RED AND WHITE, BLACK AND BLUE: AN EXAMINATION OF THE SUPREME COURT'S RACIAL GERRYMANDERING JURISPRUDENCE FOLLOWING *COOPER V. HARRIS*

On May 22, 2017, the United States Supreme Court found that the North Carolina state legislature improperly gerrymandered two congressional districts by considering race as the predominant factor when redrawing district lines in 2011. Applying a "clearly erroneous" standard of review, the Court unanimously upheld the district court's decision to strike down congressional district (CD) 1 but split 5-3 over the question of CD 12. (Justice Gorsuch took no part in the consideration or decision.)

The case, *Cooper v. Harris*,[1] marked the fifth time in the past twenty-five years that the Supreme Court examined one or both of these districts.[2] In this case, the split over CD 12 arose from the defendants' assertion that the changes to the district's boundary lines were entirely partisan-driven and, therefore, lawful. That claim, combined with the plaintiffs' failure to show how the state legislature *could* have achieved its partisan goals without affecting the district's overall black voter age population (BVAP) was enough to convince three of the Court's conservative judges that the legislature's actions did not amount to racial gerrymandering.[3] But in striking down CD 12, the majority made a departure from the "alternative ways" requirement[4] laid out in a 2001 case, *Easley v. Cromartie*[5] (commonly known as *Cromartie II*)—a departure which Justice Alito likened to the act of tossing away a napkin after a single use.[6]

This Article will examine the Court's legal explanations for its decisions on CDs 1 and 12, with a particular focus on the majority's departure from the Court's earlier holding in *Cromartie II*. Lastly, this Article will explore some potential implications of that departure.

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1. 137 S. Ct. 1455 (2017).
2. *Id.* at 1472.
3. Justice Thomas sided with the Court's four liberal justices in striking down both CDs, following his belief that no consideration of race should be permissible in redistricting (for CD 1) and emphasizing the Court's strict application of the "clear error" standard of review (for CD 2). Cooper v. Harris, 137 S. Ct. at 1485 (Thomas, J., concurring); *see also* Hans von Spakovsky, *Symposium: The Goldilocks principle of redistricting*, SCOTUSBLOG, (May 23, 2017, 4:43 PM), http://www.scotusblog.com/2017/05/symposium-goldilocks-principle-redistricting/.
4. In *Cromartie II*, the Court laid out a requirement that plaintiffs in a racial gerrymandering claim must show that the legislature could have achieved its same political purposes in "alternative ways," without such a disproportionate impact on the affected racial minority. *Cromartie II*, 532 U.S. 234, 236 (2001). While Justice Alito refers to this requirement as the "counter-map requirement" in his dissent, in light of the *Cromartie II* Court's lack of specificity for how such showing must be made (map or otherwise), this article will refer to the rule as the "alternative ways" requirement.
5. 532 U.S. 234 (2001).
6. Cooper v. Harris, 137 S. Ct. at 1486 (Alito, J. dissenting).

PART I: A CAROLINIAN KERFUFFLE

In March 2011, North Carolina state legislators set about the task of redrawing the state's congressional district map.[7] Data from the 2010 national census was in, revealing a population increase of nearly 1.5 million people in the state—a change of about 18.5%.[8] This population increase prompted lawmakers to adjust the boundary lines, with a particular focus on two key districts—CD 1 and CD 12. The General Assembly undertook these changes for three reasons. First, the legislature needed to adjust district lines in order to comply with the Constitution's one-person, one-vote principle.[9] Secondly, lawmakers purportedly acted under the perception that they were required to raise the BVAP in CD 1 in order to comply with §2 of the Voting Rights Act (VRA).[10] And finally, the Republican-controlled General Assembly maintained an overarching goal of modifying the two CDs in order to secure a partisan advantage in the surrounding districts[11]—an endeavor that courts have consistently upheld as lawful.[12]

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7. *Timeline detailing North Carolina redistricting efforts and lawsuits*, Ballotpedia, https://ballotpedia.org/Timeline_detailing_North_Carolina_redistricting_efforts_and_lawsuits (last visited: June 1, 2017).

8. Paul Mackun and Steve Wilson, Population Distribution and Change: 2000 to 2010, U.S. Department of Commerce Economics and Statistics Administration U.S. Census Bureau, C2010BR-01 March 2011.

9. Statement by Senator Bob Rucho and Representative David Lewis Regarding Proposed State Legislative Redistricting Plans (July 12, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7-12-11.pdf. States are required to "draw congressional districts with populations as close to perfect equality as possible." Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016). Indeed, the Court agreed that CD 1 was "substantially underpopulated" by nearly 100,000 voters following the release of the 2010 census data. Cooper v. Harris, 137 S. Ct. 1455, 1466 (U.S. 2017). On the other hand, CD 12 was overpopulated by about 3,000 people, leading the Court to the opposing—if somewhat vague—conclusion that CD 12 "had no need for significant total-population changes." *Id.*

10. Joint Statement of Senator Bob Rucho and Representative David Lewis regarding the release of Rucho-Lewis Congress 2 (July 19, 2011), http://www.ncleg.net/representation/Content/Process2011.aspx; *see also* Cooper v. Harris, 137 S. Ct. 1455, 1460 (U.S. 2017). It is important to note that the Court rejected the legislature's reliance upon the VRA in this instance. However, in some contexts, § 2 *may*, in fact, "requir[e] drawing a majority-minority district" if certain preconditions establishing voter dilution are met. *Id.*; *see also* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986); 52 U.S.C. § 10301(a).

11. Cooper v. Harris, 137 S. Ct. at 1473.

12. *See* Gaffney v. Cummings, 412 U.S. 735, 752 (1973) ("Politics and political considerations are inseparable from districting and apportionment."); Davis v. Bandemer, 478 U.S. 109, 138 (1986) ("[T]he intentional drawing of district boundaries for partisan ends and for no other reason [does not violate] the Equal Protection Clause."); Bush v. Vera, 517 U.S. 952, 968 (1996) ("[I]f the State's goal is otherwise constitutional political gerrymandering, it is free . . . to achieve that goal."); Hunt v. Cromartie, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering."); Vieth v. Jubelirer, 541 U.S. 267, 281, 124 S. Ct. 1769, 1778, 158 L. Ed. 2d 546 (2004) (plurality opinion) ("[P]olitical gerrymandering claims are nonjusticiable.")

After a period of public hearings and some legislative tinkering,[13] the General Assembly approved a new district map in late July 2011.[14] Among other changes, the new map packed a statistically significant number of black voters into CDs 1 and 12, having taken them from surrounding districts.[15] For decades, both CD 1 and CD 12 had been Democratic strongholds, and prior to the 2011 redistricting, both had encompassed a substantial number of black voters, though African Americans remained a statistical minority in each.[16] The new map converted both districts into "majority-minority" districts.[17] In CD 1, the BVAP rose from 48.6% to 52.7%.[18] In CD 12, the BVAP rose from 43.8% to 50.7%.[19] By simply adjusting the district lines around a number of select neighborhoods, the North Carolina legislature effectively removed black voters from neighboring competitive districts and packed them into fewer, majority-black districts—thereby diluting the voting power of black citizens across the state, an illegal and immoral practice. (Alternatively, the legislature removed *Democratic* voters from neighboring competitive districts and packed *them* into fewer, majority-*Democratic* districts—thereby diluting *Democratic* voting power across the state, a perfectly legal, if "unsavory"[20] practice.) In a state whose black voters tend to favor Democratic candidates at a rate of about 90%, the distinction can be "difficult" to ascertain.[21]

On November 1, 2011, the U.S. Department of Justice granted preclearance of the General Assembly's new map, pursuant to the now-defunct Section 5 of the VRA.[22] Two days later, several civil rights groups filed suit in North Carolina Superior Court, challenging the constitutionality of CDs 1 and 12.[23] The map was upheld three times by state judicial bodies: first by a three-judge panel in superior court; then by the North Carolina Supreme Court (NCSC); and then by the NCSC again, after the U.S. Supreme Court vacated the earlier ruling and remanded the case in

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13. Joint Statement of Senator Bob Rucho and Representative David Lewis regarding the release of Rucho-Lewis Congress 2 (July 19, 2011), http://www.ncleg.net/representation/Content/Process2011.aspx.

14. *Timeline detailing North Carolina redistricting efforts and lawsuits*, Ballotpedia, https://ballotpedia.org/Timeline_detailing_North_Carolina_redistricting_efforts_and_lawsuits (last visited: June 1, 2017).

15. Cooper v. Harris, 137 S. Ct. at 1461–62, 1475.

16. *See id.* at 1465–66.

17. *See id.* at 1468, 1474.

18. *Id.*

19. *Id.*

20. Cooper v. Harris, 137 S. Ct. at 1487 (Alito, J., dissenting).

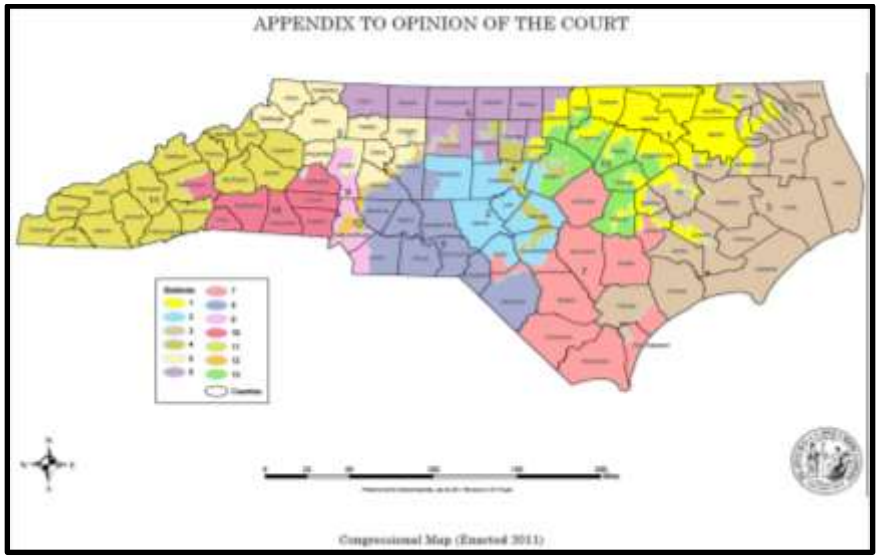
21. *Id.* at 1488 (citing polling data from the Roper Center for Public Opinion Research at Cornell University, dating back to 2000); *see also* Cromartie II, 532 U. S., at 256.

22. *Timeline detailing North Carolina redistricting efforts and lawsuits*, Ballotpedia, https://ballotpedia.org/Timeline_detailing_North_Carolina_redistricting_efforts_and_lawsuits (last visited: June 1, 2017). The Justice Department granted preclearance a second time, on December, 8, 2011, after the legislature made "technical corrections" to the July map. *Id.*

23. Cooper v. Harris, 137 S. Ct. at 1467.

light of the Court's then-recent decision in *Alabama Legislative Black Caucus v. Alabama*.[24] Despite the on-going litigation in state court, two separate plaintiffs (North Carolina voters David Harris and Christine Bowser, collectively Plaintiffs) brought action in federal district court.[25] That path proved much more successful, as a different three-judge panel found both congressional districts unconstitutional.[26] (Interestingly, that court also split over the question of CD 12.)[27] Upon appeal, the Supreme Court affirmed the district court's holding, as referenced above.

> The following is a depiction of all thirteen of North Carolina's congressional districts under the General Assembly's 2011 map. Three districts (1, 4, and 12) are solidly Democratic, while the remaining ten are represented by Republicans. This map appeared as an appendix to the Court's decision in *Cooper v. Harris*.[28] Note: the General Assembly did little to change the basic shape of either district in question in 2011—both districts' convoluted shapes were inherited from prior legislatures, and most 2011 changes were made at the neighborhood and precinct levels.[29]



24. Dickson v. Rucho, 368 N.C. 481, 485, 492 (2015), *opinion modified on denial of reh'g*, 368 N.C. 673 (2016), and *cert. granted, judgment vacated*, No. 16-24, 2017 WL 2322831 (U.S. May 30, 2017).

25. Cooper v. Harris, 137 S. Ct. at 1466–68.

26. Cooper v. Harris, 137 S. Ct. at 1466.

27. *See* Harris v. McCrory, 159 F. Supp. 3d 600, 636 (M.D.N.C. 2016), aff'd sub nom. Cooper v. Harris, 137 S. Ct. 1455 (U.S. 2017).

28. *See* Cooper v. Harris, 137 S. Ct. at 1481.

29. *See id.* at 1496 (Alito, J. dissenting) (recounting how CD 12 was first draw along the I-85 corridor in the early 1990s, with the express purposes of capturing a high concentration of black voters, and has changed little since that time); Joint Statement of Senator Bob Rucho and Representative David Lewis regarding the release of Rucho-Lewis Congress 2 (July 19, 2011), http://www.ncleg.net/representation/Content/Process2011.aspx (describing CD 1 as "inherited" from prior General Assemblies).

PART II: LEGAL PERSPECTIVES

A. CD 1 Fails Strict Scrutiny

The Court's decision on CD 1 was not particularly controversial. As early as June 2011, the state publicly vocalized its position that race was a primary consideration in how the new lines would be drawn: "The Chairs [of the Joint House and Senate Redistricting Committee] believe that . . . North Carolina remains obligated by federal and state law to create majority African American districts," NC Senator Bob Rucho and NC Representative David Lewis announced in one public statement.[30] Dr. Thomas Hofeller (a professional political map-maker hired by the General Assembly) testified that the legislature plainly and openly instructed him to draw CD 1 as "a majority black district."[31] The State's defense rested upon the argument that the VRA compelled the legislature to draw CD 1 as a majority-minority district, due to concerns about majority bloc voting along racial lines.[32] Regardless of the reason, however, in any instance where race is "the predominant factor motivating the legislature's [redistricting] decision[s],"[33] the courts will apply strict scrutiny—asking whether the "race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored.'"[34]

Notably, the Court has upheld the notion that compliance with the VRA *may* constitute a compelling interest and that "race-based districting *is* narrowly tailored to that objective if a State had 'good reasons' for thinking that the Act demanded" it.[35] However, under application of the *Thornburg v. Gingles*[36] test (a threshold analysis used to prove vote dilution), the North Carolina General Assembly struggled mightily to show that CD 1 was in danger of any such dilution. As a longtime stronghold for Democratic candidates, CD 1 has consistently operated as a "cross-over" district, where "members of the majority help a 'large enough' minority to elect [the minority's] candidate of choice."[37] Thus, the State failed to provide evidence of the type of racialized bloc voting the VRA was designed to protect against.

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30. Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee (June 17, 2011), http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_6.17.11.pdf.

31. Cooper v. Harris, 137 S. Ct. at 1468.

32. *Id.* at 140–71.

33. Miller v. Johnson, 515 U.S. 900, 916 (1995).

34. Cooper v. Harris, 137 S. Ct. at 1464 (citing Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788, 801(2017)).

35. *Id.* at 1469.

36. 478 U.S. 30 (1986).

37. Cooper v. Harris, 137 S. Ct. at 1470.

With no "good reason" for the racially motivated changes, then, the Court unanimously invalidated the impermissibly drawn district.

B. An Evidentiary Fight over CD 12

District 12 is a different story. Here, the State claimed that the district was modified for wholly partisan purposes; hence, race was not the predominant factor and strict scrutiny need not apply. Defendants conceded that the State was mindful of race but clarified that the disenfranchisement of CD 12's voters was motivated by partisanship, not racism.[38] Divining the legislature's true intent is a question of fact, and in this case, the State's facts failed to carry the day.

At trial, Plaintiffs provided particularly damning documentary and testimonial evidence that revealed the legislature's plan to raise CD 12's BVAP to exceed 50% in just the same way as CD 1.[39] Plaintiffs admitted public documents released by Rucho and Lewis prior to the map's implementation, declaring the increase in CD 12's BVAP was to "ensure preclearance" by the Department of Justice.[40] Congressman Mel Watt (the longtime representative of District 12) recounted a conversation with Rucho in which Rucho articulated the Republican "leadership['s]" intent to increase the BVAP and Rucho's responsibility "to go and convince the African–American community" that the plan "made sense."[41]

The State, by contrast, offered unpersuasive assurances to the contrary. While testifying for the defense, Dr. Hofeller conceded that race was "perhaps" a factor in one particular county—incidentally, about 25,000 of the district's 35,000 new voters were black voters *from that county*.[42] Upon such disparate evidentiary showings, the district court agreed with Plaintiffs that race predominated the legislature's decisions in CD 12 the same way it had in CD 1.

C. Counter-Map Catch-22

Upon appeal, the Supreme Court reviewed the lower court's decision for clear error. Finding the district court's factual determinations "[e]minently reasonable," the majority upheld the lower court's decision and ruled CD 12 unconstitutional.[43] Unfortunately, in so doing, the Court immediately found itself at odds with another of its own precedents—that is,

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38. "Federal law permits (and sometimes requires) states to consider race when drawing district lines, but . . . the Constitution bars states from making race *the predominant factor* when drawing districts." Amy Howe, *Argument analysis: Lots of questions, no easy answers in redistricting cases*, SCOTUSBLOG, (Dec. 5, 2016, 10:42 PM), http://www.scotusblog.com/2016/12/argument-analysis-lots-of-questions-no-easy-answers-in-redistricting-cases/ (emphasis added).

39. Cooper v. Harris, 137 S. Ct. at 1476.

40. *Id.* at 1475.

41. *Id.* at 1476.

42. *Id.* at 1477.

43. *Id.* at 1466 (quoting dissenting district court Judge Osteen) (internal citations omitted).

the "alternative ways" requirement laid out in *Cromartie II*. In that case, the Supreme Court was (remarkably enough) reviewing the 1997 version of North Carolina's congressional district 12.[44] Writing for the majority, Justice Breyer then stated:

> [W]here majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.[45]

In *that* review of CD 12, the Court was faced with a strikingly similar fact-pattern to the instant case—an allegation of racial gerrymandering; an explanation by the legislature that politics, not race, drove the redistricting; evidence demonstrating lawmakers' consideration of race in drawing the lines; and a three-judge panel finding for the plaintiffs at the district court level.[46] In that instance and under the same "clearly erroneous" standard of review, however, the Court overturned the lower court's findings, stating that the plaintiffs must show "at the least" that the legislature could have achieved its political purposes with "significantly greater racial balance."[47] The Court did not indicate how strictly or loosely that requirement would be interpreted. Nevertheless, some form of statistical and demographic analysis appears necessary.

In *Cooper*, the majority went to great lengths to try and distinguish the 2011 version of CD 12 from its 1997 predecessor, focusing its efforts on narrowing the interpretation of Justice Breyer's language above. Unfortunately, these efforts fell flat, as Justice Kagan employed a series of straw-man tactics (and a hint of snark) that conveniently ignored the messiness of the Court's current gerrymandering jurisprudence. "If the [*Cromartie II*] Court had adopted [the alternative ways] rule," she wrote in *Cooper*, "it would have had no need to weigh each piece of evidence in the case . . . [b]ut that is exactly what *Cromartie II* did, over a span of 20 pages and in exhaustive detail . . . All that careful analysis would have been superfluous—that dogged effort wasted—if the Court viewed the absence or inadequacy of a single form of evidence as necessarily dooming a gerrymandering claim."[48] According to Kagan, the problem in *Cromartie II* was that the plaintiffs simply failed to be persuasive. "Hence emerged

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44. Cromartie II, 532 U.S. at 237.
45. *Id.* at 236.
46. Cooper v. Harris, 137 S. Ct. at 1486 (Alito, J., dissenting); *see also* Cromartie II, 532 U.S. at 237–41.
47. Cromartie II, 532 U.S. at 236.
48. Cooper v. Harris, 137 S. Ct. at 1481.

the demand quoted above," she said, "for maps that would actually show what the plaintiffs' had not."[49]

Of course, the *Cromartie II* Court was neither as flippant in its language nor as simplistic in its ruling as now construed. The actual rule the Court attempted to emplace in 2001 demanded that the plaintiff in a racial gerrymandering claim show that the legislature could have achieved its same political purposes without so great an impact on the racial minority. In a world where partisan gerrymandering remains a protected activity, such a rule seems to make sense.[50] The Court did not require demonstration in map-form, but the requirement for demonstration was there, nonetheless. A fundamental fact in *Cooper* is that Plaintiffs made no such showing.[51] Thus, while Plaintiffs successfully demonstrated that the State was, indeed, motivated by certain racial considerations, it failed to meet (or even address) the *Cromartie II* "alternative way" requirement.[52] As such, the Court was on a collision-course with its own precedent. Unfortunately, the Court's prevarications on the issue delivered a supremely unsatisfying resolution.

PART III: IMPLICATIONS

The *Cromartie II* alternative ways requirement undoubtedly elevated the plaintiffs' burden in racial gerrymandering claims. Within the context of *Cromartie II*, however, such an additional requirement made a certain kind of sense.[53] In removing that requirement, the Court has made it easier for other, future plaintiffs to bring racial gerrymandering suits. Right or wrong, this about-face belies the bemusing nature of the Court's current gerrymandering jurisprudence. Such disorder could hardly come at a rowdier time. At present, Republicans and Democrats have budgeted a com-

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49. *Id.*

50. *See id.* at 1490 (Alito, J., dissenting) ("[I]f a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, usurping the role of a State's elected representatives. This does violence to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.")

51. *See* Cooper v. Harris, 137 S. Ct. 1477–1478 (summarizing the opinion of Plaintiff's expert that race predominated the legislature's decision making, but failing to address whether the legislature could have achieved its same partisan goals with greater racial balance).

52. Andrew Brasher, *Symposium: A recipe for continued confusion and more judicial involvement in redistricting*, SCOTUSBLOG (May 23rd, 2017 1:08 PM), http://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting/; *see* Alan Morrison, Response, *Cooper v. Harris: Striking Down Racial Gerrymandering in North Carolina*, GEO. WASH. L. REV. ON THE DOCKET (May 30, 2017), http://www.gwlr.org/cooper-v-harris/.

53. *See* Cromartie II, 532 U.S. at 257 (describing the plaintiff's burden of proof as "demanding" and exhorting district courts to exercise "'extraordinary caution' [in such cases] . . . to avoid treading upon legislative prerogatives") (quoting Justice O'Connor's concurrence and the majority opinion, respectively, from Miller v. Johnson, 515 U.S. 900, 928 (1995)).

bined $190 million for implementation of their 2020 redistricting campaigns.[54] No doubt, an already elbows-deep judiciary is poised to sink yet further into the tar baby.[55]

The fact of the matter is this: in an age of identity politics, racial gerrymandering and partisan gerrymandering have all but converged. "Party affiliation and voting patterns are . . . almost everywhere correlated to race," wrote Anita Earls, Executive Director of the Southern Coalition for Social Justice.[56] Even the Court has acknowledged this reality—more than once.[57] But until the Court adopts (and maintains) an effective way to differentiate between racism and partisanship in redistricting, the Court is bound to find itself playing host to a protracted and draining political war. With the Court scheduled to tackle the issue of partisan gerrymandering later this fall,[58] voters and legislatures could be in for a fresh dose of clarity—or, alternatively, more tar baby.

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54. Elizabeth Kolbert, *Drawing the Line: How redistricting turned America from blue to red*, THE NEW YORKER (June 27, 2016), http://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting.

55. *See* Andrew Brasher, *Symposium: A recipe for continued confusion and more judicial involvement in redistricting*, SCOTUSBLOG (May 23rd, 2017 1:08 PM), http://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting/ ("[T]he court's decision on CD 12 seems destined to lead to more judicial involvement in redistricting.").

56. Anita Earls, *Symposium: Bringing sanity to racial-gerrymandering jurisprudence*, SCOTUSblog (May 23rd, 2017, 5:32 PM), http://www.scotusblog.com/2017/05/symposium-bringing-sanity-racial-gerrymandering-jurisprudence/ (heralding the *Cooper* decision as a portent of "sanity" in the Court's recent gerrymandering jurisprudence). Ms. Earls also serves as plaintiff's counsel in two pending racial gerrymandering cases and one partisan gerrymandering case in North Carolina. *Id.*

57. Cooper v. Harris, 137 S. Ct. at 1473 ("[O]f course, "'racial identification is highly correlated with political affiliation.'") (citing *Cromartie II*, 532 U.S. at 243).

58. Docket for 16-1161, U.S. Supreme Court, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-1161.htm (last visited: June 13, 2017); *see also* Scott Bomboy, *A landmark gerrymandering case heading toward the Court's next term*, CONSTITUTION DAILY (April 25, 2017), https://constitutioncenter.org/blog/a-landmark-gerrymandering-case-heading-toward-the-courts-next-term.