

SOMETHING OLD, SOMETHING NEW, OR SOMETHING  
*REALLY* OLD? SECOND GENERATION RACIAL  
GERRYMANDERING LITIGATION AS INTENTIONAL RACIAL  
DISCRIMINATION CASES

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## INTRODUCTION

In four out of four opportunities during the current round of redistricting litigation, the Supreme Court sided with plaintiffs challenging redistricting plans adopted by Republican-controlled state legislatures as unconstitutional racial gerrymanders.<sup>1</sup> These challenges arose in response to the Republican post-2010 census redistricting “playbook” in numerous states, a strategy “of packing as many black voters into black districts so that the surrounding districts would be [more] white,” and thus, more conservative.<sup>2</sup> In each case, legislatures “hid[] behind the public cover of [a] cartoon of the Voting Rights Act [(VRA)],” using it as an “excuse to overpack a district with cohesive minority voters, well beyond the level needed to actually comply with the Act’s mandates,” and thus “bleaching the perceived threat of minority voting power in neighboring areas.”<sup>3</sup> In each case, the plaintiffs successfully argued that the districts at issue were (or could be understood as) unconstitutional racial gerrymanders, whose contours were not compelled by the VRA.<sup>4</sup>

This is a somewhat unexpected state of affairs, in several respects. First, the fact that racial gerrymandering claims are now being brought primarily by liberal plaintiffs is a surprising development. Voting rights advocates were often harsh critics of the Supreme Court’s decisions in the 1990s, beginning with *Shaw v. Reno* (*Shaw I*), which established racial gerrymandering as a cause of action.<sup>5</sup> These cases, which I will refer to as the “first-generation” of

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1. See *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794-95 (2017); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016) (decided on standing grounds), *dismissing appeal from Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-63 (2015).

2. See Richard Wolf, *Court to Weigh Use of Race in Drawing Political Lines*, USA TODAY (Sept. 1, 2014, 2:49 PM), <https://www.usatoday.com/story/news/politics/2014/09/01/supreme-court-redistricting-race-alabama/14628029> [<https://perma.cc/M3K5-L5E9>] (quoting David Bositis).

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

4. *Cooper*, 137 S. Ct. at 1481-82; *Bethune-Hill*, 137 S. Ct. at 794-95; *Wittman*, 136 S. Ct. at 1734; *Ala. Legislative Black Caucus*, 135 S. Ct. at 1262-63.

5. 509 U.S. 630, 642 (1993). See generally Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996) (criticizing *Shaw I* for incorporating racial

racial gerrymandering cases, were generally brought by conservatives challenging districts that had been created for the purpose of enhancing minority representation.<sup>6</sup> But now, the charge of racial gerrymandering is being deployed more frequently by minority voting rights advocates.<sup>7</sup>

Second, the fact that these cases are being *won* before the Roberts Court—which liberals have frequently characterized as hostile to voting rights,<sup>8</sup> particularly in the wake of its decision invalidating a key provision of the VRA in *Shelby County v. Holder*<sup>9</sup>—is probably not something that most practitioners in this space would have predicted at the beginning of this redistricting cycle. But the plaintiffs in these cases are 4-for-4 thus far.<sup>10</sup>

Trying to understand these developments is complicated by the fact that they have unfolded in an era of “conjoined polarization,” that is, an alignment of political contestation along racial lines mapping onto partisan divisions.<sup>11</sup> That adds a layer of complexity in attempting to analyze what I will call, for the purposes of this Article, the “second-generation” of racial gerrymandering cases. Are these second-generation racial gerrymandering cases about race? Are they about party? Some new mixture of the two?

In these brief comments, I will describe and assess three different ways of understanding these second-generation racial gerrymandering cases.

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gerrymandering into traditional equal protection analysis).

6. See *Shaw I*, 509 U.S. at 633.

7. See, e.g., *Ala. Legislative Black Caucus*, 135 S. Ct. at 1262.

8. See, e.g., Adam Cohen, *The Supreme Court's Hostility to the Voting Rights Act*, N.Y. TIMES (May 12, 2009), <http://www.nytimes.com/2009/05/13/opinion/13wed4.html> [<https://perma.cc/QBE6-MV2M>]; Ian Millhiser, *The Double Standard Behind the Roberts Court's Hostility to Voting Rights*, THINKPROGRESS (Feb. 27, 2013, 10:20 PM), <https://thinkprogress.org/the-double-standard-behind-the-roberts-courts-hostility-to-voting-rights-390b965f30df/> [<https://perma.cc/8YVA-PFEE>].

9. 133 S. Ct. 2612, 2631 (2013).

10. See *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794-95 (2017); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016), *dismissing appeal from* *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court); *Ala. Legislative Black Caucus*, 135 S. Ct. at 1262-63.

11. See generally Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867 (2016) (evaluating the effects of conjoined polarization on redistricting and election administration litigation).

*Something Old: Excessive Race Consciousness.* Perhaps the easiest way to understand these cases is that they are simply what the plaintiffs and the Court have said they are: just another iteration of racial gerrymandering cases, premised on the notion that excessive race consciousness in redistricting violates the Constitution.<sup>12</sup> As I explain below, this approach understands these cases as fundamentally about *process*—in other words, how and to what extent officials may consider race when redistricting.

*Something New: Partisan Gerrymandering.* Another way of understanding these cases is that they represent something “new”—a novel way of getting at what is best understood as a *partisan* harm, but framed in the legally cognizable language of race. Obviously, partisan gerrymandering itself is not something “new”—it has existed perhaps since the founding.<sup>13</sup> But, from this perspective, race and partisanship have aligned in a new way in contemporary politics, and the second-generation racial gerrymandering cases *really* represent a new way to attack a fundamentally partisan, rather than racial, harm.

*Something Really Old: Intentional Racial Discrimination.* A third way of understanding these cases is that they are fundamentally about state action arising from racially (rather than partisan-based) discriminatory intent. In this sense, the harm that the second-generation racial gerrymandering cases seek to address is something “really” old: the precise injury that the Fourteenth and Fifteenth Amendments were adopted to prohibit, namely, intentional state-sponsored racial discrimination.<sup>14</sup>

Each of these ways of understanding the second-generation racial gerrymandering cases implies a prescription. If these cases are just more of the same, then they can and should be litigated in basically the same way that the “old” racial gerrymandering cases were.<sup>15</sup> If instead these are cases “really” about partisanship, then perhaps they should be litigated as such, under “new” legal theories

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12. See, e.g., *Cooper*, 137 S. Ct. at 1463.

13. See Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <https://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/> [<https://perma.cc/7FAN-TZYX>].

14. See U.S. CONST. amends. XIV, XV.

15. See *infra* Part I.

premised on a requirement of partisan fairness.<sup>16</sup> From this perspective, doing so might be simpler and perhaps more honest than using race as a proxy for party. Or, if these cases are fundamentally about intentional racial discrimination, then perhaps we need to litigate them as such, using “really old” legal claims based simply on discriminatory intent.<sup>17</sup>

None of these frames provides a complete answer. But in my view, as a purely descriptive matter, contemporary redistricting battles, and voting rights disputes in general, cannot be understood fully in purely nonracial partisan terms. It is far too simple to say that these cases are about party rather than race, which ahistorically suggests that politics in America can be boiled down to an essential deracinated form. Race has always been, and remains, a highly salient factor in voting rights disputes, which cannot be fully appreciated through a purely partisan lens.<sup>18</sup>

That observation counsels against not only a primarily partisan-based understanding of the recent racial gerrymandering cases, but also a framework that views these cases as simply newer versions of *Shaw I*. Rather than acknowledging the continuing role that race plays in American politics, the first-generation racial gerrymandering cases treated the mere consideration of race as a constitutional evil in itself.<sup>19</sup> The second-generation racial gerrymandering cases, however, are different. Although they employ the color-blind language of *Shaw I*, they arise from disputes about alleged “packing” of Black voters into as few districts as possible, and a recognition that such packing diminishes the political influence of Black voters in neighboring majority-white districts, and thus, across a state as a whole.<sup>20</sup> That is, while the Court premised *Shaw I* on the notion that racial considerations, when predominant, are suspect, and sought to turn the redistricting process away from race,<sup>21</sup> the second-generation racial gerrymandering cases arguably do something different. They express a demand for more finely tuned

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16. See *infra* Part II.

17. See *infra* Part III.

18. See Karlan & Levinson, *supra* note 5, at 1220-21.

19. See *Shaw I*, 509 U.S. 630, 642-43 (1993).

20. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015).

21. See *Shaw I*, 509 U.S. at 642-43.

calibration of racial considerations, rather than a suspicion of race as an appropriate redistricting criterion altogether.<sup>22</sup>

That is because these cases—or at least, the plaintiffs’ animating concerns in these cases—are fundamentally not about instantiating colorblindness as a procedural goal, but rather addressing the substantive goal of reversing the deleterious effects that post-2010 redistricting plans have had on the political influence of communities of color in many places. Instead of efforts to stamp out racial considerations, these cases are better understood as attempts to remediate purposeful efforts to cabin the influence of minority voters. In other words, these cases seek to root out intentional efforts to discriminate on the basis of race.<sup>23</sup>

What does this mean as a prescriptive matter? Here I am more equivocal. The second-generation racial gerrymandering cases have been extremely successful, and I am not suggesting abandoning them.<sup>24</sup> Meanwhile, with respect to partisan-centric strategies, I agree that civil rights advocates should explore and develop non-race-based legal theories. Nonetheless, I suggest that we consider bringing intentional racial discrimination claims more frequently, or at least recasting the racial predominance inquiry in intent-based terms.<sup>25</sup> Below, I will attempt to sketch out some preliminary thoughts as to what such claims might look like in practice.<sup>26</sup> Bringing such claims may be difficult, because they require additional evidence of intent that is not typically necessary for *Shaw I* claims. But reframing these cases around intentional discrimination rather than racial predominance would be more broadly consistent with how the civil rights community understands these particular redistricting battles, and racial justice disputes more generally.<sup>27</sup>

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22. See *infra* Part III.

23. See *infra* Part III.

24. See *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794-95 (2017); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016), *dismissing appeal from* *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court); *Ala. Legislative Black Caucus*, 135 S. Ct. at 1262-63.

25. See *infra* Part III.

26. See *infra* Part III.

27. See, e.g., N.C. STATE CONFERENCE OF THE NAACP, RESOLUTION OF THE NC NAACP TO THE NATIONAL NAACP BOARD TO ASSIST IN DEVELOPING AN INTERNATIONAL ECONOMIC BOYCOTT OF NORTH CAROLINA UNTIL IT REPEALS CERTAIN LAWS 1 (2017), <https://www.naacp.org/>

## I. SOMETHING OLD: EXCESSIVE RACE CONSCIOUSNESS?

The first way of understanding the recent wave of racial gerrymandering cases is to conceptualize them as just another set of racial gerrymandering cases akin to *Shaw I*. The story goes something like this: whereas conservatives developed the racial gerrymandering cause of action to challenge redistricting plans featuring majority-minority districts as relying excessively on race,<sup>28</sup> now it is conservatives who are drawing majority-minority districts and, in so doing, are improperly employing racial considerations.<sup>29</sup> And they must be held to the same standards proscribing excessive racial considerations in the redistricting process. The identity of the perpetrators has changed but the basic harm is essentially the same.

There is both a descriptive claim here (that the new racial gerrymandering cases are, in essence, materially the same as the first-generation cases, in that they both identify excessive consideration of race as the underlying evil meriting constitutional scrutiny) and a prescriptive one (that turnout is fair play, and civil rights advocates should be happy to use the racial gerrymandering cause of action as a tool to advance minority representation).

Let us take the descriptive claim first. Fundamentally, the first-generation racial gerrymandering cases are about *process*, as distinct from *intent* or *results*.<sup>30</sup> *Shaw I* held that a constitutional injury occurs when racial considerations predominate the redistricting process, regardless of whether the state engaged in such race-conscious line-drawing for the purpose of helping or harming members of a particular racial group.<sup>31</sup> That is, it does not matter whether the state sought to limit the political power of members of a racial group, or to provide a historically disenfranchised group

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wp-content/uploads/2017/02/Resolution-of-National-Board-as-Proposed-by-NC-State-Conference.pdf [https://perma.cc/EFM7-N7GX].

28. See, e.g., *Shaw I*, 509 U.S. 630, 633 (1993).

29. See, e.g., *Ala. Legislative Black Caucus*, 135 S. Ct. 1257.

30. See *Shaw I*, 509 U.S. at 641-42.

31. See *id.* at 657.

with greater electoral opportunity.<sup>32</sup> Regardless of intent, excessive consideration of race is constitutionally suspect.<sup>33</sup>

Moreover, the actual *results*—at least in terms of the distribution of political power—are similarly irrelevant to the analysis. The white plaintiffs in *Shaw I* did not assert that their voting power was impermissibly diminished in some respect; nor could they, because white voters in North Carolina already had more than their share of proportional representation,<sup>34</sup> which functions as a sort of benchmark in vote dilution cases.<sup>35</sup>

Thus, the *Shaw* cases were not discriminatory animus cases based on improper motive; nor were they vote dilution cases based on discriminatory effect.<sup>36</sup> They were a new kind of race case (at least in the redistricting context), in which the plaintiffs' claim was based on an improper decision-making *process*.<sup>37</sup> To the extent that the effects of a tainted process matter, it is not because the process harms one particular group, but because of the effect that the process has on the body politic as a whole.<sup>38</sup>

As Richard Pildes famously observed, the *Shaw* cases seemed to be based on a conception of *expressive* injury.<sup>39</sup> In other words, excessive race consciousness in redistricting is constitutionally problematic because it sends a particular *message*:

It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or

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32. *See id.* at 653.

33. *See, e.g., id.* at 642, 651 (“[R]acial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.”).

34. *See id.* at 650 (rejecting Justice David Souter’s dissenting view “that racial gerrymandering is harmless unless it dilutes a racial group’s voting strength,” and holding that “reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole”).

35. *See, e.g., United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 167-68 (1977) (White, J.).

36. *See Shaw I*, 509 U.S. at 637.

37. *See id.* at 641-42.

38. *See id.* at 647-48, 657.

39. *See* 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, 485 (1993).

the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls ...[,] and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.<sup>40</sup>

The problem with racial gerrymandering, therefore, was not that the government *sought* to harm a racial group (intent), or that it actually *diminished* a group's political power (effect); it was that the government communicated a message of racial difference that, in the Court's view, is antithetical to the colorblindness demanded by the Equal Protection Clause.<sup>41</sup>

At first glance, the second-generation *Shaw* cases seem to follow a similar path. One rule that appears to have emerged from these cases is that the use of hard numerical targets for the minority voting-age population (VAP) of a particular district amounts to using race as a predominant factor in redistricting, and thus triggers strict scrutiny.<sup>42</sup> In *Cooper v. Harris*, which considered the constitutionality of the same congressional district at issue in *Shaw*, the Court held, as it did in *Shaw I*, that strict scrutiny was triggered “regardless of [the] ultimate objective in taking th[e] step” of placing a particular number of voters in a district on the basis of their race.<sup>43</sup> And, as in *Shaw I*, the Court's decision did not turn on the *effect* of the redistricting plan in terms of the distribution of political power among voters of different racial groups. The consideration of race as a predominant factor formed the basis of the plaintiffs' legal claim, regardless of the *reason* that the legislature considered race, or the *effect* that its race-based decision-making may have had on the voting power of a particular racial group.

But I question whether, as a descriptive matter, it makes sense to view *Cooper*, and other second-generation racial gerrymandering

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40. *Shaw I*, 509 U.S. at 647, 650.

41. *See id.*

42. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017) (finding strict scrutiny was triggered because “the State's mapmakers, in considering District 1, purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population”); *see also Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799, 801 (2017).

43. *See Cooper*, 137 S. Ct. at 1473 n.7.

cases, as just another iteration of *Shaw I*. Although the Court's decisions in these cases pay some lip service to the idea of expressive injury,<sup>44</sup> they do not employ the same kind of charged rhetoric present in *Shaw's* description of race-conscious redistricting as "bear[ing] an uncomfortable resemblance to political apartheid."<sup>45</sup>

The absence of such framing probably stems in part from the fact that somewhat different concerns animated the plaintiffs in this more recent wave of cases.<sup>46</sup> Indeed, trying to understand these cases within the *Shaw* excessive race-consciousness framework obscures what it was that the plaintiffs in these cases were concerned about—not the excessive *consideration* of race, but the use of race to *diminish* minority political power outside of majority-minority districts.<sup>47</sup>

The oral argument in the first of these cases, arising from Alabama, highlighted the fact that a concern about excessive race consciousness per se does not really explain the plaintiffs' motives in these cases. Counsel for the plaintiffs in the Alabama case began argument as follows:

MR. PILDES: Mr. Chief Justice, and may it please the Court:

Alabama employed rigid *racial quotas*, rigid racial targets to design all its black majority districts based on mere racial statistics alone, and then used only racial demographic data to meet those targets with astonishing precision.<sup>48</sup>

An illuminating exchange occurred a few minutes later with Justice Samuel Alito:

JUSTICE ALITO: Well, you began by -- by criticizing Alabama for supposedly imposing quotas. But listening to your argument,

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44. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (identifying the injuries of racial gerrymandering as "includ[ing] being 'personally ... subjected to [a] racial classification,' as well as being represented by a legislator who believes his 'primary obligation is to represent only the members' of a particular racial group." (alterations in original) (first quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996); and then quoting *Shaw I*, 509 U.S. at 648)).

45. *Shaw I*, 509 U.S. at 647.

46. Compare *id.* at 637, with *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

47. See *Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

48. Transcript of Oral Argument at 4, *Ala. Legislative Black Caucus*, 135 S. Ct. 1257 (No. 13-895) (emphasis added).

it sounds to me that you are just as interested in quotas. *You're just interested in lower quotas.*

MR. PILDES: Your Honor, right --

JUSTICE ALITO: So if you -- if they want to keep it at 70 percent, that's -- that may be illegitimate in your view. But if they take it down to the minimum that would be required in order to produce the desired result, that's a -- that's a -- a permissible quota. So why are you using this term "quota" at all?

MR. PILDES: We don't have to use the word "quota."

JUSTICE ALITO: Well, why did you use it?

MR. PILDES: I actually meant to use the word "racial targets." Judge Thompson used the word --

JUSTICE ALITO: You think there's a difference between the two?

MR. PILDES: Well, there's a lot of rhetorical and inflammatory power in the word "quota."<sup>49</sup>

What Justice Alito's question got at is the fact that an objection to race consciousness per se does not seem to be animating these plaintiffs.<sup>50</sup> Rather than seeking to force the State to abandon or reduce the consideration of race in the redistricting process as an end in itself (or as a means to achieving an expressive goal about colorblindness), the plaintiffs in these cases sought only to lower the minority VAP of these districts.<sup>51</sup>

This is in part because what is necessary to provide minority voters with a modicum of political power has changed. In previous decades, Black registration and turnout lagged well behind white participation rates, and given high levels of racial polarization, many districts had to be super-majority Black to provide Black voters with an opportunity to elect their preferred candidates in conformity with the VRA's requirements (65 percent was the rule of thumb).<sup>52</sup> Now, however, as gaps in Black and white participation rates have shrunk in some states, and as polarization levels have

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49. *Id.* at 11-12 (emphasis added).

50. *See id.*

51. *See, e.g., Ala. Legislative Black Caucus*, 135 S. Ct. at 1263.

52. *See* Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 414-15, 414 n.69 (2015) (citing *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977) (plurality opinion)). *See generally* Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL'Y 43 (1988).

changed, districts in some places can, in voting rights parlance, “perform” for Black voters at a lower minority VAP level than was necessary in the past.<sup>53</sup>

Nevertheless, after the 2010 census, many Republican-dominated state legislatures sought to hyperconcentrate Black voters in as few districts as possible, at levels higher than necessary to achieve VRA compliance, in a manner that reduced the influence of Black voters in surrounding majority-white districts.<sup>54</sup> In response, the (often Democratic Party-affiliated) plaintiffs in these second-generation cases sought to transfer “excess” minority voters to neighboring districts, so as to render those districts more competitive, while maintaining Black opportunity districts at slightly lower Black VAP levels that would continue to perform for Black voters.<sup>55</sup> In other words, the plaintiffs sought not to prevent the consideration of race, but rather to calibrate its use more precisely in the service of enhancing minority voting power.<sup>56</sup>

To be sure, as others and I have noted, the state legislatures in these cases employed a formalistic approach to the VRA that perversely resulted in *more* race consciousness than was necessary to provide minority voters with an opportunity to elect their preferred candidates.<sup>57</sup> But the quantum of race consciousness by the states in their line-drawing processes does not seem to be driving the plaintiffs in these cases. Rather than *procedural* (in other words, whether states consider race) the plaintiff’s concerns appear to be *substantive*: namely, the bleaching of districts adjacent to majority-Black districts, which had the effect of minimizing Black voters’ influence in those districts and, thus, across the state as a whole.<sup>58</sup>

This is somewhat different from the process-based and expressive concerns animating the first-generation racial gerrymandering cases.<sup>59</sup> Rather than seeking to turn the redistricting process away from the consideration of race, these cases can be viewed as

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53. See Ho, *supra* note 52, at 415.

54. See Levitt, *supra* note 3, at 609.

55. See *Cooper v. Harris*, 137 S. Ct. 1455, 1465-66 (2017).

56. See *id.*

57. See Ho, *supra* note 52, at 424-26; see also, e.g., Levitt, *supra* note 3, at 592-94.

58. See *supra* text accompanying notes 2-4.

59. See *supra* notes 30-33 and accompanying text.

requiring more finely grained attention to race and requiring legislatures to determine with greater detail just the right amount of minority VAP necessary in a district to provide an opportunity to elect.

Perhaps this disjuncture is fine. There is, after all, some poetic justice in flipping the racial gerrymandering cause of action—which was initially deployed to weaken minority voter power<sup>60</sup>—to further minority voting rights. And these cases have been very successful in the current Supreme Court.<sup>61</sup>

But I offer a few caveats. Narrowly speaking, I question whether, as a prescriptive matter, civil rights advocates rely too heavily on this approach, which rests on the interplay of two rules that are in some tension with each other. On the one hand, these cases hold that numerical racial targets are constitutionally suspect.<sup>62</sup> On the other hand, they assume (without definitively ruling) that racial targets may be permitted if a case-by-case functional analysis demonstrates that they are necessary to provide minority voters with an opportunity to elect their preferred candidates in conformity with the VRA.<sup>63</sup>

The jurisprudence around the intersection of race and redistricting is already incredibly complicated, and it is difficult to predict how the interplay of these two rules will continue to play out in practice. But one can imagine numerous scenarios that could rebound to the detriment of minority voting rights. For example, assume that racial polarization increases—which appears to be happening in at least some regions of the country.<sup>64</sup> If that happens, districts that currently perform for voters of color at their current

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60. See *Shaw I*, 509 U.S. 630, 636-37 (1993).

61. See *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794-95 (2017); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016), *dismissing appeal from* *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-63 (2015).

62. See, e.g., *Cooper*, 137 S. Ct. at 1476 & nn.10-12 (suggesting that “deliberately” drawing a district “as a majority-minority district” will trigger strict scrutiny).

63. See *id.* at 1469-71.

64. See, e.g., Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 206 (2013); Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1066 (2013).

minority VAP levels might not in the future, unless the minority VAP in those districts is *increased* to offset higher levels of racial polarization in the electorate. This problem could grow as incumbent minority-preferred elected officials retire, and future minority-preferred candidates compete for open seats without an incumbency bonus.<sup>65</sup> In other words, the Goldilocks level of the “just right” amount of minority VAP for a district could shift higher. But, civil rights advocates would then be placed in the challenging position of having to argue that minority VAP levels that were previously deemed indicative of impermissible race-conscious gerrymanders are now in fact *necessary* to provide minority voters with electoral opportunity in compliance with the VRA.<sup>66</sup> Maybe that concern can be dealt with on a case-by-case basis with strong expert testimony, but it is not an easy place from which to start litigating.

Another danger is that, in treating bright-line rules with skepticism, *Cooper* affords more discretion to legislatures that might be hostile to minority voting rights.<sup>67</sup> *Cooper* went so far as to intimate that, if a non-majority-minority district was already “performing” for minority voters, then the *Gingles* preconditions for section 2 vote dilution liability could not be met.<sup>68</sup> Under such circumstances, “[i]t is difficult to see how the majority-bloc-voting requirement could be met’—and hence how § 2 liability could be established.”<sup>69</sup> In other words, one could read *Cooper* as suggesting that any district that currently performs with less than a majority-minority VAP lacks any protection under section 2’s results standard.<sup>70</sup>

If that is correct, then during the next round of redistricting, hostile jurisdictions could seek to reduce minority voting power by

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65. “The incumbency advantage is perhaps the best-established effect in American elections.” Nate Cohn, *Debate Is Over: Gerrymandering Is Crucial to G.O.P.’s Hold on House*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/upshot/its-time-to-end-the-old-debate-over-gerrymandering.html> [<https://perma.cc/64YY-74TT>].

66. See *supra* notes 30-33 and accompanying text.

67. See *Cooper*, 137 S. Ct. at 1468-69 (rejecting the use of racial quotas that subordinated other legitimate criteria in the districting process).

68. See *id.* at 1470.

69. See *id.* (alteration in original) (quoting *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009) (plurality opinion)).

70. *Bartlett v. Strickland* made clear that, under certain circumstances, dismantling such a district could still violate section 2’s prohibition on intentional discrimination. See 556 U.S. 1, 19-20 (2009) (plurality opinion).

switching away from their post-2010 strategy of packing minority voters into as few districts as possible, and instead resort to cracking minority communities apart.<sup>71</sup> Districts that once provided for minority opportunity at less than 50 percent VAP could be drawn down even further, to the point that they no longer perform.<sup>72</sup> And the legislatures that employ such a strategy could point to *Cooper* and argue that, wherever 50 percent minority VAP is unnecessary to provide minority voters an opportunity to elect their preferred candidates, section 2 protections are inapplicable.<sup>73</sup> That would permit legislatures to ignore racial considerations altogether in many circumstances.

Speaking more broadly, it may also be counterproductive for civil rights advocates to embrace colorblindness as a constitutional principle, which has been deployed to undermine race-conscious civil rights remedies in a range of areas, including education<sup>74</sup> and employment.<sup>75</sup> Although the first-generation racial gerrymandering cases obviously did not categorically prohibit the use of race in the redistricting process (but only as a “predominant” factor), they expressed such a deep skepticism about race-conscious state action that at least some commentators during the 1990s worried that these cases marked a first step toward just such a categorical prohibition.<sup>76</sup> They embody the same process-based conception of racial discrimination that enabled the Court in *Fisher v. University of Texas at Austin* to find that a white student had standing to challenge the University of Texas’s race-conscious admissions program,<sup>77</sup> even if the student would *not* have been admitted under a race-neutral admissions policy.<sup>78</sup> This misguided understanding of

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71. *See id.* (inferring that districts with less than a majority-minority VAP lack protection under the result prong of section 2 of the VRA).

72. *See id.*

73. *See Cooper*, 137 S. Ct. at 1470.

74. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

75. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 587 (2009).

76. *See, e.g., James U. Blacksher, Dred Scott’s Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 *How. L.J.* 633, 660 (1996).

77. *See* 133 S. Ct. 2411, 2415 (2013).

78. As Ilya Somin has explained, whether *Fisher* could have been admitted to the University of Texas was wholly irrelevant to her claim:

Some defenders of affirmative action suggest that the *Fisher* case challenging racial preferences at the University of Texas, is somehow improper because

racial discrimination suggests that we should, wherever possible, avoid thinking about race when, to combat racial injustice, we should be doing precisely the opposite.<sup>79</sup>

Of course, we should not be unrealistic here. Formal colorblindness shows no signs of retreating as the dominant mode of interpreting the Equal Protection Clause when it comes to race.<sup>80</sup> And civil rights advocates should not forgo tactical advantages for their clients in individual cases in the hope that maintaining doctrinal consistency will, in the long run, somehow ground equal protection in a more meaningful conception of substantive equality. In representing our clients, we have to use whatever tools are available and accept the risk that any particular strategy could backfire.

But treating race consciousness as a constitutional bugaboo risks reifying a false equivalence between genuine (and under the VRA, legitimate) efforts to provide members of historically disenfranchised racial and ethnic minority groups with an opportunity to elect their preferred candidates, and pretextual invocations of the VRA to justify redistricting plans that sap communities of color of political power outside of a few hyperconcentrated districts.<sup>81</sup>

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Abigail Fisher's grades and test scores were not good enough for her to be admitted even in the absence of preferences for black and Hispanic applicants. Even if this is true, it is legally irrelevant. The *Fisher* case is not about whether Abigail Fisher deserved to be admitted to the University of Texas, but about her constitutional right to a nondiscriminatory admissions process. It is not about how strong her application was, but about whether the University of Texas was justified in judging it by different standards than those used to evaluate black and Hispanic applicants.

Ilya Somin, *Why It Does Not Matter Whether Abigail Fisher Would Have Gotten into the University of Texas in the Absence of Racial Preferences*, WASH. POST: THE VOLOKH CONSPIRACY (Dec. 14, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/14/why-it-does-not-matter-whether-abigail-fisher-would-have-gotten-into-the-university-of-texas-in-the-absence-of-racial-preferences/?utm\\_term=.9c78c918b7b5](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/14/why-it-does-not-matter-whether-abigail-fisher-would-have-gotten-into-the-university-of-texas-in-the-absence-of-racial-preferences/?utm_term=.9c78c918b7b5) [<https://perma.cc/D22U-K9DS>].

79. See *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.").

80. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

81. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015) (describing Alabama's use of the VRA to justify racial gerrymandering).

And there is something problematic about embracing this process-based conception of racial discrimination in the redistricting context, while arguing against it in other contexts.<sup>82</sup> As my ACLU colleagues argued in their amicus brief in *Fisher*:

The historical purpose of equal protection and of the strict scrutiny standard was to secure the rights and equal opportunities of disenfranchised people. This history affirms the importance of attention to persisting inequalities in conducting equal protection analysis. Far from a position of blanket skepticism, equal protection contemplates and at times even necessitates race-conscious measures to secure the guarantee of equality. Application of strict scrutiny in this case upends the original conceptions of equal protection and strict scrutiny.<sup>83</sup>

Ultimately, civil rights advocates must serve their clients' interests, and should rely on arguments that are most likely to be well-received by the courts. But we should exercise caution in embracing a theory premised on the notion that essentially any consideration of race triggers constitutional scrutiny.

## II. SOMETHING NEW: "PARTY ALL THE TIME?"

A second way of understanding the second-generation racial gerrymandering cases is that they are really about something entirely separate from race: partisanship. That is, we can understand these cases as efforts to use race as a mere proxy for partisanship—that Republicans sought to entrench their power vis-à-vis Democrats, and, knowing that Black voters tend to vote for Democrats, they packed Black voters into as few districts as possible, in order to minimize the Democratic Party's power. Arguably, the gerrymanders at issue harm not only Democrats (in the sense that they deprive them of their "fair share" of voting power); they are injurious to democracy itself, because they distort the will of the electorate, potentially in a counter-majoritarian manner by entrenching

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82. See Brief for the American Civil Liberties Union & the ACLU of Texas as Amici Curiae in Support of Respondents at 11, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981).

83. *Id.* at 10 (footnote omitted).

a minority political party in power.<sup>84</sup> Democratic accountability therefore demands nonpartisan reforms.

Again, there is both a descriptive claim here and a prescriptive one. The descriptive claim is that these cases are not “really” about race, but about party.<sup>85</sup> As Sam Issacharoff put it, “[T]he category of race increasingly fails to capture the primary motivation for what has become a battlefield in partisan wars.”<sup>86</sup> Rick Hasen, without unequivocally endorsing it, described this in his contribution to this Symposium as “the *party all the time* approach to the conjoined polarization question.”<sup>87</sup>

From a “party all the time” diagnosis, there tends to flow a prescription to “party” less (or perhaps nonparty more): in other words, given that these cases are really about party, the appropriate aim of reform should be on greater partisan fairness. Litigants could simplify the doctrine considerably by simply “litigat[ing] these cases not as race cases but as party cases, having courts rule that certain partisan actions are themselves illegal.”<sup>88</sup>

There is a lot of explanatory power in this partisan-focused lens. Surveying the recent adoption of “vote denial” practices that reduce access to the franchise in many states, Professor Issacharoff noted:

[T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life. Voting restrictions are not only likely to be found in Republican-controlled jurisdictions, but are also likely to be similar in kind across those jurisdictions.<sup>89</sup>

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84. See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795-96 (2017) (describing Virginia’s use of racial gerrymandering to achieve political outcomes).

85. See Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1406 (2015).

86. *Id.*

87. 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 Rights Cases*, 59 WM. & MARY L. REV. 1837, 1876 (2018). To be clear, I do not understand Professor Hasen to suggest that the “party all the time” approach fully explains the nature of contemporary voting rights disputes, or that it is a panacea for them.

88. See *id.*

89. Issacharoff, *supra* note 85, at 1370.

The media has largely adopted this frame in covering recent voting rights controversies, characterizing them as clashes between Republicans who seek to restrict the franchise and Democrats who seek to expand access, with each party pursuing agendas that serve their respective electoral advantage.<sup>90</sup>

Indeed, it is increasingly difficult to disentangle race and partisanship, as we have entered an era of what commentators have termed “conjoined polarization.”<sup>91</sup> As the Court noted in *Cooper*, because “racial identification is highly correlated with political affiliation,”<sup>92</sup> “political and racial reasons are capable of yielding similar oddities in a district’s boundaries.”<sup>93</sup> This phenomenon may make it more difficult in the future to replicate successful racial gerrymandering litigation strategies, in part by complicating racial polarization analysis: given conjoined polarization, polarized voting patterns might be interpreted as partisan in nature, rather than racial.<sup>94</sup>

In my view, however, a “party all the time” approach does not fully capture the fundamentally racialized nature of contemporary voting rights disputes. Race still has strong explanatory power in terms of predicting political behavior.<sup>95</sup> In *Cooper*, for example, the State’s own expert witness testified that race was a *better* predictor of vote choice in North Carolina than party affiliation, at least in presidential elections.<sup>96</sup>

And the relatively recent wave of new state-level restrictions on voting, such as voter identification requirements, is difficult to

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90. See, e.g., Alex Altman & Maya Rhodan, *Blue States Make Voting Easier as Red States Add Restrictions*, TIME (Oct. 20, 2015), <http://time.com/4080238/voting-rights-red-blue-states-2016/> [<https://perma.cc/Z477-VQM>].

91. See Cain & Zhang, *supra* note 11, at 869.

92. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (quoting *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 243 (2001)).

93. *Id.*

94. See Cain & Zhang, *supra* note 11, at 886.

95. See *id.* at 873.

96. See *Cooper*, 137 S. Ct. at 1477 n.14 (noting that the state’s own expert testified that “voting data from the 2008 Presidential election ... tracked race better than it did party registration”); see also *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 225 (4th Cir. 2016) (“As one of the State’s experts conceded, ‘in North Carolina, African-American race is a better predictor for voting Democratic than party registration.’”), *cert. denied*, 137 S. Ct. 1399 (2017).

understand if race is taken out of the picture.<sup>97</sup> Now, it is certainly true that Republican-controlled legislatures enact such restrictions far more frequently (indeed, almost exclusively).<sup>98</sup> But one recent study found that, while “a change to Republican control of the legislature or governorship dramatically increases the likelihood a state will pass an ID law, ... the effects of these shifts in political power are larger in states with large minority populations.”<sup>99</sup> That is, while it is true that a change to Republican control of a state government is highly correlated with the adoption of new restrictions on voting, newly empowered Republicans are “more likely to enact a number of these laws in states with large Black and Latino populations.”<sup>100</sup> Another recent study found that support for stringent voter identification requirements correlated not only with partisanship, but also with indicia of racial resentment.<sup>101</sup> All of this suggests that contemporary voting controversies cannot be explained exclusively—or perhaps even chiefly—through a partisan lens.

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97. See, e.g., S.M., *North Carolina Voter ID Law Is Struck Down as Racially Discriminatory*, ECONOMIST (Aug. 1, 2016), <https://www.economist.com/blogs/democracyinamerica/2016/08/its-duck> [<https://perma.cc/L6MP-B3PE>].

98. See Issacharoff, *supra* note 85, at 1370.

99. See Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RES. 560, 562 (2017).

100. See *id.* at 580. Republican control, by itself, does not appear to be a sufficient condition for the adoption of new restrictions on voting, as states with small minority populations tend not to have adopted new restrictions on voting in the last ten years. For example, of the top ten states in terms of non-Hispanic white population percentage, see *QuickFacts: White Alone, Percent, July 1, 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/map/US/RHI125216> [<https://perma.cc/4586-J9HT>], seven have state legislatures and governorships controlled by Republicans: Idaho, Iowa, Nebraska, New Hampshire, Utah, West Virginia, and Wyoming, see *Gubernatorial and Legislative Party Control of State Government*, BALLOTPEdia, [https://ballotpedia.org/Gubernatorial\\_and\\_legislative\\_party\\_control\\_of\\_state\\_government](https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government) [<https://perma.cc/6HJA-NDPX>]. Of those seven states, none currently has a strict photo ID requirement for voting. See *Voter Identification Requirements*, NAT'L CONF. ST. LEGISLATURES (June 5, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/3LXK-2A2A>]. Anecdotally, states have only adopted strict voter identification requirements under full GOP control. Compare *id.*, with BALLOTPEdia, *supra*. But it seems that the states that have done so—like Texas or Georgia, see NAT'L CONF. ST. LEGISLATURES, *supra*—have substantial minority populations, perhaps rendering these states more susceptible to political contestation along racial lines.

101. See David C. Wilson & Paul R. Brewer, *The Foundations of Public Opinion on Voter ID Laws: Political Predispositions, Racial Resentment, and Information Effects*, 77 PUB. OPINION Q. 962, 980 (2013) (“[W]e see that racial resentment has its strongest effects among liberals, many of whom support voter ID laws while possessing no clear ideological justifications for doing so.”).

An exclusive focus on partisanship not only misrepresents the present, but also it obscures the past. In its purest form, one could interpret a “party all the time” framework as suggesting that contemporary voting rights disputes are best understood as arising from differences about policy (or perhaps ideology), wholly distinct from issues of race. But an absolute distinction between policy and race does not, and probably never has, existed.<sup>102</sup> The racial discrimination fights of the past were very much about *policy*.<sup>103</sup> It was not as though opponents of voting rights sought to disempower African Americans exclusively out of a free-standing desire to subjugate; rather, African American disenfranchisement in the Jim Crow South had downstream consequences in terms of representation, and thus, policy, which was largely the point.<sup>104</sup> Conflicts about policy were always a component of the struggle for racial justice.<sup>105</sup>

In that sense, the partisan framework also makes it harder to apprehend the future properly. The Trump era has coincided not only with conjoined partisan and racial polarization, but also more specifically, with a high correlation between racial resentment and candidate choice.<sup>106</sup> And the Trump presidency itself has already had profound policy consequences for racial justice issues—with crack-downs on undocumented immigration,<sup>107</sup> proposals to limit legal immigration,<sup>108</sup> the Muslim travel ban,<sup>109</sup> and possible challenges to

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102. See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 138 (2004).

103. See *id.*

104. See, e.g., *id.* at 131-39.

105. See, e.g., *id.*

106. See, e.g., Christopher Ingraham, *Two New Studies Find Racial Anxiety Is the Biggest Driver of Support for Trump*, WASH. POST: WONKBLOG (June 6, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/06/06/racial-anxiety-is-a-huge-driver-of-support-for-donald-trump-two-new-studies-find/?utm\\_term=.8f92900abed4](https://www.washingtonpost.com/news/wonk/wp/2016/06/06/racial-anxiety-is-a-huge-driver-of-support-for-donald-trump-two-new-studies-find/?utm_term=.8f92900abed4) [https://perma.cc/S4T9-2DM9]; Michael Tesler, *Views About Race Mattered More in Electing Trump than in Electing Obama*, WASH. POST: MONKEY CAGE (Nov. 22, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/22/peoples-views-about-race-mattered-more-in-electing-trump-than-in-electing-obama/?utm\\_term=.91c275fe1503](https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/22/peoples-views-about-race-mattered-more-in-electing-trump-than-in-electing-obama/?utm_term=.91c275fe1503) [https://perma.cc/D5VG-MVEX].

107. See, e.g., Caitlin Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES (July 1, 2017), [https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html?\\_r=0](https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html?_r=0) [https://perma.cc/GF6Q-AMR6].

108. See, e.g., Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [https://perma.cc/7RW5-RDMH].

109. See, e.g., Emily Stephenson & Eric Knecht, *Trump Bars Door to Refugees, Visitors*

affirmative action in college and university admissions on behalf of white applicants.<sup>110</sup> It seems like an overclaim to suggest that this political moment, and those that are to come, can be best understood through a lens that downplays the role of race.

What about as a prescriptive matter? Even if everything above is 100 percent correct, it does not necessarily follow that race-based remedies are the best path forward. For their part, Professors Issacharoff and Hasen both suggest that a renewed focus on non-race-based reform and legal strategies could represent a more productive path forward for voting rights advocates. Professor Issacharoff proposes federal administrative curbs on partisan abuses,<sup>111</sup> while Professor Hasen suggests that it could be “a more sensible approach to police partisanship in redistricting directly than to use racial gerrymandering for parties to shadowbox over these issues.”<sup>112</sup>

While I am skeptical of the possibility of new congressional legislation to reign in excessive partisanship in electoral processes, I agree that race-neutral litigation strategies and nonpartisan electoral reforms at the state level are good ideas. State constitutions often provide more robust protections for voting rights,<sup>113</sup> and state ballot initiatives in places like Florida<sup>114</sup> and California<sup>115</sup> have been adopted to reign in partisan gerrymandering.<sup>116</sup> Even at the federal

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from *Seven Mainly Muslim Nations*, REUTERS (Jan. 27, 2017, 6:12 PM), <http://www.reuters.com/article/us-usa-trump-refugees-idUSKBN15B2HL> [<https://perma.cc/J937-8KH4>].

110. See, e.g., Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> [<https://perma.cc/7TPB-CPT2>].

111. See Issacharoff, *supra* note 85, at 1407-08.

112. Hasen, *supra* note 87, at 1879.

113. See, e.g., Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101-05 (2014). The ACLU has successfully litigated voting rights cases under race-neutral legal theories based on state constitutional guarantees of the right to vote. See, e.g., *Brown v. Kobach*, No. 2016-CV-550, slip op. at 17 (Kan. Dist. Ct. Nov. 4, 2016) (Third Judicial Dist. Kan. Website, Recent Court Decisions) (striking down Kansas’s dual registration system for voting); *Chelsea Collaborative v. Galvin*, No. 16-3354-D, 2017 WL 4125039, at \*32-35 (Mass. Super. Ct. July 24, 2017) (striking down Massachusetts’s twenty-day cutoff for voter registration).

114. See FLA. CONST. art. III, §§ 20-21.

115. See CAL. CONST. art. XXI.

116. See Richard L. Hasen, *Assessing California’s Hybrid Democracy*, 97 CALIF. L. REV. 1501, 1504 (2009) (book review); Michael Woods, Comment, *Gerrymandering (Almost) Gone Wild: How the Supreme Court Saved Independent Redistricting Reform*, 68 FLA. L. REV. 1509,

level, the Supreme Court's decision to hear two partisan gerrymandering cases in the October 2017 Term is an encouraging sign. If nothing else, at a time when courts are likely to grow more conservative,<sup>117</sup> litigants should seek to diversify their portfolios in terms of the strategies that they employ, so as to minimize the risk to our work arising from adverse precedent.

Again, though, I have caveats. First, I question whether, as a general matter, voting rights reforms based on appeals to partisan fairness will be more successful than race-based strategies. In the vote denial context, "partisan fencing" claims have been brought numerous times in recent years, challenging various voting practices as unfair efforts to skew the electorate on partisan terms.<sup>118</sup> I am not aware of a single successful such case to date.<sup>119</sup> That may be because of the difficulty of discerning judicially manageable standards in this context, as essentially any change to elections procedures governing voter access could have partisan consequences.<sup>120</sup> Obviously, I believe that increasing access to the franchise is good in itself, and would distinguish between restrictions on voting for partisan ends on the one hand, and reforms to increase access, even if adopted for partisan gain, on the other. But given the zero-sum nature of our two-party system,<sup>121</sup> even increasing access to the franchise could be viewed by some as "disadvantaging" one party vis-à-vis the other. Where is a court to draw the line?

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1514 (2016).

117. See Carl Hulse, *As G.O.P. Moves to Fill Courts, McConnell Takes Aim at an Enduring Hurdle*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/us/politics/mcconnell-federal-judges-trump.html> [<https://perma.cc/VUK4-ZRKK>].

118. See, e.g., *Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1093 (D. Ariz.), *aff'd*, 840 F.3d 1057 (9th Cir. 2016).

119. See Hasen, *supra* note 87, at 1877 & n.234 (referencing unsuccessful partisan fencing claims in *Feldman*, 208 F. Supp. 3d at 1094; *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708 (S.D. Ohio 2016), *rev'd on other grounds*, *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 974 (W.D. Wis. 2016); and *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 584 (E.D. Va. 2015), *amended by* No. 3:15cv357-HEH, 2016 WL 6921611 (E.D. Va. Feb. 2, 2016)).

120. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

121. See, e.g., Eric Cantor, *Eric Cantor: What the Obama Presidency Looked Like to the Opposition*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/opinion/sunday/eric-cantor-what-the-obama-presidency-looked-like-to-the-opposition.html?mcubz=1> [<https://perma.cc/ECC3-WDDA>].

As for redistricting, I, like many others,<sup>122</sup> hope that the Supreme Court will place limits on partisan gerrymandering in *Gill v. Whitford*.<sup>123</sup> But it has never done so before.<sup>124</sup> Unless and until it does, it seems to me that it is difficult to argue confidently, based on past experience, that voting rights litigation strategies based on partisan fairness represent a more promising vehicle than those based on race. The latter is fraught with peril, but at least it has been successful in recent cases, in both the redistricting<sup>125</sup> and vote denial contexts.<sup>126</sup> Obviously, *Gill* may change all that.<sup>127</sup> But for now, given the long-established legal prohibition against racial discrimination<sup>128</sup> and the absence (as of this writing) of meaningful judicial limits on excessive partisanship,<sup>129</sup> advocates might be better served by continuing to focus their litigation efforts under battle-tested race-based legal theories.

I suspect that most people (although certainly not all) have a sense of fair play in politics and intuit that partisan discrimination is wrong. But there is a reason that racial and ethnic minorities—and not members of political parties—are the paradigmatic discrete and insular class in our constitutional jurisprudence and in our national imagination. Racial discrimination has a particular place as the ugliest stain in our national history, meriting the highest

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122. See, e.g., Adam Liptak, *Prominent Republicans Urge Supreme Court to End Gerrymandering*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/us/politics/prominent-republicans-urge-supreme-court-to-end-gerrymandering.html?mcubz=1> [<https://perma.cc/G6ZV-9K6F>].

123. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

124. See *Vieth*, 541 U.S. at 279 (plurality opinion).

125. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794-95 (2017); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016), *dismissing appeal from* *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015) (three-judge court); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-63 (2015).

126. See *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (striking down provisions of North Carolina's elections law as intentionally discriminatory); *Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc) (striking down Texas's voter identification law under section 2 of the VRA for racially discriminatory results), *cert. denied*, 137 S. Ct. 612 (2017).

127. Amy Howe, *The Justices Tackle Partisan Gerrymandering Again: In Plain English (UPDATED)*, SCOTUSBLOG (Aug. 7, 2017, 5:45 PM), <http://www.scotusblog.com/2017/08/justices-tackle-partisan-gerrymandering-plain-english/> [<https://perma.cc/Z4K6-3D2U>].

128. See *Shaw I*, 509 U.S. 630, 639-41 (1993).

129. See *Vieth*, 541 U.S. at 279.

levels of protections from our laws and our courts.<sup>130</sup> And, given that many perceive our political system as a zero-sum game between the parties, it seems to me that, notwithstanding the abstract appeal of partisan fairness as a concept, appeals to partisan fairness in specific cases may be seen as efforts to advantage one party against the other. If we frame voting rights disputes along party lines, then we risk situating these issues within what many might perceive as a “political thicket”<sup>131</sup> of ordinary partisan strife.

Of course, partisan- and race-based strategies are not mutually exclusive.<sup>132</sup> But as long as we are debating comparative likelihood of success, it is at best unclear at this point that partisan-based strategies hold the greater promise. The popular backlash (followed by judicial rulings) against the Muslim ban<sup>133</sup> demonstrated that appeals to nondiscrimination—one of the highest values in our national self-image—remain potent.<sup>134</sup> I acknowledge, of course, that there is not much of an empirical basis for this argument. But as a civil rights lawyer whose work is social change, abstract calls for more partisan fairness do not strike me as a more likely catalyst for such change than do traditional rights appeals based on racial equality.

### III. SOMETHING *REALLY* OLD: INTENTIONAL RACIAL DISCRIMINATION

Turning back to the second-generation racial gerrymandering cases, what would such a discrimination-based strategy look like if, as I suggested above, we considered alternatives to the *Shaw I* racial predominance inquiry?

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130. See *Shaw I*, 509 U.S. at 650.

131. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

132. See Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 560-62 (2011).

133. See, e.g., Lauren Gambino et al., *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, GUARDIAN (Jan. 29, 2017, 7:01 PM), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> [<https://perma.cc/QM55-XRVK>]; Gregory Krieg, *Opposition Groups Launch Instant Backlash to New Travel Ban*, CNN (Mar. 6, 2017, 4:50 PM), <http://www.cnn.com/2017/03/06/politics/backlash-protest-trump-travel-ban/index.html> [<https://perma.cc/2PQW-J2ER>].

134. See, e.g., Gambino et al., *supra* note 133.

Obviously, the second-generation racial gerrymandering cases are not standard section 2 vote dilution cases, otherwise they would be brought as such. For the plaintiffs in these cases, the redistricting plans of concern did not “decrease the number of representatives th[at] black voters can elect,” but rather “decrease[d] their influence in [neighboring] white-dominated districts.”<sup>135</sup> Thus we may be seeing something like the long-feared trade-off of greater certainty for descriptive representation (that is, more minority-preferred candidates, who are typically members of the minority group in question) at a cost of less substantive representation (candidates who, while not minorities themselves and perhaps not the top choice of minority voters, are still sympathetic to the interests of minority communities).<sup>136</sup>

There is, therefore, a material injury that occurs here beyond the process-based expressive harms contemplated in the first-generation racial gerrymandering cases.<sup>137</sup> That is, it is not simply that the legislatures thought too much about race, it is that they have engaged in race-conscious decision-making for the purpose of materially reducing the influence of voters of color, and thus their potential for substantive representation.<sup>138</sup> In other words, unlike in the redistricting plans at issue in the first-generation racial gerrymandering cases, these redistricting plans have a discriminatory *effect*.<sup>139</sup>

But that is not all. These redistricting plans might also arise from discriminatory *intent*, triggering the most severe constitutional

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135. See Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST: WONKBLOG (June 9, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/?utm\\_term=.1cff833a26bc](https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/?utm_term=.1cff833a26bc) [<https://perma.cc/R8KE-DZ2Z>].

136. See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1398 (2016) (citing Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2531 (1997)).

137. *Cf. Shaw I*, 509 U.S. 630, 641-42, 647, 650 (1993).

138. See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 807 (2017) (Thomas, J., concurring in part and dissenting in part) (“I cannot ignore the Constitution’s clear prohibition on state-sponsored race discrimination.... This prohibition was ‘[p]urchased at the price of immeasurable human suffering,’ and it ‘reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.’” (alteration in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment))).

139. *See id.*

safeguards.<sup>140</sup> *Cooper* contemplated precisely this possibility, noting that legislatures

may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and voting behavior to advance their partisan interests. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters.<sup>141</sup>

*Cooper* did not say that the evidence demonstrated that this was the case in North Carolina. But it did suggest that it is possible to litigate these cases not only as racial gerrymandering cases, but also as intentional discrimination claims—what could be called intentional packing or intentional minority-influence dilution claims.<sup>142</sup>

To be clear, these claims likely could not be brought under a purely discriminatory results theory pursuant to section 2 of the VRA. The touchstone for that statutory standard is the opportunity to elect, which is a relatively clear *standard*—in that, whether minority-preferred candidates can actually *win* an election.<sup>143</sup> The ability to “influence” the outcome of an election without actually being able to elect one’s preferred candidate is a harder concept to measure—and therefore does not lend itself to a purely results-based claim. It is for similar reasons that the Supreme Court in *Bartlett v. Strickland* rejected the notion that section 2 of the VRA requires states to draw “crossover districts”<sup>144</sup>—districts where minority voters constitute less than 50 percent of a hypothetical

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140. See *Shaw I*, 509 U.S. at 642-43.

141. *Cooper v. Harris*, 137 S. Ct. 1455, 1480 n.15 (2017) (citation omitted).

142. See *id.*

143. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

144. See 556 U.S. 1, 23 (2009) (plurality opinion). Prior to *Bartlett*, the Supreme Court had held open the possibility that discriminatory-results claims based on influence dilution might be actionable under section 2 of the VRA. See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (assuming without deciding the cognizability of a claim brought by minority voters who allege that “they could elect their candidate of choice nonetheless if they are [not a majority of a district but] numerous enough and their candidate attracts sufficient cross-over votes from white voters”); *Gingles*, 478 U.S. at 46 n.12 (“We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.”).

district's VAP, but can elect their preferred candidates with consistent levels of "crossover" support from white voters.<sup>145</sup> Given that ruling, I would expect courts to find that a discriminatory results claim for influence dilution is similarly not judicially manageable.

But from the proposition that the "appropriate" level of influence is difficult to measure—and therefore cannot serve as the basis of a results claim—it does not follow that influence short of an opportunity to elect is a meaningless concept, or that diminishment of influence is not the sort of injury that can be cognizable for purposes of a discriminatory *intent* claim. As Justice O'Connor observed in *Thornburg v. Gingles*, "the power to influence the political process is not limited to winning elections."<sup>146</sup> And, in *Georgia v. Ashcroft*, the Court noted:

[S]preading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group.<sup>147</sup>

It is precisely this opportunity to influence elections and build coalitions in districts adjacent to true minority opportunity districts that has been diminished in the second-generation racial gerrymandering cases.<sup>148</sup>

If, in fact, a legislature intentionally seeks to dilute the influence of minority voters by overpacking them into as few districts as possible, that seems like a paradigmatic example of intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments. While the harm of diminishing influence might be too

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145. See *Bartlett*, 556 U.S. at 16 (plurality opinion).

146. 478 U.S. at 99 (O'Connor, J., concurring in the judgment) (quoting *Davis v. Bandemer*, 478 U.S. 109, 132 (1986)).

147. 539 U.S. 461, 481 (2003) (citing HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 114 (1967)).

148. See Ho, *supra* note 64, at 1062-63 (explaining that minority vote dilution is akin to "outright denial of the ballot" because vote dilution makes minority communities' votes ineffective).

difficult to measure from a purely results-based theory of liability, it is undeniably a form of harm that, in the presence of discriminatory intent, should be a sufficient basis to state a claim. Indeed, in rejecting the cognizability of a results-based claim based on the failure to draw crossover districts as judicially unmanageable, *Bartlett* expressly noted that its “holding does not apply to cases in which there is intentional discrimination against a racial minority,”<sup>149</sup> and that, “if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.”<sup>150</sup>

Another way of thinking about this issue is that the *Gingles* preconditions—which were developed for section 2 results claims for minority vote dilution—should not be necessary elements for intentional discrimination claims. The first *Gingles* precondition, for example, requires a plaintiff to show that a challenged redistricting plan deprives minority voters of an opportunity to elect their preferred candidates, by presenting an alternative districting arrangement that affords such an opportunity. But there is no reason why this requirement—which was intended to create a judicially manageable standard for (and limit the reach of) a *statutory* claim for discriminatory *results*—should be understood as placing a limit on the *constitutional* prohibition on *intentional* discrimination expressed in the Fourteenth and Fifteenth Amendments.<sup>151</sup>

As a practical matter, can such claims be won? Evidence of discriminatory intent is hard to come by, but it does emerge in some cases. For example, plaintiffs in the ongoing Texas redistricting litigation successfully brought claims for intentional vote dilution without relying on the *Gingles* preconditions before the three-judge court in that case—but the Supreme Court heard the case in the

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149. *Bartlett*, 556 U.S. at 20 (plurality opinion).

150. *Id.* at 24.

151. *See* *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990); *Perez v. Abbott*, 253 F. Supp. 3d 864, 944 (W.D. Tex. 2017) (three-judge court); *Comm. for a Fair & Balanced Map v. Ill. Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011) (three-judge court) (*per curiam*); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1249 (C.D. Cal. 2002) (three-judge court) (*per curiam*). *But see* *Johnson v. DeSoto Cty. Bd. of Comm’rs (DeSoto II)*, 204 F.3d 1335, 1338-39 (11th Cir. 2000) (requiring that the *Gingles* preconditions be shown in an intentional vote dilution case).

October 2017 Term. Meanwhile, in another redistricting case in South Carolina, one state representative provided a sworn affidavit asserting that another state representative admitted that the Republican redistricting strategy post-2010 in that state was to eliminate districts in which Black and white voters voted together to elect Democrats, and, in the long run, to shift the state's political context so that essentially all Democratic candidates would be assumed to be African American, effectively polarizing the parties along racial lines, with African Americans perpetually confined to the minority party.<sup>152</sup>

Where such evidence of discriminatory intent exists, it should be sufficient to state a claim. And if a state asserts, but cannot establish, that the particular concentration of minorities in a district was necessary to provide minority voters with an opportunity to elect their preferred candidates to comply with the VRA, then the state's rationale would appear to be a pretext for intentional discrimination.<sup>153</sup> Findings of discriminatory intent are rare, but one need look no further than the unanimous Fourth Circuit decision striking down provisions of a North Carolina bill concerning voter identification and other election procedures, for an example of a recent finding of discriminatory intent against a state legislature.<sup>154</sup>

Of course, an advocate of a "party all the time" approach might view the North Carolina voter ID case, and the South Carolina redistricting plan, as examples of partisan-based, rather than race-based, discrimination.<sup>155</sup> After all, the alleged goal of the state representative in South Carolina was to cement long-term political power for the Republican Party by marginalizing Democrats as the party of African Americans only.<sup>156</sup> At bottom, is that not just an attempt to seek partisan advantage, rather than to inflict harm on the basis of race?

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152. See Levitt, *supra* note 3, at 610 (quoting Affidavit of the Honorable Mia Butler Garrick ¶ 16, Backus v. South Carolina, No. 3:11-CV-03120 (D.S.C. Feb. 22, 2012), Doc. 147).

153. See *id.*

154. See *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 226-27 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

155. See Hasen, *supra* note 87, at 1876.

156. See Levitt, *supra* note 3, at 610 (quoting Affidavit of the Honorable Mia Butler Garrick ¶ 16, Backus v. South Carolina, No. 3:11-CV-03120 (D.S.C. Feb. 22, 2012), Doc. 147).

The answer to that question depends on one's definition of intentional discrimination. If intentional discrimination is understood principally as a bare desire to harm members of a group out of animosity toward that group, then perhaps one might not understand the North Carolina and South Carolina cases as intentional discrimination cases. But if we instead understand intentional discrimination as the purposeful attempt to harm members of a group, regardless of the ultimate *reasons* motivating that purposeful harm, then these cases are paradigmatic examples of intentional discrimination.<sup>157</sup> Purposefully harming members of one group constitutes intentional discrimination, regardless of whether one does so out of spite or for other reasons.<sup>158</sup>

It might seem like a stretch to suggest that the current Supreme Court would endorse such a conception of intentional discrimination. But the Court has already come quite close to doing so. The majority in *Cooper* observed:

[I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more “sellable” as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.<sup>159</sup>

Now, the above-quoted language from *Cooper* sounds in racial predominance, the process-based injury from the *Shaw* cases.<sup>160</sup> But the Court's logic—that using race in a particular way, regardless of one's ultimate objective, triggers constitutional scrutiny—would seem to apply equally to discriminatory intent claims. That is, from

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157. See, e.g., *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (arguing that signing a restrictive covenant that prohibits the sale of a home to minorities constitutes racial discrimination, regardless of whether it is motivated by animus toward minorities or by a belief that minority homeownership reduces property values).

158. See *id.*

159. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (citations omitted).

160. See *Shaw I*, 509 U.S. 630, 641-43 (1993).

a process-based theory of discrimination, one's goals in making race a predominant consideration are irrelevant;<sup>161</sup> similarly, one's ultimate purpose in intentionally selecting members of a racial group for disfavored treatment are irrelevant.<sup>162</sup>

To be sure, the level of proof required in discriminatory intent cases may exceed what is typically necessary in racial gerrymandering cases, because a plaintiff must show not only that the decision maker took race into account, but also that it acted with the intent to harm a particular racial group.<sup>163</sup> Gerrymandering cases require evidence only that race was the predominant consideration, without regard to the motives of the legislature in considering race.<sup>164</sup> Indeed, the Court observed this fact in *Cooper*, noting that “[w]hen plaintiffs meet their burden of showing that [racial gerrymandering] has occurred, there is no basis for subjecting them to additional—and unique—evidentiary hurdles, preventing them from receiving the remedy to which they are entitled.”<sup>165</sup> Bringing an intentional discrimination claim for minority influence dilution may entail accepting additional evidentiary burdens that are unnecessary for a standard *Shaw* claim.

## CONCLUSION

It may be the case that the best thing we can do is repurpose the racial predominance inquiry into one that focuses more on discriminatory racial intent than race-conscious process,<sup>166</sup> rather than seeking to upend the doctrine entirely. But at a minimum, civil rights advocates should consider broadening their palette to include intentional discrimination claims to supplement racial gerrymandering claims. Such a move would more accurately capture what is

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161. *Cf. id.*

162. *See Garza*, 918 F.2d at 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

163. *Compare Rogers v. Lodge*, 458 U.S. 613, 616-22 (1982) (describing a discriminatory intent analysis), *with Shaw I*, 509 U.S. at 642-43 (describing a racial gerrymandering analysis).

164. *See Cooper*, 137 S. Ct. at 1463-64.

165. *Id.* at 1480 n.15.

166. The Brennan Center's amicus brief in *Cooper* attempts to do precisely this. *See generally* Brief for the Brennan Center for Justice at NYU School of Law as Amicus Curiae in Support of Appellees at 6-8, *Cooper*, 137 S. Ct. 1455 (No. 15-1262).

so offensive about a disingenuous redistricting strategy employed in so many places post-2010, in which redistricting plans that do great harm to minority voters have been misleadingly defended as necessary to comply with a caricature of the VRA.<sup>167</sup>

We should be realistic. We cannot jettison *Shaw I* overnight, nor should we yield tactical advantage in particular cases. I am not suggesting that civil rights advocates refuse to bring racial gerrymandering claims that could provide the shortest route to victory on behalf of their clients in particular cases. I only suggest that, given the potential downsides of continuing to reify the process-based conception of equal protection underlying the racial gerrymandering cases, we might do well also to explore older legal theories based on intent.

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167. See Levitt, *supra* note 3, at 609.

