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Equal Voting Rights Require Removing Race and Partisan Discrimination from Elections and Legislative Gerrymandering

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Equal Voting Rights Require Removing Race and Partisan Discrimination from Elections and Legislative Gerrymandering

L. Darnell Weeden*

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INTRODUCTION

Judge Mark Walker ruled on February 1, 2018 that Florida's vote-restoration process had wrongly impacted 1.5 million Floridians' right to vote. A Republican-led clemency board implemented this process, headed

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by Governor Rick Scott.¹ After being criticized for violating the Fourteenth Amendment of the United States Constitution, Governor Scott joined other Republican state politicians facing legal backlash from laws that courts have determined legislators intentionally enacted to discriminate against African-Americans attempting to participate in the political process or vote.² During the past two years, courts have held that Texas, North Carolina, and Ohio practiced racial gerrymandering in an unlawful attempt to disenfranchise African-American voters.³

Civil rights experts contend the verdict against Florida's voter-restoration process may refocus the nation's eyes on the connections between voting rights, race, and Republican politics.⁴ Judge Walker viewed the arbitrary nature of the Florida voter-restoration scheme as part of an expanding trend in which Republican partisans—because of the U.S. Supreme Court's rollback of federal voting protections for racial minorities—are now trying to utilize voter identification and legislative gerrymandering to create a permanent electoral advantage.⁵ As Judge Walker stated, "This court is not blind to nationwide trends in which the spigot to access the United States' most 'precious' and 'fundamental' right, the right to vote, depends on who controls the levers of power."⁶ Further, Judge Walker declared in his order, "[t]hat spigot is turned on or off depending on whether politicians perceive they will benefit from the expansion or contraction of the electorate."⁷ Judge Walker's opinion sends the message that the right to vote is so precious that the government should protect it regardless of which political party has access to power.

Part I of this Article challenges the United States to reevaluate and protect the fundamental right to vote against racial targeting. Part II contends that the U.S. Supreme Court should reject the belief that race could be justified as a factor in legislative gerrymandering because race is too sensitive a factor to be considered when gerrymandering. Part II also argues that any consideration of race taints the equality principle, and the Court should reverse its 2001 holding in *Easley v. Cromartie*.⁸ Part II also

1. Patrick Jonsson, *More than a third of all US ex-cons who can't vote live in Florida. Why?*, CHRISTIAN SCI. MONITOR (Feb. 12, 2018), <https://www.csmonitor.com/USA/Justice/2018/0212/More-than-a-third-of-all-US-ex-cons-who-can-t-vote-live-in-Florida.-Why> [https://perma.cc/GC9C-4NS3].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Easley v. Cromartie*, 532 U.S. 234 (2001).

discusses *Cooper v. Harris*,⁹ which the Court decided 16 years after *Easley*. *Cooper* reveals how the Court repeated its failure in *Easley* by holding that reapportioning congressional districts required racial neutrality to promote nondiscrimination in an electoral democracy. Part III argues that the Court should reject partisan gerrymandering because partisanship has evolved into a proxy for maximizing racial bloc voting patterns. Part IV concludes with a practical solution for courts to handle gerrymandering cases by respecting conformity with traditional districting principles, such as compactness and respect for county lines, as long as those districts are established free of any partisan or racial considerations.

I. AMERICA IS CHALLENGED TO REEVALUATE AND PROTECT THE FUNDAMENTAL RIGHT TO VOTE AGAINST RACIAL TARGETING

A gerrymander represents a distortion of legislative district boundaries and populations because of partisan politics or separate specific motives.¹⁰ Partisan political gerrymandering is expanding because discretionary redistricting provides an opportunity for one political party to give itself advantage over another political party.¹¹ Those involved in legislative redistricting typically implement two techniques to create a partisan gerrymander: “packing” and “cracking.”¹² The packing strategy “packs” the opposing party’s supporters into a comparatively small number of districts to help the opposing party win big majorities in a small number of districts but lose a large majority of the districts.¹³ “Cracking” cracks or rips the opposing party’s voters so badly that it virtually guarantees the opposing party voters, although large in number, are an unsuccessful minority party in all of the targeted districts.¹⁴

Partisan gerrymandering is particularly harmful for at least two primary grounds.¹⁵ First, a partisan gerrymander is likely to permit a political party possessing a minority of the popular vote to take command over a majority of the seats in the state assembly, as well as its state’s representatives in the House of Representatives.¹⁶ Second, a partisan gerrymander is likely to permit “a party that possess only a slim majority

9. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

10. Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 405 (1993).

11. *Id.*

12. *Id.* at 406.

13. *Id.*

14. *Id.*

15. *Id.* at 407.

16. *Id.*

in popular vote over its main political challenger . . . to convert this slim popular vote advantage into a tactical established ascendancy.”¹⁷ Whether a gerrymander establishes a majority party or disproportionately expands the majority’s power when compared to the votes actually received, a gerrymander unfairly risks establishing a partisan imbalance so expertly that the legislature becomes indifferent to the desires of a changing voting demographic.¹⁸

According to Bryan Sells, a civil rights lawyer in Atlanta, America is in a new moment because this nation is “reevaluating the value of the right to vote and of unrigged systems. It’s not because the system was less rigged before. People are just caring about it more in the last five years.”¹⁹ The U.S. Supreme Court should hold that a state may not target African-American voters in the election process for either racial or partisan reasons.

In today’s politics, race and partisan political identity have evolved into one. This nation has witnessed a 21st-century explosion of election-related targeting laws Republican-controlled legislatures adopted over the opposition of both Democrats and civil rights supporters.²⁰ Examples of election-related targeting laws contested along partisan and racial lines include a litany of Republican-sponsored voting restrictions, such as strict voter ID laws, voter registration and early voting restraints, and the treatment of provisional ballots.²¹ Democrats and civil rights groups attack these Republican-sponsored restrictions because they unjustifiably suppress involvement in the election process by a number of eligible racial minority voters who usually support Democrats.²² Civil rights activists correctly contend these 21st-century burdens on the right to vote effectively deny racial minorities the right to vote by diluting their roles in the electoral process.²³ “Vote dilution” in the context of racial politics is more than an absence of proportional representation; it does not occur when elected officials fail to mirror on a proportional basis a racial group’s voting potential ability.²⁴ Plaintiffs in a voter dilution case must demonstrate under the totality of the circumstances standard that the

17. *Id.*

18. *Id.*

19. Jonsson, *supra* note 1.

20. Daniel P. Tokaji, *Vote Dissociation*, 127 *YALE L.J. F.* 761, 766 (2018).

21. *Id.* at 761.

22. *Id.*

23. *Id.* at 766–67.

24. Captain Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 *U. CIN. L. REV.* 823, 850 (1994) (citing *White v. Regester*, 412 U.S. 755, 765–66 (1973)) (identifying dilution under the Constitution).

political processes involving the nomination and election were not equally accessible to minority group involvement, attacking the process.²⁵ A minority group is required to show that its members do not have the same opportunity as other groups to contribute to the political process and to elect their preferred officials.²⁶

Although Republicans implemented their vote-denial policies against racial minorities, they also used their control over redistricting by gerrymandering both the U.S. House of Representatives and state legislative districts.²⁷ Gerrymandering allows the controlling political party to entrench itself in power by diluting votes cast for a rival party.²⁸ For example, a simple Republican gerrymandering strategy is to pack Democrats into a small number of districts to create safe Republican majorities but simultaneously pack African Americans—who, as a collective, consistently vote for Democrats—inside a small number of districts which produces a promising election map for Republicans.²⁹ Racial-political polarization helps to explain why Republican-dominated legislatures have racially gerrymandered Congressional and state legislative districts to implement majority-minority districts and effectively “dilute” the political impact of minority votes.³⁰ Racial gerrymandering is extremely challenging since it dilutes the votes of racial minorities under contemporary America’s single electoral practice for casting ballots for legislators.³¹ Because African-Americans and Hispanics disproportionately reside in geographically condensed inner cities without a proportional representation model, racial, minority vote-dilution will continue to exist as an inherent feature of American democracy.³²

Since 2016, several federal courts have issued decisions finding that states and localities practiced intentional discrimination in framing their voting and election laws.³³ Intentional discrimination assertions in the

25. *Id.* (citing *White*, 412 U.S. at 769).

26. *Id.*

27. Tokaji, *supra* note 20, at 767.

28. *Id.*

29. *Id.* at 768.

30. M. Akram Faizer, *Reinforced Polarization: How the Roberts Court’s Recent Decision to Invalidate the Voting Rights Act’s Coverage Formula Will Exacerbate the Divisions That Bedevil U.S. Society*, 45 CUMB. L. REV. 303, 325 (2014–15).

31. *Id.* at 326.

32. *Id.* at 327.

33. Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent In Voting Rights Litigation*, 127 YALE L.J. F. 779, 780 (2018) (citing *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (remanding a

setting of voting rights litigation virtually always generate the issue of disentangling race from party.³⁴ Race and partisan connection are repeatedly linked in modern politics, especially in the South.³⁵ When race and partisanship align, the usual state politician defense is that the legislators are implementing their plans for predominantly partisan purposes with only incidental race-based motives.³⁶ Because of the strong link between partisan politics and race-based politics, the Supreme Court has held that to succeed in a racial gerrymandering case in which race and party truly correlate, the plaintiffs must demonstrate that race, not partisan politics, was the predominant motive.³⁷ Courts should reject partisan motives as a proxy defense for targeting African-Americans, as well as other minority voters, to create marginalization in the political process.³⁸

Racial targeting to marginalize voters is intentional discrimination even if that marginalization was driven primarily by a political scheme and not racial hostility.³⁹ The Fourth Circuit asserted: “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

discriminatory purpose finding regarding Texas’s strict photo ID law, but holding that “there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose”); *Terrebonne Par. Branch NAACP v. Jindal*, 2017 WL 3574878 (M.D. La. Aug. 17, 2017) (finding that the at-large voting system for election of judges was maintained for a discriminatory purpose); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017) (holding that the City of Pasadena, Texas, intentionally discriminated against Latino voters in changing its city governance structure); *Perez v. Abbott*, 2017 WL 1787454 (W.D. Tex. May 2, 2017) (holding that the Texas Legislature intentionally discriminated against Latino voters in drawing the 2011 congressional redistricting plan); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016) (finding that Wisconsin’s restrictions on in-person absentee voting were motivated by discriminatory intent)).

34. *Id.* at 788.

35. *Id.*

36. *Id.* (citing *Veasey*, 830 F.3d at 303 (Jones, J., dissenting) (“The law reflects party politics, not racism, and the majority of this court—in their hearts—know this.”)).

37. *Id.* (citing *Easley v. Cromartie*, 532 U.S. 234 (2001)). *See, e.g.*, Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018).

38. Lang & Hebert, *supra* note 33, at 788.

39. *See id.*

vote for a particular party, in a predictable manner, constitutes discriminatory purpose.”⁴⁰

Since the partisan gerrymandering evolution is virtually indistinguishable from racial gerrymandering, the Supreme Court should put an end to them both to breathe new life into the equal protection concept and promote electoral democracy in America.

II. RACE IS TOO SENSITIVE A FACTOR TO BE CONSIDERED IN LEGISLATIVE GERRYMANDERING

North Carolina has continued to encounter the intersection of race and partisan gerrymandering. In 1993, in a North Carolina case, Justice O’Connor appropriately interpreted the meaning of the constitutional right to vote and the correctness of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups as two very complex and sensitive issues that continue to appear before the Supreme Court.⁴¹ Because of the 1990 census, North Carolina was entitled to a 12th seat in the U.S. House of Representatives. The North Carolina General Assembly passed a reapportionment strategy that contained one majority-black congressional district.⁴² After the Attorney General of the United States objected to the plan under § 5 of the Voting Rights Act of 1965 (“VRA” or “Act”), the General Assembly approved new legislation establishing a second majority-black district.⁴³ In the 1993 North Carolina case of *Shaw v. Reno*, the plaintiffs raised the complicated issue of whether a modified race-conscious redistricting plan and district boundary lines create an unconstitutional racial gerrymander.⁴⁴ A review of the North Carolina litigation odyssey supports the argument that race is too sensitive a factor—because of its historical baggage—to be a factor in the context of partisan gerrymandering.

A. *Easley v. Cromartie*

Easley is the descendant of *Shaw I*.⁴⁵ In *Shaw I*, the Court held that proof of North Carolina’s drawing of district boundaries for race-based

40. *Id.* (quoting N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 925 (W.D. Wis. 2016).

41. *Shaw v. Reno*, 509 U.S. 630, 633 (1993).

42. *Id.*

43. *Id.*

44. *Id.* at 633–34.

45. *Easley v. Cromartie*, 532 U.S. 234, 237 (2001).

reasons could establish that the legislature violated the Equal Protection Clause.⁴⁶ In *Easley*, the Supreme Court reviewed and rejected a three-judge district court's decision that the North Carolina Legislature used race as the predominant factor in drawing its 12th Congressional District's boundaries.⁴⁷ The Court found the district court's findings clearly erroneous and reversed the lower court's conclusion that North Carolina violated the Equal Protection Clause.⁴⁸

This racial districting litigation appeared before the Supreme Court four times, and each time the Court failed to get it right. The Court's first two rulings focused on North Carolina's old 12th Congressional District, one of two North Carolina congressional districts containing a majority of African-American voters.⁴⁹ The Court held that an equal protection violation may exist in the drawing of a legislative boundary that is race-neutral on its face if that boundary drawing is only rationally understood as a plan to isolate voters into individual districts because of their race, and there is no adequate justification for that racial isolation.⁵⁰

In *Easley* and its three predecessors involving the North Carolina Legislature's use of race as a factor in drawing congressional districts' boundaries, the Court's holdings were wrong because race should never be used as a factor when a legislature gerrymanders boundaries.⁵¹ The Court should reconsider its suggestion in gerrymandering that race may be used as a factor in drawing district boundaries as long as it is not a predominant factor⁵² because using race as a factor is simply unworkable in gerrymandering cases. Patricia Okonta supports the position that racial gerrymandering occurs in redistricting when state legislators approve reapportionment plans to "stack, crack, or pack clusters of minority voters in single-member district systems."⁵³ According to Okonta, civil rights advocates have utilized non-race-neutral redistricting plans to empower disenfranchised minorities to choose by ballot their desired candidates, but

46. *Id.* See U.S. CONST. amend. IX, § 1.

47. *Easley*, 532 U.S. 234.

48. *Id.* at 237; see U.S. CONST. amend. IX, § 1.

49. *Easley*, 532 U.S. at 237; see *Shaw*, 509 U.S. 630; *Shaw v. Hunt*, 517 U.S. 899 (1996).

50. *Easley*, 532 U.S. at 237–38.

51. *Id.* at 238.

52. *Id.*

53. Patricia Okonta, *Race-Based Political Exclusion And Social Subjugation: Racial Gerrymandering As A Badge Of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 255 (quoting STEVEN A. LIGHT, "THE LAW IS GOOD": THE VOTING RIGHTS ACT, REDISTRICTING AND BLACK REGIME POLITICS 22 (2010)).

new plans have been applied to achieve the opposite goal.⁵⁴ Those new plans may use racial gerrymandering to exploit racially polarized voting to reduce minorities' potential to elect a preferred candidate.⁵⁵ Since the Supreme Court prohibits public school officials from admitting students to public schools using race as a factor, then, by analogy, North Carolina should not be allowed to set district boundaries by using race as a factor, since the way to accomplish legislative redistricting without considering race⁵⁶ is to stop establishing district boundaries by using race as a factor.⁵⁷ Under the Supreme Court's big-picture, race-neutral rationale as articulated in *Parents Involved in Community Schools v. Seattle School District*, the way to stop gerrymandering discrimination in redistricting boundaries is to stop using race as a factor in drawing those boundaries.⁵⁸

In *Shaw II*, the Court likewise reversed a three-judge district court decision that held that the boundary-drawing law in question did not violate the Constitution.⁵⁹ The Court found that the district's "predominately African-American racial makeup, and its history, together demonstrated an intentional plan to create a 'majority-black' district" in which race was the predominant factor in designing the district and the district boundaries were not "designed to 'protec[t] Democrat incumbents.'"⁶⁰ The Court's conclusion in *Shaw II* was correct in that the Constitution was violated,⁶¹ but the Court's belief that race could justifiably be a factor in legislative gerrymandering should be rejected as impractical. Any consideration of race taints the equality principle in the gerrymandering process and obstructs the goal of representative democracy.⁶²

The Court's third holding focused on a newly redrawn North Carolina 12th Congressional District.⁶³ A three-judge district court,⁶⁴ with one judge dissenting, granted summary judgment to those challenging the

54. *Id.*

55. *Id.*

56. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007).

57. *Id.* at 748.

58. *Id.*

59. *Easley v. Cromartie*, 532 U.S. 234, 238 (2001).

60. *Id.*

61. *Id.*

62. *Contra id.*

63. *Id.* See *Hunt v. Cromartie*, 526 U.S. 541 (1999).

64. Harris S. Ammerman, *Three Judge Courts: See How They Run!*, 52 F.R.D. 293 (1971) ("Three-judge courts hear injunction cases alleging unconstitutionally of federal or state statutes.").

congressional district's boundaries.⁶⁵ The federal district court held that the North Carolina Legislature had once again used criteria that, on its face, focused on race in violation of the Equal Protection Clause.⁶⁶ The federal district court grounded its decision on substantial facts revealing that the boundaries established an abnormally designed district—the boundaries divided counties as well as cities.⁶⁷ The facts also highlighted that the new congressional district contained virtually all the Democratic-registered, largely African-American, voting precincts but placed Democratic-registered, largely white precincts, outside the district.⁶⁸ The North Carolina Legislature's relocation of the predominately white precincts outside the 12th Congressional District is reliable evidence that the legislative goal was to maximize the new 12th District's African-American voting power and not simply to maximize the district's voting power for Democrats.⁶⁹

Upon Supreme Court review, in its third holding, the Court again rejected the district court's holding that North Carolina's 12th District was shaped the way it was because of race.⁷⁰ The Court failed to recognize that the North Carolina Legislature was preoccupied with the racial makeup of the district and not the relatively secondary partisan nature of the district.⁷¹ The Court rejected the district court's position that the new 12th Congressional District's appearance, the manner in which it divided towns and counties, and its largely African-American voting population, should have allowed the plaintiffs to prevail in the case.⁷² All of these activities show a preoccupation with the racial makeup of the district, not the secondary effects of partisan politics.⁷³

Evidence of the shape of a district united with the evidence of African-American Democratic registration is sufficient to demonstrate, on summary judgment, the unconstitutional race-based taint, because only a preoccupation with race can reasonably explain the redistricting plan.⁷⁴ The Supreme Court conceded that race was a significant factor in North Carolina's redistricting plan, but, unfortunately, the Court concluded there was a genuine issue of material fact as to whether the evidence was

65. *Easley*, 532 U.S. at 238.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 238–39.

70. *Id.*

71. *Contra id.* at 239.

72. *Id.* at 238–39.

73. *Contra id.*

74. *Contra id.*

consistent with the constitutional partisan objective of producing a safe Democratic seat.⁷⁵

The Court's third holding was ill-advised because it failed to realize that the government should never utilize race as a factor in gerrymandering a legislative district. Any use of race in shaping a congressional or legislative district fatally taints the equal protection standard and blocks free and fair elections in America. The Court should have adopted the position that it is never permissible to use race as a factor in redistricting a congressional district because true voting equality requires using race-neutral traditional demographics and prohibiting the use of partisan politics while redistricting.⁷⁶

The Court's fourth consideration of North Carolina's redistricting scheme in *Easley v. Cromartie* from an equal protection perspective demonstrated that it is virtually impossible to reliably measure the race factor while a state is engaging in a congressional gerrymandering process.⁷⁷ The record contained little evidence supporting the district court's conclusion that the 12th Congressional District plan only considered race as a minor factor since the relevant evidence included Senator Cooper's declaration that racial balancing was a primary goal of redistricting a new 12th District and not democratic partisan concerns.⁷⁸

In a North Carolina racial gerrymandering case, the Supreme Court failed to follow the clearly erroneous standard for factual finding by declaring, "The evidence taken together, however, does not show that racial considerations predominated in the drawing of District 12's boundaries. That is because race in this case correlates closely with political behavior."⁷⁹ According to Justice Thomas, the only proper issue for the Supreme Court to consider regarding North Carolina's new 12th Congressional District was whether the district court's factual conclusion that race was the predominant factor was clearly erroneous.⁸⁰

Justice Thomas rejected the majority's conclusion about the trial court's decision regarding the predominant purpose of the 12th District gerrymandering plan.⁸¹ In dissent, Justice Thomas said that because the district court's conclusion that race was the predominant factor motivating the North Carolina Legislature constituted a factual finding, the Supreme Court could not overturn the district court's factual finding unless it was

75. *Contra id.*

76. *Contra id.*

77. *Contra id.* at 257.

78. *Contra id.*

79. *Contra id.*

80. *Id.* (Thomas, J., dissenting).

81. *Id.* (Thomas, J., dissenting).

clearly erroneous.⁸² Thomas reminded the Court that an intentional discrimination determination is a conclusion of fact.⁸³ He stated: “Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.”⁸⁴ According to Justice Thomas, when the Court conceded that the evidence reasonably pointed to either a partisan or racial motive for creating the new 12th District under the Court’s precedent, the district court’s decision simply could not be clearly erroneous.⁸⁵ The Supreme Court should reject the district court’s conclusion of facts only if it possesses an unambiguous and well-founded belief that an error was made.⁸⁶

In this most recent iteration of the North Carolina congressional districts, the basic equal protection question the Court avoided was whether the Constitution should prohibit the North Carolina Legislature in establishing the new 12th District’s boundaries from considering either race or partisanship as factors, because our Constitution has evolved to race and partisan neutrality in gerrymandering.⁸⁷ In a case involving the gerrymandering of districts, because racial identification often correlates to partisan political affiliation, the person attacking the legislatively drawn boundaries should only be required to prove that the state used race or partisanship as a factor to prove an illegitimate violation of the equal protection principle.⁸⁸ When race or partisanship is not a factor in establishing congressional redistricting, the legislature acts consistently with necessary race-neutral and partisan-neutral redistricting principles.⁸⁹

The Court should reverse its decision in *Easley* that allows race to be a factor in gerrymandering legislative boundaries when a partisan motive is also equally plausible.⁹⁰ The Court should abandon its rationale in *Easley* and declare the fundamental principle that, like unconstitutional racial discrimination in public school education, using race as a factor in gerrymandering legislative districts is a violation of the Equal Protection Clause.⁹¹ The Court should also proclaim that all federal, state, and local laws requiring or permitting the use of race as a factor in congressional

82. *Id.* (Thomas, J., dissenting).

83. *Id.* (Thomas, J., dissenting).

84. *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

85. *Id.* at 259 (Thomas, J., dissenting).

86. *Id.* (Thomas, J., dissenting) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

87. *See id.* at 257.

88. *Contra id.* at 258.

89. *See id.*

90. *Id.* at 234.

91. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 298 (1955).

redistricting must yield to the race neutrality principle.⁹² Future gerrymandering cases applying the race neutrality principle or a partisan-neutral concept to establish congressional boundaries will present opportunities for the Court to consider the manner in which it will accord relief.⁹³

Since the issue being appealed in *Easley* was an evidentiary question of fact,⁹⁴ the only relevant issue before the appellate court under the proposed race-neutral or partisan-neutral gerrymandering standard should be whether there is plausible factual evidence to support the district court's conclusion that race or partisanship was a factor, regardless of whether North Carolina's legislative motive was predominantly political and not racial.⁹⁵ In making its evidentiary determination, the Court followed its flawed burden of proof required in gerrymandering cases alleging racial discrimination in *Shaw I* and later cases.⁹⁶ Under current case law, in a situation involving a racial gerrymandering, the burden of proof is on the plaintiffs who claim that a legislature has improperly used race as a factor to produce a majority-minority district.⁹⁷ The gerrymandering plaintiffs must prove the "legislature subordinated traditional race-neutral districting principles . . . to racial considerations."⁹⁸ The Court should abandon its current case law involving gerrymandering and hold that a successful plaintiff challenging the use of race as a factor while gerrymandering must only prove that true race neutral principles were utilized, which would prohibit any consideration of race as a factor.

Despite the Supreme Court's racially tainted gerrymandering precedents, race should not be a permissible motivating factor when a legislature draws a majority-minority district under the equal protection principle.⁹⁹ The Court requires plaintiffs in a gerrymandering case to prove that race was the *predominant* factor motivating a legislature districting decision.¹⁰⁰ A correct reading of the equal protection principle in a gerrymandering case would require the plaintiff to prove only that race is a factor, not that it is the predominant factor, to establish an Equal

92. *See id.*

93. *See id.*

94. *Easley*, 532 U.S. at 241.

95. *Contra id.*

96. *Id.*

97. *Id.*

98. *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

99. *Contra id.*; *contra* *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'Connor, J., concurring).

100. *Contra Easley*, 532 U.S. at 241 (quoting *Miller*, 515 U.S. at 916); *contra* *Vera*, 517 U.S. at 959 (O'Connor, J., concurring).

Protection Clause violation. If a plaintiff proves that one cannot rationalize a facially neutral law with any justifications except race,¹⁰¹ the plaintiff has implicitly proved by circumstantial evidence that race is an unacceptable tainted factor.¹⁰² The African-American experience reveals that when race is a factor in gerrymandering of congressional districts, race virtually always becomes a tainted predominating factor. The only way to assure that the legislature utilizes race-neutral redistricting principles is to prohibit the legislature from giving any consideration to race or partisan politics in the gerrymandering process.¹⁰³

B. Cooper v. Harris

In *Cooper v. Harris*, Justice Kagan declared that the U.S. Constitution delegates the task of establishing congressional districts to the states.¹⁰⁴ It is the author's belief that an appropriate reading of the Constitution, however, would prohibit the use of race as a factor in redistricting those congressional districts.¹⁰⁵ The Court has consistently held, "[a] State may not use race as the predominant factor in drawing district lines unless it has a compelling reason";¹⁰⁶ a state should never be allowed, however, to use race as a factor in establishing congressional district lines under any circumstances. Any consideration of race in the redistricting process is an unreasonable separate-but-equal poison pill.¹⁰⁷

Cooper involved North Carolina's latest redrawing of two congressional districts, both of which have historically contained a substantial number of black voters.¹⁰⁸ In its present incarnation, District 1 is anchored in northeastern North Carolina, with attachments extending both south and west—the west into Durham.¹⁰⁹ District 12 starts in south-central North Carolina, which includes a large section of Charlotte, and next journeys northeast, zig-zagging much of the way to North Carolina's northern border.¹¹⁰ The two districts have quite a history before the

101. *Contra Easley*, 532 U.S. at 241–42.

102. *Contra id.* at 242.

103. *Id.*

104. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017).

105. *Contra id.*

106. *Id.*

107. *Contra id.*

108. *Id.* at 1466.

109. *Id.*

110. *Id.*

Supreme Court.¹¹¹ The Supreme Court first encountered the 1992 versions of the two districts in *Shaw v. Reno*.¹¹²

In *Cooper*, a three-judge district court held that North Carolina officials violated the Equal Protection Clause because they considered race as the predominant factor when the state redistricted the two districts in which the voting-age populations were majority black.¹¹³ The Supreme Court correctly affirmed the district court's conclusion that North Carolina violated the equal protection principle; the Court's rationale for the violation, however, is unacceptable. The Court should reject its prior precedents and hold that North Carolina's redistricting plan violates the equal protection principle if the legislature gives any consideration to race.

The Equal Protection Clause of the Fourteenth Amendment, properly understood, should prohibit any consideration of race as a factor when a state gerrymanders its congressional districts.¹¹⁴ The equal protection principle prevents a state from utilizing race as a factor to justify separating its citizens into different voting districts.¹¹⁵ When a voter sues state officials for drawing district lines and considering race as a factor, the Court should apply a simple and manageable, one-step analysis.¹¹⁶ The challenger to the redistricting plan should have to prove race is a factor influencing the legislature's determination to locate a substantial number of voters inside or outside of a specific district.¹¹⁷ If a challenger demonstrates that, despite the use of other traditional factors such as compactness or respect for political subdivisions, any consideration of race in gerrymandering creates a partisan advantage violating the equal protection principle.¹¹⁸ The challenger's proof of race as a factor could consist of "direct evidence" of legislative purpose or circumstantial evidence. Circumstantial evidence includes the district's appearance and demographics, which only a consideration of the race factor can

111. *Id.*

112. *Id.* (citing *Shaw v. Reno*, 509 U.S. 630 (1993)).

113. *Id.*

114. *Contra id.*

115. *Contra Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

116. *Contra Cooper*, 137 S. Ct. at 1463.

117. *Contra Miller v. Johnson*, 515 U.S. 900, 916 (1995).

118. *Contra Cooper*, 137 S. Ct. at 1463–64. "[R]equiring districts be compact . . . [is] overrated. With the exception of it . . . usefulness as an indicia of . . . gerrymandering, I do not believe there is anything desirable . . . about districts that look like squares. . . . [I]t is rare . . . to find regular geometric figures . . . , while satisfying equal population constraints." Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 90–91 (1985).

reasonably explain.¹¹⁹ Because racial considerations in reality are virtually never subordinate to other considerations in the design of the district, the Court should prohibit any use of race in the gerrymandering process.¹²⁰ Once the challenger proves that race was a factor in the design of a legislative district, the challenger should prevail because the equal protection principle of fair and equal representation for all voters prohibits the state from using race as a factor in the sorting of voters to serve even a supposed “compelling interest” that is allegedly “narrowly tailored” to achieve that goal.¹²¹

The Court should reject its long-held assumption that race may be a factor under its compelling interest rationale to comply with operative provisions of the VRA¹²² in favor of a true race-neutral approach, which strictly prohibits any consideration of race. Two provisions of the VRA—§§ 2 and 5—were considered in *Cooper*.¹²³ Section 2 makes a paradigm, practice, or procedure that produces an exclusion or abridgement of the right to vote because of race unlawful.¹²⁴ Unlike § 2, prior to the Court’s canceling of § 5’s coverage formula, § 5 mandated specific states, as well as several counties in North Carolina, to pre-clear voting adjustments or amendments with the Department of Justice to preempt a deterioration in the voting capacity of racial minorities.¹²⁵ The government should give all Americans the opportunity to elect their preferred candidate, regardless of race, because race should never be a factor to enhance or dilute a specific group’s chance to elect their preferred candidate.¹²⁶

A state should not be allowed to invoke the VRA to support race-based districting because litigation experience provides strong evidence that the statute must now require race neutrality by all the relevant actors to avoid laying a trap for an unwary legislature.¹²⁷ If a legislature uses race as a factor in its redistricting plan, a court may reject “its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few.”¹²⁸ If the legislature is

119. *Contra Cooper*, 137 S. Ct. at 1464.

120. *Contra Bethune-Hill*, 137 S. Ct. at 800.

121. *Contra Cooper*, 137 S. Ct. at 1464.

122. *Contra id.* (citing Pub. L. 89-110, 79 Stat. 437, amended by 52 U.S.C. § 10301-14); *contra Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (*Shaw II*).

123. *Cooper*, 137 S. Ct. at 1464.

124. *Id.*

125. *Id.* See *Beer v. United States*, 425 U.S. 130, 141 (1976).

126. *Cooper*, 137 S. Ct. at 1464.

127. *Contra Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015).

128. *Id.*

prohibited from giving any consideration to race in the gerrymandering process, it would not have to worry about the trap of trying to decide how much race consideration is too much and how much race consideration is not enough.¹²⁹ If legislative reapportionment could not use race as a factor to dilute or enhance a group's voting power, the state now has "good reasons" under the Act to design a single district line with a reduced reliance on partisan politics.¹³⁰ The "strong basis" for "race conscious reasons" typically gives states breathing room to implement fake race-conscious compliance measures that produce foreseeable racial discrimination in the electoral process at the expense of cross-racial coalition building in the reapportionment process.¹³¹ Professor Lani Guinier has described cross-racial coalition building as involving a situation in which a person is not confined to a minority outlook and a person is certainly not abandoned because of the outlook selected.¹³²

The Supreme Court still retains full power to correct and reverse its understanding of the law and adopt this recommended analysis by requiring complete race neutrality in legislative reapportionment cases. Under this analysis and the proposed constitutional standard, any American court's findings of fact that a racial consideration was a factor in drawing district lines makes that district unconstitutional. As Justice Thomas observed, "Because racial gerrymandering offends the Constitution whether the motivation is malicious or benign. It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters."¹³³ By continuing to use race as a predominant factor in the politics of gerrymandering, America's opportunity for a growing and inclusive democracy diminishes.

III. BOTH PARTISAN AND RACIAL GERRYMANDERING SHOULD BE REJECTED BECAUSE THERE IS NO REASONABLE WAY TO DISTINGUISH BETWEEN THE TWO

Intentional discrimination claims in situations involving gerrymandering produce difficulty in separating race from partisan politics.¹³⁴ When race and

129. *Contra id.*

130. *Contra id.*

131. *Contra Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 802 (2017).

132. LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 16 (1994).

133. *Easley v. Cromartie*, 532 U.S. 234, 266–67 (2001) (Thomas, J., dissenting).

134. *Lang & Hebert*, *supra* note 33, at 788 (citing *Veasey v. Abbott*, 830 F.3d 216, 303 (5th Cir. 2016) (Jones, J., dissenting) ("The law reflects party politics, not racism, and the majority of this court—in their hearts—know this.")).

partisan politics are linked to gerrymandering “as they so often do in modern politics, particularly in the South—a common defense is that the legislators acted for partisan reasons, not for race-based ones.”¹³⁵ Since the Supreme Court has failed to develop any manageable objective standards to separate partisan motives from racial motives in gerrymandering cases, the Court should abandon its current requirement that to succeed in a racial gerrymandering case, in which race and party closely correlate, the plaintiffs must be able to show that race, not partisan politics, was the predominant motive.¹³⁶ The Court should instead adopt the position that, to prevail, a plaintiff must prove only that race was a factor in the partisan redistricting gerrymandering process.

A. Partisan Politics as an Illegitimate Defense Where Race Is a Factor in Legislative Redistricting

The U.S. Court of Appeals for the Fourth Circuit identified the problem in utilizing race as a factor in a partisan gerrymandering case.¹³⁷ The Fourth Circuit’s approach to gerrymandering, although appropriate, may not effectively discourage those legislators who present partisan motives as an affirmative defense for racially targeting minority voters.¹³⁸ The Fourth Circuit’s holding that those who raise partisan political motives to justify targeting black and minority voters for exclusion from the political process by gerrymander is, without a reasonable doubt, discriminatory.¹³⁹ By analogy, it should be equally true under the rationale of the Fourth Circuit that a court should treat the targeting of African-Americans or racial minorities when redistricting congressional districts even if inspired by a political scheme and not racial animus as discriminatory.¹⁴⁰ Under the rationale of the Fourth Circuit, exploiting race as a proxy for party may successfully redistrict the legislature to prevail in an election, but it is not a fair way to protect or promote equal representation.¹⁴¹ To intentionally target a particular race, however, and place them in a legislative district while redistricting because its members vote for a certain party, in an expected routine, establishes discriminatory purpose. The Fourth Circuit did not unequivocally declare that race is an

135. *Id.*

136. *Id.*

137. *Id.*; N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

138. *See supra* note 137.

139. *See supra* note 137.

140. *See supra* note 137.

141. *See supra* note 137.

impermissible factor in either partisan or racial gerrymandering because targeting African-American and other racial minority voters for marginalization in the political process is discriminatory even if the motivating factor is predominantly partisan rather than racially hostile.¹⁴² A more progressive Fourth Circuit decision would have asserted that exploiting race as a proxy for political advantage is not an acceptable way to win an election because any use of race under the circumstances is a divisive poison pill that harms representative democracy. The Fourth Circuit should have prohibited the legislature from intentionally using race in the reapportionment process, even for a predominately partisan motive, because to do so demeans those adversely affected.¹⁴³

Completely removing race and partisan advantage as factors from redistricting law provides structural and institutional certainty under a different equal protection analysis that is completely race neutral.¹⁴⁴ When state actors violate clear rules that prohibit the consideration of either the race factor or partisan advantage, judges using other traditional equal protection principles should become very predictable.¹⁴⁵ According to Gary Michael Parsons, predictability by judges addressing the partisan politics issue represents good public policy because it helps to shield the dispensation of redistricting justice from claims of unfair partisanship.¹⁴⁶

Redistricting law should utilize other traditional equal protection principles to prohibit the use of either race or partisan political advantage. In a situation involving partisan or racial gerrymandering, the Court should embrace equitable principles that absolutely prohibit any consideration of race or political advantage when enacting a redistricting plan.¹⁴⁷

The Court's usual treatment of partisan gerrymandering under equitable principles avoids any commitment to racial neutrality under equal protection principles but, at the same time, accommodates racial or partisan stereotyping.¹⁴⁸ The Supreme Court attacks the government's invidious racial discrimination, yet the Court inconsistently and incoherently accepts partisan gerrymanders as a defense in racial gerrymandering litigation,¹⁴⁹

142. *See supra* note 137.

143. *See* Lang & Hebert, *supra* note 33, at 788 (citing N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 224 (4th Cir. 2016)).

144. *See* Gary Michael Parsons, Jr., *The Institutional Case For Partisan Gerrymandering Claim*, 2017 CARDOZO L. REV. DE NOVO 155, 166 (2017).

145. *See id.*

146. *Id.*

147. *See id.* at 166–67 (citing North Carolina v. Covington, 137 S. Ct. 1624 (2017)).

148. *See id.* at 167.

149. *Id.* *See* Hunt v. Cromartie, 526 U.S. 541, 551 (1999).

and the Court rejects plaintiffs' allegations that partisan politics represent a very thinly disguised pretext for racial gerrymandering.¹⁵⁰ If partisan gerrymandering can accommodate the race factor as legitimate, then partisan gerrymandering under the equal protection principle may also prohibit the use of the race factor as illegitimate because partisan politics is so easily manipulated as a tool for racial targeting.¹⁵¹ For instance, following the last census, legislators sorted voters by race with a pretext of serving a legitimate constitutional purpose—prohibiting racial vote dilution—but actually achieving an unconstitutional predominant purpose of racial targeting by calling it a partisan vote advantage effort.¹⁵²

If the Supreme Court wants to establish certainty in the redistricting process, the Court should prohibit any consideration of partisan politics in the gerrymandering process. The Court should also deny the states the power to use partisan politics to defend racial targeting in redistricting cases.¹⁵³ An equal protection analysis prohibiting any consideration of race or partisan politics “would begin to fill the doctrinal gap in redistricting jurisprudence and help bring certainty to legislators navigating the”¹⁵⁴ redistricting process. Both partisan-neutral politics and race-neutral redistricting practices help to promote the goal of allowing redistricting law to become analytically consistent, predictable, and not as likely to be exposed to either partisan or racial manipulation by legislators or litigants.¹⁵⁵ Predictability in how the Court will rule in a gerrymandering case will not work until the Court is prepared to hold that consideration of either partisan politics or race is prohibited in the gerrymandering process.

B. Redistricting's Legitimate Goal Is Fair Representation

Gerrymandering became a significant issue in the 2018 midterm elections.¹⁵⁶ The Pennsylvania Supreme Court redrew the state's GOP-

150. See Parsons, Jr., *supra* note 144, at 167. See *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004).

151. See Parsons, Jr., *supra* note 144, at 167.

152. See *id.* at 168 (citing Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 609 (2016)).

153. See *id.* at 169.

154. *Id.* at 171.

155. *Id.* at 174 (citations omitted).

156. Ari Berman, *Five myths about gerrymandering*, WASH. POST (Mar. 8, 2018), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-gerrymandering/2018/03/08/f9d1a230-2241-11e8-badd-7c9f29a55815_story.html [<https://perma.cc/J7ND-AYF5>].

controlled congressional map.¹⁵⁷ According to one commentator, Democrats would have gained approximately 37 Congressional House seats in the 2018 midterm elections.¹⁵⁸ While Democrats actually accrued 39 seats,¹⁵⁹ the total seats for Democrats could have been larger but for Republican gerrymandering in particular states.¹⁶⁰ A contrast between the 2018 House election outcomes in North Carolina and Pennsylvania demonstrate the capacity of gerrymandering to distort the number of legislative seats that a specific political party won based on the percentage of statewide popular votes received in a given election.¹⁶¹

Christopher Ingraham demonstrates why partisan gerrymandering matters by contrasting the results in North Carolina and Pennsylvania in light of Pennsylvania prohibiting extreme partisan gerrymandering in the 2018 midterm elections, while North Carolina continued to embrace the same.¹⁶²

During the 2016 national elections, Democrats in North Carolina earned a 47% proportion of the statewide ballots cast for the House seats, but Democrats were awarded only a 23% proportion of the seats as a result of extreme partisan legislative redistricting.¹⁶³ In Pennsylvania, Democrats earned a 48% proportion of the ballots cast in the state for House elections with opponents; nonetheless, the Pennsylvania Democrats received 27% of the seats.¹⁶⁴ Ingraham contends that “[b]ig differences between popular votes and seat totals are one of the telltale signs of a heavily gerrymandered state. But the two states’ paths diverged after 2016.”¹⁶⁵

North Carolina used its gerrymandered districts during the 2018 midterm election.¹⁶⁶ In Pennsylvania, the state supreme court redrew the maps earlier in 2018 to prohibit extreme partisan gerrymandering.¹⁶⁷ The

157. *Id.*

158. Christopher Ingraham, *One state fixed its gerrymandered districts, the other didn't. Here's how the election played out in both*, WASH. POST (Nov. 9, 2018), https://www.washingtonpost.com/business/2018/11/09/one-state-fixed-its-gerrymandered-districts-other-didnt-heres-how-election-played-out-both/?noredirect=on&utm_term=.91b1e04efbe1 [http://perma.cc/CTJ5-REVH].

159. *Forecasting the race for the House*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/2018-midterm-election-forecast/house/> [http://perma.cc/5A42-U5K4] (last updated Nov. 6, 2018).

160. Ingraham, *supra* note 158.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

difference between extreme partisan gerrymandering and eliminating or reducing the effect of gerrymandering in the ballot box outcome is eye-catching but very predictable.¹⁶⁸ Since North Carolina retained its old maps of 2016, it achieved an electoral result in 2018 that was virtually identical to that of 2016.¹⁶⁹ Although there was a Democratic wave in North Carolina where more than half of voters cast a ballot for a Democratic House candidate, North Carolina Democrats received only a quarter of the seats with opposition.¹⁷⁰ Ingraham said, in Pennsylvania, “a 53 percent majority in the popular vote yielded a hair under half of the contested seats — a big difference from 2016, when 48 percent of the vote gave Democrats 27 percent of the seats.”¹⁷¹

The author of this Article believes the different congressional election outcomes in North Carolina and Pennsylvania provide realistic optic perceptions regarding how the gerrymandering process operates.¹⁷² A great deal of the misconception about how the current gerrymandering process operates, however, may be linked to the fact that the Court has failed to establish identifiable or manageable standards for separating partisan politics from racial targeting of voters.¹⁷³

The government should reject partisan gerrymandering and racial gerrymandering when redistricting to advance the democratic goal of fair representation and to prevent the return to the historical British practice of providing no real representation for Americans, because the British did not allow the Americans to have any input in the actual governing of their colony.¹⁷⁴ A combination of partisan gerrymandering and using race as a factor pose a grave risk of placing targeted racial minority voters in legislative districts without any meaningful representation because voter dilution results in a lack of opportunity to provide input in selecting leaders in their districts.¹⁷⁵

Although the Supreme Court has historically left redistricting to the states, the Court has the authority to revise state legislative redistricting plans to assure fair and equal representation under the rationale of the Court’s 1962 decision in *Baker v. Carr*.¹⁷⁶ In *Baker*, Justice William Brennan acknowledged that the Court has a judicial duty to assure fair and

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See id.*

173. Berman, *supra* note 156.

174. *Id.*

175. *See id.*

176. *See Baker v. Carr*, 369 U.S. 186 (1962); Berman, *supra* note 156.

equal representation to all people when legislative redistricting occurs under the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁷ Justice Brennan's declaration in the 1960s laid the foundation for plaintiffs to challenge legislative redistricting plans that fail to provide voters with equal representation in the legislative branch of government.¹⁷⁸ The Supreme Court used the equal protection power established in *Baker* to prohibit unequal representation in legislative redistricting inspired by any consideration of either race or partisan politics.¹⁷⁹

Under the rationale of *Baker*,¹⁸⁰ the Court should use its power to prohibit the use of the race factor in redistricting because the link between partisan political identity and racial targeting typically stereotypes and unfairly dilutes the vote of a racial minority. According to Donald Earl Collins, American history reveals that because race continues to identify where many Americans live as well as how many Americans vote, politicians continue to gerrymander voting districts in at least two states by playing the race card, because race significantly impacts almost every aspect of a person's life in America.¹⁸¹

A racial gerrymander occurs if race, rather than traditional criteria, such as recognizing city and county boundaries or attempting to shield an identifiable political party's candidate from losing an election, is the "predominant factor" as to why the legislature established certain geographical lines without providing a compelling justification for giving so much deference to race.¹⁸²

The 2017 North Carolina case of *Cooper v. Harris* involved two North Carolina congressional districts, District 1 and District 12.¹⁸³ North Carolina justified its redistricting plan on the theory that the disputed congressional districts were established for partisan political purposes and

177. See *Baker*, 369 U.S. at 226.

178. See Berman, *supra* note 156.

179. *Id.*

180. See *Baker*, 369 U.S. at 226.

181. Donald Earl Collins, *Black history is U.S. history — but some of my students don't want to hear it*, WASH. POST (Feb. 7, 2018), <https://www.washingtonpost.com/news/posteverything/wp/2018/02/07/black-history-is-u-s-history-but-some-of-my-students-dont-want-to-hear-it/> [<https://perma.cc/VJH2-E537>].

182. Richard L. Hasen, *The Supreme Court may just have given voting rights activists a powerful new tool*, WASH. POST (May 22, 2017), https://www.washingtonpost.com/opinions/voting-rights-activists-should-love-todays-supreme-court-ruling/2017/05/22/9443d726-3f2f-11e7-9869-bac8b446820a_story.html [<https://perma.cc/HJ55-9E2Q>] (originally titled "*Kagan quietly declares war on gerrymandering*").

183. *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017).

not racial purposes.¹⁸⁴ The two congressional districts were designed to benefit Republicans, North Carolina contended, not to redistribute white and black voters.¹⁸⁵ Since North Carolina knew the Supreme Court had never invalidated a gerrymandered district that articulated a plausible appearance of a partisan gerrymander, it was necessary for the state to articulate that this was partisan politics and not race to survive a legal challenge.¹⁸⁶ Professor Richard L. Hasen, the chancellor's professor of law and political science at the University of California at Irvine and the author of *Plutocrats United*, believes some of the statements Associate Justice Elena Kagan made in the *Cooper*¹⁸⁷ opinion demonstrate the problematic nature of the intersection of partisan politics and the race factor.¹⁸⁸ Justice Kagan asserted, "[W]hen it comes to drawing congressional districts, race and party are not necessarily separate categories."¹⁸⁹ Hasen thinks Justice Kagan believes "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."¹⁹⁰ Although Justice Kagan's views are a step in the right direction, they do not go far enough, because neither race nor partisan politics should be considered as a factor in redistricting. When redistricting of congressional districts is involved, race and partisan politics are often not separate categories, and there is no principled way to distinguish partisan political gerrymandering from racial gerrymandering under the equal protection of the law.¹⁹¹

CONCLUSION

Determining whether the design of a congressional district is motivated by either a racial or partisan reason poses a virtually impossible challenge for a federal court.¹⁹² If the U.S. Supreme Court continues to allow fake partisan political advantage to be a factor in deciding redistricting cases alleging a real racial gerrymander, virtually everyone will raise the fake-partisan-politics defense.¹⁹³ The prestige of the Supreme Court is at risk if it is perceived as endorsing either a fake-partisan-politics

184. Hasen, *supra* note 182.

185. *Id.*

186. *Id.*

187. *Cooper*, 137 S. Ct. at 1455.

188. Hasen, *supra* note 182.

189. *Id.*

190. *Id.*

191. *See id.*

192. *See Cooper*, 137 S. Ct. at 1473.

193. *Id.*

claim to provide cover for racial targeting in redistricting or permitting partisan political advantage to exist at the expense of fair representation in the nation's congressional districts.

The most practical way for the Supreme Court to make progress in situations involving redistricting is by respecting conformity to traditional districting principles, such as compactness and respect for county lines as long as those districts are established free of partisan politics or racial considerations.¹⁹⁴ The government should delete race and partisan politics from redistricting because political and racial reasons are capable of yielding similar oddities that block a district's ability to produce fair representation within its boundaries.¹⁹⁵ The similar results, which block the goal of fair representation in our democracy, exist because racial identification is interrelated to political involvement.¹⁹⁶ As a result of these highly correlated redistricting realities, the Supreme Court has a formidable task of instructing lower courts in gerrymandering cases to engage in "a sensitive inquiry" into all "circumstantial and direct evidence of intent" to assess whether the plaintiff can simply prove that either race or partisanship was a factor in establishing a district's lines.¹⁹⁷ As soon as possible, the Court should prohibit the use of race and partisan politics as factors in redistricting because the secondary effects produced by both unnecessarily obstruct the democratic goal of fair representation in Congress and state legislative houses.

194. *See id.*

195. *See id.* (citing *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)).

196. *Id.*

197. *Contra id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (internal quotation marks omitted)).