the same result would apply if the State did not use racial data in creating its law, but given conjoined polarization and the state legislature's knowledge of the racial effects of partisan laws, it well could have.

In *Veasey*, the Fifth Circuit's view on discriminatory intent did not go as far as the Fourth Circuit's in *NC NAACP*. The Fifth Circuit sent the case back to the trial court, which had initially found that Texas acted with racially discriminatory intent, to reconsider the question using a stricter set of criteria to measure motive, but suggesting that the court could well find motive.[202] It left open the potential for a *race as party* proxy argument, but did not resolve it. The district court again found discriminatory intent on remand, and an appeal on this point is expected.[203]

Even under these narrower Fifth Circuit rules for discerning intent, however, a federal district court judge, bound by *Veasey*, recently found that the City of Pasadena, Texas, engaged in intentional racial discrimination against Latino voters.[204] The City enacted a plan for city council elections that moved from eight single-member districts to six districts and two at-large districts, "eliminat[ing] one Hispanic-majority district and prevent[ing] Latino-backed candidates from winning a City Council majority."[205]

In the judge's factual findings in *Patino v. City of Pasadena*, the court found that in the city's campaign to change the districting system, "Pasadena officials used partisan terms as proxies for race or racial terms."[206] For example:

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provision after it had been softened. *See id.* at 242-44 (Motz, J., dissenting as to Part V.B of the majority opinion).

201. *Id*. at 241 (alteration in original).

202. *See* Veasey v. Abbott, 830 F.3d 216, 230-43 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

203. *See* Veasey v. Abbott, No. 2:13-CV-193, 2017 WL 1315593, at *5 (S.D. Tex. Apr. 10, 2017), *stay granted by* 870 F.3d 387 (5th Cir. 2017).

204. *See* Patino v. City of Pasadena, 230 F. Supp. 3d 667, 729 (S.D. Tex. 2017).

205. Manny Fernandez, *In Texas, a Test of Whether the Voting Rights Act Still Has Teeth*, N.Y. TIMES (Jan. 15, 2017), https://www.nytimes.com/2017/01/15/us/in-texas-a-test-of-whether-the-voting-rights-act-still-has-teeth.html [https://perma.cc/76E7-WRBN].

206. *Patino*, 230 F. Supp. 3d at 703-04.

> In preparing a mailing list to target voters to receive campaign materials in favor of changing to the 6-2 map and plan, [Pasadena Director of Community Relations Richard] Scott wrote a campaign vendor and recommended using Mayor Isbell's campaign list from a previous campaign but asked the vendor first to "pull out Hispanic names" from the list. At trial, Mr. Scott testified that when he wrote "pull out Hispanic names," he meant to direct the vendor to pull out the names of Democratic voters. When asked by the court why he said "Hispanics" if he meant "Democrats," Mr. Scott testified that he did not know, but then testified that he thought of "Hispanic" as a proxy for Democratic voters and "Anglos" as a proxy for Republican voters. Mr. Scott testified that he did not know how many Latinos received the mailers he sent through Citizens for Positive Change.[207]

The trial court used this finding and others in holding that partisanship was a proxy for race. Relying on the Fourth Circuit's decision in *NC NAACP*, and the majority and Judge Costa's opinion in *Veasey*, the court found racially discriminatory intent, which served as the basis not only to find a section 2 violation but also to put the City of Pasadena back under preclearance through section 3 of Voting Rights Act:

> The same reasoning [as in *NC NAACP*] applies here....
>
> Mr. Scott's directive to "pull out the Hispanic names" from campaign lists for Proposition 1 provides a clear example. The City attempts to characterize Mr. Scott's statements as race-neutral because they were "premised on [the] belief that most Hispanics in Pasadena vote as Democrats and that Democratic groups were opposing the charter change." That explanation is not inconsistent with, and does not lessen, the evidence showing the intent to discriminate against Latinos in changing the district map. The word Mr. Scott chose was not *Democrats* but *Hispanics*. Pasadena officials supporting Proposition 1, and doing so on behalf of Mayor Isbell and at the direction of his appointed officials, understood race and party as interchangeable proxies. By clearly and explicitly intending to diminish Latinos' voting power for partisan ends, Pasadena officials intentionally discriminated on the basis of race.[208]

207. *Id.* at 704 (citations omitted).
208. *Id.* at 727-28 (citation omitted).

Finally, Professor Karlan went further than Professor Tokaji on the relevance of evidence of partisan intent in a section 2 vote denial case. While Professor Tokaji argued that such evidence should not be considered as a permissible justification to enact a voting law,[209] Professor Karlan "would actually go further. Not only can partisan motivations not justify restrictions, they should in fact count as evidence that the restrictions violate the results test [of section 2]."[210] The statement places Professor Karlan firmly in the *race as party* camp.

B. Implications and Critiques

Race as party has much to commend it, at least compared to *race or party*. It avoids an artificial and indefensible distinction between race and party under conditions of conjoined polarization.[211] It recognizes that when Republicans discriminate against Democrats under these conditions, and Democrats are much more likely to

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209. *See* Tokaji, *supra* note 155, at 441-42.

210. Karlan, *supra* note 158, at 786 n.123; *see also id.* at 789 ("But even if a court were to find that partisan considerations did not rise to that level, it must treat those motivations under the section 2 results test as evidence that the jurisdiction's policy is tenuous and therefore, under the totality of the circumstances, partisan motivation cuts in favor of finding section 2 liability.").

211. For an early articulation of this position, see Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2545 (1997).

> [T]he mix of partisan and racial considerations, and the further internal interrelationship between the two, makes a predominant motive test that seeks to isolate the contribution of racial considerations all the more unwieldy. This intertwining of race and politics has at least two implications for constraints on redistricting. First, it is often unrealistic to act as if the two aims can be disentangled and one assigned predominance. Second, even if these aims could be distinguished, many of the criticisms of race-consciousness that lead to extreme forms of districting could also be levelled at partisan goals that contribute to such districting. If the Court is going to develop constitutional constraints on excessive manipulations of the districting system, it would be more manageable, more consistent with the way motives mix complexly in this area, and leave the Court less open to charges of selective concern for the integrity of territorial districting were the Court to develop more general and universal constraints on district manipulation. Constraints that took the form of more general principles would necessarily focus less on searching for specific motives and more on specifying objective limitations on how far district manipulation could go, with less concern for judgments about the reasons driving it.

Id.

represent the interest of minority voters, then discrimination on the basis of party hurts minority voters.[212]

Race as party also follows the common sense view reflected in the common law—but denied by the Supreme Court in *Cromartie I*[213]—that when it comes to intent, having the purpose to do something and acting with the knowledge that a consequence is substantially certain to occur should be treated similarly. Indeed, in a 2006 Supreme Court case, *League of United Latin American Citizens v. Perry*, the Supreme Court held that efforts to gerrymander Texas Congressional District 23, so as to prevent the emerging Latino majority from electing a candidate of their choice, violated section 2 of the Voting Rights Act.[214] Justice Kennedy for the Court wrote:

> In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23.[215]

Race as party is in line with the Supreme Court's observation in *Personnel Administrator of Massachusetts v. Feeney* that:

> "Discriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[216]

Or as Judge Alex Kozinski wrote in the context of a suit over the redistricting of Los Angeles County supervisorial districts, a legislative body can engage in intentional racial discrimination even

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212. *See id.*; *see also* Cain & Zhang, *supra* note 9, at 872-74.

213. *Cromartie I*, 526 U.S. 541, 546 (1999).

214. 548 U.S. 399, 441-42 (2006).

215. *Id.* at 440 (citing Session v. Perry, 298 F. Supp. 2d 451, 508 (2006)).

216. 442 U.S. 256, 279 (1979) (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977) (Stewart, J., concurring)).

when harboring no animus to the racial or ethnic minority but acting purely in its political self-interest.[217] It is intentional racial discrimination when:

> [E]lected officials engage[ ] in the single-minded pursuit of incumbency [and] run roughshod over the rights of protected minorities....
>
> ...
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> ...Where, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption—that this was a result of intentional discrimination, even absent ... smoking gun evidence.[218]

One serious objection to treating race as a proxy for party under conditions of conjoined polarization is that it creates a kind of "one-way ratchet," or nonretrogression principle, under section 2. Thus, when Democrats pass laws that make it easier to register and vote, those laws are not subject to judicial scrutiny, but when Republicans do so under conditions of conjoined polarization, they may run afoul of the protections of the Voting Rights Act.[219] This does not mean that every Republican voting law would be illegal, but it would limit the liability-free options for Republicans to make what would otherwise be considered legitimate policy choices.

The other objection is that the rule likely will have disparate applications across the United States. By all accounts, partisan politics in Wisconsin is just as heated as it is in North Carolina.[220] And Wisconsin too passed a strict voter identification law, which

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217. Garza v. County of Los Angeles, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

218. *Id.* at 778-79.

219. In its petition for writ of certiorari to the Supreme Court in *NC NAACP*, the State of North Carolina argued that the Fourth Circuit's standard for discriminatory intent imposed a nonretrogression standard, essentially reinstituting *Shelby County* through the back door. Petition for a Writ for Certiorari and Volume I of the Appendix at 16-19, North Carolina v. N.C. State Conference of NAACP, 137 S. Ct. 1399 (2017) (No. 16-833).

220. See the excellent series, *Dividing Lines*, by Craig Gilbert in the *Journal Sentinel*, beginning with, Craig Gilbert, *Democratic, Republican Voters Worlds Apart in Divided Wisconsin*, J. SENTINEL (May 3, 2014, 4:58 PM), http://archive.jsonline.com/news/statepolitics/democratic-republican-voters-worlds-apart-in-divided-wisconsin-b99249564z1-255883361.html [https://perma.cc/N4BX-RF5R].

litigants challenged in the courts.[221] But Wisconsin has a much smaller minority population—it is just 6.6 percent African American[222]—and much less racially polarized voting among white voters.[223] According to results of the Marquette Law School polls conducted in 2016, white voters (counting leaners) support Republicans 46.5 percent compared to Democrats 44.8 percent.[224] African Americans are solidly Democratic, supporting Democrats 81.6 percent compared to 8.9 percent for Republicans; Hispanics support Democrats 60 percent, and 32 percent for Republicans.[225] Wisconsin also has less of a history of racial discrimination in voting than states in the American South,[226] and therefore, treating party as a proxy for race in Wisconsin makes little sense.

The Seventh Circuit, in a rather superficial analysis by Judge Frank Easterbrook, rejected section 2 challenges to the law,[227] and there is no question that outside the American South litigating challenges under a *race as party* proxy standard will be harder. It is odd to have a rule saying that a strict voter identification law that makes it harder for African Americans and Democrats to vote is illegal in North Carolina but legal in Wisconsin.[228]

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221. *See, e.g.*, Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014) (citing Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014)).

222. *See Wisconsin*, U.S. CENSUS BUREAU, *supra* note 25.

223. Email from Charles Franklin, Director of Marquette Law School, to author (Feb. 1, 2017) (on file with author).

224. *Id.*

225. *Id.* The relative numbers are not appreciably different if learners are excluded. *Id.* (whites without learners are 30.3 percent Republican compared to 29.2 percent Democratic; African Americans are 5.1 percent Republican compared to 63.7 percent Democratic).

226. Wisconsin was a free state, not a slave state, before the Civil War, *see* WIS. CONST. of 1848, art. I, § 2 (barring slavery except as punishment for a crime), and it granted voting rights to African American men in 1849 (though the right was not recognized until years later). *See Black History in Wisconsin*, WIS. HIST. SOC'Y, https://www.wisconsinhistory.org/Records/Article/CS502 [https://perma.cc/6EVX-U6MQ].

227. *See* Frank v. Waller 768 F.3d 744, 751 (7th Cir. 2014). The Seventh Circuit divided evenly on whether to take the case en banc, 773 F.3d 783 (7th Cir. 2014), and the Supreme Court denied certiorari, 135 S. Ct. 1551 (2015).

228. For a defense, see Karlan, *supra* note 158, at 777-82.

III. PARTY ALL THE TIME

A. Party All the Time

The third approach to dealing with the problem of conjoined polarization is to litigate these cases not as race cases but as party cases, having courts rule that certain partisan actions are themselves illegal. Thus, rather than making partisanship or incumbency protection *a defense* in cases of racial gerrymandering, vote dilution, or vote denial, admission of such conduct would make out a *prima facie case for liability*. An admission of partisan intent would be sufficient, though not necessary. It would be enough to show that a law burdens voters for no good reason—and partisan advantage is no good reason.[229] I refer to this as the *party all the time* approach to the conjoined polarization question.

In vote denial cases, involving voting changes such as strict voter identification rules, cutbacks in early voting, and more onerous registration rules, courts can rule that legislative decisions about election administration to benefit one party or another violates the Equal Protection Clause of the Fourteenth Amendment.[230] One way litigants have begun framing this argument is that these laws unconstitutionally "fence out" voters from political participation.[231] This claim builds upon the Supreme Court's 1965 decision in *Carrington v. Rash*, holding it illegal to exclude voters from an election because the jurisdiction is worried about how those voters may vote.[232]

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229. I have previously expressed doubt about making bad partisan intent the basis for liability. *See generally* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843. While I still harbor those doubts and believe an effects-based test focused on burdens facing voters is best, courts need not ignore admissions by legislative bodies and government entities that they acted with the intent of burdening voters from an opposing party. Most importantly, states should not accept an admitted partisan motivation as a *defense* for a law burdening voters.

230. *See, e.g.*, N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 222-23 (4th Cir. 2016), *cert. denied* 137 S. Ct. 1399 (2017).

231. *See, e.g.*, One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 927 (W.D. Wis. 2016), *appeal filed*, No. 16-3083 (7th Cir. Aug. 2, 2016) (citing Aderson v. Celebrezze, 460 U.S. 780, 793 (1983)).

232. 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

Although the Fourth Circuit in *NC NAACP* dropped a footnote stating in dicta that "[o]f course, state legislators also cannot impermissibly dilute or deny the votes of opponent political parties,"[233] the fencing out claims have not met with success so far.[234]

Whether or not "fencing out" is the right doctrinal hook, there are a number of ways to police laws passed to burden voters of the opposite party. If the state has no good reason to intentionally make it harder for one group of voters to register and vote, courts can recognize that conduct as an equal protection violation, even under the existing framework for evaluating such claims.

Both Professor Sam Issacharoff and I have suggested a more direct focus on partisanship in vote denial cases. Professor Issacharoff first noted the partisan valence of these laws, which he pointed out is based upon the premise that higher voter turnout seems to help Democrats these days:

> [T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life. Voting restrictions are not only likely to be found in Republican-controlled jurisdictions, but are also likely to be similar in kind across those jurisdictions. Part of this could be copying or learning from the experiences of other states. But the similarity of these voting restrictions in form, and their prevalence across states with significantly different prior voting regimes and divergent demographics, points to something else. The likeliest hypothesis is that both political parties have a similar understanding of the relation between turnout and electoral outcomes, and both parties understand voting access as a threshold determinant of turnout.[235]

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233. *NC State Conference of NAACP*, 831 F.3d at 226 n.6 (citing Anderson v. Celebrezze, 460 U.S. 780, 793 (1983)).

234. *See, e.g.*, Feldman v. Ariz. Sec'y of State's Office, 208 F. Supp. 3d 1074, 1094 (D. Ariz. 2016).

235. Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370 (2015) (footnote omitted); *see also* Cain & Zhang, *supra* note 9, at 893 ("For various reasons, minority populations have benefited disproportionately from the flexibility that early voting and same-day registration offers.").

Professor Issacharoff then frames the *race or party* question that arises in this context, this way:

> To the conventional question whether the renewed ballot restrictions should be understood in terms of race or party, the answer unfortunately is yes. Race and party are intertwined to such a large extent that it is difficult to disentangle the two when seeking a simple narrative of causation. But the more difficult question is a different one: How is it that a mature democracy like the United States still allows basic rules of ballot access to be a battleground for political skirmishing?[236]

His answer depends on a recognition that "the category of race increasingly fails to capture the primary motivation for what has become a battlefield in partisan wars,"[237] and he proposed federal legislation protecting the fairness of the electoral process from such partisan manipulation.[238] But federal legislation to protect the right to vote from partisan manipulation seems extremely unlikely in the near term, with a President making unsubstantiated claims of millions of fraudulent votes cast in the 2016 election.[239] Perhaps it is a prelude to federal legislation that will match what we have seen come out of Republican legislatures.[240]

A more promising route, though perhaps still a tough one given the likely partisan trajectory of the Supreme Court, is for courts to tighten the legal standards for judging the constitutionality of laws making it harder to register and vote. I have argued:

> When a legislature passes an election-administration law (outside of the redistricting context) discriminating against a

236. Issacharoff, *supra* note 235, at 1371 (footnote omitted).

237. *Id*. at 1406.

238. *Id*. at 1407-08.

239. *See* Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/0-000002-percent-of-all-the-ballots-cast-in-the-2016-election-were-fraudulent/?utm_term=.685eec9333a6 [https://perma.cc/8RUF-SFC3].

240. Dale Ho, *Trump's Lies Pave the Way for an Assault on Voting Rights*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/opinion/trumps-lies-pave-the-way-for-an-assault-on-voting-rights.html [https://perma.cc/B5WJ-3Z7Z]; Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html?mcubz=0 [https://perma.cc/YBW9-PX3J].

> party's voters or otherwise burdening voters, that fact should not be a defense. Instead, courts should read the Fourteenth Amendment's Equal Protection Clause to require the legislature to produce substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends. The achievement of partisan ends would not be considered a good reason (as it appears to be in the redistricting context). This rule would both discourage party power grabs and protect voting rights of minority voters. In short, it would inhibit discrimination on the basis of both race and party, and protect all voters from unnecessary burdens on the right to vote.[241]

As noted, my proposed standard excludes redistricting, where I have long believed that court policing of partisan gerrymandering is too difficult because there is no way to separate permissible from impermissible consideration of party information in redistricting.[242] Professor Issacharoff, in contrast, has long favored court intervention to police partisan gerrymandering.[243] The issue of partisan gerrymandering will be especially important following the 2020 round of redistricting: the first one without *Shelby County* in place to provide federal preclearance of redistricting plans in previously covered jurisdictions.[244]

Recent experience with the race or party problem is causing me to rethink my earlier opposition to court policing of partisan gerrymandering claims. While I remain ambivalent, it certainly seems a more sensible approach to police partisanship in redistricting directly than to use racial gerrymandering for parties to shadowbox over these issues. The question is whether it is possible to develop judicially manageable standards to separate permissible from impermissible considerations of party in drawing district lines.

Cases working their way up from the lower courts to the Supreme Court provide the best opportunity in a decade to reconsider these

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241. Hasen, *supra* note 13, at 62; *see also* Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 743 (2006) (arguing for national uniform laws to protect the right to vote).

242. Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Cases after* Vieth, 3 ELECTION L.J. 626, 628 (2004).

243. *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 600 (2002).

244. Cain & Zhang, *supra* note 9, at 884-91.

issues.[245] Most notable is a case out of Wisconsin, using the "efficiency gap" measurements of Professor Nick Stephanopoulos and Eric McGhee to argue for a standard to determine when partisanship crosses the line into an equal protection violation.[246]

B. Implications and Critiques

There are two serious objections to direct policing of partisanship, whether in the vote denial or redistricting context. First, having courts determine when partisanship goes too far injects federal court judges further into the political thicket. Whether we are talking about vote denial or redistricting cases, it seems increasingly clear that Democratic-appointed judges are much more likely than Republican-appointed judges to be ready to police these kinds of claims. It should be no surprise that the district court judge in *NC NAACP*, who found that the law was a nondiscriminatory, fair law, was appointed by a Republican president,[247] and the Fourth Circuit judges who saw the law as a partisan power play—which in turn made it racially discriminatory through *race as party*—were all appointed by Democratic presidents.[248] That divide does not bode well for the development of fair standards, nor is it likely to promote public confidence in the impartiality and fairness of the judiciary.

The other concern is that by focusing on party, rather than race, something essential about the nature of race discrimination is lost. Professor Issacharoff, responding to Professors Samuel Bagenstos[249]

245. *See, e.g.*, Whitford v. Gill, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

246. *See id.* at 854; *see also* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850-53 (2015). The other cases working their way up from the lower courts are from Maryland, see, for example, Benisek v. Lamone, 266 F. Supp. 3d 799 (D. Md. 2017) (three-judge court), *argued*, No. 17-333 (U.S. Mar. 28, 2018), and North Carolina, see, for example, Rucho v. Common Cause, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *stay granted*, No. 17A745, 2018 WL 472142 (Jan. 18, 2018).

247. *See Schroeder, Thomas D.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/schroeder-thomas-d [https://perma.cc/Z33X-U4HK].

248. *See Judge Diana Gribbon Motz*, U.S. CT. APPEALS FOR FOURTH CIR., http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-diana-gribbon-motz [https://perma.cc/8TYV-PWH3]; *Judge Henry F. Floyd*, U.S. CT. OF APPEALS FOR FOURTH CIR., http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-henry-f-floyd [https://perma.cc/D75S-AN6D]; *Judge James A. Wynn, Jr.*, U.S. CT. OF APPEALS FOR FOURTH CIR., http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-james-a-wynn-jr- [https://perma.cc/LC8C-2AZJ].

249. *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights*

and Spencer Overton,[250] recognized the danger that "a lowering of the guard will reveal the unique vulnerabilities still borne by minorities."[251]

The critique is an important one. Recent research by Professors Ansolabehere, Persily, and Stewart found that racially polarized voting is increasing in those jurisdictions previously covered by section 5 of the Voting Rights Act, and it is not *just* about party.[252] "This gap is not the result of mere partisanship, for even when controlling for partisan identification, race is a statistically significant predictor of vote choice, especially in the covered jurisdictions."[253]

The data suggest it is important not to abandon litigation under the Voting Rights Act, and to fight against the Supreme Court lessening the reach of section 2 of the Act through chary statutory interpretation.[254] The *party all the time* approach is not arguing that racial divisions are no longer significant, but that it often will be easier and more fruitful to try to attack the partisanship directly, relying on the racial litigation route only as a backstop. Doing so will lead to fewer calls for courts to declare a legislative body has a racially discriminatory intent or that it had a predominant motive to favor racial separation in drawing district lines. If done right, a *party all the time* approach will still stop the most egregious conduct that dilutes votes or makes it more difficult to register and vote without raising these issues. Perhaps more accurately, in light of race's continued salience, we should call the approach *party when you can*.

Conjoined polarization has complicated court forays into the political thicket and the protection of the political process against racial discrimination in voting. The three approaches to dealing with conjoined polarization each have their problems, but *party all the time* appears to present fewer problems than either treating race and party as dichotomous and unrelated phenomena or treating all party discrimination as a form of race discrimination in the Amer-

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After Shelby), 123 YALE L.J. 2838, 2870 (2014).

250. *See* Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 23 (2013).

251. Issacharoff, *supra* note 235, at 1409.

252. Charles Stewart III et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 215 (2013).

253. *Id.* at 206.

254. *See id.* at 210.

ican South, but not necessarily elsewhere. If courts would allow greater regulation of partisanship in the running of elections, many of the race issues would be addressed, but in a cleaner way that potentially avoids having to label jurisdictions as racist or making race predominant.

Party all the time is not perfect. It keeps courts in the political thicket, where the judges themselves may divide along party lines.[255] And it raises the danger that racial claims will not be taken seriously enough. These are real concerns, but the approach appears better than the alternatives.

CONCLUSION

The *race or party* question most recently came to a head in the Supreme Court's 2017 *Cooper v. Harris* case.[256] Briefly, the Court sharply divided 5-3 over whether a three-judge district court clearly erred in concluding that North Carolina's Republican legislature drew Congressional District 12 as an unconstitutional racial gerrymander.[257] The Court majority, in an opinion written by Justice Kagan and joined by the Court's other liberals and Justice Clarence Thomas, concluded that the trial court did not clearly err in deciding that race, not partisanship, predominated in the drawing of that district.[258] Justice Alito, for himself, Chief Justice Roberts, and Justice Kennedy dissented, concluding that the trial court clearly erred.[259] *Harris* was the mirror image of *Cromartie II*, involving the earlier incarnation of the same congressional district, in which the Court's liberals and Justice O'Connor concluded that the trial court *had* clearly erred in finding that party, not race,

255. *See supra* text accompanying notes 247-51.

256. *See generally* Cooper v. Harris, 137 S. Ct. 1455 (2017).

257. *Id.* at 1481-82. For a fuller analysis, see Hasen, *supra* note 113.

258. *Harris*, 137 S. Ct. at 1481-82.

259. *Id.* at 1486-87 (Alito, J., concurring in the judgment in part and dissenting). Justice Neil Gorsuch, new to the Court, did not participate. *Id.* at 1482 (majority opinion). The dissenting Justices dissented only as to District 12. *Id.* at 1486 (Alito, J., concurring in the judgment in part and dissenting in part). The Court was unanimous in holding District 1, which the State justified as required by section 2 of the Voting Rights Act, was an unconstitutional racial gerrymander. *Id*. at 1487 n.1.

predominated.[260] In both *Cromartie II* and *Harris*, Justice Thomas voted to defer to the factual finding of the trial court.[261]

Much of the debate among the Justices in *Harris* concerned whether *Cromartie II* required the plaintiffs in *Harris* to present an alternative map where the same political ends could have been achieved through a redistricting demonstrating a "significantly greater racial balance."[262] The majority held *Cromartie II* did not require this evidentiary showing, while the dissenters held it was required and plaintiffs' claims failed because of their absence.[263]

For our purposes, the most interesting part of the Kagan-Alito dispute over District 12 concerned the question of how to deal with conjoined polarization in North Carolina. Justice Alito, noting that 90 percent of African American voters supported Democrats, wrote that this huge overlap meant that courts need to exert extreme caution when analyzing racial gerrymandering claims, lest "federal courts ... be transformed into weapons of political warfare"—as if it were not too late for voicing that concern.[264] Citing statements from *Bush v. Vera* and *Cromartie I*, indicating that race *consciousness* did not equal race *predominance*, Justice Alito strongly endorsed a *race or party* approach to the racial gerrymandering question, with a thumb on the scale to favor the State's "good faith," which Justice Alito oddly equated with intent to engage in partisan gerrymandering.[265] He closely examined the State's evidence supporting its position that it was motivated by partisanship, and concluded that the trial court clearly erred in finding that party, not race, predominated.[266]

Justice Kagan, in contrast, spent much of her majority opinion emphasizing the deferential standard of review afforded to a factual finding of racial predominance.[267] Perhaps she did so to please

260. *Cromartie II*, 532 U.S. 234, 239 (2001).

261. *Harris*, 137 S. Ct. at 1486 (Thomas, J., concurring); *Cromartie II*, 532 U.S. at 267 (Thomas, J., dissenting).

262. *Compare Harris*, 137 S. Ct. at 1480-81 (majority opinion) (rejecting the argument that *Cromartie II* requires plaintiffs to show alternative map), *with id.* at 1486-88 (Alito, J., concurring in the judgment in part and dissenting in part).

263. *Id.* at 1480-81 (majority opinion); *id.* at 1486-90 (Alito, J., concurring in the judgment in part and dissenting in part) (accepting argument).

264. *Id.* at 1488, 1490 (Alito, J., concurring in the judgment in part and dissenting in part).

265. *See id.* at 1487-88, 1502-04 (quoting Miller v. Johnson, 515 U.S. 900, 915 (1995)).

266. *Id.* at 1486-1504.

267. *Id.* at 1464-65, 1468 (majority opinion).

Justice Thomas, a crucial fifth vote.[268] But in three footnotes of great significance, Justice Kagan moved racial gerrymandering law significantly in the direction of the *race as party* proxy argument. The Court in the first footnote 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 goals, including political ones."[269] The Court explained in the second footnote 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."[270] Finally, in the third footnote, the Court described reasons why redistricting authorities might choose to employ race as a predominant redistricting factor.[271] 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 less commonly—they may simply seek to suppress the electoral power of minority voters."[272]

Like Paul Clement's comments during the *Harris* oral argument,[273] the Kagan approach in *Harris* seemed subversive of the entire racial gerrymandering enterprise, at least when it involved a race or party question like the one in District 12.[274] With courts recognizing that race can be a "proxy" to advance "political interest[s],"[275] based on "leveraging" conjoined polarization,[276] it will be much easier to argue that race, rather than party, predominate 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.[277]

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268. *Cf. id.* at 1463.

269. *Id.* 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." *Id.* (citations omitted).

270. *Id.* at 1473 n.7 (citing *Miller*, 515 U.S. at 914).

271. *Id.* at 1480 n.15.

272. *Id.*

273. *See* Transcript of Oral Argument, *supra* note 1, at 19-22.

274. *See* Harris, 137 S. Ct. at 1479-81.

275. *See id.* at 1464 n.1 (alteration in original) (quoting *Miller*, 515 U.S. at 914).

276. *See id.* at 1480 n.15.

277. In response to an earlier version of this Article and to a related blog post on the *Harris*

The *Harris* opinion seemed to mark the complete transformation of racial gerrymandering cases from a conservative tool to limit the number of majority-minority districts into another tool used by minority voters and their allies to attack minority voting rights.[278] Less clear is whether the *Harris* holding will last, and here there is some reason for doubt. The liberals lost Justice Kennedy, who had been with them in the *Alabama* and *Bethune-Hill* racial gerrymandering cases,[279] and they might have picked up Justice Thomas only because of *Harris*'s focus on the clear error standard of review.[280] In the longer term, especially as new conservative Justices join the Court, the Justice Alito view could be more likely to hold sway.

Indeed, while nothing is certain,[281] the expected new conservative Supreme Court could well adopt a *to the victor goes the spoils* approach to redistricting and voting cases generally. The Court could reject claims of partisan gerrymandering, could reject claims of racial gerrymandering when brought by minority voters, and could continue to reject constitutional and voting rights attacks on restrictive voting laws by reading the Equal Protection Clause narrowly and constricting the protections of the Voting Rights Act.

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case, Professor Justin Levitt protests that the three categories I put forward in this Article are too "blunt," and that in fact the Court's decisions show more nuance in the treatment of race and party questions. *See* Justin Levitt, *NC Redistricting, from Someone Not Named Rick*, ELECTION L. BLOG (May 22, 2017, 11:44 AM), http://electionlawblog.org/?p=92700 [https://perma.cc/MB7E-F3MH]. To be clear, I do not mean that *Harris* stands for the proposition that race and party are always interchangeable. But *Harris* demonstrates that while the courts do not always use my terminology, in cases of conjoined polarization Court opinions have divided between viewing race and party as dichotomous categories and viewing use of race as a proxy for party.

Relatedly, Rick Pildes claims that there is nothing new in the *Harris* approach to the race or party question, and that I exaggerate the extent to which *Harris* and the Fourth Circuit's *NC NAACP* case marks something new. Richard Pildes, *Disagreeing with Rick Hasen on the North Carolina Case*, ELECTION L. BLOG (May 22, 2017, 12:06 PM), http://electionlawblog.org/?p=92706 [https://perma.cc/G49Z-84G8]. To the contrary, the footnotes in *Harris* described above show that the Court now has two conflicting strands of analysis on the race or party question, with a Court majority appearing to adopt the proxy approach in a way it has not before. Eventually the Court will have to resolve this tension.

278. *Harris*, 137 S. Ct. at 1468-69.

279. *See generally* Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788 (2017); Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).

280. *See generally Harris*, 137 S. Ct. 1455.

281. *See* 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, 1599 (2016) (noting that the Roberts Court was not as conservative in election law cases as the author predicted ten years earlier).

If all of this happens, the race or party question will not matter to the courts for the reason that neither will be objectionable. The Court could achieve Justice Alito's goal of keeping courts out of further partisan "warfare,"[282] and this abdication will allow the victors to savor their spoils and "run roughshod"[283] over the rights of (political and racial) minority voters.

282. *Harris*, 137 S. Ct. at 1490 (Alito, J., concurring in part and dissenting in part).

283. Garza v. County of Los Angeles, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).