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1-1-2017

# Race, Redistricting, and the Manufactured Conundrum

Justin Levitt

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## Recommended Citation

Justin Levitt, Article, Race, Redistricting, and the Manufactured Conundrum, 50 Loy. L.A. L. Rev. 555 (2017).

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# RACE, REDISTRICTING, AND THE MANUFACTURED CONUNDRUM

*Justin Levitt\**

*Race and redistricting each lie at the core of recurring contests over American political identity. It is therefore perhaps no surprise that cases concerning the role of race in redistricting have offered the Supreme Court a steady diet. In 2017, for the fourth time in four decades, the Court struck North Carolina districts based on the legislature's misuse of race. And the North Carolina legislature, proclaiming the whole business too complicated, simply threw up its hands.*

*This petulance is likely performance. The law of race and redistricting is resistant to shortcuts and stereotypes, but that does not render it intractable, particularly for those actually drawing the lines. For legislators, confronting race in the redistricting process is most difficult if you're not actually trying.*

*This piece traces the law of race and redistricting from the perspective of a redistricting body, distilling the present state of the doctrine to a few core elements. It then places the Supreme Court's most recent pronouncements within this doctrinal framework, and interrogates the portent of the latest developments as a trail marker of developments to come. As the next redistricting cycle approaches, the most vexing issue is likely not that the Court's statements on the law are inscrutable, but that some redistricting bodies may not yet be ready to listen.*

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\* Professor of Law, Loyola Law School, Los Angeles. Full disclosure: I had the opportunity to work on an amicus brief in the *Cooper v. Harris* case at the heart of this Article while serving in the Civil Rights Division of the U.S. Department of Justice. The analysis herein should not be imputed to that institution, then or now; this Article reflects my views alone. I am grateful to Guy-Uriel Charles, Rick Hasen, Rick Pildes, and the participants in an AALS Section on Election Law program on *Shaw v. Reno* for their helpful comments and suggestions. All errors, of course, are my own.

## TABLE OF CONTENTS

I. THE STATE OF FEDERAL LAW BEFORE <i>HARRIS</i> .....	559
A. Invidious Discrimination.....	559
B. <i>Shaw v. Reno</i> .....	563
1. Predominance.....	564
2. Predominance and Politics.....	569
3. Justification.....	571
C. Voting Rights Act.....	574
D. Recap.....	578
II. NORTH CAROLINA.....	579
III. <i>COOPER V. HARRIS</i> .....	588
IV. THE SIGNIFICANCE.....	595

On May 22, 2017, the Supreme Court issued its decision in *Cooper v. Harris*,<sup>1</sup> holding that the North Carolina legislature improperly used race in the redistricting process. North Carolina legislators responded to the decision with the grace of a petulant toddler. Informed that they had erred in the way they considered race when drawing district lines, they promptly vowed to ignore race entirely when reconvening to draw the remedy.<sup>2</sup>

This is a silly reaction, and in most circumstances is likely to run practically and legally astray. Most drivers do not respond to a speeding ticket by promising to drive zero miles per hour, or to a citation for excessive weaving among lanes by swearing never again to turn the wheel. But it has seemingly become fashionable for legislators to address race in the redistricting process by simply throwing up their hands.<sup>3</sup> The claim appears to be that it is just too difficult to deal with race correctly.

America's recurring local and national attempts to confront, and to refuse to confront, racial discrimination and racial equity in both public and private spheres amount to a topic of galactic size and complexity. The law has periodically intervened, or refused to intervene, in this confrontation; those efforts also defy straightforward description. Even in the redistricting realm, it would be overly charitable to describe the path carved by legislatures and courts, sometimes in partnership and sometimes in opposition, as meandering. Statutes are incomplete; cases are inconsistent, questionably justified, and occasionally incoherent. Tensions abound. But though the path to present doctrine concerning race and voting has been more than rocky, that does not mean that officials with the pen find themselves on the brink of a decennial redistricting enveloped in impenetrable fog.

Race relations are complex. Racial justice is complex. Effective representation is complex. Redistricting is complex. But the current state of the law regarding race in the redistricting process is not remotely as complicated as some voices have sought to convey. It requires a bit of care to negotiate, yes. But the complete reluctance to engage seems strategic rather than sincere. For legislators, confronting

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1. 137 S. Ct. 1455 (2017).

2. *See infra* note 225.

3. *See infra* at 601–02.

race in the redistricting process is really most difficult if you are not actually trying.<sup>4</sup>

This Article reflects on the Supreme Court's latest foray into race and the redistricting process. Ultimately, it concludes that the doctrinal outcome of *Harris* is essentially unsurprising: though any Supreme Court decision is a momentous occurrence, the case applies more law than it makes. To establish this proposition, Part I outlines the law of race and redistricting before *Harris*,<sup>5</sup> with a historical overview firmly oriented from the view of today's redistricter; Part II briefly traces the relevant markers of redistricting law in North Carolina, following the lived experience of the legislature in question. These overviews describe more than they explain or justify, and attempt to present the doctrine as if it represented a coherent whole, even though it is admittedly quite difficult to gather the same perspective while riding along with the law chronologically.<sup>6</sup> Part III discusses *Harris* itself. Part IV then turns to the reaction to *Harris*. The North Carolina legislature's obstinate declaration that colorblindness is the only viable path forward is a pretense. Properly understood, *Harris* does not notably add to the difficulty of drawing compliant maps. Nor does it bring the Voting Rights Act ("VRA") into greater conflict with the

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4. This piece attempts to demonstrate that claims of impenetrable complexity in the law of race and redistricting are substantially overstated. But the piece also suggests that to the extent complexity lingers, it is found more in the evidentiary tests designed to ferret out wrongdoing—which may occasionally be inadequate to the task—than in the substantive standards defining the wrongdoing itself. Just as it is more difficult for detectives to reconstruct a crime than for the perpetrator to know what he himself has done, courts and litigators investigating potential wrongdoing must manage a modest layer of additional complexity that need not burden officials following the law in the first instance. To the extent that those who conduct redistricting are the source of the current complaints, the comparative simplicity of their task makes the complaints even harder to credit.

5. David Harris was the lead individual plaintiff; Roy Cooper was the Governor of North Carolina, and the lead institutional defendant sued in his official capacity. The case is most often cited as *Cooper*, despite the convention to refer to cases in abbreviated fashion by citing the individual plaintiff and not the repeat institutional player. This piece adopts the convention, and instead refers to the case as *Harris*.

6. In this respect, I follow the well-trod methodological path of commentators in the voting rights sphere, tracing constellations while acknowledging that in reality, the sky may contain only a welter of stars. But while others have tried to make sense of the muddle by adopting the perspective of a lower court applying the Court's rulings, *see, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 232 (2001), I find it more productive for this piece to look through the lens of a redistricting body. That allows more purchase on the heart of the substantive doctrine, and avoids some admittedly difficult questions concerning the power of evidentiary tools to yield reliable answers.

Constitution: it merely requires that redistricting bodies make a sincere effort to understand both.

## I. THE STATE OF FEDERAL LAW BEFORE *HARRIS*

On the eve of *Harris*, federal law regulated race and redistricting in several ways.<sup>7</sup> First, the Constitution prohibited invidious discrimination on the basis of race. Second (and separate), the Constitution subjected to close scrutiny redistricting in which race predominates in determining which voters are moved into or out of a district, to the detriment of all other factors. Third, the federal Voting Rights Act established protection against the dilution of minority votes under certain circumstances. This Part briefly reviews each, in turn.

### *A. Invidious Discrimination*

For more than a century, the Constitution has purported to prohibit invidious government discrimination on the basis of race and ethnicity.<sup>8</sup> Government action that intentionally treats some similarly situated individuals worse than others because of (and not merely despite) their race is unconstitutional.<sup>9</sup>

There is no redistricting exception to this general rule. Indeed, even as other redistricting matters have generated heartburn about the propriety of any judicial intervention at all, the Court has shown no similar hesitation about confronting invidious racial discrimination in the redistricting process. Consider the constitutional requirement of equal population for each district: until 1962, the bulk of a bitterly divided Court famously refused to address even wildly disproportionate district sizes, lest it wander into an impenetrable “political thicket.”<sup>10</sup> The judicial role in these so-called “one-person, one vote” cases was enormously controversial, with Justice Felix

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7. This piece uses “race” as a shorthand, to include all distinctions in both constitutional and statutory voting rights law reflecting meaningful socially perceived distinctions among groups relating to racial, ethnic, and linguistic heritage. *See generally* Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33 (2001) (reviewing the conceptual fluidity of these distinctions); *see also, e.g.*, U.S. CONST. amend. XV; 52 U.S.C. §§ 10301(a), 10310(c)(3).

8. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886); *Strauder v. West Virginia*, 100 U.S. 303, 307–10 (1879).

9. *See Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

10. *See Baker v. Carr*, 369 U.S. 186, 208–09 (1962); *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

Frankfurter leading the resistance to judicial engagement.<sup>11</sup> But at the same time that Justice Frankfurter was vigorously contesting judicial intervention in most redistricting matters, neither he nor any of his colleagues betrayed the slightest unease about the propriety of striking the invidious racially discriminatory gerrymander of Tuskegee, Alabama.<sup>12</sup> Invidious racial discrimination in the redistricting process is well recognized as unconstitutional.<sup>13</sup>

Most every redistricting statute is facially neutral: lines on a map have no *inherent* racial content or valence.<sup>14</sup> But from *Gomillion* on,

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11. See *Baker*, 369 U.S. at 266–70 (Frankfurter, J., dissenting); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Reynolds Revisited*, in *ELECTION LAW STORIES* 21, 24, 29–31, 36–37 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

12. *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). Indeed, the Court’s opinion in *Gomillion* was unanimous on the matter of liability, with the Justices disagreeing on only the particular constitutional provision at issue. See *infra* note 13.

13. The particular source of the constitutional prohibition against intentional racial discrimination in the redistricting process is a matter of somewhat more dispute. We know, at least, that the Fourteenth Amendment’s Equal Protection Clause prohibits invidious racial discrimination in redistricting. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). But *Gomillion* was decided under the Fifteenth Amendment, not the Fourteenth, and there is apparently a dispute about its application to invidious racial redistricting.

The dispute concerns the difference between vote denial (restrictions on the ability to cast a ballot) and vote dilution (redistricting decisions that do not impair the ability to cast a ballot, but render that act less meaningful by restricting the plausible ability to elect preferred candidates). It is clear that acts taken to restrict voters’ ability to cast a ballot because of their race violate the Fifteenth Amendment, which specifically prohibits the denial or abridgment of the right “to vote” on account of race. U.S. CONST. amend. XV. But there is somewhat less agreement about whether the Fifteenth Amendment encompasses racial vote dilution as well.

In *Gomillion*, the Court faced a claim that the city boundaries of Tuskegee, Alabama, had been drawn to excise African-American voters from the city electorate, and found a clear violation of the Fifteenth Amendment, 364 U.S. at 346. Justice Whittaker, concurring, was unsure that the Fifteenth Amendment was particularly apt in the redistricting context (as opposed, presumably, to the process of casting a ballot), but thought that the question showed a clear and unmistakable violation of the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 349 (Whittaker, J., concurring). Years later, Justice Scalia asserted that *Gomillion* concerned only the complete denial of the municipal franchise, and therefore claimed that the Court has never directly addressed the application of the Fifteenth Amendment to redistricting. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). However, this gloss on *Gomillion* is difficult to credit. The Tuskegee voters removed from the city limits by the boundary redrawing invalidated in *Gomillion* did not entirely lose the ability to vote on local officials; the redrawing removed their ability to vote in Tuskegee elections, but not the elections of Macon County. Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2020–21 (2018). That is, the Tuskegee redrawing shifted the representation of African-American voters from one local representative to another, in a manner calculated to send a message of exclusion based on race—but it did not deny the right to cast a ballot for local representatives. Seen in this light, *Gomillion* is no more a case about vote denial than any other case predicated on moving voters from one legislative district to another. Still, the myth that *Gomillion* was a vote denial case appears to persist, and the Court has not otherwise clarified the application of the Fifteenth Amendment to redistricting questions.

14. *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541, 547 (1999).

the Court has recognized that a redistricting statute may be predicated on discriminatory intent even when that intent is not apparent on the statute's face.<sup>15</sup> The intent to harm minority citizens based on their race may be inferred from context, bolstered by the same sorts of direct and circumstantial evidence that are used to assess whether racially discriminatory intent lies behind facially neutral statutes in other arenas.<sup>16</sup> The courts have set a demanding evidentiary standard for such claims.<sup>17</sup> But from the standpoint of a line-drawer attempting to comply with the law, the evidentiary standard of proof is less relevant. The best way for redistricters to ensure that a plan does not invidiously discriminate on the basis of race is to stop invidiously discriminating on the basis of race.<sup>18</sup>

Redistricting undertaken with the intent to harm on the basis of race, like all other state action undertaken with the intent to harm on the basis of race, is simply *ultra vires*. As a result, invidious intent need not be the sole motive, or even the predominant motive, in order to invalidate a redistricting plan.<sup>19</sup> Once an invidious motive has been proven, a state may defend its action only by attacking the causal link between the impermissible motive and the presumptively infirm plan.<sup>20</sup> That is, the plan may survive if—and only if—the state can show that it would have passed precisely the same plan in any event, even in the absence of the impermissible motive.<sup>21</sup>

It is worth clarifying one apparently persistent misunderstanding of this prohibition: the intent to discriminate on the basis of race may take many forms. Intentional discrimination of old often presented as *animus* or stereotype: treating minority citizens worse than others

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15. See, e.g., *Gomillion* 364 U.S. at 341–42.

16. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

17. Levitt, *supra* note 13, at 2037–39 & n.207.

18. Cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (asserting that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). For cases like *Parents Involved* that do not involve intentional subordination of individuals based on their race, Chief Justice Roberts’s quip is of questionable veracity; sometimes race-conscious action is the only appropriate means to avoid perpetuating discrimination. See *Int’l Broth. of Teamsters v. United States*, 431 U.S. 324, 349 (1977). But for legislators seeking to avoid their own intentional invidious discrimination—in circumstances like those recounted in *Gomillion*—the simple maxim is far more appropriate.

19. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 231–32 (1985); *Vill. of Arlington Heights*, 429 U.S. at 265–66..

20. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286–87 (1977).

21. *Id.*; see also *Underwood*, 471 U.S. at 228.



because of hatred or mistrust of members of the group, or because of overbroad assumptions or improper value judgments.<sup>22</sup> Intentional racial discrimination founded in animus or stereotype lingers still, and when deployed by the state is clearly unconstitutional.<sup>23</sup> But *any* other intentional mistreatment of a group because of race or ethnicity is also constitutionally suspect, even if in service of an ultimate goal unrelated to racial animus.<sup>24</sup>

That is, state action that seeks to treat Latinos worse than others because they are Latino is just as closely scrutinized as state action that seeks to treat Latinos worse than others because of their support for particular political candidates.<sup>25</sup> The relevant operative fact in either scenario is the intentional mistreatment of individuals based on their race, not the ultimate motive. Almost thirty years ago, Judge Alex Kozinski of the Ninth Circuit offered this explanation:

The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.<sup>26</sup>

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22. See generally Rachel F. Moran, *Whatever Happened to Racism?*, 79 ST. JOHN'S L. REV. 899 (2005) (reviewing various manifestations of racism).

23. See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CAL. L. REV. 1123, 1143–49 (2014).

24. This piece does not address the hotly disputed topic of the extent to which the constitutional guarantee of equal protection reaches either unconscious or systemic bias, as either a jurisprudential or evidentiary matter.

25. See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2173–74 (2015).

26. *Garza v. Cty. of L.A.*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

Indeed, the case in which Judge Kozinski offered this explanation was a redistricting matter: Los Angeles County had “a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors.”<sup>27</sup> A panel of the Ninth Circuit unanimously confirmed that such a pattern clearly constituted intentional racial discrimination, even if the ultimate objective behind the racial misdeeds was incumbent protection.<sup>28</sup>

Nor is this constitutional prohibition against intentional racial discrimination a historical relic. In the past few years, courts have emphatically confirmed that redistricting maps designed to deliver partisan political gains were the products of unconstitutional racial discrimination when legislatures intentionally targeted racial minorities for harm as the means to that political end.<sup>29</sup>

### B. *Shaw v. Reno*

In addition to the protections against invidious discrimination described above, the Supreme Court has interpreted the Constitution to contain another limit on race-based redistricting action, expressed in a line of cases beginning with *Shaw v. Reno*.<sup>30</sup> These cases permit a state’s “predominant” use of race in the redistricting process only when such use is narrowly tailored to a compelling state interest: that is, when it would satisfy strict scrutiny.<sup>31</sup>

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27. *Id.* at 778.

28. *See id.*; *id.* at 771 (majority opinion). Another analogy may also illuminate the difference between the ultimate goal of an action and the deliberate choice of particular means to achieve that goal; the latter is usually the operative focus for legal purposes. It is in no way unlawful for me to take action with the goal of becoming wealthier. It is clearly unlawful for me to intentionally rob another as the particular means by which I further that goal.

29. *See, e.g.,* *Perez v. Abbott*, 253 F. Supp. 3d 864, 884–86, 949–50, 955 (W.D. Tex. 2017) (three-judge court) (congressional plan); *Perez v. Abbott*, 250 F. Supp. 3d 123, 145–46, 148–49, 152–54, 157, 163–64, 169–70, 172, 175–76, 179–80 (W.D. Tex. 2017) (three-judge court) (State House plan); *cf. League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 440 (2006) (“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.”); *see also* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016) (finding intentional racial discrimination in manipulating the mechanics of the voting process); Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 *YALE L.J. F.* 779, 788 (2018).

30. 509 U.S. 630 (1993) (*Shaw I*).

31. *Miller v. Johnson*, 515 U.S. 900, 916, 920 (1995).

*Shaw* claims and claims of invidious intent are both primarily process claims: causes of action that depend more on an improper approach to redistricting than on any particular result.<sup>32</sup> But the prohibition in *Shaw* and its progeny is “analytically distinct” from the prohibition on invidious racial discrimination in several respects.<sup>33</sup> For example, a *Shaw* cause of action need not rely on any intent to harm, whether premised on animus or otherwise; it turns not on a desire to injure, but on the unjustified overreliance on a particular factor in deciding which individuals to place in which districts.<sup>34</sup> Moreover, while the invidious intent to discriminate based on race infects a plan when present in any degree, the Court has recognized that mere awareness or consideration of race poses no such infirmity.<sup>35</sup> And so the *Shaw* line of cases imposes the possibility of liability only when race is the “predominant” rationale explaining why district lines were drawn where they were.<sup>36</sup>

### 1. Predominance

There are two primary elements of any *Shaw* claim: first, that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district,”<sup>37</sup> and second, that the use of race was unjustified.<sup>38</sup> With respect to the first prong, the Court has offered several formulations attempting to more precisely articulate what it means for a factor to be

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32. See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017); but see *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam) (suggesting otherwise, albeit without explanation).

In federal court, litigants must show some kernel of tangible adverse impact in order to demonstrate standing to sue. See *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). And so, at least as litigated in federal court, neither *Shaw* claims nor invidious impact claims are truly purely about intent alone.

33. *Johnson*, 515 U.S. at 911; *LULAC*, 548 U.S. at 513–14 (Scalia, J., concurring in the judgment in part and dissenting in part).

34. *Johnson*, 515 U.S. at 916.

35. See, e.g., *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 241 (2001). Individual Justices, to be sure, have expressed more hesitation about the intentional use of race in redistricting, even when race is not used to injure and does not predominate. See, e.g., *Bush v. Vera*, 517 U.S. 952, 996 (1996) (Kennedy, J., concurring). But the Court as a whole has not subjected non-predominant use of race to closer scrutiny. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015).

36. The Supreme Court has emphasized that courts must “exercise extraordinary caution in adjudicating” these sorts of claims. *Johnson*, 515 U.S. at 916.

37. *Id.*; *Ala. Legislative Black Caucus*, 135 S. Ct. at 1267 (quoting *Johnson*, 515 U.S. at 916).

38. See *Johnson*, 515 U.S. at 920.

predominant.<sup>39</sup> The most enduring explication of predominance seems to be that race predominates if a redistricting body “*subordinated . . .* race-neutral districting principles . . . to racial considerations” in determining which voters to put where.<sup>40</sup> Essentially, race is predominant in this context when the runaway reason that a significant number of people were placed into or removed from a particular district was their race.

Predominance has proved to be clearer in concept than in application. It may help to give that standard more specific content by exploring the concerns that motivated its adoption. This is not as straightforward as it may appear: *Shaw* itself is both overwritten and overwrought.<sup>41</sup> But at its heart, the *Shaw* doctrine is focused primarily on the expressive and communicative harm of government stereotype.<sup>42</sup> According to the Court, a district with a predominant focus on race will convey to the district’s representatives that they should represent racial communities within the district on the basis of their race and to the exclusion of others—and, perhaps, convey to citizens who are not the predominant racial group within the district that their elected officials feel no need to represent their interests.<sup>43</sup>

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39. See *Vera*, 517 U.S. at 958 (plurality opinion). For example, the Court has suggested that race predominates when “race for its own sake, and not other districting principles, [is] the legislature’s *dominant and controlling* rationale in drawing its district lines.” *Johnson*, 515 U.S. at 913 (emphasis added). Justice O’Connor, whose vote was necessary to the majority opinion in *Johnson*, expressly declared that she understood the predominance threshold standard “to be a demanding one,” satisfied only if plaintiffs can “show that the State has relied on race in substantial disregard of” race-neutral districting practices. See *id.* at 928 (O’Connor, J., concurring). In an earlier case, she had articulated that the focus of the doctrine was to be on districts that are “unexplainable on grounds other than race.” *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 643–44 (1993) (internal citations and quotation marks omitted).

40. *Johnson*, 515 U.S. at 916 (emphasis added).

41. For example, the decision repeatedly described the gravamen of the cause of action as aimed at a piece of redistricting legislation that “rationally can be viewed only as an effort to segregate the races for purposes of voting,” *Shaw I*, 509 U.S. at 642, 646–47, 658, and that “bears an uncomfortable resemblance to political apartheid.” *Id.* at 647. Not only was the principal disputed district in that legislation one of the first since Reconstruction to offer African-American voters a meaningful opportunity to elect a candidate of their choice, but the district in question was apparently 54.71% African-American, which renders more than slightly inapt the use of “segregation” and “apartheid” as analogies. *Id.* at 659, 671, 671 n.7 (White, J., dissenting); see also Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 282 (1993).

42. See *Johnson*, 515 U.S. at 911–12; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 500–09 (1993).

43. *Shaw I*, 509 U.S. at 648, 650.

If this is indeed the motivating thrust behind the *Shaw* doctrine, it may help explain what it means to say that race was “the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”<sup>44</sup> *Shaw* is not concerned with the mere presence of race among several other co-equal factors determining where the lines are drawn, even when race has a principal co-starring role.<sup>45</sup> Districts always and inevitably reflect an agglomeration of interests, and the fact that those drawing the lines have fashioned the district as an amalgam does not convey the same message of exclusion.

Similarly, *Shaw* is not a simple but-for causation standard. Consider, for example, an existing district which the Census reveals to be too sparsely populated to satisfy the Constitution’s equal population requirement.<sup>46</sup> Line-drawers may include more population by expanding the district to the north or to the south; to the north lies a minority population, and the line-drawers expand north in order to include that minority population in the district. Race may well be the but-for reason that the lines expand north rather than south. But this alone does not render race predominant, if the line-drawers carefully pay attention to other factors as well.<sup>47</sup> Perhaps the line-drawers understand that the minority population shares common representational interests with the population already in the district, and include other communities of common interest in the district as well; perhaps the line-drawers are attentive to selecting the population in the north so as to render the district relatively compact; perhaps the line-drawers are careful to include populations in whole precincts or wards or towns or counties in ways that preserve local governmental boundaries. A multifaceted approach, considering several different objectives, will be less likely to communicate a message of exclusion—and in these circumstances, even while race may explain one aspect of the district’s configuration, race would not *predominate* as the reason why the district is shaped as it is.<sup>48</sup>

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44. *Johnson*, 515 U.S. at 916.

45. See Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 788 (2002).

46. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

47. See, e.g., *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 253–54 (2001).

48. Hence, a redistricting plan prominently considering other factors in addition to race will likely indicate the lack of predominance. But in this mix, the simple consideration of equal population will not alone defeat racial predominance. *Ala. Legislative Black Caucus v. Alabama*,

Similarly, *Shaw* does not necessarily subject every racial target to strict scrutiny. Occasionally, redistricting bodies will aim (for any number of reasons) to draw particular districts with a particular concentration of minority citizens. In this past redistricting cycle, those targets were lamentably often based on unfounded demographic stereotype, or pretext, or both.<sup>49</sup> But in some circumstances, such a goal may well be justified.<sup>50</sup>

Whether justified or unjustified, the simple fact of a target (or a narrow targeted range) does not itself show predominance.<sup>51</sup> In some cases, a target will overwhelmingly drive the location of the lines.<sup>52</sup> But if a redistricting body aims to create a district that is compact, that follows political boundaries, or that incorporates distinct communities of interest, and that *also* contains a particular percentage of minority voters, the consideration of race will not *subordinate* all other race-neutral factors in determining whether people are moved into or out of the district.<sup>53</sup> Rather, in such circumstances, the district's lines will be drawn to include particular groups of people because they help render the overall district compact, or because they help to keep political subdivisions whole, or because they help to maintain common communities of interest, and also because of race. This sort of multi-factor nuance does not produce the same communicative harm of exclusion that the *Shaw* Court believed to be the result of single-minded racial obsession, and is therefore not what the predominance standard is meant to combat.<sup>54</sup>

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135 S. Ct. 1257, 1270 (2015). The Constitution's equal population mandate means that legislators have to pay attention to *how many* individuals are placed in each district, but does not in any way determine *which* individuals are placed where. In contrast, the *Shaw* doctrine is concerned with a redistricting body's choice of *which* individuals to place within or without a district. *Id.* at 1270–71.

49. See Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 591–605 (2016).

50. See *infra* at 577 (discussing the requirement under the Voting Rights Act in certain circumstances to draw districts where minorities have an effective opportunity to elect candidates of choice); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 802 (2017).

51. See, e.g., *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (“Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts.”) (citation omitted).

52. See *Ala. Legislative Black Caucus*, 135 S. Ct. at 1271–72.

53. *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413–15 (E.D. Cal. 1994) (three-judge court), *aff'd. in relevant part, dismissed in part on other grounds*, 515 U.S. 1170 (1995).

54. In practice, it may be that the same redistricting bodies that develop unjustified racial targets, derived via thoughtless stereotype, are also uninterested in engaging with the nuance

In this respect, it may be useful for analysts to think of predominance much like the operator of a motor vehicle normally thinks of the process of driving a car. It is certainly possible for a driver to obsess over her speed, subordinating all other inputs—and likely leading to a crash. But most careful drivers monitor a sizable set of factors at once, including the directions to get to a destination, the location of other vehicles, weather conditions, potential hazards, fuel volume, vehicle performance, signage, lane designators, signaling responsibilities, passenger activity, internal temperature, road trip soundtrack—and also speed. The fact that the driver may glance down from time to time to check that her speed is still within an acceptable range does not mean that speed has predominated, subordinating all other factors in determining how the car proceeds from point A to point B.<sup>55</sup> And that remains true even if the driver has a specific target speed firmly in mind, and even if it remains an extremely high priority to avoid a ticket for speeding. So too with the consideration of race.

One more element of predominance is worth reviewing: the fact that *Shaw* claims are process claims means that the resulting district lines are relevant only as evidence of the process.<sup>56</sup> If a redistricting body revealed that it drew district X to achieve only a racial objective and considered no other goals along the way, race would clearly have been the predominant reason driving the particular lines of district X. That conclusion with respect to predominance would still hold even

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necessary to defeat predominance. The pursuit of a racial target founded on thoughtless stereotype may well be correlated with the single-minded pursuit of a racial objective. But the existence of a target on its own does not establish predominance, without knowing whether or how other factors were incorporated into the line-drawing decision.

Similarly, it may be that the approach to selecting a target demonstrates the application of overriding impermissible stereotype even if that target is applied in any one district as one factor among several. For example, consider a jurisdiction that rigorously maintained real attention to multiple nuanced, race-neutral redistricting criteria, but only accepted combinations of those criteria that produced a 75% minority electorate in every district yielding that possibility. The individuals placed within or without any individual district would have been put there based on a nuanced assortment of criteria, both race-neutral and race-based, and from a worm's-eye view, no individual district might communicate the expressive harm *Shaw* sought to avoid. But the uniform global racial criterion would so clearly suggest unjustified and impermissible stereotype that it would very likely be seen as racial predominance, permissible only for the most compelling of reasons. I am grateful to Professor Richard Pildes for the intriguing scenario.

55. Cf. Gormley, *supra* note 45, at 789 (noting that the use of race to check maps for legal compliance does not by itself indicate predominance).

56. See, e.g., *Bethune-Hill*, 137 S. Ct. at 798.

if, by utter coincidence, district X happened to preserve a community of common interest or followed along a county boundary.<sup>57</sup>

True, the practical likelihood of backing into conformity with other traditional and race-neutral factors, without actually paying attention to those factors, may be vanishingly small. In the normal course, the fact that district lines happen to be consonant with race-neutral factors will usually amount to a strong, albeit rebuttable, presumption that the redistricting body actually considered those other factors in drawing the district, to a degree sufficient to defeat a claim of predominance. Conversely, “[a]s a practical matter, in many cases, perhaps most cases, challengers will be unable to prove an unconstitutional racial gerrymander without evidence that the enacted plan conflicts with traditional redistricting criteria.”<sup>58</sup> But the simple fact that district boundaries happen to line up with race-neutral factors does not offer complete immunity to a *Shaw* claim, if other evidence is available to prove that the redistricting body’s obsession with race was the runaway reason to move a significant number of voters into or out of the district.<sup>59</sup>

## 2. Predominance and Politics

Given the development of the law above, it is unsurprising that jurisdictions usually defend *Shaw* claims by contending that factors other than race predominated when the lines were drawn. And of those other factors, the most frequent defense appears to be that politics (and more specifically, tribally partisan gain), not race, truly drove the redistricting process.

As with claims of invidious discrimination, this defense is easily misunderstood. If partisan gain is the ultimate goal, but single-minded obsession with race is the means to achieve that goal, race has still predominated.<sup>60</sup> Moving a significant community into a district because they are Latino while subordinating all other race-neutral factors amounts to racial predominance, no matter the ultimate reason for the action.

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57. See, e.g., *id.*

58. *Id.* at 799.

59. See *id.*

60. See *supra* at 563–64.



In a district in which factors other than partisanship and race have all been subordinated, it can occasionally be difficult for outside evaluators to discern the distinction between the two. For example, in areas where racial and partisan preferences are exceedingly highly correlated, it may not be possible to tell whether people were moved into a district predominantly because they were African-American, or whether they were moved into a district predominantly because they were Democratic. Which means that in the absence of proof of racial predominance, some *Shaw* claims will—and should—fail.<sup>61</sup>

But these conditions should not be mistaken for an assessment that race and partisanship are everywhere equivalent, or that all attempts to distinguish them are futile. In some jurisdictions, yes, race and partisanship are exceedingly highly correlated (for example, areas where 90% of African-Americans vote Democratic and 90% of Anglo voters vote Republican).<sup>62</sup> In these locations, it may not be possible to distinguish lines drawn based predominantly on race from those drawn predominantly based on party.<sup>63</sup> But in other jurisdictions, the correlation between race and party is asymmetric (for example, where 90% of African-Americans vote Democratic and 60% of Anglo voters vote Republican) or symmetrically less strong (for example, where 60% of Latinos vote Democratic and 60% of Anglo voters vote Republican).<sup>64</sup> In still other contexts, the correlation devolves when considering politics other than partisanship: for example, in primaries where African-American Democrats and Anglo Democrats have decidedly different preferences.

Both of these latter conditions may provide some evidentiary power to litigants. A predominant focus on race in circumstances of asymmetric partisanship, or in striving to drive the result of a primary, may yield different lines than would be expected from a truly predominant focus on partisanship alone.<sup>65</sup> The data available to, or

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61. See, e.g., *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 257 (2001).

62. See, e.g., Levitt, *supra* note 13, at 2050 n.248.

63. See 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, 1838, 1852–54, 1863–64 (2018); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1579 (2018).

64. See, e.g., Levitt, *supra* note 13, at 2050 n.248.

65. *Id.* Of course, even similar levels of partisan support by race does not mean that different voters with similar partisan preferences are politically fungible: if an African-American group is far more *reliably* Democratic than an Anglo group in a given jurisdiction, a single-minded focus

choices made by, redistricting bodies may also provide evidentiary cues. For example, partisan performance data is often aggregated by precinct, while racial data is aggregated by more granular census blocks. This means that lines that split precincts to distinguish one census block from another, particularly where the blocks on either side of the line reveal a racial pattern, are more likely to indicate racial considerations than partisan ones.<sup>66</sup>

Stepping back, as with the claims of invidious race discrimination described above, it is important to keep in mind that the above discussion speaks more to the evidentiary difficulty of establishing cases, and hence to judges and litigators, than to redistricting bodies charged with following the law in the first instance. The easiest way for redistricting bodies to avoid the scrutiny that comes with single-minded obsession about race is to consider and account for other race-neutral factors in the mix.

### 3. Justification

Even if race is the predominant reason for moving some significant groups into or out of a district, that does not under *Shaw* necessarily render the districting process unconstitutional. Instead, a predominant focus on race, subordinating other race-neutral factors, requires adequate justification. The Court has explained that predominant focus on race is constitutional if it survives strict scrutiny: that is, if it is narrowly tailored to achieve a compelling state interest.<sup>67</sup> In the redistricting context, this is a demanding standard, but not an impossible one.

Beyond a government's interest in countering the concrete and particularized effects of past discrimination, the Court has never squarely issued a ruling on a goal sufficiently compelling to survive

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on politics aimed at selecting only the most reliable partisans may explain district lines that otherwise look like they are drawn with predominant focus on race. *See, e.g., Cromartie II*, 532 U.S. at 245.

66. *See, e.g., Bush v. Vera*, 517 U.S. 952, 961, 970–71, 975 (1996) (plurality opinion); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 449 (2000). Admittedly, increasingly sophisticated political microtargeting may increasingly provide sophisticated partisan performance data in geographies smaller than a precinct, and may also explain precinct splits for reasons that are primarily partisan and not primarily racial. The degree to which redistricting bodies—both state and local—have access to such data will vary.

67. *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

strict scrutiny in the redistricting context.<sup>68</sup> But the Court has repeatedly hinted that drawing district lines to ensure compliance with the federal Voting Rights Act would do the trick.<sup>69</sup> Recognizing compliance with the Voting Rights Act as a compelling state interest has provided the Court with a means to harmonize, if uneasily, its hesitance about excessive government attention to race with its occasional recognition that “racial discrimination and racially polarized voting are not ancient history[, and that m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions[.]”<sup>70</sup>

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68. *Id.*

69. *See, e.g.*, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 475 & n.12 (2006) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part); *id.* at 518–19 (Scalia, J., joined by Thomas, J., Alito, J., and Roberts, C.J., concurring in the judgment in part and dissenting in part); *Vera*, 517 U.S. at 990, 994 (O’Connor, J., concurring); *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 653–54 (1993).

The Court’s strongest such hint to date in a majority opinion was the decision in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017). The Court upheld Virginia’s District 75 against challenge, on the theory that District 75 was predominantly driven by race, but in a manner designed to *meet* strict scrutiny through compliance with the Voting Rights Act. *Id.* at 802. The Court noted that neither party contested the notion that compliance with the Voting Rights Act was a sufficiently compelling interest to satisfy strict scrutiny, and focused its analysis on narrow tailoring; the Court purportedly continued to reserve the question whether the state’s interest in compliance with the Act would suffice. *Id.* at 801. However, it seems quite unusual for the Court, having determined that suspect state action required its most exacting scrutiny, to allow the litigants to concede the legal basis for that action.

70. Charles & Fuentes-Rohwer, *supra* note 63, at 1562–64, 1573–74. Professors Charles and Fuentes-Rohwer helpfully describe this uneasy balance as the tension between the anticlassification and antisubordination interests that the Court has located in the Equal Protection Clause. *See id.*; *see also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1470–75 (2004).

While I agree with Professors Charles and Fuentes-Rohwer in this assessment of the Court’s constitutional concerns, I am less sure about the connections they draw between anticlassification and substantive representation, and between antisubordination and descriptive representation, in the context of the Voting Rights Act. Charles & Fuentes-Rohwer, *supra* note 63, at 1562–64, 1584, 1597. The thrust of the anticlassification instinct is to resist government action that classifies individuals based on their race; the thrust of the antisubordination instinct is to resist government action that creates or maintains subordination of a minority group. Siegel, *supra*, at 1472–73. Substantive representation (the representation of groups’ substantive interests) and descriptive representation (the representation of groups by individuals who are group members) may both provide representation to racial minorities, albeit in different ways with different theoretical underpinning. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60–62, 86, 115 (1967). Antisubordination theories can support both, while anticlassification theories, by denying the legitimacy of recognizing distinct minority group interests in the first instance, support neither. And the Voting Rights Act, deployed as an antisubordination measure, distinctly favors *substantive* representation: its focus is on the conditional opportunity of cohesive minority groups to elect candidates of their substantive choice, whether those candidates are members of the group or not. *See* Levitt, *supra* note 49, at 588 n.76; *Thornburg v. Gingles*, 478 U.S. 30, 67–68 (1986) (plurality opinion); *LULAC*, 548 U.S. at 423–24, 427, 439 (noting polarized Latino voting *against*

Justifying lines drawn predominantly based on race based on the need to satisfy the Voting Rights Act requires the actual belief that such drawing is reasonably necessary for compliance. Grossly overbroad prophylaxis will not suffice—for example, a jurisdiction may not defend a finding of racial predominance by claiming that it merely wished to maximize minority power so as to avoid even the prospect of a vote dilution claim.<sup>71</sup> Nor will the bare *assertion* of attempted compliance with the Voting Rights Act suffice as insulation: if the jurisdiction’s alleged attempt to comply with the Voting Rights Act is predicated on a basic legal misunderstanding of how the Voting Rights Act works, it too will not survive strict scrutiny.<sup>72</sup>

But in justifying predominance, the demand for a reasonably close tie between the district lines at hand and the obligations of the VRA is not a demand for perfection. The Court understands that the Voting Rights Act is a statute heavily dependent on factual nuance in its local application, and that there may be legitimate disputes over the best interpretation of the relevant data.<sup>73</sup> As a result, the Court has recognized the constitutional need for local flexibility to attempt good-faith compliance with the Voting Rights Act.<sup>74</sup>

For purposes of satisfying constitutional strict scrutiny, then, jurisdictions have some “breathing room.”<sup>75</sup> As the Court has explained, the law is not so constraining that it simply “lay[s] a trap for an unwary legislature.”<sup>76</sup> It is sufficient to attempt in good faith to comply with the (accurate) legal requirements of the Voting Rights Act, as long as there exists a “strong basis in evidence” for the redistricting body’s choice, even if the attempt is later interpreted to

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a Latino candidate). If, as Charles & Fuentes-Rohwer suggest, the Voting Rights Act has come to be equated with a mandate for descriptive representation—a statute simply assigning minority representatives to minority communities—that equation comes from a public gloss of a simulacrum of the statute, and neither the statute itself nor the doctrine implementing it. *Cf.* Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151, 165–68 (2013).

71. *See, e.g., Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 916 n.8 (1996); *Johnson*, 515 U.S. at 921–22, 924.

72. *See, e.g., Shaw II*, 517 U.S. at 912; *Johnson*, 515 U.S. at 921–24; *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015).

73. *See, e.g., Ala. Legislative Black Caucus*, 135 S. Ct. at 1273–74.

74. *See id.*

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

76. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273–74.

reveal a factual lapse.<sup>77</sup> If a jurisdiction attempts good-faith compliance by asking the right question, with some tie to reasonable and relevant facts, its efforts will be constitutionally sufficient even if the ultimate answer is wrong. Asking the wrong question, in contrast, will not suffice to justify a plan otherwise drawn predominantly on the basis of race.<sup>78</sup>

Which means it's now time to discuss what the Voting Rights Act requires.

### C. *Voting Rights Act*

The Voting Rights Act, long considered one of the country's most effective civil rights statutes, is often misunderstood or mischaracterized.<sup>79</sup> It does not, for example, require majority-minority districts to be drawn wherever they can be drawn.<sup>80</sup> In certain circumstances, however, it requires careful attention to the districting process so as not to dilute the electoral power of racial or language minorities.

After the Supreme Court's 2013 decision in *Shelby County v. Holder*,<sup>81</sup> Section 2 of the Voting Rights Act is the principal provision requiring the attention of redistricting bodies. Section 2 states:

(a) No 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 vote on account of race or color [or language minority status], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members

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77. *Id.*; *Bethune-Hill*, 137 S. Ct. at 801–02.

78. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1274.

79. Levitt, *supra* note 49, at 575, 606–07.

80. *See id.* at 575.

81. 133 S. Ct. 2612 (2013). For an analysis of *Shelby County* and the preclearance structure it gutted, *see generally* Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013).

of the electorate to participate in the political process and to elect representatives of their choice.<sup>82</sup>

This provision of the Voting Rights Act applies nationally, and prohibits both intentional discrimination on the basis of race or language minority status and practices which result in vote dilution on the basis of race or language minority status.<sup>83</sup> The prohibition on intentional discrimination essentially mirrors the constitutional prohibition on invidious racial discrimination, discussed above.<sup>84</sup> The alternative cause of action, often referenced in abbreviated fashion as a “results” claim,<sup>85</sup> is a bit more involved. As others have recognized, Section 2 essentially amounts to a “common-law” statute: it invites courts to refine the liability standard in the more specific context of election disputes on the ground.<sup>86</sup> And indeed, courts have done so.

With respect to redistricting in particular, courts have clarified that Section 2 requires jurisdictions in certain circumstances to draw districts affording minority voters an equitable opportunity to elect candidates of their choice. There are a few preconditions before this legal responsibility kicks in.<sup>87</sup> First, a jurisdiction has no Section 2 “results”-based responsibility to a minority community insufficiently large or insufficiently compact to constitute half of the electorate in a reasonable district.<sup>88</sup> Voting must also be polarized on the basis of race

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82. 52 U.S.C. § 10301 (2012).

83. See *Thornburg v. Gingles*, 478 U.S. 30, 43–47 (1986); S. REP. NO. 97–417, at 27 (1982).

84. See *supra* Part I.A.

85. Designating these claims as “results” claims amounts to a bit of a misnomer. See *Levitt, supra* note 49, at 587 n.69. “Results” claims need not rely on proof of intentional invidious racial discrimination. But they also do not depend on a showing of disparate impact alone. As explained below, racial vote dilution is a richer concept, and dependent on discriminatory local context.

86. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 UNIV. PA. L. REV. 377, 381–84, 404–07 (2012).

87. What follows is just a thumbnail sketch; courts have given more specific content to each of the conditions explored below.

88. *Gingles*, 478 U.S. at 50; *Grove v. Emison*, 507 U.S. 25, 40–41 (1993); *Bartlett v. Strickland*, 556 U.S. 1, 14–15, 18–20 (2009) (plurality opinion). The Court has clearly defined the notion that the minority community must be of sufficient size: the community must constitute at least 50% of the potential electorate in a demonstrative district. *Strickland*, 556 U.S. at 20. (This demonstrative district is drawn purely to assess the viability of a claim. District lines ultimately imposed for remedial purposes need not precisely follow the demonstrative district lines; indeed, minority voting-age citizens may comprise less than half of an actual remedial district, if the district’s composition nevertheless provides the minority community a reliably equitable opportunity to elect candidates of choice. See *Levitt, supra* note 49, at 590–91; *infra* at 580–83).

The notion that the minority community must be sufficiently compact is a bit more ambiguous. See *infra* note 219 (discussing the notions of geographical compactness and cultural

before this responsibility arises—with minority voters tending to prefer candidates to a similar degree, and distinct from the candidates preferred by non-minority voters.<sup>89</sup> And this polarized voting must be sufficiently pronounced that without districts drawn specifically to break the pattern, non-minority voters, voting as a bloc, would regularly defeat the candidates of choice of minority voters.<sup>90</sup>

Together, these preconditions are roughly designed to indicate when minority voters would have an opportunity to elect their candidates of choice if district lines were drawn for that purpose, but would not likely have that opportunity otherwise.<sup>91</sup> But the preconditions are not the end of the analysis. The legal responsibility to draw districts providing an opportunity to minority voters also depends on the statutory “totality of circumstances,” which accounts for the lingering concern that the absence of opportunity constitutes dilution or “abridgement” and not merely happenstance.<sup>92</sup> The “totality of circumstances,” for example, accounts for the extent to which the minority group otherwise maintains a reliable opportunity to elect candidates of choice in proportion to their share of the electorate jurisdiction-wide; if the minority group has already effectively achieved proportional representation, the absence of incremental opportunity is not generally inequitable or actionable.<sup>93</sup> It also accounts for present and past local political conditions that together constitute danger signs of present discrimination or the lingering impact of past discrimination.<sup>94</sup> Without such conditions, the Voting Rights Act imposes no mandate.<sup>95</sup>

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compactness in *LULAC v. Perry*, and suggesting that compactness may simply relate to common representational interests beyond race and candidate preference).

89. *Gingles*, 478 U.S. at 51.

90. *Id.*

91. See Levitt, *supra* note 49, at 586. In this context, the Court’s imposition of a hard, bright-line liability threshold of sufficient minority electorate size (50% of a district-sized population) appears to depart from the underlying purpose of the precondition in the service of promoting administrability. *Id.* at 589–90; *Strickland*, 556 U.S. at 17 (plurality opinion). Minority communities may have the practical opportunity to elect candidates of their choice even if they constitute less than a majority of the voters within a jurisdiction. See, e.g., *Strickland*, 556 U.S. at 27, 32–33 (Souter, J., dissenting).

92. 52 U.S.C. § 10301(b).

93. *Johnson v. De Grandy*, 512 U.S. 997, 1013–15 (1994).

94. See Levitt, *supra* note 49, at 586–87; Lang & Hebert, *supra* note 29, at 793–94.

95. See S. REP. NO. 97-417, at 40, 43, as reprinted in 1982 U.S.C.C.A.N. 177, 218, 221 (1982). Because many of the Supreme Court’s pivotal Voting Rights Act cases have been litigated in jurisdictions where these danger signs are abundantly and obviously present, they may sometimes slip from view. See Charles & Fuentes-Rohwer, *supra* note 63, at 1571 (focusing on the

Taken together, the standard for Section 2 liability essentially resolves to this: a jurisdiction in which discrimination against racial or language minorities played or plays a significant role, and in which minorities do not already have a reliable opportunity to elect candidates of choice in proportion to their presence in the jurisdiction's electorate, should be on alert. Those jurisdictions should assess the size of the minority community and the degree of local polarization.<sup>96</sup> If minority groups are large, compact, and cohesive, and would without protection regularly be outvoted by a cohesive non-minority bloc, the jurisdiction likely has the responsibility to draw districts so that they provide an equitable opportunity for the minority community to elect the candidates of its choice.

The practice of that remedial obligation is deeply local and deeply contextual, and never premised on demographics alone.<sup>97</sup> In some areas, the degree of polarization and lingering impact of past discrimination will mean that only a supermajority of the electorate will effectively afford a minority community the effective opportunity to elect candidates of choice. In some areas, the appropriate threshold will be half of the electorate.<sup>98</sup> In some areas, engagement and crossover voting patterns will mean that minority communities are able to maintain a reliable opportunity to elect candidates of their choice even without constituting the majority of a district.<sup>99</sup>

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preconditions alone). The Court, however, has been careful to assess liability only upon consideration of this context. *See, e.g.*, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 436–42 (2006).

96. Assessing the degree of local polarization will not always require a full-blown statistical calculation engaging methodologies of ecological inference, but it will require a “careful assessment of local [political] conditions and structures,” and not merely assumptions premised on demographics. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801–02 (2017) (confirming the adequacy of a functional analysis of electoral opportunity, even without regression analysis, under Section 5 of the Voting Rights Act). Indeed, the requirement to do at least some meaningful homework to determine polarization is enforced not only by federal courts, but by state courts as well. *See, e.g.*, *In re Colorado General Assembly*, 332 P.3d 108, 111 & n.5 (Colo. 2011) (en banc).

97. *See Levitt, supra* note 49, at 590–91; *cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272–73 (2015) (rejecting a mechanically demographic view of electoral opportunity under Section 5 of the Voting Rights Act); *Bethune-Hill*, 137 S. Ct. at 801 (confirming a functional analysis of electoral opportunity under Section 5 of the Voting Rights Act).

98. *Levitt, supra* note 49, at 590.

99. *Id.*



### D. Recap

The recap above briefly describes the state of federal redistricting law concerning race and language minority status, heading into *Cooper v. Harris*.<sup>100</sup> Several threads of this legal framework are designed for litigants: they concern evidentiary tests for establishing wrongdoing in court. For those actually drawing the lines, though, the law before *Harris* can probably be distilled into a few, even more basic, guidelines:

1. Do not draw lines that set out to harm voters based on race or ethnicity, even if the reason to single them out is “political.”<sup>101</sup>
2. In a jurisdiction in which discrimination plays or has played a significant role, and where voting is substantially polarized along racial or ethnic lines, look at electoral patterns and decide whether minorities already have proportionate electoral power. If not, consider whether a compact and sizable minority community could exercise equitable electoral opportunity they do not currently enjoy. There may be a federal statutory responsibility to provide that opportunity.<sup>102</sup>
3. When considering race in the context of drawing districts, whether to provide an opportunity required under the Voting Rights Act or for reasons beyond statutory requirements, consider other factors in the mix as well. Good-faith compliance with the Voting Rights Act will likely satisfy strict scrutiny, but a thoughtful and multifaceted redistricting plan can often achieve compliance without stepping onto that knife’s edge.<sup>103</sup>

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100. For a more thorough explanation of the Voting Rights Act’s substantive provision and its interaction with the Constitution, see Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1047–69 (2013).

101. See *supra* Part I.A.

102. See *supra* Part I.C.

103. See *supra* Part I.B.

In Alaska, state law has been construed to preclude such a multifaceted blend, which leaves Alaska redistricting bodies more exposed than similar bodies in other states. Alaska’s state constitution specifies certain criteria for the drawing of districts, but does not explicitly reference the federal Voting Rights Act or any other independent obligation to avoid the dilution or abridgment of equitable electoral opportunity on the basis of race. See ALASKA CONST. art. 6, § 6. The Alaska state courts have interpreted this language to require strict adherence to a particular

This assessment reveals that the driving thrust of the law is not the product of a single theoretical vision. It betrays the rough accommodation of jurisprudential, historical, and political commitments asserted by a multitude of actors, occasionally working at cross purposes. It roughly reconciles statutory mandates and constitutional prohibitions in a way that protects minorities with cohesive political preferences against discrimination while managing the degree to which that protection becomes all-consuming. To the extent that it exalts any one principle, it is the uplifting of local detail and multifaceted consideration and the rejection of gross stereotype. And it can be conveyed in four Tweets.

## II. NORTH CAROLINA

Before engaging *Harris* in detail, it may help to provide one more piece of context: a brief synopsis of the specific redistricting cases in North Carolina that helped build the various principles above.<sup>104</sup> Given the state's history, it is perhaps no surprise that many of the most pivotal of the cases concerning race and redistricting arose out of North Carolina.<sup>105</sup> And North Carolina legislators responsible for drawing the plan at issue in *Harris* were likely keenly aware of this history.

This particular review will start with *Thornburg v. Gingles*,<sup>106</sup> in 1986. Four years earlier, Congress had amended the Voting Rights Act to include the “results”-based standard, and *Gingles* was the first Supreme Court case to give it meaningful content. Among other

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process: the state redistricting body must create an initial map based on state law, “not . . . affected by VRA considerations in any way,” and only then adjust based on federal requirements. *In re* 2011 Redistricting Cases, 294 P.3d 1032, 1037 (Alaska 2013). This unusual requirement leaves the redistricting body unable to consider Voting Rights Act compliance in concert with other important criteria. And though good-faith attempts to comply with the Act should still be legally protected, the process leaves such compliance more exposed to challenge than it might otherwise be.

104. As above, this overview is presented from the perspective of a present legislator attempting to harmonize for prospective application all of the principles at play, and with the benefit of intervening case law and 20-20 hindsight. I do not make the claim that each incremental decision was inevitable, nor even particularly reasonably foreseeable, from the decisions before. For the purposes of anticipating and understanding *Cooper v. Harris*, it is only necessary to understand the doctrine at the time of the decision, and the various concerns animating the Court's opinions leading to that point.

105. For a keen overview of the history of race relations and the franchise in North Carolina, see Daniel P. Tokaji, *Realizing the Right to Vote: The Story of Thornburg v. Gingles*, in *ELECTION LAW STORIES* 127, 130–41 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

106. 478 U.S. 30 (1986).

innovations, *Gingles* established the three preconditions for “results”-based Section 2 liability in the redistricting context.<sup>107</sup> First, these claims impose no incremental responsibility when the minority community is insufficiently large or compact to constitute a minority in a reasonable district.<sup>108</sup> Second, these claims impose no incremental responsibility when voting is insufficiently polarized along racial or language minority lines.<sup>109</sup> And third, these claims impose no incremental responsibility when the minority community is regularly able to elect candidates of its choice without districts specially drawn for that end.<sup>110</sup> *Gingles* also interpreted the statutory standard for dilution in the “totality of circumstances” to embrace factors like the “Senate factors” indicating a tie between present conditions and past or present discrimination.<sup>111</sup> *Gingles* laid the basic structural framework for Section 2 redistricting claims everywhere in the country.

Two decades later, the Court clarified a piece of Section 2 doctrine in the North Carolina case of *Bartlett v. Strickland*.<sup>112</sup> North Carolina has a comparatively robust state constitutional requirement to draw state legislative districts that keep counties whole where possible.<sup>113</sup> When the state drew lines departing from county bounds, plaintiffs sued in state court, and North Carolina defended on the basis that the departures were required by the Voting Rights Act.<sup>114</sup> The African-American community in the area constituted at least 43% of the electorate, but enough other voters in the area regularly “crossed over” to vote for minority-preferred candidates.<sup>115</sup> And so the Court

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107. *Id.* at 50–51.

108. *Id.* at 50.

109. *Id.* at 51.

110. *Id.* at 52.

111. *Id.* at 43–46, 44 n.9.

112. 556 U.S. 1 (2009). Dwight Strickland was the lead individual plaintiff; Gary Bartlett was the Executive Director of the North Carolina State Board of Elections, and the lead institutional defendant sued in his official capacity. The case is most commonly known as *Bartlett*, despite the convention to refer to cases in abbreviated fashion by citing the individual plaintiff and not the repeat institutional player. *See supra* note 5. This piece adopts the convention, and instead refers to the case as *Strickland*.

113. N.C. CONST. art. II, §§ 3, 5.

114. *Strickland*, 556 U.S. at 6–7 (plurality opinion).

115. This case was litigated in the unusual posture of defending against a state law challenge by claiming that the Voting Rights Act required departing from state law: specifically, that the Voting Rights Act required splitting Pender County, which state law would otherwise have kept intact. *Id.* In that context, the litigants seem to have assumed that the minority community within the district that was actually drawn—the District 18 under challenge—reflected the composition of

confronted the question whether this minority community was sufficiently sizable to meet the threshold of the first *Gingles* precondition.<sup>116</sup>

According to the *Gingles* Court itself, “the reason [for the size threshold] is this: Unless minority voters possess the potential to elect

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the relevant minority community for *Gingles* purposes. The *Strickland* plurality cites District 18 with an African-American voting-age population of 39.36%, *id.* at 8, and the notion that that figure more generally represented the size of the African-American community in the area is not otherwise rebutted in the opinion, or in the briefs to the Court.

But District 18—the district drawn to provide an ostensible Voting Rights Act remedy—does not necessarily reveal the full size of the relevant minority community in the Pender County area. The Voting Rights Act offers a sort of collective right to representation for a local community as a whole. *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001). This aspect of the rights conveyed by the Voting Rights Act explains a substantial amount of the doctrine: it is why, for example, liability for Section 2 “results” claims requires a showing of political cohesion by the local minority community generally, *Gingles*, 478 U.S. at 51, without requiring that each and every minority voter share the same preferences. It is why, if two different minority communities could each establish an opportunity to elect the candidates of their choice in mutually incompatible districts, a jurisdiction with an obligation under Section 2 has the freedom to choose *where* to draw a remedial district embracing some but not all of the communities in question, *see* League of United Latin Am. Citizens v. Perry (LULAC), 548 U.S. 399, 429 (2006). And it is why an electorate short of a majority but sufficient to provide meaningful electoral opportunity constitutes a valid remedial district, even when the community must be of majority size in order to establish liability, *see infra* at 583.

The obverse of this last point explains why District 18 may not fully reveal the size of the Pender County minority community. The boundaries of a demonstrative district for *Gingles* liability purposes establish that the community generally is of sufficient size; the boundaries of a remedial district provide the community generally with an opportunity to elect candidates of choice. But as long as an injury to the community is established, and repaired, those two districts need not be identical. (Indeed, *requiring* states to draw remedial districts with bright-line 50% demographic thresholds solely to match the *Gingles* demonstrative district would involve essentialist assumptions of questionable constitutional validity. Levitt, *supra* note 49, at 589–90; *see also infra* at 580–83). A demonstrative district for *Gingles* liability may include community members who are not within the remedial district; the remedial right inures to members of the community even if individual community members happen to live outside the remedial district that is drawn. What this all means is that District 18, as actually drawn by the North Carolina legislature as a district intended to avoid or remedy a Voting Rights Act violation, need not define the entirety of the relevant minority community for *Gingles* threshold purposes: it is possible that a demonstrative district could have been drawn with a larger proportion of African-American voters. In 2002, the North Carolina Superior Court created an interim plan for use in the 2002 election cycle; that plan offers a different District 18 which can help assess the relevant size of the community. Stephenson v. Bartlett, 582 S.E.2d 247, 249 (N.C. 2003). In that plan, African-Americans constituted 43.44% of the potential electorate (and Anglo voters constituted just 51.79%). *See Interim House Plan – Voting Age Population by Race and Ethnicity* (2003), [https://www.ncleg.net/GIS/Download/District\\_Plans/DB\\_2003/House/Interim\\_House\\_Redistricting\\_Plan\\_for\\_NC\\_2002\\_Elections/Reports/StatewideByDistrict/rptVap.pdf](https://www.ncleg.net/GIS/Download/District_Plans/DB_2003/House/Interim_House_Redistricting_Plan_for_NC_2002_Elections/Reports/StatewideByDistrict/rptVap.pdf). We therefore know that the relevant minority community in the Pender County area was at least as large as the community within this interim 2002 district; because this interim district was also not drawn specifically for *Gingles* threshold purposes, it is possible that the relevant community was larger still.

116. *Strickland*, 556 U.S. at 6 (plurality opinion).

representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.”<sup>117</sup> But there are at least two distinct possible approaches to determining how large a group must be before it possesses the potential to elect representatives of its choice. *Strickland* raised the question whether the requirement of sufficient minority community size reflected a functional standard (a minority community able to drive the election of its candidates of choice, including with reliable crossover support from like-minded non-minority voters) or a demographic standard (50% of a district-sized electorate).<sup>118</sup>

The Court opted for the bright-line demographic standard. It held that liability for a Section 2 “results”-based redistricting claim depended, *inter alia*, on a minority community constituting more than half of the potential electorate in a potential district.<sup>119</sup> This was comparatively unusual: as I have discussed at length, the Court has otherwise consistently interpreted the substantive provisions of the Voting Rights Act in a manner reflecting functional political power and not merely demographics.<sup>120</sup> In these other arenas, that consistent approach reveals the Court’s preference for pragmatic local context and its distaste for stereotype, and helps to maintain the constitutional underpinning of the Act against charges of essentialism.<sup>121</sup> Given this backdrop, the Court’s preference for a bright-line demographic rule in *Strickland* is odd. The strict demographic cutoff certainly makes it easier for jurisdictions and courts to evaluate their potential exposure to a Voting Rights Act claim, but in the realm of the Court’s jurisprudence on race, it represents a rare sop to administrability over contextual nuance.<sup>122</sup>

Still, the *Strickland* rule applies in the least constitutionally suspect circumstance: the bright-line 50% threshold essentially serves only as a litigation screen, barring some claims that might otherwise

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117. *Gingles*, 478 U.S. at 50 n.17.

118. *Strickland*, 556 U.S. at 12–14 (plurality opinion).

119. *Id.* at 14–15, 18–20.

120. See Levitt, *supra* note 49, at 587–89. The provision governing the geographic location of coverage for the “preclearance” provision of the Voting Rights Act was not so lucky, and after being subjected to a cartoonish reading devoid of local context and replete with stereotype, was summarily discarded. See *infra* note 141; Levitt, *supra* note 81, at 152, 155–60; Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>.

121. See Levitt, *supra* note 49, at 574–76.

122. *Strickland*, 556 U.S. at 17–18.

be brought by smaller communities.<sup>123</sup> It is a tool for courts to toss cases, and a limit on the circumstances in which the Voting Rights Act will force governments to consider race.<sup>124</sup> But the bright-line 50% threshold for statutory liability serves only as a signal indicating potential responsibility or its absence, and not as a goal for jurisdictions to hit. *Strickland* did not establish a demographic standard for the remedial *creation* of a district: nothing in the opinion indicated that jurisdictions with responsibilities under the Voting Rights Act would be warranted in foregoing local functional analysis when drawing districts to give minority voters equitable electoral opportunity. That is, *Strickland* did not suggest that redistricting bodies substitute demographic stereotype for actual local voter behavior when undertaking their own action in the name of the state.<sup>125</sup> And in that respect, *Strickland*'s departure from the Court's usual practice in this arena was relatively limited.

*Shaw v. Reno* also arose out of a North Carolina district plan, and was refined in that context.<sup>126</sup> In 1991, the North Carolina electorate was 20% African-American, and substantially polarized along racial lines.<sup>127</sup> The legislature had drawn a single congressional district—District 1, out of twelve total—that yielded an equitable opportunity for minorities to elect candidates of choice; the Department of Justice felt that given the state's history and political demography, the absence of a second “opportunity district” communicated invidious intent, and under pressure, the state drew another.<sup>128</sup> The electorate in that district, District 12, was 55% African-American,<sup>129</sup> and gathered into a district that threaded narrowly along I-85; as the Court recounted, one legislator colorfully remarked that “[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.”<sup>130</sup>

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123. See Levitt, *supra* note 49, at 589–91.

124. *Strickland*, 556 U.S. at 21–22.

125. Levitt, *supra* note 49, at 590–91 & n.88.

126. 509 U.S. 630 (1993) (*Shaw I*).

127. *Id.* at 634; *id.* at 678 n.3 (Stevens, J., dissenting).

128. *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 912 (1996).

129. *Shaw I*, 509 U.S. at 671 n.7 (White, J., dissenting).

130. *Id.* at 636 (majority opinion) (internal citation omitted). The district was first challenged as an unconstitutional partisan gerrymander; that claim was rejected, *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992).

The Court, fresh off of decisions like *City of Richmond v. J.A. Croson Co.* drawing parallels between invidious discrimination and affirmative action,<sup>131</sup> saw similarities between the invidious redistricting cases like *Gomillion* and an excessive focus on race even without invidious intent.<sup>132</sup> The Court made clear that it did not think race-conscious redistricting to be impermissible in all circumstances,<sup>133</sup> but did find reason to strictly scrutinize under the Equal Protection Clause “district lines obviously drawn for the purpose of separating voters by race.”<sup>134</sup> And the Court then remanded to determine whether these particular districts merited strict scrutiny, and if so, whether they were sufficiently justified.<sup>135</sup>

That remand returned to the Court in 1996. In *Shaw v. Hunt*,<sup>136</sup> the Court determined that strict scrutiny was warranted for Congressional District 12, and that the district failed that test.<sup>137</sup> The Court determined that both direct and circumstantial evidence, including the irregularity of the district’s shape, established that significant numbers of voters were placed in or out of District 12 predominantly because of their race.<sup>138</sup> And the Court determined that no sufficiently compelling rationale supported that racial predominance.<sup>139</sup> The Court refused to reverse the lower court’s conclusion that the legislature had not been motivated by the desire to use District 12 to remedy specific past discrimination.<sup>140</sup> The Court also refused to credit the notion that the predominant use of race was required by the Voting Rights Act: Even if such compliance in the

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131. 488 U.S. 469, 493–95 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment).

132. *Shaw I*, 509 U.S. at 641 (“It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.”); *see also id.* at 644–45, 647.

133. *Id.* at 642, 646.

134. *Id.* at 645. *Shaw I* has been roundly critiqued for many reasons, including equating an excessive focus on race with invidious discrimination. The opinion’s florid language may well contribute to that critique. Justice O’Connor intimated that districts primarily drawn to yield minority opportunity would be drawn for the purpose of “separating” voters by race, *id.*, and later claimed that a district including individuals of the same race but otherwise geographically dispersed and with little else in common “bears an uncomfortable resemblance to political apartheid.” *Id.* at 647; *see also supra* note 41.

135. *Shaw I*, 509 U.S. at 658.

136. 517 U.S. 899 (1996) (*Shaw II*).

137. District 1 was also challenged as an unjustified racial gerrymander, but the plaintiffs lacked standing to proceed on that challenge. *Id.* at 904.

138. *Id.* at 905–08.

139. *Id.* at 908–15.

140. *Id.* at 909.

abstract constituted an interest sufficient for strict scrutiny, because the population embraced by District 12 was not sufficiently geographically compact, the legislature could not reasonably have thought that it owed that population a responsibility under Section 2.<sup>141</sup>

The legislature enacted a new plan in response to *Shaw v. Hunt*, and that plan again found its way to the Court. In *Hunt v. Cromartie*,<sup>142</sup> the Court evaluated District 12 as newly redrawn, “wider and shorter” than it had been, and with African Americans comprising less of the electorate.<sup>143</sup> Plaintiffs claimed that the district had again been drawn predominantly and unjustifiably on the basis of race, but the state contended that this time, the primary reason for the district’s shape was political.<sup>144</sup> Specifically, the state alleged that it “drew its district lines with the intent to make District 12 a strong Democratic district,” and the Court found that the evidence it proffered was sufficiently

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141. *Id.* at 916–17. The Court also addressed the legislature’s asserted obligation under Section 5 of the Voting Rights Act, at least in part. This piece has not discussed Section 5, in part because it has been rendered all but inert: in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Court struck the provision describing where Section 5 could be applied, which means that until Congress revisits that geographic coverage, it applies nowhere. *See id.* at 2631.

At the time, Section 5 prohibited jurisdictions with the most troublesome record of minority voting rights from drawing district plans with either the effect or intent of abridging the voting rights of minority citizens. The effect prong was otherwise known as “retrogression”: making minority citizens worse off than they had been with respect to the effective exercise of the franchise. *Beer v. United States*, 425 U.S. 130, 140–41 (1976). And in North Carolina in 1991, the Court thought that it was not possible to draw a plan making minority citizens worse off: minority citizens had not previously had any realistic opportunity to elect candidates of choice, and so any redistricting plan would necessarily have either preserved or improved the status quo. *Shaw II*, 517 U.S. at 912. Hence the Court found that there was no danger of retrogression justifying the decision to draw a minority opportunity district. *Id.*

As for the intent prong, despite the Department of Justice’s objection on these grounds, the Court also rejected the evidence put forward to show that North Carolina would have thought District 12 necessary to avoid a finding of discriminatory intent under a proper reading of the Voting Rights Act. *Id.* at 912–13. According to the Court, North Carolina had expressed abundant alternative and race-neutral explanations for the refusal to draw District 12, including a desire to keep precincts whole, to avoid dividing counties, and to retain minority influence in the areas surrounding District 12. *Id.* These alternative justifications would have sufficed to show the absence of invidious discriminatory intent that was prohibited by Section 5 at the time. *Id.* (Section 5 was later interpreted to regulate only retrogressive intent, rather than all invidious discriminatory intent. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328, 336, 341 (2000). Had that narrower definition been the understanding at the time of *Shaw II*, it would have further insulated North Carolina’s 1991 plan.)

142. 526 U.S. 541 (1999) (*Cromartie I*).

143. *Id.* at 544. District 12, as redrawn, had a forty-three percent African-American voting-age population. *Id.*

144. *Id.* at 548–49.



robust to defeat summary judgment against the state.<sup>145</sup> A trial would have to sort out whether the reason for the lines was predominantly racial or political.<sup>146</sup>

The Court's fourth look at District 12 in a decade followed that trial. In *Easley v. Cromartie*,<sup>147</sup> the Court reversed the trial court's finding that race, and not politics, had predominated in the drawing of District 12.<sup>148</sup> The Court dove deep into the weeds of the available evidence, finding alternative partisan political explanations for the shape of the district to be at least as persuasive as the racial explanations, and hence adequate to defeat a finding of racial predominance.<sup>149</sup> In the portion of North Carolina covered by District 12, African-Americans also tended to be extremely reliable Democratic voters; the Court thought that plaintiffs had not made their case that the legislature had been predominantly intent on moving into the district African-Americans who happened to be Democrats, rather than moving into the district reliable Democrats who happened to be African-Americans.<sup>150</sup> With the evidence supporting either motive, or both, plaintiffs had not proven predominance.<sup>151</sup>

The Court summarized its holding with a final conclusion:

We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives

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145. *Id.* at 549–52.

146. Though the Court claimed in *Cromartie I* that it had previously granted permission to engage in “constitutional political gerrymandering,” *id.* at 551, that assertion was dicta. The import of the state’s reliance on partisan preferences is not that districting for partisan gain would independently have been constitutionally permissible, but that a partisan motive would have rebutted the notion that race predominated over other race-neutral factors in explaining why the district was drawn as it was. The claim of racial predominance was the only claim before the Court, and in that context, claiming an alternative partisan motive provided a defense. *See* Levitt, *supra* note 13, at 2049–50.

147. 532 U.S. 234 (2001) (*Cromartie II*).

148. *Id.* at 237.

149. *Id.* at 243–57.

150. *Id.* at 257.

151. *Id.*

would have brought about significantly greater racial balance.<sup>152</sup>

These two sentences, as it turns out, generated a fair amount of controversy and confusion. Some interpreted the *Cromartie II* Court as retreating from *Shaw*. On this view, after a decade of litigation, the Court was tired of policing *Shaw* claims, and signaled that it was raising the bar for the standard of proof.<sup>153</sup> On this view, plausible political considerations would usually preclude *Shaw* liability.<sup>154</sup> And on this view, to prove racial predominance, *any* would-be *Shaw* plaintiffs would have to present an alternative map with less stark racial impact, the same political outcome, and at least the same measure of adherence to other nonracial redistricting objectives like compactness and the maintenance of political boundaries. Given the various and competing political considerations frequently underpinning redistricting maps, such alternative plans would be hard to develop, and cases would be exceedingly difficult to prove.

This view essentially treats all *Shaw* claims in which race correlates with politics as requiring an alternative map.<sup>155</sup> But this is not the only possible reading of the *Cromartie II* summary. The alternative focuses on the fact that the Court would have required an alternative map “in a case such as this one”: a case with ample credible evidence of political motive and only minimal evidence of racial focus. In such cases, the weight of the predominance standard cuts against *Shaw* plaintiffs, and so litigation will fail without *some* compelling reason to believe that race really drove the boundary lines. An alternative map might provide such evidence. But this view does not import an alternative map prerequisite into every evidentiary presentation. If other evidence sufficed to show racial predominance, it would not constitute a “case such as this one.”

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152. *Id.* at 258.

153. *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note 63, at 1564, 1578, 1592.

154. *Id.*

155. As such, this view essentially inserts a comma into the Court’s summary in *Cromartie II*: “In a case such as this one[,] where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles.” *But see Cromartie II*, 532 U.S. at 258 (without comma, indicating that the “where” clause may be a restrictive clause rather than an appositive).

It was on this footing that the North Carolina legislature redrew district lines in 2011.

### III. *COOPER V. HARRIS*

The 2010 election wave was kind to Republicans across the country, and North Carolina Republicans in particular. In 2009, the state Senate comprised thirty Democrats and twenty Republicans; the state House comprised sixty-eight Democrats and fifty-two Republicans.<sup>156</sup> By 2011, control had dramatically flipped: the state Senate comprised nineteen Democrats and thirty-one Republicans, and the state House comprised fifty-two Democrats, sixty-seven Republicans, and one unaffiliated legislator.<sup>157</sup>

The new legislature promptly passed a redistricting resolution.<sup>158</sup> The resulting congressional map heavily favored Republican candidates.<sup>159</sup> This was made possible, in part, as Districts 1 and 12 became both more heavily African-American and more heavily

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156. N.C. Gen. Assembly Party Affiliations (Jan. 19, 2017), <https://www.ncleg.net/library/Documents/GAPartyAffiliations.pdf>.

157. *Id.*

158. Act of July 28, 2011, ch. 163, N.C. S.L. 2011-403, <https://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2011&BillID=S453>. North Carolina state and congressional districts are passed by joint resolution, without a role for the governor. *See* N.C. CONST. art. II, § 22(5).

159. For most of the 2002–2012 period, the congressional delegation consisted of 6–7 Democratic representatives and 6–7 Republican representatives (the 2008 election brought eight Democratic representatives, for just one cycle). *See Members of the U.S. Congress*, CONGRESS.GOV, [https://www.congress.gov/members?q={%22member-state%22:%22North+Carolina%22}](https://www.congress.gov/members?q={%22member-state%22:%22North+Carolina%22). In the 2012 elections, after implementation of the new map, Republican candidates won 9 seats to 4 for Democrats; in 2014, the Republicans picked up an additional seat. *Id.*

Democratic,<sup>160</sup> leaching Democratic voters from the surrounding districts.<sup>161</sup> Predictably, litigation ensued.

Several different groups of plaintiffs contested the congressional map, in several different fora;<sup>162</sup> in the federal case styled as *Harris v. McCrory*,<sup>163</sup> the challengers alleged that Congressional Districts 1 and 12 were—once again—infirm under *Shaw*.<sup>164</sup> A three-judge trial court agreed.<sup>165</sup> The court found that race predominated in the drawing of Districts 1 and 12, and that this predominance was unjustified; the legislature had no good reason to believe that its predominant use of race was required to comply with the Voting Rights Act, or for any other compelling interest.<sup>166</sup>

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160. 48.6% of the electorate in District 1 had been African-American before redistricting; afterward, African-Americans constituted 52.7%. *Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017). And the district became about 4–8% more Democratic, depending on the particular race. *Compare District Statistics, Plan: Congress ZeroDeviation – District 1*, N.C. GEN. ASSEMBLY (2011), [https://www.ncleg.net/GIS/Download/District\\_Plans/DB\\_2011/Congress/Congress\\_ZeroDeviation/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf](https://www.ncleg.net/GIS/Download/District_Plans/DB_2011/Congress/Congress_ZeroDeviation/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf) (showing District 1 before redistricting), with *District Statistics, Plan: Plan CST1A Rucho Lewis Congress 3 – District 1*, N.C. GEN. ASSEMBLY (2011), [https://www.ncleg.net/GIS/Download/District\\_Plans/DB\\_2011/Congress/Rucho-Lewis\\_Congress\\_3/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf](https://www.ncleg.net/GIS/Download/District_Plans/DB_2011/Congress/Rucho-Lewis_Congress_3/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf) (District 1 after redistricting).

In District 12, 43.8% of the electorate had been African-American before redistricting; afterward, African-Americans constituted about 50.7%. *Harris*, 137 S. Ct. at 1466. And the district became about 6–9.5% more Democratic, depending on the particular race. *Compare District Statistics, Plan: Congress ZeroDeviation – District 12*, N.C. GEN. ASSEMBLY (2011), [https://www.ncleg.net/GIS/Download/District\\_Plans/DB\\_2011/Congress/Congress\\_ZeroDeviation/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-12.pdf](https://www.ncleg.net/GIS/Download/District_Plans/DB_2011/Congress/Congress_ZeroDeviation/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-12.pdf) (showing District 12 before redistricting), with *District Statistics, Plan: Plan CST1A Rucho Lewis Congress 3 – District 12*, N.C. GEN. ASSEMBLY (2011), [https://www.ncleg.net/GIS/Download/District\\_Plans/DB\\_2011/Congress/Rucho-Lewis\\_Congress\\_3/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-12.pdf](https://www.ncleg.net/GIS/Download/District_Plans/DB_2011/Congress/Rucho-Lewis_Congress_3/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-12.pdf) (District 12 after redistricting).

161. This was not North Carolina’s first district plan in which overpacked minority voters also furthered partisan goals. A century before, Democrats drew the “Black Second” congressional district to pack Republican supporters and further Democratic victories in the remainder of the state. See Tokaji, *supra* note 105, at 132–33.

162. See, e.g., *Dickson v. Rucho*, 781 S.E.2d 404, 410 (N.C. 2015), *vacated and remanded*, 137 S. Ct. 2186 (2017).

163. 159 F. Supp. 3d 600 (M.D.N.C. 2016).

164. Complaint at 2, *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (No. 1:13cv00949), 2013 WL 5797301.

165. *Harris*, 159 F. Supp. 3d at 604 (three-judge court). By federal statute, a three-judge court, generally composed of two federal trial judges and a judge from the court of appeals, hears constitutional challenges to congressional redistricting brought in federal court. See 28 U.S.C. § 2284 (2012).

166. See *Harris*, 159 F. Supp. 3d at 610–11.

The Supreme Court affirmed.<sup>167</sup> With respect to District 1, it determined that the evidence supported a finding that when North Carolina sought 100,000 additional people to put in the district to comply with constitutional equal population requirements, the state chose those individuals predominantly because of their race.<sup>168</sup> The state had established a clear demographic target: District 1 was to be a “majority black district.”<sup>169</sup> But the simple existence of a target, on its own, does not establish predominance.<sup>170</sup> Instead, the Court noted that the state’s redistricting consultant specifically changed the boundaries of the district, taking in African-American populations but not others, and “*deviat[ing] from the districting practices he otherwise would have followed,*” to ensure he hit the target.<sup>171</sup>

Moreover, the predominant use of race in driving District 1’s boundaries was not adequately justified. The state claimed that it had a good-faith belief that it had to draw District 1 as a majority-minority district in order to avoid liability under the Voting Rights Act.<sup>172</sup> But the Court disagreed. African-Americans had for years comprised 46–48% of the district’s electorate, and assisted by a minimal Anglo crossover vote, had reliably and consistently elected their candidates

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167. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). The Court first disposed of a procedural matter: the *Dickson v. Rucho* litigation wending through state court had rejected those plaintiffs’ *Shaw* claims, and the Court had to determine the impact of that decision on its review of the federal litigation. *Id.* at 1467. Essentially, the Court found no reason to spend much energy on the impact of the *Dickson* case. Because the plaintiffs in the two cases were distinct, there was no reason to apply any form of claim preclusion from the result in one case to the other. *Id.* at 1467–68. The Court also found no concern in the potential for inconsistent conclusions coming out of the state and federal courts. *Id.* at 1468. The state court rejected its challengers’ claims, while the federal court accepted the claims of different challengers; only one suit yielded an injunction with consequences for the state, and so there was no concern about mutually incompatible court orders.

The Court’s decision on this question reflects an important understanding about the nature of litigation, too often misconstrued in the popular imagination. Judicial decisions—indeed, even factual findings by a court of law—do not actually purport to reflect “fact” in the abstract. Adversarial litigation is a mechanism for dispute resolution, not a means to discern absolute truth. Rather, judicial decisions reflect an assessment of whether a particular litigant has offered particular evidence sufficient to meet a particular burden of proof in the minds of particular finders of fact. A successful challenge means only that sufficient evidence was lawfully mustered to surpass the necessary burden, without adequate rebuttal; an unsuccessful challenge means only that sufficient evidence was not lawfully mustered or was successfully contested. It is in no way inconsistent for a claim to fail in one tribunal and for a similar claim, put forth by different litigants with different evidence and a different narrative stitching the pieces into a coherent whole, to succeed in another.

168. *Id.* at 1468–69.

169. *Id.* at 1468.

170. *See supra* at 568–69.

171. *Harris*, 137 S. Ct. at 1469 (emphasis added).

172. *Id.*

of choice, by substantial margins.<sup>173</sup> Under these circumstances, the Court found that the legislature had no good reason to believe that the Voting Rights Act would have forced the legislature to pack the district with more African-American voters.<sup>174</sup> The state halfheartedly claimed that packing was necessary because its introduction of 100,000 new voters *might* have impaired the African-American community's opportunity to elect candidates of choice.<sup>175</sup> But to satisfy *Shaw*-level scrutiny, the state had the responsibility to establish a strong basis in *evidence* that the new Anglo voters might reasonably have jeopardized the African-American community's electoral success (and hence required Voting Rights Act relief), rather than simply assuming the electoral consequences.<sup>176</sup> This they did not do.

More meaningful still, the Court firmly rejected North Carolina's misreading of *Bartlett v. Strickland*. As explained above, *Strickland* set a bright-line introductory threshold: plaintiffs may not establish liability under section 2 of the Voting Rights Act if the minority community is smaller than 50% of a district-sized electorate.<sup>177</sup> This is a liability limitation only, adopted in the name of administrability. But *Strickland* sensibly imposed no similar condition on remedy: given a community able to establish Section 2 liability, a jurisdiction must ensure the community only a reliable opportunity to elect candidates of choice.<sup>178</sup> Sometimes that opportunity will entail a district with a supermajority of minority voters, sometimes a bare majority, sometimes less; in every instance, the evaluation is rigorously functional and dependent on local electoral conditions. The functional approach demands that legislatures attend to facts on the ground, rather than mere stereotype or demographic determinism.<sup>179</sup> And in so doing, it avoids an interpretation of the Voting Rights Act that would otherwise raise constitutional concern.

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173. *Id.* at 1470.

174. *Id.* Notably, the Court did not assert or imply that North Carolina was free of any obligation under the Voting Rights Act to draw any sort of effective opportunity district in the region. *See infra* at 602–03. The Court merely found, instead, no basis for believing that the Voting Rights Act required further packing the African-American electorate, above pre-existing levels.

175. *Harris*, 137 S. Ct. at 1470–71.

176. *Id.* at 1471.

177. *See supra* at 581–84.

178. *See supra* at 583–84.

179. *See Levitt, supra note 49, at 587–89.*

The North Carolina legislature—sincerely<sup>180</sup> or strategically<sup>181</sup> or both—had interpreted *Strickland* to mean that any district drawn to satisfy a Voting Rights Act responsibility *also* had to be majority-minority.<sup>182</sup> That is, the legislature had read *Strickland* to impose an automatic 50% deterministic demographic threshold for any district constructed in the name of the Voting Rights Act.<sup>183</sup> The Court flatly rejected that rule, as “at war with our § 2 jurisprudence—*Strickland* included.”<sup>184</sup> And absent that legal misunderstanding, the state’s predominant use of race in drawing District 1 was unsupported.<sup>185</sup>

District 12 fared little better. While the legality of District 1 turned primarily on the justification for an excessive use of race, the state did not defend any race-based reason for District 12. Instead, the legality of District 12 turned on whether race was in fact the predominant factor driving the district’s shape.<sup>186</sup> Plaintiffs asserted that voters’ race was the overriding impetus; the state claimed that partisan politics alone explained its choices.<sup>187</sup> The trial court, relying heavily on determinations of witness credibility, found race predominant.<sup>188</sup> And the Court, while noting that a different tribunal

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180. In his dissent in *Strickland*, Justice Souter suggested that as a matter of logic, “[t]he [*Strickland*] plurality has thus boiled § 2 down to one option: the best way to avoid suit under § 2, and the only way to comply with § 2, is by drawing district lines in a way that packs minority voters into majority-minority districts, probably eradicating crossover districts in the process.” 556 U.S. at 43 (Souter, J., dissenting). In the next sentence, Justice Souter noted that the plurality disavowed this particular implication, *id.*, but some may have taken his hyperbolic assessment as a statement of the governing law.

181. Given African-American voting patterns in North Carolina, increasing the percentage of African-American voters in District 1 also served to increase the Democratic propensity of District 1, and to decrease Democratic propensity (and increase Republican propensity) in surrounding districts.

182. *Harris*, 137 S. Ct. at 1472.

183. *Id.*

184. *Id.*; see also Nicholas Stephanopoulos, *Further Thoughts on Cooper*, ELECTION LAW BLOG (May 22, 2017, 1:28PM), <http://electionlawblog.org/?p=92717>; Rick Pildes, *Analysis of the Supreme Court’s North Carolina Racial Redistricting Case*, ELECTION LAW BLOG (May 22, 2017, 10:17 AM), <http://electionlawblog.org/?p=92694>.

185. *Harris*, 137 S. Ct. at 1472.

186. *Id.* at 1472–73.

187. *Id.* at 1473.

188. *Id.* at 1474. The pre-litigation public justifications for the shape of District 12 mostly focused on purported compliance with the Voting Rights Act, and further distending the boundaries of the district in order to ensure a predetermined racial composition. See *Harris v. McCrory*, 159 F. Supp. 3d 600, 608, 616–17 (M.D.N.C. 2016) (three-judge court). The trial court noted that the notion that District 12 was drawn for purely partisan reasons seemed mostly to reflect strategic litigation choices once a *Shaw* claim had been asserted, and the court found that an exclusive reliance on partisanship did not credibly represent the motives of those actually drawing the lines at the time. See *id.* at 619–20.

with a different view of the witnesses' credibility might have been justified in coming to a different conclusion, found insufficient reason to overturn the trial court's decision for clear error.<sup>189</sup>

Along the way, as with its discussion of the justification for District 1, the Court clarified or confirmed other pieces of the doctrine. Most significant of these was its treatment of the ambiguity identified above in *Cromartie II*'s summary presentation of its holding.<sup>190</sup> The Court essentially opted to harmonize *Cromartie II* with its general evidentiary approach in the equal protection sphere. An alternative map showing that a redistricting body chose a particularly racialized way to achieve partisan political goals may be a crucial piece of evidence in *Shaw* cases, particularly in the face of substantial facts suggesting partisan motive and little suggesting racial predominance.<sup>191</sup> But with ample other evidence of racial predominance, an alternative map is not an absolute prerequisite to succeeding on a *Shaw* claim.<sup>192</sup>

Justice Thomas joined the opinion of the Court, and also wrote his own brief concurrence.<sup>193</sup> That separate opinion revolves around Justice Thomas's stark approach to colorblindness: in his view, any intent to fashion a majority-black district, no matter how driving or trivial that race-consciousness may be, not only prompts but fails strict scrutiny.<sup>194</sup> In Justice Thomas's view, Section 2 of the Voting Rights Act has no application to redistricting at all, and thereby cannot serve to justify any race-conscious redistricting.<sup>195</sup> A majority of the Court

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189. *Harris*, 137 S. Ct. at 1474, 1478.

190. *See supra* at 587–88. There were other important confirmations as well. For example, the Court confirmed that the intentional and predominant deployment of race, subordinating other concerns, is the trigger for constitutional concern even if in the service of a political or other goal. *Id.* at 1464 n.1, 1473 n.7; *cf. supra* at 563–64, 569 (reviewing the expression of this idea in the doctrine before *Harris* was issued). It is perhaps unsurprising that Justice Kagan, the author of the *Harris* majority opinion, should be particularly attuned to proper interpretation of the motives of public actors; as a law professor, she published one of the leading pieces of scholarship on the subject. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

191. *Harris*, 137 S. Ct. at 1479–81.

192. *Id.*

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

194. *Id.* at 1485–86. To return to the automotive metaphor discussed above, Justice Thomas would preclude even a fleeting glance at the speedometer to avoid speeding. *See supra* at 569.

195. *Harris*, 137 S. Ct. at 1485 (Thomas, J., concurring). Whatever the merits of this view as a matter of initial statutory interpretation, it is at best an exceedingly odd approach to stare decisis in the statutory realm. When Congress believes that the Supreme Court has incorrectly interpreted a



has firmly rejected this view of the relevant interplay between the constitution and the Voting Rights Act in the redistricting arena.

Justice Alito, joined by Chief Justice Roberts and Justice Kennedy, concurred in the judgment in part and dissented in part.<sup>196</sup> Justice Alito agreed with the Court's disposition of District 1, but disagreed with respect to District 12.<sup>197</sup> His primary complaint revolved around the alternative reading of *Cromartie II*: when courts are asked to distinguish between political or racial factors in adjudicating predominance under *Shaw*, Justice Alito would have read *Cromartie II* to require, for *any* successful *Shaw* challenge, an alternative map demonstrating that it is possible to produce similar political effects with less prominent racial impacts.<sup>198</sup> He thought the absence of such a map telling: if such a map cannot be produced, it amounts to a confession of the importance of partisan goals in rendering the contested map, and an implied refutation of the predominance of racial considerations.<sup>199</sup> And even if it led to rejection of a few cases in which race really did predominate, he thought the evidentiary prerequisite warranted in this arena, given the ostensibly substantial imposition represented by false *Shaw* positives.<sup>200</sup>

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federal statute, it has the power to correct that misinterpretation by revisiting the statute itself. Indeed, Congress has availed itself of this power in many circumstances, including with respect to the Voting Rights Act. See Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006), amended by Pub. L. No. 110-258, 122 Stat. 2428 (2008); *id.* at §§ 2(b)(6), 5 (noting that the effectiveness of the Voting Rights Act was “significantly weakened” by two Supreme Court decisions “which have misconstrued Congress’ original intent in enacting” the Voting Rights Act, and amending the Voting Rights Act to restore the original design). Section 2 has long been interpreted to apply to redistricting matters, and while Congress has amended the statute on several occasions in other respects, it has neither criticized nor “corrected” the courts’ application of the statute to redistricting. This absence of Congressional response suggests that it is Justice Thomas who has misconstrued the reach of the statute. See Justin Levitt, LULAC v. Perry: *The Frumious Gerry-Mander, Rampant*, in ELECTION LAW STORIES 233, 262 n.146 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

196. *Harris*, 137 S. Ct. at 1486 (Alito, J., concurring in the judgment in part and dissenting in part).

197. *See id.* at 1487 & n.1.

198. *See id.* at 1487.

199. *See id.* at 1491.

200. *See id.* at 1490.

## IV. THE SIGNIFICANCE

Though *Harris* wrapped up a few lingering loose ends, it otherwise broke little new doctrinal ground. The decision confirmed that *Strickland*'s bright-line rule—requiring a minority community sufficiently sizable to reach fifty percent of a district's electorate before bringing a Section 2 “results” claim—is a case-management tool for statutory liability only, and neither a requirement for drawing minority opportunity districts nor a demographic safe harbor justifying inattention to local electoral patterns.<sup>201</sup> And it clarified that *Cromartie II* drew attention to the power of an evidentiary tool in certain circumstances, without establishing an absolute litigation prerequisite.<sup>202</sup> Both points represent a bit of preference for textured nuance over artificial clarity: they ask courts to do hard work with fewer shortcuts. And if they amount to a bit of pushback against the *Strickland* approach, introducing a bit less predictability in any given case, they also reorient the *Shaw* doctrine around the multifaceted nuance it purports to prize.

But perhaps because of that nuance, *Harris* drops few abiding doctrinal bombshells.<sup>203</sup> Most of the discussion, in both majority and dissent, revolves around recounting the particular evidence offered in the district court about who said what happened when and why, and how much deference to offer that court's determinations.<sup>204</sup> When assessing the legal constraints on race and redistricting, two recent precursor redistricting cases—one from Alabama and the other from Virginia—seem significantly more meaningful.<sup>205</sup> Pending cases

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201. See *supra* at 583–84, 592–93.

202. See *supra* at 588.

203. Some astute commentators believe that *Harris* effectively declared fatally unconstitutional any attempt to create a majority-minority district. See, e.g., Charles & Fuentes-Rohwer, *supra* note 63, at 1588. If I agreed with that assessment, that would be a bombshell indeed. But I believe that the *Harris* Court found fault with the way that the state sought to achieve the desired minority composition of the district in question, to the subordination of all other considerations, and not with the simple fact of a target itself. See *supra* at 569, 591–92.

204. See *Harris*, 137 S. Ct. at 1474–81; *id.* at 1491–1504 (Alito, J., concurring in the judgment in part and dissenting in part).

205. *Alabama Legislative Black Caucus v. Alabama* confirmed both that *Shaw* predominance is not determined by the simple priority order of redistricting criteria, and that the Voting Rights Act is not satisfied by demographics alone. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270, 1272–74 (2015); see also Levitt, *supra* note 49, at 584–89. And *Bethune-Hill v. Va. State Bd. of Elections* confirmed both that *Shaw* predominance is a process harm, and the degree of vigilance necessary to ensure that purported compliance with the Voting Rights Act rises to meet the obligations of strict scrutiny. See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788,

evaluating Texas's toxic redistricting practice will be more meaningful still.<sup>206</sup>

Perhaps the deeper meaning of *Harris*, then, is not as instruction manual but as trail marker. And in this vein, *Harris*'s place in the voting rights corpus suggests several potential paths forward. One reading focuses on a tactical reversal of fortune. North Carolina's District 12 was drawn in the early 90s to give African-American voters an additional meaningful opportunity to elect a candidate of their choice to the state's congressional delegation.<sup>207</sup> Given North Carolina's history, including but not limited to its attention to voting rights, civil rights groups vigorously defended the district against the striking and novel claim pressed in *Shaw*.<sup>208</sup> When *Shaw* was handed down, civil rights groups cried foul.<sup>209</sup> Many considered the premise of *Shaw* to be a slap in the face,<sup>210</sup> and remained deeply opposed to the doctrine as it was used through the 1990s to dismantle districts seen as protecting minority voters.<sup>211</sup>

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798–99, 801–02 (2017). Both of these decisions gave far more substantial shape to the assessment of a *Shaw* claim, and its interactions with other constitutional and statutory requirements, than does *Harris*.

206. The 2011 Texas legislature intentionally discriminated on the basis of race in drawing congressional and state House districts. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 884–86, 949–50, 955 (W.D. Tex. 2017) (three-judge court) (congressional plan); *Perez v. Abbott*, 250 F. Supp. 3d 123, 145–46, 148–49, 152–54, 157, 163–64, 169–70, 172, 175–76, 179–80 (W.D. Tex. 2017) (three-judge court) (State House plan). After an interim compromise plan was installed for the 2012 elections, the 2013 Texas legislature enacted maps substantially along the lines of the 2012 compromise. *See Order, Perez v. Perry*, No. 5:11cv00360, 2012 WL 13124278 (W.D. Tex. Mar. 19, 2012) (three-judge court) (congressional plan); *Opinion, Perez v. Perry*, No. 5:11cv00360, 2012 WL 13124275 (W.D. Tex. Mar. 19, 2012) (three-judge court) (State House plan); *Abbott v. Perez*, 138 S. Ct. 2305, 2317 (2018). The Supreme Court rejected most of the challenges to that 2013 enactment, based largely on the presumption that the 2013 legislature acted in good faith, *Perez*, 138 S. Ct. at 2313–14, 2324–25. But the findings of unconstitutional discriminatory intent with respect to the 2011 legislature remain, and remain the subject of continuing litigation, including a fight over the viability of court-ordered preclearance after *Shelby County*. *See, e.g.*, Plaintiffs' Joint Request for Relief Under Section 3(c) of the Voting Rights Act, *Perez v. Abbott*, No. 5:11cv00360 (W.D. Tex. Nov. 30, 2018); Texas Latino Redistricting Task Force, et al. and MALC Plaintiffs' Brief in Support of Relief Under Section 3(c) of the Voting Rights Act, *Perez v. Abbott*, No. 5:11cv00360 (W.D. Tex. Nov. 30, 2018).

207. *See Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 906 (1996).

208. *See, e.g.*, Brief of Amicus Curiae in Support of Appellees of the NAACP Legal Defense and Educ. Fund, Inc., *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993) (No. 92-357); Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law et al. in Support of Appellees, *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993) (No. 92-357).

209. *See, e.g.*, John King, Supreme Court Casts Legal Doubts Into Minority Empowerment Debate, AP, June 29, 1993.

210. *See, e.g.*, Charles & Fuentes-Rohwer, *supra* note 63, at 1560.

211. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 957 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 920–21 (1995); *Clark v. Putnam Cty.*, 293 F.3d 1261, 1278–79 (11th Cir. 2002). In

By the 2010s, however, a pattern began to emerge, in the apparent use of the Voting Rights Act as potential pretext for political advantage, ostensibly justifying the packing of minority constituents more heavily into a few districts and diminishing their influence elsewhere.<sup>212</sup> The real injury in such circumstances sounds in a sort of vote dilution, not *Shaw*. But vote dilution claims—whether based on discriminatory intent or “results”-based Section 2 predicates—are difficult to prove under the best of circumstances; in practice, current doctrine all but precludes such a claim premised on overpacking.<sup>213</sup> In several of the circumstances raised by the 2010 districting cycle, it may have appeared more straightforward to demonstrate the predominant but unjustified use of race. And so some minority groups tentatively began to allege *Shaw* claims on *behalf* of the minority community.<sup>214</sup>

*Harris* represents one of several successful *Shaw* claims in the 2010 cycle brought against redistricting plans thought to injure the electoral power of minority voters (though, of course, *Shaw* claims

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other cases, *Shaw* was deployed to attack such districts, but the challenges were unsuccessful. *See, e.g.,* Prejean v. Foster, 83 Fed. App’x 5, 8, 11 (5th Cir. 2003); Theriot v. Par. of Jefferson, 185 F.3d 477, 488 (5th Cir. 1999).

212. *See* Levitt, *supra* note 49, at 609–10.

213. Indeed, these claims may effectively be available only where there is proof of invidious intent. A Section 2 “results” claim is at best an uneasy fit for an assertion that minority voters have been overconcentrated. The voters *within* the overpacked district will not lack the opportunity to elect candidates of their choice, and only rarely will the minority community be sufficiently large to allow the voters *outside* of the overpacked district to meet the first *Gingles* precondition.

214. Some civil rights groups were earlier adopters than others. *Compare, e.g.,* Complaint at 81–86, 89–91, N.C. State Conference of the NAACP v. North Carolina, 2013 WL 3376658 (N.C. Super. Ct., Wake Cty., Nov. 4, 2011) (No. 11-CVS-16940), 2011 WL 5528909, <http://redistricting.ils.edu/files/NC%20NAACP%2020111104%20complaint.pdf> (alleging prominent *Shaw* claims), with ALBC Plaintiffs’ Reply Brief in Support of Second Motion for Partial Summary Judgment at 9, Ala. Legis. Black Caucus v. Alabama, No. 2:12-cv-00691 (M.D. Ala. Mar. 4, 2013), <http://redistricting.ils.edu/files/AL%20leg%2020130304%20reply.pdf> (expressly, and cautiously, specifying *Shaw* by name as the basis for a potential violation, for the first time in the case). By early 2014, the issue had been forced at the Supreme Court. *See* Jurisdictional Statement at i, 30, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (No. 13-895), 2014 WL 281685 (emphasizing the *Shaw* claim as one of two questions presented to the Supreme Court).

*Cooper v. Harris* was brought in federal court by Marc Elias, an attorney more generally known for representing Democratic party committees and Democratic party elected officials and candidates for elected office. *See* Complaint at 20, Harris v. McCrory, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (No. 1:13CV00949), 2013 WL 5797301. The allegations rooted in *Shaw*, however, closely mirrored the claims brought by the plaintiffs in an earlier state court case: *N.C. State Conference of the NAACP v. North Carolina, supra*.

require no showing of such injury).<sup>215</sup> And as a case concerning District 12, which was at the heart of *Shaw* itself, some see *Harris* as a mightily intriguing symbolic reclaiming of *Shaw* by minority advocates, as a tool to combat the dilution that may otherwise be more difficult to prove.<sup>216</sup> *Harris* may also represent the use of doctrine developed around race to address potential partisan gerrymanders, in the absence of a distinct viable cause of action for partisan gerrymandering itself.<sup>217</sup> Indeed, it may be that the courts are, as a practical matter, more likely to take a particularly hard look at *Shaw* challenges when a whiff of minority vote dilution or partisan mischief lingers in the contextual background, even without specific evidence marshaled to sustain either claim on its own.

Another reading of *Harris*'s place in the voting rights corpus recognizes that the case does not merely represent a means for minorities to weaponize *Shaw* against dilution. On this reading, *Harris* is instead (or in addition) a renewed warning against shoddy

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215. Or, at least, one of several challenges modestly successful in the Supreme Court. *Harris* itself affirmed a trial court's finding of a *Shaw* violation; its precursors this redistricting cycle generally flagged legal errors in trial court rejections of *Shaw* challenges, and remanded for further development. See, e.g., Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262–63 (2015); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 794–95 (2017).

216. See, e.g., Richard L. Hasen, *Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool*, ACS SUP. CT. REV. 2016-17, at 105, 106, 122–24; Dale E. Ho, *Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887, 1888–89 (2018). Indeed, Professor Hasen underscores that the notion that *Shaw* cases are primarily about the communicative harm of the excessive use of race is no longer worn on the sleeve of the majority opinions in the latest round of *Shaw* cases. See Hasen, *supra*, at 124.

The fact that *Harris* may amount to a repurposing of *Shaw* by minority advocates, when *Shaw* itself was seen as a blow to minority advocates, does not render *Harris* ironic. History is replete with examples of communities beset by instruments of perceived injustice striving to recapture and repurpose those tools. Those instruments are not merely jurisprudential; they may be cultural, economic, or social as well. For example, the idea is well-recognized in linguistic and artistic reappropriation of slurs or badges of oppression by marginalized communities. See, e.g., Todd Anten, Note, *Self-Disparaging Trademarks and Social Change: Factoring the Reappropriation of Slurs Into Section 2(a) of the Lanham Act*, 106 COLUM. L. REV. 388, 412–14 (2006); Robin Brontsema, *A Queer Revolution: Reconceptualizing the Debate over Linguistic Reclamation*, 17 COLO. RES. LINGUIST. 1, (2004); Erik N. Jensen, *The Pink Triangle and Political Consciousness: Gays, Lesbians, and the Memory of Nazi Persecution*, 11 J. HIST. SEXUALITY 319 (2002).

217. See, e.g., Brief of Amici Curiae Law Professors in Support of Appellees at 27–28, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311104; Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc., et al., in Support of Appellees at 34–35, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 3948432; Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 569 (2004).

homework and a nudge toward local nuance, both for those who seek to serve minority citizens and those who do not, in a sphere too often globally caricatured as simply black and white. *Harris* revealed *Cromartie II* to be not the harbinger of a full-bore judicial retreat from *Shaw*, nor a blanket statement of the impossibility of distinguishing race and politics forevermore, but “just” an assessment of particular claims brought by particular litigants on particular evidence. And in directing the evaluation of future cases, the *Harris* Court rejected bright-line absolutes in favor of a richer understanding of the fact-finding compelled by the doctrine: both the logic of the *Shaw* line, such as it is,<sup>218</sup> and the logic of the Voting Rights Act.<sup>219</sup> That it did

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218. This particular twist—the notion that the Court will force *Shaw* plaintiffs and defendants alike to focus on the factual details of local legislative process—may seem odd, given that several legal premises of *Shaw* itself were rooted in stylized assumptions rather than grounded local fact. See, e.g., J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 627–29, 639 (1995); cf. Michael J. Pitts, *What Has 25 Years of Racial Gerrymandering Doctrine Achieved?*, 9 U.C. IRVINE L. REV. 229, 244–247 (2018) (reviewing the extent to which the doctrinal assumptions have been borne out in the intervening years); Stephen Ansolabehere & Nathaniel Persily, *Testing Shaw v. Reno: Do Majority-Minority Districts Cause Expressive Harms?*, 90 N.Y.U. L. REV. 1041, 1045–47, 1058–62 (2015) (attempting to assess the assumptions of stereotype with direct survey data).

Still, the articulated legal concern in the *Shaw* line of cases is that redistricting bodies may constitutionally maintain a predominant focus on race only with sufficiently compelling justification. Adjudicating cases under that standard depends on factual determinations regarding the bases on which the redistricting body made its choices. And the Court’s development of the factual findings required by *Shaw* has relied on rigorous evidentiary investigation into a specific redistricting body’s particular intent, without global shortcuts.

219. As I have discussed at length elsewhere, the factual predicates for responsibility under the Voting Rights Act are relentlessly particularized. See Levitt, *supra* note 49, at 584–89. Indeed, the Court has so thoroughly insisted on localized fact-finding rather than stereotype in its Voting Rights Act jurisprudence that it may have undermined one of the premises of *Shaw* itself. Recall that District 12 was struck down in *Shaw II* in part because the predominance of race was unjustified by any attempt to comply with the Voting Rights Act that the Court was prepared to recognize as valid. See *supra* at 585–86; *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 915–16 (1996). And recall that the Court rejected a Voting Rights Act defense in part because the Court considered the African-American community embraced by District 12 to be insufficiently geographically compact. *Id.*

A decade later, in a redistricting case out of Texas, a Supreme Court opinion appeared to push back at the notion of strict geographic compactness as a prerequisite for Voting Rights Act liability, although it is also wholly unclear that the Court recognized the import of its language. In *LULAC v. Perry*—as in *Shaw II*—the Court rejected a state’s assertion that a particular agglomeration of minorities merited protection under the Voting Rights Act. League of United Latin Am. Citizens v. Perry (LULAC), 548 U.S. 399, 435 (2006). Unlike *Shaw II*, though, the Court seemed to venture beyond geographic shape, stressing that “it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 non-compact for § 2 purposes.” *Id.*

The “compactness” prerequisite for Section 2 “results” liability appeared to stem from the notion that communities must demonstrate shared *representational* interests, beyond shared

so with the vote of Justice Thomas, who made clear in his concurrence that he remains a sweeping opponent of the powerful reach of the Act, is an abiding curiosity. But the seed of an explanation for his joining the majority, and not merely concurring in the judgment, may be found in the notion that the majority's approach, grounded in local detail, firmly pushes back against stereotype, as both the Voting Rights Act and the Constitution do. And though the majority opinion strikes race-based legislative action on constitutional grounds, by doing so in this fashion, it seems more likely to support the Voting Rights Act against inevitable direct constitutional attack than to undermine it.

A third reading of *Harris*'s place in the voting rights corpus, with less to commend it, lamentably seems to have found fertile ground. This third reading points to *Harris* as the latest sign of nonsensical, incomprehensible, contradictory competing mandates with respect to race in the redistricting process.<sup>220</sup> It is the apparent approach of the North Carolina legislature, throwing up its hands in mock exasperation,<sup>221</sup> claiming that the only available safe legal option is to

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ethnicity and political preference, in order to merit Section 2 protection. See Levitt, *supra* note 195, at 279. The *LULAC* quote above suggests that *either* geographic proximity *or* similar needs and interests might satisfy that representational mandate. *Id.* And though it is admittedly the only such suggestion in *LULAC*, if that snippet is to be taken seriously, it at least opens the possibility that a dispersed minority population with distinct political preferences might have sufficiently distinct needs—if demonstrated, and not simply presumed—to justify Section 2 responsibility. It is not at all clear that such an approach would find favor with the current Court. But taken to its logical conclusion, it offers the intriguing possibility that if the North Carolina legislature had in 1991 developed a strong basis in evidence linking the distinct needs and interests of the population within District 12, the *LULAC* majority might by 2006 have recognized a factual predicate for Section 2 responsibility that the *Shaw II* majority dismissed as mere stereotype.

220. See, e.g., Hans von Spakovsky, *The Goldilocks Principle of Redistricting*, SCOTUSBLOG (May 23, 2017, 4:43 PM), <http://www.scotusblog.com/2017/05/symposium-goldilocks-principle-redistricting/>. To be clear, this approach did not start with *Harris*. Advocates—and a few commentators—have offered similar complaints, similarly overstated, for some time. See, e.g., Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellees at 22, *Ala. Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) (Nos. 13-895, 13-1138), 2014 WL 5359810 (“In the post-*Shelby County* era, states will continue to be placed in the impossible position of being required to comply with racial balancing statutes and the Equal Protection Clause simultaneously.”). Regrettably, some members of the Supreme Court appear recently to have picked up elements of this rhetoric, labeling the obligations of the Equal Protection Clause and the Voting Rights Act a “legal obstacle course.” *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018). As explained in this Article, those most likely to run into the “obstacles” are those who show little sincere interest in attempting to avoid them.

221. Specifically, the legislative committee responsible for drawing congressional maps to remedy the violation upheld in *Cooper v. Harris* stated that “[d]ata identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan.” N.C. Gen. Assembly Joint Select Comm. on Congr. Redistricting, *2016 Contingent Congressional Plan Committee Adopted Criteria* (2016), <https://www.ncleg.net/>

ignore race entirely. As the House co-chair of the North Carolina Elections Committee, one of the two legislative leaders controlling the redistricting process, put it: “I would reiterate the only way to make sure that race is not the predominant factor is to make sure it’s not a factor [at all] when the maps are being considered.”<sup>222</sup>

*Harris* rebuked North Carolina for an extreme approach: an excessive and unjustified focus on race in an arena which requires nuance. North Carolina’s response seems diametrically opposed, but no less extreme and unjustified. And no less problematic. Most drivers do not respond to a speeding ticket by promising to drive zero miles per hour, or to a citation for excessive weaving among lanes by swearing never again to turn the wheel. Or, for those who prefer sports analogies: when a batter called for a strike by swinging at too high a pitch vows to resolve the problem by swinging only at pitches in the dirt, or to stop swinging at pitches entirely, that batter has displayed a rather fundamental misunderstanding of the objective.

Federal law *requires* attention to race, under certain conditions designed to combat the legacy or prospect of unconstitutional discrimination.<sup>223</sup> When jurisdictions with a history of racial injustice also suffer from substantial underrepresentation of minority community preferences, they had best be attentive. Sizable and compact minority communities may well have a right to race-based attention, if voting is polarized such that a relatively cohesive minority electorate facing a relatively cohesive majority would regularly lose without such attention. Under these circumstances, willfully blinding

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documentsites/committees/JointSelectCommitteeonCongressionalRedistricting/2016%20Contingent%20Congressional%20Plan%20Committee%20Adopted%20Criteria%202%2016%2016.pdf; *Transcript of the Proceedings*, N.C. Gen. Assembly, Joint Comm. on Redistricting, at 25–47 (Feb. 16, 2016) (found in Complaint ex. B, *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Sept. 22, 2016), [http://redistricting.ils.edu/files/NC\\_Women%2020160922%20Complaint%20EX%20B.pdf](http://redistricting.ils.edu/files/NC_Women%2020160922%20Complaint%20EX%20B.pdf)).

222. *Transcript of the Proceedings*, N.C. Gen. Assembly, Joint Comm. on Redistricting, at 41 (Feb. 16, 2016) (found in Complaint ex. B, *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Sept. 22, 2016), [http://redistricting.ils.edu/files/NC\\_Women%2020160922%20Complaint%20EX%20B.pdf](http://redistricting.ils.edu/files/NC_Women%2020160922%20Complaint%20EX%20B.pdf)); *see also id.* at 37 (Rep. Stam) (“I like this criteria. It’s very principled, and it’s principles that I’ve heard, for example, the Senate Minority Leader state publicly many times. Let’s not—let’s not consider race anymore. We’re past that.”).

223. *See, e.g.*, Pildes & Niemi, *supra* note 42, at 486.



oneself to race is not a strategy designed to achieve legal compliance.<sup>224</sup>

Legislative leaders in North Carolina asserted after *Harris* that they face no responsibility under the Voting Rights Act, and could therefore ignore race entirely, because *Harris* ostensibly found that there was no racially polarized voting in North Carolina.<sup>225</sup> That reading so subverts the Court's opinion as to render it unrecognizable.

*Harris* addressed polarization in its discussion of District 1: specifically, in assessing the justification for racial predominance.<sup>226</sup> Given a finding that race predominated in redrawing District 1 so as to drive the African-American portion of the electorate from 48.6% to 52.7%, the question was whether North Carolina had "good reason" to think the *increase* was required by the Voting Rights Act.<sup>227</sup> The answer required, *inter alia*, assessing the *Gingles* preconditions for

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224. It is conceivable, of course, that legislative leaders assessing the legal environment around redistricting are seeking to achieve not legal compliance, but delay of litigation consequences. Government bodies charged with defending redistricting maps generally litigate with the resources of the jurisdiction rather than personal funds, and thereby spread the financial cost to all taxpaying constituents. Individual legislators, by contrast, enjoy the tangible and concentrated rewards of retaining power (and salary) based on the districts they have drawn, which may be engineered to include supporters who may not be as electorally outraged by legal misconduct as one might hope. And even in the event of an adverse court judgment, legislators often get the first crack at a remedy; said remedy may have its own legal problems, stalling compliance further. Beyond the desire to comply with the law for its own sake, most incumbents with the power to draw district lines currently face incentives aligned more thoroughly toward legal violation and delayed resolution than toward compliance in the first instance.

So *which* legal violations might delay resolution most thoroughly? The answer likely depends on local context. Few voting cases are easy for plaintiffs to prove: indeed, if the amount of time that a case occupies on a court's calendar is a rough proxy for the evidentiary complexity of the case itself, the Federal Judicial Center in 2005 deemed voting rights cases the sixth most time-consuming type of federal case out of 61 categories, behind only death penalty habeas cases, environmental cases, civil RICO cases, continuing criminal enterprise drug cases, and patent cases. See Patricia Lombard & Carol Krafka, *2003-2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States*, at 60–62 (Jan. 1, 2005), <https://www.fjc.gov/sites/default/files/2012/CaseWts0.pdf>. Almost all voting cases are cumbersome. And among these cumbersome options, the speed of the resolution of any particular claim, even as a matter of preliminary relief, will likely depend on local history, legal precedent on discovery and privilege, political demography and population clustering, and the clarity of local political preferences by race, among other factors. In some instances, it may be easier for plaintiffs to prove a "results"-based violation of the Voting Rights Act; in others, a *Shaw* violation; in others, an act of intentional vote dilution.

225. *Transcript of the Proceedings*, N.C. Gen. Assembly, Joint Comm. on Redistricting, at 31–32, 42–43 (Feb. 16, 2016) (found in Complaint exh. B, League of Women Voters of North Carolina v. Rucho, No. 1:16-cv-1164 (M.D.N.C. Sept. 22, 2016), [http://redistricting.ils.edu/files/NC\\_Women%2020160922%20Complaint%20EX%20B.pdf](http://redistricting.ils.edu/files/NC_Women%2020160922%20Complaint%20EX%20B.pdf)).

226. See *Cooper v. Harris*, 137 S. Ct. 1455, 1469–72 (2017).

227. *Id.* at 1469.

Voting Rights Act liability.<sup>228</sup> As for the first precondition, African-Americans *could* constitute a majority of the electorate in a reasonable district—witness redrawn District 1 itself.<sup>229</sup> The second precondition was met as well: as the Court noted, the African-American community in the area was politically cohesive.<sup>230</sup> But the third condition was the trouble: the minority community had reliable historic success in electing candidates of choice with 48.6% of the district and consistent crossover support.<sup>231</sup> There was no reason to think that majority voters—either the same voters who had been District 1 constituents or new voters from the area—would vote consistently as a bloc to thwart minority opportunity at existing minority concentrations.<sup>232</sup> Or, as the Court put it: “experience gave the State no reason to think that the VRA required it to *ramp up* District 1’s [black voting-age population].”<sup>233</sup>

That is, the *Harris* Court found that the legislature produced no basis for believing that racial polarization, in the area right around District 1, required an *increase* in District 1’s minority electorate. That conclusion does not support the weight that North Carolina’s legislature would have it bear. It does not establish an absence of racial polarization in North Carolina, in the District 1 region or anywhere else. It does not establish an absence of legally sufficient polarization in North Carolina, in the District 1 region or anywhere else. It does not establish that the minority voters would continue to enjoy electoral success at lower minority concentrations against relatively unified opposition. It establishes only that the legislature did not do its homework when redrawing the lines in 2011.

And now, the legislative leaders have responded by loudly declaring that they have refused to do their homework again. It is possible, of course, that the gambit will pay off. Refusing to acknowledge race will insulate a jurisdiction from *Shaw* claims, and likely other constitutional vote dilution claims dependent on intent. At

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228. *See supra* at 576–77.

229. *See Harris*, 137 S. Ct. at 1466.

230. *Id.* at 1470.

231. *Id.*

232. *Id.* at 1470–71.

233. *Id.* at 1470 (emphasis added); *see also id.* at 1471 n.5 (“And so the reports [proffered by the state] do not answer whether the legislature needed to *boost* District 1’s BVAP to avoid potential § 2 liability.”) (emphasis added).

the same time, in a jurisdiction with North Carolina's demographics and history, it substantially increases the risk of a Voting Rights Act violation. But that risk is not certainty: if the purportedly race-blind districts end up, by happenstance, allotting the equitable electoral power required by the Voting Rights Act, there will be no statutory violation either.<sup>234</sup> A batter swinging blindly may hit a pitch now and then.

Still, a strategy focused on merely lucking into legal compliance is neither particularly sustainable nor particularly ethical. Nor is it particularly necessary. The ostensible angst about the difficulty of complying with both the Voting Rights Act and the Constitution is a manufactured conundrum. *Harris* is not the latest opinion to demand the impossible; it is merely the latest opinion to demand a good-faith approach to answering the right questions, grounded in local facts and resistant to unfounded stereotype.

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234. Of course, in practice, the North Carolina leadership has substantially hedged its bets in constructing a new map on remand from *Harris*. Even taking the legislators at their word that no attention at all would be paid to race, the redistricters understood full well the demographic core of the districts they were tweaking and the overwhelming support of local African-Americans for Democratic candidates, and made no secret of their desire to maintain both the core of the district and its strong Democratic control so as to facilitate Republican control of the surrounds. *See, e.g., Transcript of the Proceedings*, N.C. Gen. Assembly, Joint Comm. on Redistricting, at 47–48, 50, 53–54 (Feb. 16, 2016) (found in Complaint exh. B, League of Women Voters of North Carolina v. Rucho, No. 1:16-cv-1164 (M.D.N.C. Sept. 22, 2016), [http://redistricting.lls.edu/files/NC\\_Women%2020160922%20Complaint%20EX%20B.pdf](http://redistricting.lls.edu/files/NC_Women%2020160922%20Complaint%20EX%20B.pdf)). And so it is perhaps not entirely coincidental that District 1, ostensibly drawn on remand with no attention to race, appears to have an electorate that is 44.5 percent African-American, and given the political proclivities of the area, quite likely to elect African-American candidates of choice. *See District Statistics, Plan: 2016 Contingent Congressional Plan Corrected – District 1*, N.C. GEN. ASSEMBLY (2016), [https://www3.ncleg.net/GIS/Download/District\\_Plans/DB\\_2016/Congress/2016\\_Contingent\\_Congressional\\_Plan\\_-\\_Corrected/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf](https://www3.ncleg.net/GIS/Download/District_Plans/DB_2016/Congress/2016_Contingent_Congressional_Plan_-_Corrected/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf). In other contexts, it is unlikely that a race-blind approach would so reliably back into Voting Rights Act compliance.



