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### Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA

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RACE AND REPRESENTATION REVISITED:  
THE NEW RACIAL GERRYMANDERING CASES AND  
SECTION 2 OF THE VRA

GUY-URIEL E. CHARLES\* & LUIS FUENTES-ROHWER\*\*

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## INTRODUCTION

When the Supreme Court decided *Shaw v. Reno (Shaw I)*<sup>1</sup> in 1993, the civil rights community reacted to the opinion with shock, dismay, anger, confusion, and fear.<sup>2</sup> By contrast, conservatives were elated and hopeful.<sup>3</sup> The plaintiffs in *Shaw* challenged a North Carolina redistricting plan drawn by the State's Democrats,<sup>4</sup> who were in control of the redistricting process.<sup>5</sup> The Democrats wanted to maximize both partisan and racial advantage. Ideally, they preferred to create only one majority-Black district, and that is precisely what they did initially.<sup>6</sup> Their redistricting plan contained only one such district, District 1, located in the northeastern corner of the state.<sup>7</sup> Their attempt to satisfy partisan goals while seeming to placate the political preferences of the African American community resulted in a district with a "contorted" shape.<sup>8</sup>

However, the districting plan was subject to the requirements of the Voting Rights Act (VRA) of 1965, which obligated the State to submit voting changes to either the Department of Justice (DOJ) or the United States District Court for the District of Columbia.<sup>9</sup> The State submitted its plan to the DOJ, which refused to preclear the plan because it contained just one majority-minority district.<sup>10</sup> The DOJ demanded a second majority-Black district in another part of the state.<sup>11</sup> Thus, to satisfy the DOJ while trying to maximize partisan advantage, the legislature added a second and equally

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1. 509 U.S. 630 (1993).

2. See, e.g., Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 526-32 (1995).

3. For an article that attempted to temper the early reactions, both positive and negative, see Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)).

4. *Shaw I*, 509 U.S. at 633-34.

5. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992) (three-judge court), *aff'd*, 506 U.S. 801 (1992).

6. See *Shaw I*, 509 U.S. at 634.

7. *Id.*

8. *Pope*, 809 F. Supp. at 394 ("In order to protect white Democratic congressmen at the expense of Republicans, the General Assembly had to make that district very contorted.")

9. *Shaw I*, 509 U.S. at 634.

10. *Id.* at 635.

11. *Id.*

contorted majority-Black district.<sup>12</sup> While the first district was centered in the northeast part of the state, this second district was located in the north-central part of the state.<sup>13</sup> These two districts attempted to unite the State's relatively far-flung African American populations.

In *Pope v. Blue*, a group of plaintiffs filed a lawsuit against the plan.<sup>14</sup> They argued that it was an unconstitutional political gerrymander.<sup>15</sup> They lost on a motion to dismiss, for failure to state a claim.<sup>16</sup> The lower court claimed that political gerrymandering claims were not justiciable.<sup>17</sup> Another group of plaintiffs, not unrelated to the first group, filed a second lawsuit, in the case that became known as *Shaw I*.

The *Shaw* plaintiffs argued that racial gerrymandering, understood as the intentional creation of race-based districts, violated the Equal Protection Clause.<sup>18</sup> The plaintiffs maintained that they had a right to a color-blind voting process, which was violated when the State took race into account in constructing the redistricting plan.<sup>19</sup> The trial court ruled against the plaintiffs and the case eventually came before the Supreme Court.<sup>20</sup> The question before the Court was whether this kind of racial gerrymandering claim was cognizable, a question that the Court resolved in favor of the plaintiffs.<sup>21</sup>

The *Shaw* decision appeared to present an existential threat to the VRA. However, as it turned out, the threat was more phantasmal than actual. Though it was not quite as apparent at the time that *Shaw* was decided, Justice Sandra Day O'Connor, writing for the Court, seemed to be fully committed to two principles of racial equality. On one hand, she was committed to colorblindness as an aspirational ideal.<sup>22</sup> Indeed, the very point of *Shaw* was to bring voting rights within the ambit of the Court's standard equal protection

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12. *Id.* at 635-36.

13. *Id.*

14. 809 F. Supp. 392, 394 (W.D.N.C. 1992) (three-judge court), *aff'd*, 506 U.S. 801 (1992).

15. *Id.* at 395.

16. *Id.* at 399.

17. *Id.* at 395-97, 399.

18. *Shaw I*, 509 U.S. at 636-37.

19. *Id.* at 641-42.

20. *Id.* at 637.

21. *Id.* at 634, 658.

22. *See id.* at 642-44.

doctrine, which applied an anticlassification framework when the government uses race in its decision-making processes.<sup>23</sup> On the other hand, Justice O'Connor also seemed to be committed to an understanding of the Equal Protection Clause that allowed sufficient room for race consciousness as a necessary remedy for past and present structural racial discrimination in voting.<sup>24</sup> From that perspective, which reflects an antisubordination approach to understanding racial equality, racial equality required some modicum of race consciousness as an antidote to racial discrimination.<sup>25</sup> Though these dual commitments created an evident tension in *Shaw*, Justice O'Connor saw the value of both race consciousness and race blindness, and she was dedicated to giving effect to both commitments even though these twin commitments pulled the Court's jurisprudence in opposing directions.<sup>26</sup>

Less apparent than the Court's dual commitments to both anticlassification and antisubordination, or to both colorblindness and race consciousness, was the Court's conflicted intuitions about representation in the domain of race and redistricting. One goal of the state redistricting plans that gave rise to the *Shaw* line of cases was to provide descriptive representation for voters of color, specifically African American or Latino voters.<sup>27</sup> This goal reflected the ideals of the VRA, particularly section 2 of the Act as interpreted by the Court in *Thornburg v. Gingles*.<sup>28</sup> The districts at issue in the *Shaw* line of cases represented the State's struggle to balance competing objectives, including substantive representation, while attempting to provide descriptive representation, which they maintained was mandated by the VRA.<sup>29</sup> Faced with the stark cartographical evidence of the State's attempt to effectuate descriptive representation under the ostensible guise of the VRA, the Court recoiled.<sup>30</sup>

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23. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472 (2004) (describing anticlassification).

24. See *Shaw I*, 509 U.S. at 642, 654-55.

25. See Siegel, *supra* note 23, at 1472-73 (defining antisubordination).

26. See *Shaw I*, 509 U.S. at 657.

27. See *infra* Part II.

28. 478 U.S. 30, 69-70 (1986).

29. See *infra* Part II.

30. See *infra* Part III.

Though the *Shaw* majority was hostile to the manner in which the states chose to provide descriptive representation in the *Shaw* cases, the *Shaw* majority was not hostile to the states' pursuit of descriptive representation as such, if done in a less ostentatious manner.<sup>31</sup> Notwithstanding the majority's expressed concerns about the essentialist assumptions that undergird descriptive representation, and notwithstanding the majority's preference for substantive representation over descriptive representation, the *Shaw* majority was never prepared to forbid the states from pursuing descriptive representation as a legitimate end.<sup>32</sup> In fact, to the extent that Justice O'Connor represented the *Shaw* majority's views, she, and by extension the *Shaw* majority, believed that the state was required, under some circumstances, to pursue descriptive representation.<sup>33</sup>

Correspondingly, the Court's invocation of the anticlassification doctrine, which often strongly signals the Court's intent to strike down a state's use of race, signaled something else in the *Shaw* cases. It was intended to discipline what the Court viewed as the state's unrestrained impulse to effectuate descriptive representation no matter the costs, instead of making the difficult trade-offs often required when designing structures of representation. Anticlassification functioned as a thumb on the scale to favor substantive over descriptive representation, or at the very least to cabin descriptive representation. Conversely, the Court deployed the antisubordination framework to allow the state space for properly deploying descriptive representation. Thus, the antisubordination/anticlassification tension mapped perfectly onto the descriptive/substantive representation considerations.

While the *Shaw* doctrine pulled the Court in opposing directions, the Court did its best to manage the tension for almost a decade. During that time, it was not clear whether the Court would strike down sections 2 and 5 of the VRA or whether the Court's standard equal protection jurisprudence would be applied in a way that accommodated voting rights as an exception to the color-blindness and anticlassification ideal. The cases seesawed between the two

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31. See *infra* Part I.

32. See *infra* Part I.

33. See *infra* Part I.

poles until the Court sounded the call to retreat in the 2001 case of *Easley v. Cromartie (Cromartie II)*.<sup>34</sup>

In *Cromartie II*, Justice O'Connor joined the Court's liberals as they reversed the decision of a lower court that struck down one of the North Carolina districts at issue in the first *Shaw* case.<sup>35</sup> *Cromartie II* essentially put an end to *Shaw* claims. The Court sent a clear message to legislatures drawing majority-minority districts that they would have a safe harbor from such claims so long as they could plausibly claim they were motivated by political considerations as opposed to racial considerations when they drew the district lines.<sup>36</sup> Given the relationship between political and racial identity, it was not hard for state legislatures to plausibly claim that their redistricting lines were motivated by politics and not race.

The civil rights bar breathed a sigh of relief. Notwithstanding the application of the anticlassification doctrine in other domains, voting rights had survived largely unscathed. And section 2 of the VRA, which seemed particularly vulnerable to *Shaw* claims, remained a robust provision of the statute. As importantly, states were free to pursue descriptive representation unburdened by strict judicial supervision.

*Shaw* claims remained buried for well over a decade, until the Court decided *Alabama Legislative Black Caucus v. Alabama*, in 2015.<sup>37</sup> In *Alabama Legislative Black Caucus*, the plaintiffs challenged the State of Alabama's legislative redistricting plan on the ground that the plan was a racial gerrymander.<sup>38</sup> The plaintiffs lost in the lower court on numerous grounds, including the failure to prove that race predominated in the way the State drew the district lines.<sup>39</sup> In an opinion authored by Justice Stephen Breyer and joined by Justices Ruth Bader Ginsburg, Elena Kagan, Sonia Sotomayor, and Anthony Kennedy, the Court reversed the lower court and signaled the revivification of the *Shaw* doctrine.<sup>40</sup>

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34. 532 U.S. 234 (2001).

35. *Id.* at 237.

36. *See id.* at 257.

37. 135 S. Ct. 1257 (2015).

38. *Id.* at 1262.

39. *Id.* at 1264.

40. *Id.* at 1274.

To the extent that there were any doubts about the return of *Shaw*, those doubts were erased two years later when the Court decided two more racial gerrymandering cases, *Bethune-Hill v. Virginia State Board of Elections*<sup>41</sup> and *Cooper v. Harris*,<sup>42</sup> cases arising out of Virginia and North Carolina respectively. In *Bethune-Hill*, the Court reversed a lower court's decision upholding Virginia's state legislative redistricting plan against a *Shaw* challenge.<sup>43</sup> The lower court interpreted the predominance standard in a way that would have made it more difficult for plaintiffs to prevail in *Shaw* claims.<sup>44</sup> In an opinion by Justice Kennedy that was joined by Justices Ginsburg, Breyer, Kagan, Sotomayor, and Chief Justice John Roberts, the Court held that the lower court applied an incorrect legal standard and remanded the case back to the trial court.<sup>45</sup> In *Cooper*, and in an opinion by Justice Kagan, the Court upheld a *Shaw* challenge to two North Carolina congressional districts.<sup>46</sup> *Cooper* is the first of the new racial gerrymandering cases to use *Shaw* in order to strike down race-conscious majority-minority districts as unconstitutional.<sup>47</sup>

The return of the *Shaw* cases provides an occasion for a reexamination of the *Shaw* doctrine—which was thought to be inimical to the interests of voters of color—and to understand what this new, incipient line of racial gerrymandering cases mean for the voting rights of voters of color. We make four points in this Article, in increasing order of importance and originality. First, we argue in Part I that the original *Shaw* cases were more nuanced than commentators recognize. Though the Court's central purpose in *Shaw* was to introduce colorblindness to the voting context, it also preserved an important role for race-conscious decision-making. The Court's antisubordination impulse tempered its anticlassification orientation. The fundamental point here is that the Court in the *Shaw* cases was committed to both anticlassification or race blindness and antisubordination or race consciousness. The *Shaw* cases

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41. 137 S. Ct. 788 (2017).

42. 137 S. Ct. 1455 (2017).

43. *Bethune-Hill*, 137 S. Ct. at 794-95.

44. *Id.* at 796.

45. *Id.* at 797-98.

46. *Cooper*, 137 S. Ct. at 1463, 1465.

47. *Id.* at 1468.



did not eliminate color-conscious decision-making in the design of electoral structures. In fact, the Court was so committed to preserving race consciousness in the districting context that when faced with the choice of eliminating race consciousness in redistricting in order to reduce the tension that is caused by maintaining two theoretical approaches that point in different directions, the Court chose to end *Shaw* claims.

Second, we argue in Part II that the doctrinal tension in the *Shaw* cases is a function of the fact that the Court was working through two different and sometimes competing conceptions of representation: descriptive and substantive. The tension is the product of the Court's refusal to choose between these two conceptions and its attempt to allow the state to give effect to both, when the state so chooses. The antirsubordination strand of the doctrine tried to preserve room for descriptive representation and the anticlassification strand tried to give primacy to substantive representation and limit the extreme instances of descriptive representation. We present the descriptive-substantive representation frame as more compelling than the race and party frame that some scholars have used to describe these cases.<sup>48</sup> The Court's reaction in *Shaw* is best understood not as objecting to the state's use of race per se, or preferring a partisan frame, but to the state's conception of representation as reflected in the existing redistricting map. The Court saw the state as too committed to descriptive representation over and above other legitimate goals, including substantive representation. In response, *Shaw* applied the color-blindness doctrine to discipline the state's use of descriptive representation.

We then turn to the new racial gerrymandering cases. We argue in Part III that the new racial gerrymandering cases are a departure from the *Shaw* cases. Unlike the *Shaw* cases in which the *Shaw* majorities sought to give effect to both antidiscrimination and anticlassification norms, the new racial gerrymandering cases reflect a new consensus on the Court that favors the application of an unfettered anticlassification approach for adjudicating race-based districting claims. This new consensus includes the Court's liberal

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48. See generally Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018).

Justices as well as its conservative ones. Indeed, there is a case to be made that the new consensus is led by the Court's liberal Justices. Post-*Cooper*, there is really no such category as an analytically distinct *Shaw* claim. *Cooper* has brought the racial gerrymandering claims fully within the ambit of the Court's traditional equal protection jurisprudence.

In Part IV, assuming that we are right about this new consensus, we assess what this all means for the VRA. We argue that because the new racial gerrymandering cases do not place much value on descriptive representation, they are on a collision course with the primary mechanism for forcing the states to give effect to descriptive representation, section 2 of the VRA. The color-blindness impulse that governs the Court's analysis in the racial gerrymandering cases is incompatible with the deep color consciousness of section 2. Because the Court's color-blindness impulse is not tempered by a commitment to antisubordination or by the recognition of the value of descriptive representation, which was reflected in the *Shaw* line of cases, something will have to give. For the reasons that we will set forth in this Article, we believe that it is section 2 that will yield to the Court's attempt to fully apply its anticlassification approach to the domain of voting rights. Thus, to the extent that the voting rights community values section 2 of the VRA and descriptive representation, they should be wary of the new racial gerrymandering cases.

#### I. THE EARLY RACIAL GERRYMANDERING CASES AND CONSTITUTIONAL EQUALITY: ANTICLASSIFICATION AND ANTISUBORDINATION

Commentators writing about *Shaw* and the *Shaw* line of cases have generally focused on the Court's importation of the color-blindness or anticlassification framework to the context of voting, justifiably so. However, though it is true that the primary goal of the majority in *Shaw* and in the *Shaw* cases was to bring racial gerrymandering within the Court's standard equal protection doctrine, this Part shows that the *Shaw* majority did not replace race consciousness with race blindness *in toto*. Animated by considerations

consonant with antistatutory theory, *Shaw* also sought to preserve a role for race consciousness in voting rights.

At the time it was decided, *Shaw I*<sup>49</sup> was the most significant voting rights decision since *South Carolina v. Katzenbach*,<sup>50</sup> the landmark case in which the Court broadly upheld the constitutionality of the VRA. *Shaw* introduced, or revealed, depending upon one's priors on these issues, a tension between the Supreme Court's evolving equal protection jurisprudence and the VRA. When the Court decided *Shaw*, its Equal Protection Clause jurisprudence was increasingly animated by a color-blindness impulse in the domains in which these questions were primarily adjudicated. Specifically, in the context of education, government contracting, and employment, the Court viewed color-blind decision-making by the state as an aspirational and constitutional ideal. Race consciousness was an exception that the government was required to justify. Conceptually and doctrinally, the Court's approach to race-based decision-making by the state was best captured by the theory and frame of the anticlassification doctrine, in which the Equal Protection Clause is implicated whenever the government classifies at all by race. The standard approach of the Court's equal protection jurisprudence is that courts must strictly scrutinize all governmental classifications by race.<sup>51</sup> And in order to survive this strict scrutiny, the government is required to offer a compelling justification for its classification and the means used for the classification must be narrowly tailored.<sup>52</sup>

Prior to *Shaw*, it was at best unclear whether the Court's anticlassification framework and the attendant color-blindness ideal were applicable in racial districting conducted pursuant to the VRA or justified by the state as a counter to private and public discrimination in voting.<sup>53</sup> Indeed, there were good reasons to believe that the VRA was an exception to the color-blindness ideal and the

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49. 509 U.S. 630 (1993).

50. 383 U.S. 301, 337 (1966), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

51. *See, e.g., Shaw I*, 509 U.S. at 644.

52. *E.g., id.* at 643.

53. *See* *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 163-64 (1977) (plurality opinion); *id.* at 167-68 (White, J.).

anticlassification approach of the Court's equal protection jurisprudence.<sup>54</sup>

The argument in favor of voting rights exceptionalism was based on two observations. First, the Court had largely approved the approach to racial equality in voting as exemplified by the VRA.<sup>55</sup> The VRA was based on Congress's attempt to address unrelenting racism in the electoral process.<sup>56</sup> The Court recognized what it characterized as the VRA's unusual methods of addressing the problem and notwithstanding the VRA's explicit race consciousness, the Court had largely signed off on the VRA and its most significant provisions.<sup>57</sup> Moreover, the Court's interpretation of the VRA significantly expanded the scope of the Act.<sup>58</sup> The Court went even further by holding up the VRA as model legislation.<sup>59</sup> Consequently, it was easy to assume or believe that the VRA was an exception to the Court's broader equal protection doctrine.

Second, the Court's anticlassification approach to race-conscious decision-making by the state was—and is—deeply and fatally incompatible with the VRA.<sup>60</sup> Whereas anticlassification doctrine generally abhors race consciousness, the VRA requires race

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54. See *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986); see also *United Jewish Orgs. of Williamsburgh, Inc.*, 430 U.S. at 161 (plurality opinion) (“Implicit in [the Supreme Court’s prior precedents] is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5.”).

55. See, e.g., *Katzenbach*, 383 U.S. at 337.

56. See *id.* at 308.

57. See *id.* at 327-28.

58. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1414 (2015).

59. See *City of Boerne v. Flores*, 521 U.S. 507, 529-535 (1997) (explaining that the strong measures that Congress adopted in the VRA were congruent and proportional to the problem that Congress sought to resolve); *Katzenbach*, 383 U.S. at 337.

60. See, e.g., *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 181 (1977) (Burger, C.J., dissenting) (“If *Gomillion [v. Lightfoot]* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution.”); see also Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 7 (2000) (noting that after *Shaw I*, the Court “invalidated every district line drawn on the basis of race ... even though the districts at issue ha[d] been drawn precisely to comply with the antidiscrimination command contained in the Voting Rights Act”).

consciousness and compels the government, under certain specified circumstances, to classify citizens on the basis of race.<sup>61</sup>

Moreover, and perhaps most importantly, the Court's equality jurisprudence defines racial discrimination as government behavior that is motivated by a discriminatory purpose. A law that has a negative impact on a racial group is not racial discrimination, as the Court defines it, unless the law was also motivated by a discriminatory purpose. Important components of the VRA operate on the basis of discriminatory impact and not discriminatory purpose. If the anticlassification approach was fully applicable in the voting context, then the VRA, and the Court's implementation of the core aims of the VRA, could not exist in their current expression.

To concretize the point, consider two of the most prominent provisions of the VRA, section 5 and section 2. Section 5 forbids jurisdictions that were subject to its provisions from adopting a voting law that would make voters of color worse off than the status quo.<sup>62</sup> In order to implement section 5, covered jurisdictions were required to ask how a new voting law would impact the voters of color living in that jurisdiction.<sup>63</sup> If the law would make these voters worse off, whether the legislature intended to make the voters worse off or not, the state could not implement the new voting law or rule consistent with section 5.<sup>64</sup>

One would be hard-pressed to imagine a similar law operating in any other similar domain or context, such as contracting, affirmative action in education, or employment. Imagine how the Court would have responded if, for example, in *Gratz v. Bollinger*, the University of Michigan affirmative action case, the university had implemented an admissions policy that prohibited Black student enrollment from falling below a certain preestablished baseline.<sup>65</sup> Or imagine how the Court would have reacted in the affirmative action contracting case *City of Richmond v. J. A. Croson Co.*, if the City of Richmond had adopted an ordinance that prevented the city

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61. See 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, 239 & n.66 (2001).

62. *Shelby County v. Holder*, 133 S. Ct. 2612, 2619-20 (2013).

63. *Id.* at 2620.

64. See *id.* at 2626-27.

65. Cf. 539 U.S. 244 (2003).

from implementing contracting rules that disadvantaged subcontractors of color.<sup>66</sup> There is no doubt that these policies would have been subject to strict scrutiny and there is no doubt that they would have also been struck down.

Analogously, section 2 of the VRA prohibits the government from drawing districting lines in a manner that would dilute the votes of voters of color,<sup>67</sup> using the proportion of voters of color in the population as the relevant baseline. As interpreted by the Court, section 2 entitles voters of color to a voting district of their own when they constitute a significantly large enough portion of the population, when their political preferences are inimical to that of white voters, and when white voters vote in a manner that undermines the political interests of voters of color.<sup>68</sup> When these conditions are met, barring the applicability of a totality of circumstances analysis, section 2 not only requires the government to be aware of race, it commands it to classify on the basis of race.

Using affirmative action as our operating contrasting example once again, imagine if a university had an admissions policy that entitled students of color to some baseline representation in an admissions class or required the university to set aside a certain number of seats in each class for students of color if the school's admissions policy had a disparate impact on students of color. In light of the Court's decisions in *Regents of the University of California v. Bakke*,<sup>69</sup> which preceded *Shaw*, and in *Gratz*,<sup>70</sup> decided post-*Shaw*, we know that the Court would easily and swiftly conclude that these types of admissions policies are not only subject to strict scrutiny, but that the Court would also conclude that these types of policies are unconstitutional. Racial classifications that are not tolerated in other domains, such as education and employment, are viewed as necessary in the context of race and voting. Moreover, they are not just viewed as necessary, sometimes they are even celebrated.

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66. *Cf.* 488 U.S. 469 (1989).

67. *See* 52 U.S.C. § 10301 (Supp. III 2016).

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

69. 438 U.S. 265, 319-20 (1978).

70. *Gratz*, 539 U.S. at 275-76.

Until *Shaw*, race consciousness in voting rights coexisted peacefully in parallel with the anticlassification and race-blindness framework that increasingly animated the Court's standard equal protection jurisprudence. The fact that these two doctrines did in fact peacefully coexist side-by-side, even if sometimes uneasily,<sup>71</sup> is the reason why it was plausible to believe that voting was exceptional and not subject to the Court's anticlassification doctrine, until *Shaw*.

When the Court decided *Shaw* and held that race-conscious electoral structures created to provide representation for voters of color were justiciable under the Equal Protection Clause, many commentators and activists assumed that the conservative Supreme Court would soon thereafter target the VRA, specifically section 2 of the Act.<sup>72</sup> They concluded that the race-conscious impetus of the VRA could not cohabit peacefully with the race-blind impulse of the Court's equality jurisprudence.<sup>73</sup> And there were certainly members of the *Shaw* majority who believed that the VRA was fundamentally inconsistent with the Court's broader equality cases.<sup>74</sup>

However, Justice O'Connor, *Shaw*'s author and the median Justice at the time, committed the *Shaw* majority to two seemingly inconsistent understandings of constitutional equality: race blindness, operationalized through the anticlassification approach, and race consciousness, operationalized through the antisubordination approach.<sup>75</sup> Take first her commitment to both anticlassification and to colorblindness, if only as an aspirational ideal. One does not need a degree in hermeneutics to see that the central aim of *Shaw* was to import the anticlassification model to the domain of voting rights. Justice O'Connor begins her legal analysis by declaring some doctrinal maxims. First, she reminded us, the "central purpose" of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race."<sup>76</sup> Second,

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

72. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 639 (1993).

73. See, e.g., *id.*

74. See Charles & Fuentes-Rohwer, *supra* note 61, at 237.

75. See *Shaw I*, 509 U.S. 630, 657-58 (1993).

76. *Id.* at 642 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

racial classifications—whether benign or not and whether the classification appears on the face of the statute or not—are entitled to strict scrutiny.<sup>77</sup> Third, racial gerrymandering, which she defined as “the deliberate segregation of voters into separate districts on the basis of race,”<sup>78</sup> is an “analytically distinct claim” from traditional voting rights claims, such as vote dilution claims, and as a racial classification is therefore subject to strict scrutiny.<sup>79</sup> Racial gerrymandering implicates the Equal Protection Clause’s equality principle and violates the Constitution when the government creates a racial gerrymander without sufficient justification.

But *Shaw* did not import the anticlassification doctrine into the voting rights domain unrestrained. *Shaw* also recognized a countervailing conception, race consciousness, as an imperative to constitutional equality.<sup>80</sup> This counterbalance to the anticlassification doctrine was easy to miss at the time because it came at the beginning of Justice O’Connor’s opinion and also because it was overshadowed by the majority’s attempt to justify the insertion of the anticlassification model into the voting rights context. Those parts of Justice O’Connor’s opinion rightfully attracted the most attention. However, particularly as refracted through the lens of time and the benefit of hindsight, we can also see that Justice O’Connor was committed, even if comparatively less so, to a competing principle, which was that racial equality also demanded some modicum of race consciousness.

In the prelude to her legal analysis, which she self-consciously styled as historical “background,”<sup>81</sup> she took pains from the outset to place the VRA as a laudable and successful response to a long and enduring history of racial discrimination.<sup>82</sup> She expressly noted that notwithstanding the promise of the Fifteenth Amendment, which made racial discrimination in voting unconstitutional, the Amendment was effectively a dead letter in much of the country even one hundred years after its ratification.<sup>83</sup> Further, she noted

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77. *Id.* at 642-43.

78. *Id.* at 641.

79. *Id.* at 652.

80. *See id.* at 640-41.

81. *Id.* at 641.

82. *See id.* at 639-41.

83. *See id.* at 639-40.



that even though there had been progress under the Act—the Act had caused a reduction of racial discrimination in voting by lowering first-generation voting rights barriers, such as discriminatory voting registration laws—the task of achieving racial equality had yet to be completed.<sup>84</sup> Justice O'Connor acknowledged the fact that discriminators were quick to find new ways to discriminate—what some commentators have described as the second-generation voting rights violations—such as diluting the votes of voters of color.<sup>85</sup>

One is left with the clear impression from Justice O'Connor's "background" section that she and the majority recognized that the goal of racial equality remained still yet elusive in the domain of voting. She framed colorblindness against the background history and present reality of racial discrimination voting. She then cabined the reach of the color-blindness approach. Justice O'Connor remarked, "Despite [the plaintiffs'] invocation of the ideal of a 'color-blind' Constitution, [they] appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise."<sup>86</sup> Race-conscious districting is not always unconstitutional because the "Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."<sup>87</sup>

Additionally, and perhaps more importantly, she recognized that race consciousness, properly cabined, is necessary in the redistricting process. "That sort of race consciousness does not lead inevitably to impermissible race discrimination."<sup>88</sup> "That sort of race consciousness" is indispensable to the protection of the equality rights of voters of color. In light of the fact that racism in voting is a current reality and in light of the fact that the discrimination of the past has present day effects, color-blind redistricting would consign voters of color to second-class status. Accordingly, the majority not only explicitly refused to import the full array of the Court's colorblindness jurisprudence to the voting context, it also expressly preserved space for race consciousness.

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84. *See id.* at 640.

85. *See id.* at 640-41.

86. *Id.* at 642 (citations omitted).

87. *Id.*

88. *Id.* at 646.

There is no better evidence for the role of race consciousness and anticlassification in the racial gerrymandering cases than *Shaw's* focus on bizarrely shaped race-conscious districts. As the Court defined it originally, a *Shaw* claim is a claim that challenges “re-districting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.”<sup>89</sup>

The fact that *Shaw* applied only to bizarrely shaped race-conscious districts and not simply to all race-conscious districts served to limit the application of the anticlassification doctrine. The bizarreness requirement supplied a limiting principle. Just in the same way that the application of the anticlassification doctrine served to domesticate or discipline the use of race by the state, the requirement of bizarreness served to domesticate and limit the application of the anticlassification doctrine. The anticlassification doctrine did not apply to all race-conscious districts, only those that were bizarrely shaped: the “exceptional cases.”<sup>90</sup>

In this way, the *Shaw* majority could give effect to the two conceptions of racial equality that were often thought to be mutually incompatible: in redistricting, the state must be as race blind as possible and as race conscious as necessary. The bizarreness requirement was the fulcrum that sustained *Shaw's* ability to deploy both concepts of equality. The state can be race conscious so long as it does not draw race-conscious, bizarrely shaped districts, that would be going too far. The state can draw bizarrely shaped districts, but only if those districts are race blind.<sup>91</sup>

The Court began to move away from the bizarreness requirement two years after *Shaw*, in *Miller v. Johnson*.<sup>92</sup> In an opinion by Justice Kennedy, the Court explained that the constitutional violation

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89. *Id.* at 642.

90. *Id.* at 646-47 (“In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregat[e] ... voters’ on the basis of race.” (alterations in original) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960))).

91. 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, 494-96 (1993).

92. See 515 U.S. 900, 912-13 (1995).

in racial gerrymandering claims, consistent with the constitutional violation in anticlassification claims generally, “was the presumed racial purpose of state action, not its stark manifestation.”<sup>93</sup> Shape was relevant to prove intent and show impact, but it was not a necessary element of the constitutional claim.<sup>94</sup> In a departure from *Shaw*, the Court in *Miller* explained that it was not extreme instances of racial gerrymandering but a racial motive that implicated the Constitution.<sup>95</sup> The Court in *Miller* promulgated the “predominant factor” test, by which the plaintiff can prove intent in a racial gerrymandering case.<sup>96</sup> A racial gerrymander was subject to strict scrutiny if “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”<sup>97</sup>

*Miller*’s focus on racial motive brought *Shaw* claims closer to the Court’s standard equal protection jurisprudence and undermined the position of those who believed that voting rights were exceptional. Addressing the voting rights exceptionalism argument directly, Justice Kennedy stated explicitly that redistricting cases are not “excepted from standard equal protection precepts.”<sup>98</sup> However,

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93. *Id.* at 913.

94. *Id.* at 915.

95. *Id.* at 911.

96. *Id.* at 916.

97. *Id.*

98. *Id.* at 914 (“Appellants and some of their *amici* argue that the Equal Protection Clause’s general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations. Underlying their argument are the very stereotypical assumptions the Equal Protection Clause forbids.”). Indeed, in many respects one can see the relationship between the Court’s approach in *Miller* and other domains of the Court’s broader equal protection jurisprudence. For example, *Miller*’s predominant factor test was not too dissimilar from Justice Lewis Powell’s approach to race-based affirmative action in *Bakke*. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978). Justice Powell argued in *Bakke* that race can be one consideration among many that state universities can take into account in constructing their admissions program. *Id.* Race, however, cannot be the sole criterion. *Id.* at 315. Justice Powell’s approach represents the state of the doctrine after Justice O’Connor essentially incorporated it into her majority opinion for the Court in *Grutter*. *Grutter v. Bollinger*, 539 U.S. 306, 323-25 (2003). Following Justice Powell in *Bakke* and anticipating O’Connor in *Grutter*, Justice Kennedy stated for the Court in *Miller* that race can be one of many factors considered by the government. *Miller*, 515 U.S. at 916 (“Redistricting legislatures will ... almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.”). Also, like in the affirmative action context where Justices Powell and O’Connor urged courts to show some deference to the decision makers, *Grutter*, 539 U.S. at 328; *Bakke*, 438 U.S. at 320 (holding

though *Miller* undermined the proposition that redistricting cases are exceptional and not subject to standard equal protection doctrine, *Miller* did not and could not eliminate the gap between standard equal protection doctrine and the racial gerrymandering cases completely, unless it was prepared to strike down significant parts of the VRA. The fact of the matter is that the VRA authorized and compelled the government to take race into account in redistricting.<sup>99</sup> There is no other domain in the equal protection context in which the government is under such an explicit legal mandate and to this extent.<sup>100</sup>

By bringing the racial gerrymandering cases closer to the standard equal protection approach, the Court in *Miller* simply increased the tension between the Equal Protection Clause and the VRA. Eventually, something would have to give. Either the Court would back away from its insistence that the racial gerrymandering cases were subject to the same equal protection standards as the race cases outside of the redistricting context, or the Court would strike down one or both central provisions of the VRA. For several years after *Miller*, the Court attempted to walk the now even more fine line between permissible race consciousness and impermissible racial categorization.

The Court eventually decided that it was more committed to the VRA than to purifying equal protection doctrine. The end for *Shaw* cases came swiftly and perhaps unexpectedly. In *Cromartie II*, the Court addressed for the fourth time the constitutionality of North Carolina's District 12, one of the districts at issue in the first *Shaw* case.<sup>101</sup> Reversing the lower court's finding of fact on a clear error

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that, although deference was not given to the decision maker in this instance, states do have a substantial interest that may be served by considering race), Justice Kennedy also urged "courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. However, notwithstanding the admonition to courts that decision makers are entitled some amount of deference, the Court in *Miller* showed that it will strike down race-conscious state action in the redistricting context, in the same manner that it strikes down race-conscious decision-making in other domains. *Id.* at 927-28.

99. See Aleinikoff & Issacharoff, *supra* note 72, at 594.

100. The arguable exception might be the disparate impact doctrine in the Title VII context. See generally George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987).

101. 532 U.S. 234, 237 (2001).

review, the Court held that the district was the product of a political and not racial gerrymander, as the lower court had held.

The *Shaw* cases themselves are a perfect microcosm of the saga of the racial gerrymandering cases. In *Shaw I*, the Court held that racial gerrymandering cases were justiciable, reversing the lower court.<sup>102</sup> In *Shaw II*, the Court held that the district at issue was a racial gerrymander in violation of the Constitution, reversing the lower court.<sup>103</sup> In *Cromartie I*, the plaintiffs challenged the then newly revised District 12.<sup>104</sup> The lower court granted summary judgment to the plaintiffs and concluded—taking its cues from the Court in *Shaw II*—that the district was a racial gerrymander in violation of the *Shaw* doctrine.<sup>105</sup> The Supreme Court reversed, for the third time, on the ground that summary judgment was not appropriate, as there were issues of material fact with respect to whether the district was drawn for political as opposed to racial reasons.<sup>106</sup> The Court returned the case to the lower court for its consideration of that issue, strongly hinting for the Court to find in favor of the State.<sup>107</sup>

On remand and following a three-day trial, the lower court once again concluded that race predominated in the manner in which the State drew the district.<sup>108</sup> And once again, the Supreme Court reversed.<sup>109</sup> In an opinion for the Court by Justice Breyer, joined by Justices Stevens, O'Connor, Souter, and Ginsburg, the Court concluded that the lower court's factual findings were clearly erroneous because the available evidence supported the State's contention that the district was drawn for political reasons and not racial reasons.<sup>110</sup> *Cromartie II* provided a safe harbor of sorts for the states when they drew majority-minority districts. As long as they could plausibly claim that those districts were drawn for partisan reasons—and given the correlation between racial and political identity, that

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102. *Id.* at 237-38 (citing *Shaw I*, 509 U.S. 630, 649 (1993)).

103. *Id.* at 238 (citing *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996)).

104. *Id.* (citing *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541 (1999)).

105. *Id.* at 238-39.

106. *Id.* at 239.

107. *Id.*

108. *Id.*

109. *Id.* at 243.

110. *Id.* at 258.

claim can almost always be made—the states are likely to prevail against claims of racial gerrymandering under *Shaw*. And so, *Shaw* claims were laid to rest.

## II. DESCRIPTIVE REPRESENTATION

Though *Shaw* is often viewed as a case that is inimical to the goals of the VRA, *Shaw* is underappreciated as a case that attempted to preserve doctrinal space for the states to pursue descriptive representation for voters of color. We argue in this Part that the best way to make sense of *Shaw* and the *Shaw* cases is to simply recognize them as cases that are about representational rights and the Court's hesitant, clumsy, and groping attempt to work its way through two concepts of representation. Specifically, *Shaw* forced the Court to think about the constitutional limits on the state's authority when the state is arbitrating between descriptive representation and substantive representation. While *Shaw* and the racial gerrymandering cases certainly favored substantive over descriptive representation, *Shaw* also attempted to preserve the ability of state legislatures to pursue descriptive representation for voters of color so long as they did so within the relative parameters established by the Court. *Shaw* sought to cabin, not eliminate, the state's pursuit of descriptive representation.

There are two ways of characterizing the racial gerrymandering cases, including the new cases such as *Cooper*. Some commentators have depicted these cases as cases that are about the clash between race and party.<sup>111</sup> The race and/or party frame is a serviceable framework, but it lacks some nuance. That frame fails to account for what is truly at stake in this domain, which is whether there are constitutional limits on the state when the state is choosing among different and consequential concepts of representation. Additionally, the race and/or party setup cannot provide a coherent doctrinal resolution of the constitutional questions, including standing questions, that are raised in this area. Sometimes the state creates majority-minority districts for racial reasons—to promote or dilute the voting rights of a particular racial group—and sometimes the

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111. See, e.g., Hasen, *supra* note 48.

state creates these districts for partisan reasons—to promote or dilute the voting rights of the in-party or out-party respectively. And of course, and here is the complication, in our modern political era, race and partisanship are highly correlated. A race-based district will have partisan effects and vice versa. In such circumstances, the attempt to divine the essence of these cases—whether they are truly racial or truly partisan—is quixotic at best.<sup>112</sup>

One possibility is to say that these districts are both racial and partisan. But that option does not lead to a doctrinally coherent answer either. This is so for two reasons. First, the Court's racial districting jurisprudence compels a choice. The trier of fact must identify race as the predominant factor, not the correlative factor or the conjoined factor; choosing both is not a doctrinal option. Second, to say that these districts are both partisan and racial does not serve to impose any limits on the state. This is because current doctrine provides politicians in charge of districting with an opportunity for engaging in regulatory arbitrage. As a legal matter, the doctrine treats race differently from partisanship. The government violates the Constitution when it creates a race-based district without sufficient justification. The government does not violate the Constitution when its redistricting plan is primarily, predominantly, or exclusively motivated by partisan considerations. And, as we have already established, a redistricting plan can have both partisan and racial purposes and effects. Thus, those in charge of the redistricting process can frame the districts as racial or partisan strictly depending upon which frame would be most advantageous. This doctrinal difference presents an opportunity for a type of regulatory arbitrage by allowing redistricters to take advantage of the different regulatory structure that applies to functionally the same act.

The Court could solve the arbitrage problem by changing the law to limit the government's discretion when the government redistricts to maximize or minimize partisan advantage. This would resolve the race or party problem. It would also enable us to see that the core of the issue is not race or party but representation. What is

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112. *See id.*

at stake in these cases, is a Court weakly wrestling with the problem of representation, specifically descriptive representation. Thus, an alternative way to think about the racial districting cases is to look at them simply as cases trying to come to terms with whether there are constitutional limits on government when the government designs electoral structures to enhance or undermine descriptive or substantive representation.

Hanna Pitkin describes descriptive representation as “depend[ing] on the representative’s characteristics, on what he *is* or is *like*, on being something rather than doing something.”<sup>113</sup> In contrast to substantive representation, in which the representative is endeavoring to effectuate the substantive policy preferences of the represented, the representative, in descriptive account, is not acting on behalf of the represented as much as she is standing in for them.<sup>114</sup> The representative is a reflection of the represented. What representation means in this context is “resemblance, reflection, [and] accurate [descriptive] correspondence.”<sup>115</sup> Descriptive representation reduces, if not eliminates, the principal-agent problem that is endemic to the concept of representation.<sup>116</sup> At least theoretically, if the representative is chosen not because he or she was authorized or delegated by the principal, but by being a mirror image or the essence of the principal, the representative, *ipso facto*, “reflects” the views of the principal, the representative is much more likely to understand and implement the preferences of the principal because the representative is just like the principal, the principal’s mirror image.<sup>117</sup> As such, descriptive representation is particularly useful when thinking about the best way to represent racial, political, or numerical minorities.<sup>118</sup> A member of the minority group can “stand for” the group, and because she is a member of the group, she will inherently understand what the group wants; she is a reflection of

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113. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 61 (1967).

114. *Id.*

115. *Id.* at 62.

116. For an introduction, see Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203 (2005).

117. See PITKIN, *supra* note 113, at 61.

118. See, e.g., Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POLITICS 628 (1999).



the group's interests, so the theory goes.<sup>119</sup> This is the concept of representation against which the Court recoiled in the *Shaw* cases.

One of the more vexing questions about *Shaw* has always been to figure out the constitutional harm at issue. A *Shaw* claim, at least in the original *Shaw* case, was one in which the Court would strictly scrutinize "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race.'"<sup>120</sup> *Shaw* claims were unlike the two types of voting rights claims that the Court had previously found objectionable on constitutional grounds, vote denial and vote dilution cases.

*Shaw* claims were also unlike the types of racial discrimination claims that the Court concluded violated the Equal Protection Clause. In the equal protection context, race-based decision-making by the state violated the Equal Protection Clause either because the government targeted the individual for disadvantage because of the individual's race or because the use of race by the state was per se unconstitutional notwithstanding whether the individual suffered material disadvantage.<sup>121</sup> *Shaw* claims did not fall into either of these categories. As we note above, the *Shaw* majority stated explicitly that taking race into account was not a per se violation of the Equal Protection Clause in the racial gerrymandering context. Thus, the harm was not race-conscious state action per se. With respect to material disadvantage, the plaintiffs did not articulate how they were materially disadvantaged. For example, they did not maintain that the state's racial gerrymander would make it less likely for them to get the type of constituency service or legislation that they would prefer.<sup>122</sup> Because the plaintiffs had no claim whatsoever to be placed in a particular district and there was no reason to believe that being placed in one district is better or worse than another, it would have been difficult for the plaintiffs to claim that they were disadvantaged or harmed simply because of which district they were placed in by the state.<sup>123</sup> *Shaw's* claims did not easily fit into theories of harm in the voting or race context as those

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119. See PITKIN, *supra* note 113, at 61.

120. *Shaw I*, 509 U.S. 630, 644 (1993) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

121. See Aleinikoff & Issacharoff, *supra* note 72, at 597-98.

122. See Pildes & Niemi, *supra* note 91, at 494.

123. See *id.*

theories were articulated in prior cases.<sup>124</sup> *Shaw's* theory of harm was a bit inchoate.

The bizarre shape of the district was thought to supply *Shaw's* conception of constitutional harm.<sup>125</sup> As Professors Richard Pildes and Richard Niemi stated, *Shaw* recognized an expressive harm.<sup>126</sup> Pildes and Niemi argued that bizarrely shaped districts communicate a message or signal to government officials and the electorate that "race has become paramount and dwarfed all other, traditionally relevant criteria."<sup>127</sup> From the point of view of the *Shaw* majority, race-conscious bizarrely shaped districts "are in-your-face visual representations of racial interest as raw political power."<sup>128</sup> To slightly paraphrase the late John Hart Ely, when the state draws a bizarrely shaped race-conscious district, the state sends a message to the electorate that there is no length to which the government will not go to help Black people.<sup>129</sup> The bizarre shape communicates the state's preference for helping one racial group no matter the cost.<sup>130</sup> The bizarre shape of the district is the instantiation of the extreme racial behavior by the state, of the excessive use of race, and of the extreme reliance on race by the state.<sup>131</sup>

But these explanations of the relationship between the bizarre shape and the constitutional harm are incomplete. They do not tell us what it is about the use of race in this particular way that the Court found objectionable. The Court in *Shaw* was not simply objecting to a racial interest as raw political power; it was objecting to the manner in which political power was deployed to design electoral structures on the basis of descriptive representation.<sup>132</sup> In the

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124. Indeed, one of the important questions following the Court's decision in *Shaw* was how standing would be conceived and conferred. See generally John Hart Ely, Commentary, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

125. See Charles & Fuentes-Rohwer, *supra* note 61, at 236; Rubin, *supra* note 60, at 138-40; see also Aleinikoff & Issacharoff, *supra* note 72, at 609.

126. Pildes & Niemi, *supra* note 91, at 506-07 ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.").

127. *Id.* at 501.

128. Charles & Fuentes-Rohwer, *supra* note 61, at 241.

129. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 615 (1998).

130. *Id.*

131. Aleinikoff & Issacharoff, *supra* note 72, at 608-10.

132. *Shaw I*, 509 U.S. 630, 648 (1993).

Court's terms, it was objecting to "district[s] obviously ... created solely to effectuate the perceived common interests of one racial group."<sup>133</sup>

In one of the most recognized lines from the opinion, the majority exclaimed "that reapportionment is one area in which appearances do matter."<sup>134</sup> Appearances matter because of the message that appearances communicate to the represented and the representatives. To those being represented, bizarrely drawn race-conscious districts communicate the message that political identity ought to be first and foremost racial.<sup>135</sup> Or put differently, these districts communicate the primacy and normativity of descriptive representation, that voters of a particular race are best represented by a representative of that race.<sup>136</sup> This normative claim is what the Court has summarized on numerous occasions as an "impermissible racial stereotype[.]"<sup>137</sup>

The Court viewed descriptive representation as a representational harm.<sup>138</sup> *Shaw* took issue with the central normative claim of descriptive representation: that representation tracks identity. As the Court put it in *Shaw*, the constitutional worry is the proposition "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."<sup>139</sup>

To the representative, those districts communicate a similar message, which is that she ought to understand her task as standing in for her race. She ought not view herself as representing her party, ideology, or substantive views, but as speaking for her race. As the Court said, the problem with descriptive representation is that the representative believes her "primary obligation is to represent only the members of [her racial] group, rather than [her]

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133. *Id.*

134. *Id.* at 647.

135. *Id.*

136. See PITKIN, *supra* note 113, at 61.

137. *Shaw I*, 509 U.S. at 647-48 (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991); *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990)).

138. See, e.g., *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

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

constituency as a whole.”<sup>140</sup> The normative primacy of descriptive representation is “antithetical to our system of representative democracy.”<sup>141</sup>

Correspondingly, the doctrinal moves in *Shaw* were in the service of enforcing the Court’s vision of the relationship between race and representation. Thus, the tug-of-war between the anticlassification and antisubordination camps mirrored precisely the Court’s struggle to understand the constitutional limits to effectuating descriptive or substantive representation.<sup>142</sup> The Court’s theoretical conception of representation informed its constitutional doctrine. As the core aim of *Shaw* was to privilege substantive representation over descriptive representation, the core aim of the doctrine was to privilege anticlassification over antisubordination. Similarly, as a secondary aim of *Shaw* was to preserve room for the state to pursue descriptive representation, the Court’s antisubordination doctrine was deployed to achieve that objective. *Shaw*’s tension and sometimes incoherence was its attempt to hold on to these two strands.

### III. BACK TO THE FUTURE: THE NEW RACIAL GERRYMANDERING CASES

When the Court essentially retreated from strictly policing the boundaries of racial gerrymandering in *Cromartie II*, it thereby signaled its commitment to race consciousness and descriptive representation at the expense of its anticlassification jurisprudence. We argue in this Part that the new racial gerrymandering cases, unlike the *Shaw* line of cases, are much less committed, if at all, to race consciousness and to *Shaw*’s antisubordination strand. There seems to be an emerging new consensus on the current Court that deploys the anticlassification framework to the near exclusion of the antisubordination approach and that privileges colorblindness and strictly limits race-conscious districting.

In order to see this emergent consensus, we look closely at *Cooper v. Harris*. In *Cooper*, the Supreme Court upheld a lower court’s

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140. *Id.* at 648.

141. *Id.*

142. See generally Siegel, *supra* note 23 (describing the debate between anticlassification and antisubordination principles).

findings that the North Carolina legislature violated the Equal Protection Clause when it racially gerrymandered two of the State's congressional districts, District 1 in the northeastern part of the state, and District 12 in the south-central part of the state.<sup>143</sup> The State argued that it created District 1 as a majority-minority district in order to comply with the VRA.<sup>144</sup> It argued that it created the second district, District 12, so as to politically gerrymander Democrats and not African American voters; partisan consideration, it maintained, not race, was the motivating factor in the construction of the district.<sup>145</sup>

Given the significant divisions on the Court over the *Shaw* doctrine, the *Cooper* Court was surprisingly and significantly less fractured than the *Shaw* Court. In fact, Justice Kagan wrote for a unanimous Court when she concluded that race was the predominant reason that the State created District 1, and that the VRA did not justify the State's intentional decision to construct the district as a majority-minority district. Since the Court promulgated the *Shaw* doctrine, *Cooper* is the first time that the liberals on the Court agreed to strike down a majority-minority district on the ground that it was an unconstitutional racial gerrymander.

The Court was not quite as harmonious when it came to District 12. However, Justice Kagan's majority opinion was joined by none other than Justice Clarence Thomas, who teamed with the Court's liberals, Justices Ginsburg, Sotomayor, and Breyer, to strike down District 12.<sup>146</sup> In contrast to *Shaw*, it was the conservatives in *Cooper*—minus Justice Thomas—in an opinion by Justice Alito, who made the argument that race was not predominant. Justice Alito's opinion dissented from the Court's constitutional analysis of District 12 and argued that the district was drawn for partisan reasons.

Also unlike *Shaw*, in which the majority opinion attempted to accommodate both antidiscrimination and anticlassification approaches, Justice Kagan's doctrinal analysis of North Carolina's majority-minority congressional districts applied the Court's anticlassification jurisprudence matter-of-factly and without any con-

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143. *Cooper v. Harris*, 137 S. Ct. 1455, 1465, 1481-82 (2017).

144. *Id.* at 1466.

145. *Id.* at 1473.

146. *Id.* at 1463.

cession to the antisubordination approach. *Cooper* moves the Court's *Shaw* jurisprudence strongly in the direction of anticlassification and away from any consideration of antisubordination. Consider four observations from the opinion in support of our claim.

First, from the outset, Justice Kagan frames the legal standard in anticlassification terms. She characterizes the State's line-drawing in a manner that would have been very familiar to the Justices who were in the majority in the *Shaw* cases: race-based districting is racial separation, which, like any other racial classification or government action that separates voters on the basis of race, is entitled to strict scrutiny. Quoting from Justice Kennedy's opinion in *Bethune-Hill v. Virginia State Board of Elections*, a racial gerrymandering case the Court decided just a few months before *Cooper*, Justice Kagan stated, "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting" and "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'"<sup>147</sup> To the Court in *Cooper*, the intentional creation of majority-minority districts is a racial classification that separates voters on the basis of race. To the extent that there is any doubt, the Court in *Bethune-Hill* stated emphatically, "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications."<sup>148</sup> When the government draws districts on the basis of race, the government is engaging in a racial classification, which demands strict scrutiny by a reviewing court. This legal proposition, though fiercely contested in *Shaw*,<sup>149</sup> after the Court's decisions in *Cooper* and *Bethune-Hill*, is now settled doctrine.<sup>150</sup>

Second, *Cooper*, in the parlance of the anticlassification approach, characterizes the State's desire to create a majority-minority district

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

148. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017).

149. See *Shaw I*, 509 U.S. 630, 667 (1993) (White, J., dissenting); *id.* at 679 (Stevens, J., dissenting); *id.* at 680-81 (Souter, J., dissenting).

150. The Court in *Bethune-Hill* pretty much admitted as much. *Bethune-Hill*, 137 S. Ct. at 798 (noting that the government's argument in that case, which depended upon *Shaw*'s antisubordination strand, "might have been reconcilable with this Court's case law at an earlier time" and that "[c]ertain language in *Shaw I* can be read to support" the State's argument).

as a racial quota. In her analysis of District 1, Justice Kagan argued that strict scrutiny was warranted because the State was committed to creating the district as a majority-minority district, which she defined as a quota.<sup>151</sup> She maintained that North Carolina “purposefully established a racial target” in the construction of the district.<sup>152</sup> The racial target or quota was not a specific percentage, but the State’s intention to draw a majority-minority district, a district in which “African-Americans should make up no less than a majority of the voting-age population.”<sup>153</sup> Given this “announced racial target,” strict scrutiny was necessary.<sup>154</sup>

*Cooper*’s characterization of the State’s bare desire to create a majority-minority district as the equivalent to a racial target is a significant development in the doctrine. Though prior cases had held that the intent to create a majority-minority district constitutes discriminatory purpose, requiring strict scrutiny, the Court had never before held that intent to create a majority-minority district is itself a racial target. The Court in *Cooper* effectively equates North Carolina’s intent to create a majority-minority district with an intent that the district constitutes a specific percentage of voters of a particular race, say 55 or 60 percent. This would be equivalent to saying, in the affirmative action in higher education context, for example, that the desire to engage in race-conscious affirmative action is *ipso facto* equivalent to a racial target or quota. The Court has concluded that the state is committed to a racial quota only when the state is committed to a specific number; not when the state intends to be race conscious or to take race into account. A fundamental tenet of the Court’s antidiscrimination jurisprudence is that racial targets or quotas are almost per se unconstitutional. By invoking the language of a racial target, the majority in *Cooper* sends a strong signal that the district at issue is fatally and irredeemably flawed.

Third, the majority in *Cooper* limits the state’s ability to prevent a districting plan from having a disparate impact on an identifiable

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151. *Cooper*, 137 S. Ct. at 1468-69.

152. *Id.* at 1468.

153. *Id.* (defining the racial target as the fact that the State’s mapmakers “repeatedly told their colleagues that District 1 had to be majority-minority”).

154. *Id.* at 1469.

racial group. The Court in *Cooper* held that the government cannot use section 2 of the VRA to justify drawing a majority-minority district, unless the state first demonstrates that a race-blind districting plan would dilute the voting power of the putative plaintiffs. In *Cooper*, North Carolina argued that creating District 1 as a majority-minority district was necessary because otherwise the State would be subject to liability under section 2 of the VRA, which forbids the government from diluting the votes of voters of color.<sup>155</sup> Justice Kagan disagreed.<sup>156</sup> She argued that North Carolina did not have a good reason to believe that it would have violated section 2 if it had not created District 1 as a majority-minority district.<sup>157</sup> This was because putative plaintiffs could not meet all three *Gingles* preconditions.<sup>158</sup>

In *Thornburg v. Gingles*, the Court held that a racial group that is a minority in the relevant electorate can allege that the majority diluted its voting power under section 2 of the Act if the minority could meet three preconditions.<sup>159</sup> First, the minority group must be large enough to constitute a numerical majority in a compact single-member district.<sup>160</sup> Second, the minority group must have the same political preferences.<sup>161</sup> Third, the majority group must vote as a bloc to defeat the political preferences of the minority.<sup>162</sup> Further, in *Bush v. Vera*, the Court held that avoiding section 2 liability could not serve as a compelling justification for taking race into account in districting, unless the state had a “strong basis in evidence” that its redistricting plan would have violated section 2.<sup>163</sup>

Justice Kagan argued that North Carolina did not have a good reason or strong basis in evidence to believe that it would violate section 2 if it did not create District 1 as a majority-minority district.<sup>164</sup> This was because potential plaintiffs would not be able to meet the third *Gingles* precondition that the majority group votes

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155. *Id.* at 1468-69.

156. *Id.* at 1471.

157. *Id.*

158. *Id.* at 1470-71.

159. 478 U.S. 30, 48-51 (1986).

160. *Id.* at 50.

161. *Id.* at 51.

162. *Id.*

163. 517 U.S. 952, 977 (1996) (quoting *Shaw I*, 509 U.S. 630, 656 (1993)).

164. *Cooper v. Harris*, 137 S. Ct. 1455, 1470-71 (2017).



as a bloc to defeat the political preferences of the racial minority.<sup>165</sup> Justice Kagan argued that for two decades, white voters in District 1 voted in a manner that was consistent with the political preferences of Black voters.<sup>166</sup> Moreover, and more importantly, the Court stated that the State failed to determine whether a race-blind districting process would have led to a violation of section 2.<sup>167</sup> Given that white voters in the district have historically voted for candidates preferred by the district's voters of color, the State should have first created the district without taking race into account and determined whether the crossover voting by white voters would have continued.<sup>168</sup> If white voters maintained their history of crossover voting, then potential plaintiffs would not be able to meet the third *Gingles* precondition, which would mean that the State would have no reason to worry about liability under section 2.<sup>169</sup> Consequently, potential section 2 liability could not serve as a compelling reason for the State to use race in creating District 1.<sup>170</sup> Thus, the Court upheld the lower court's determination that District 1 was an unconstitutional racial gerrymander.<sup>171</sup> *Cooper* firmly establishes that the use of race has to be remedial.

Fourth, the Court in *Cooper* sought to limit the practice of racial districting by making it easier for plaintiffs to prevail in these types of claims. Consider the Court's analysis of District 12. North Carolina argued that District 12 was not created as a racial gerrymander but as a political gerrymander.<sup>172</sup> The State maintained that its goal was not to undermine the representation of African Americans, but to minimize the representation of Democrats.<sup>173</sup> The plaintiffs presented evidence to show that North Carolina moved tens of thousands of white voters out of the district and tens of thousands of Black voters into the district to create a majority-minority

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165. *Id.* at 1470.

166. *Id.*

167. *Id.* at 1471 (“[E]ven more important, North Carolina can point to no meaningful legislative inquiry into ... whether a new, enlarged District 1, created without a focus on race ... could lead to § 2 liability.”).

168. *See id.* at 1472.

169. *See id.*

170. *See id.*

171. *Id.*

172. *Id.* at 1473.

173. *Id.*

district.<sup>174</sup> The plaintiffs argued that North Carolina believed that it needed to do so to obtain preclearance from the Justice Department pursuant to section 5 of the VRA.<sup>175</sup> In affirming the lower court, Justice Kagan reasoned that it was possible to view the evidence as supporting either the plaintiffs' or the State's version of the facts and though the Court might have decided the issue differently were it the trier of fact, the standard of review compelled the Court to affirm the lower court's decision unless that decision was based upon clear error.<sup>176</sup>

The most significant part of the Court's analysis of District 12's constitutionality addressed an argument offered by the State and supported by Justice Samuel Alito in his dissent with respect to the type of proof that plaintiffs ought to offer in mixed motive redistricting cases. Justice Alito argued in his dissent that when racial and political identity are highly correlated and when the state maintains that its line-drawing was influenced by political justifications and not racial motivations, the Court's prior precedents, specifically *Cromartie II*, require plaintiffs to present evidence in the form of an alternative map demonstrating that the state could have achieved its political goals without the racial effect.<sup>177</sup>

Justice Kagan and the majority disagreed with the dissent's read of *Cromartie II*. Justice Kagan argued that the Court's statement in *Cromartie II* must be understood within the context of the nature of the evidence of racial motivation presented by the plaintiffs in that case. "The direct evidence of a racial gerrymander ... [in *Cromartie II*] was extremely weak," she stated.<sup>178</sup> In light of the nature of the evidence, she argued, the *Cromartie II* Court required the plaintiffs to present an alternative map that would have met the State's goals without having the racial effect.<sup>179</sup> By contrast, she maintained that the plaintiffs in *Cooper* presented direct evidence of the State's

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174. *Id.* at 1474.

175. *Id.* at 1475.

176. *Id.* at 1478 ("Maybe we would have evaluated the testimony differently had we presided over the trial; or then again, maybe we would not have. Either way ... we are far from having a 'definite and firm conviction' that the District Court made a mistake in concluding from the record before it that racial considerations predominated in District 12's design.")

177. *Id.* at 1487 (Alito, J., concurring in the judgment in part and dissenting in part).

178. *Id.* at 1481 (majority opinion).

179. *Id.*

motive supporting a claim of racial gerrymander.<sup>180</sup> Therefore, they were not required to produce a *Cromartie II* alternative map.<sup>181</sup>

Notwithstanding Justice Kagan's post-hoc justification of *Cromartie II*, Justice Alito has the better read of the case. *Cromartie II* did not say anything about the nature of the plaintiff's evidence. The Court clearly stated in *Cromartie II*:

In a case such as this one where majority-minority districts ... 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.<sup>182</sup>

As Justice Thomas argued in his *Cromartie II* dissenting opinion, the evidence was more than sufficient to sustain the lower court's decision.<sup>183</sup> Justice Thomas was clearly right that the Court's detailed and factual review of the lower court's findings of fact in *Cromartie II* was not consistent with the standard of review, which required the reviewing court to uphold the lower court's judgment unless its factual findings were clearly erroneous.

But Justice Kagan's move in *Cooper* is consonant with *Cromartie II* in this respect. The *Cromartie II* Court sought to make the evidentiary burden for plaintiffs consistent with its doctrinal orientation. *Cromartie II* pushed the Court away from anticlassification and toward antisubordination as a way of limiting *Shaw* claims. *Cromartie II*'s evidentiary requirement is synchronistic with its doctrinal orientation.

*Cooper* also makes the evidentiary burden for plaintiffs consistent with the Court's doctrinal orientation. *Cooper* relaxed the evidentiary burden in mixed motive cases to make the evidentiary burden consistent with the Court's anticlassification approach and the Court's broader equal protection doctrine. As Justice Kagan stated in *Cooper*, "[I]n no area of our equal protection law have we forced

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180. *Id.*

181. *Id.*

182. 532 U.S. 234, 258 (2001).

183. *Id.* at 267 (Thomas, J., dissenting).

plaintiffs to submit one particular form of proof to prevail.”<sup>184</sup> More tellingly, she stated in justifying this reinterpretation of *Cromartie II*: “The Equal Protection Clause prohibits the unjustified drawing of district lines based on race.”<sup>185</sup>

Racial gerrymandering cases are now adjudicated exclusively through the anticlassification framework. Just like other areas of equal protection law, what matters in the districting context is determining whether the government has classified on the basis of race and whether it has good reason for doing so. This is the consensus of the new racial gerrymandering cases.

#### IV. THE END OF SECTION 2?

If we are right that there is new consensus on the Court toward an anticlassification approach, what are the implications of this new consensus for the VRA? In this Part, we explore three possibilities. We warn that *Cooper* may signal the end for section 2 of the VRA.

It is tempting to view the new racial gerrymandering cases as a victory for voting rights plaintiffs. And perhaps they are, at least in the short term. Voters of color were among the plaintiffs in the new racial gerrymandering cases and they prevailed. Indeed, the three plaintiffs in *Cooper* are African American. The new racial gerrymandering cases seem to have used the *Shaw* doctrine to preclude the government from using race in a manner that would dilute the political power of voters of color.<sup>186</sup>

The original racial gerrymandering claims from the *Shaw* line of cases were filed by white voters who challenged majority-minority districts created by state legislatures—most often state legislatures controlled by Democrats—that attempted to maximize the partisan political power of Democrats while providing whatever descriptive representation for voters of color they needed to comply with the VRA.<sup>187</sup> The Democrats, when they were in charge of the redistricting process, attempted to minimize the trade-off between descriptive

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184. *Cooper*, 137 S. Ct. at 1479 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)).

185. *Id.* at 1480.

186. *See, e.g., id.* at 1469.

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

representation and substantive representation for voters of color.<sup>188</sup> And they sometimes did so by stringing together geographically dispersed populations into districts that were not always aesthetically attractive.<sup>189</sup> The Court's decision in *Shaw* and its progeny forced mapmakers to choose between the descriptive and substantive representation for voters of color by constraining the ability of the line-drawers to efficiently spread voters of color.

By contrast, the new racial gerrymandering cases minimize that trade-off. In comparison to the *Shaw* cases, which were filed by white voters, the new racial gerrymandering cases are brought by voters of color and Democrats who are not challenging majority-minority districts per se, but the percentage of voters of color in legislative districts drawn by state legislatures controlled by Republicans.<sup>190</sup> From the perspective of voters of color, they were inefficiently grouped in these types of districts, districts that forced a trade-off between their descriptive and substantive representation. State legislatures respond that they drew these districts in order to comply with federal law, and specifically the VRA.<sup>191</sup> It is only a happy coincidence that while seeking to maintain descriptive representation for voters of color, these districts minimize the political power of the Democratic Party and maximize the political power of the Republican Party.<sup>192</sup> In *Cooper*, the Court was unanimous in its view that race may not be used excessively without the proper justification.<sup>193</sup> Moving forward, states should no longer be able to pack voters of color into districts under the guise of complying with the VRA. Thus, it is tempting to view *Cooper* and the new racial gerrymandering cases as victories for voters of color.<sup>194</sup>

But the conclusion that the case is a victory for voters of color may be too facile and only ineluctable if we ignore the fact that the new racial gerrymandering cases exhibit a commitment from a unanimous Court to colorblindness as a constitutional principle in

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188. Charles & Fuentes-Rohwer, *supra* note 61, at 292-94.

189. *See id.* at 247.

190. *See, e.g., Cooper*, 137 S. Ct. at 1466, 1467-68.

191. *Id.* at 1468.

192. *See Ely, supra* note 129, at 618.

193. *Cooper*, 137 S. Ct. at 1472, 1481-82.

194. For an article that anticipated this outcome and provides a very good explanation of the outcome of the new racial gerrymandering cases, see Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011).

districting and an aversion to descriptive representation.<sup>195</sup> If we understand descriptive representation as achieved through the crafting of majority-minority districts, *Cooper* has certainly made the crafting of such districts more difficult.

North Carolina's argument in *Cooper*, after all, was that it created District 1 in order to provide descriptive representation for the State's African American citizens. Justice Kagan not only rejected North Carolina's claim, but her analysis casts significant doubt on the practice of descriptive representation. Recall Justice Kagan's response to North Carolina's contention that District 1 was necessary in order to avoid liability under section 2 of the VRA.<sup>196</sup> In terms that echoed the Court in *Shelby County*, Justice Kagan essentially argued that private discrimination in voting has waned sufficiently in North Carolina—namely that abundant numbers of white voters are willing to vote for candidates preferred by Black voters—such that the State could not justify creating this district as a section 2 district. Before creating a majority-minority district under section 2, the government must first “point to [a] meaningful legislative inquiry into what it now rightly identifies as ... whether a ... [district] created without a focus on race ... could lead to § 2 liability.”<sup>197</sup> The Court will no longer presume the need for descriptive representation unless it is absolutely necessary to avoid potential statutory liability. As the Court continues to abandon descriptive representation as a legitimate approach to drafting legislative districts, the effects on voting rights law, and section 2 of the VRA in particular, are ominous.

So, where is the doctrine likely to go from here? There are at least three possible avenues for the future. First, *Cooper* may be like *Shaw* when that case first appeared on the scene. *Shaw* seemed ominous, but turned out to be less disruptive than it looked at first blush. Looking back to the *Shaw* cases, it is natural to understand that doctrine as a correction on the aggressive use of race in crafting district lines. Mapmakers adjusted and did not pursue descriptive representation *über alles*. As mapmakers adjusted, and the doctrine lost its *raison d'être*, given that its goal was not colorblindness but

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195. See, e.g., *Cooper*, 137 S. Ct. at 1469.

196. See *supra* Part III.

197. *Cooper*, 137 S. Ct. at 1471.

limiting descriptive representation, the Court retreated. Mission accomplished.

Like *Shaw*, *Cooper* seems quite ominous. But the Court in *Cooper* may simply be intending to send a message to mapmakers that they cannot use the VRA pretextually under the guise of providing descriptive representation. Assuming that the message is received, the Court could simply withdraw from the racial gerrymandering context for a time as it did in *Cromartie II*.

This seems unlikely. As we noted above, *Cromartie II* was a reflection of a Court that was committed to anticlassification and preserving room for descriptive representation. The *Cooper* Court does not seem to share *Cromartie II*'s values.

Second, the Court could adjudicate political gerrymandering cases in the same way that it resolves racial gerrymandering claims. This would be to treat political gerrymandering questions as only race questions. This Term, the Court had a chance to do exactly that, in the *Gill* case, argued the first day of the Term.<sup>198</sup> If the Court were to make this move it would remove the “politics, not race” argument that so obfuscates this area of the law. This would take a lot of pressure off section 2 of the VRA and might result in more fairness in the redistricting process. Indeed, voting rights plaintiffs might be more inclined to bring districting claims as partisan claims than as racial claims. As we have written before, the move is not as difficult as some members of the Court and some commentators presume.<sup>199</sup> The Court has been reluctant to take this step. But given the *Gill* case, we will soon know whether this is a realistic option.

Finally, the Court may simply strike down section 2 of the Act. This may be the likeliest course of action. As many as four Justices are on record as skeptical of section 2. The Court may simply be of the view that section 2 is no longer necessary to enable voters of color to elect their candidates of choice. It may also be of the view that it has the responsibility for updating the VRA and making it consistent with current political realities. The Court is certainly of the view that mapmakers are not required to include super majorities of voters of color within a district in order for these voters to

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198. *Gill v. Whitford*, No. 16-1161 (U.S. argued Oct. 3, 2017).

199. See Charles & Fuentes-Rowher, *supra* note 61, at 284-94.

elect their candidates of choice. In fact, the percentage is now well below 50 percent. The Court alluded to this fact in *Cooper*.<sup>200</sup>

Alternatively, or additionally, the Court may be of the view that these districting fights are truly partisan fights when race is being used instrumentally. Relatedly, it may view section 2 as a crude and outmoded way to effectuate representation. It certainly views race-based districting as incompatible with its equal protection jurisprudence. Thus, the same way that the Court used its understanding of race and its waning influence in American society to strike down section 4(b) of the VRA in *Shelby County v. Holder*,<sup>201</sup> an outcome that was presaged in the Court's decision in *Northwest Austin Utility District No. One v. Holder*,<sup>202</sup> the Court may similarly strike down section 2. This would mark the triumph of substantive over descriptive representation once and for all. If descriptive representation is the best way of representing voters of color, and we are not arguing that it is, the new racial gerrymandering cases may spell the end for what is left of the voting rights edifice that has been in place for more than fifty years.

We offer one final observation. In this Article, we have largely assumed a relationship among descriptive representation, an antisubordination framework, and race consciousness. And correspondingly, we have also assumed a relationship among substantive representation, an anticlassification framework, and race blindness. The association between antisubordination and race consciousness and anticlassification and race blindness is a standard part of the literature. But adding descriptive representation and substantive representation, respectively, to the equation is not standard and demands at least flagging, if not some thicker theoretical justification.

A thicker explanation will have to await a different opportunity. It should suffice for our present purposes to acknowledge the theoretical possibility that descriptive representation can cohabit with an anticlassification approach. But this uneasy cohabitation is only possible when descriptive representation is a remedy for racial discrimination. Otherwise the two concepts are mutual antagonists.

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200. See *Cooper*, 137 S. Ct. at 1472.

201. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2625-26 (2013).

202. 557 U.S. 193 (2008).



Analogously, though substantive representation might be theoretically achievable through an antisubordination framework, whether the two concepts can cohabit easily depends upon whether substantive representation for voters of color is contingent upon first establishing descriptive representation. Voting rights scholarship has not fully faced up to this central and theoretical question, which is currently directing the present and future of voting rights law and policy. Specifically, whether descriptive representation—and by extension race consciousness—is only justified in the voting rights regime to the extent that it is a remedy for racial discrimination in voting, or whether descriptive representation is a normatively justifiable end either because descriptive representation is worth pursuing intrinsically along the lines identified by theorists such as Anne Phillips and Iris Marion Young<sup>203</sup> or relatedly, because descriptive representation is necessarily instrumental to achieving substantive representation for citizens of color.<sup>204</sup>

To the extent that descriptive representation is only justifiable as a remedy for racial discrimination in voting, *Cooper* and the new racial gerrymandering cases may be taking voting rights doctrine in the right direction. The Court will apply strict scrutiny whenever the government uses race to draw district lines. But the districts will survive strict scrutiny when the VRA requires race-conscious line-drawing. Importantly, the Court will only interpret the VRA to require race-conscious line-drawing as absolutely necessary to address racial discrimination in voting. Thus, when the government cannot justify race-conscious line-drawing on remedial grounds—as necessary to address racial discrimination—a racial districting plan will not survive strict scrutiny.

However, to the extent that descriptive representation is a normatively justifiable end outside the discrimination model, *Cooper* and the new racial gerrymandering cases are possibly taking us in the wrong direction. This is because anticlassification's preference for race blindness is antithetical to descriptive representation, unless descriptive representation is a remedy for a constitutional

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203. See generally ANNE PHILLIPS, *THE POLITICS OF PRESENCE* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (2011).

204. Charles & Fuentes-Rohwer, *supra* note 58, at 1430-38.

violation. Otherwise, as between descriptive and substantive, anti-classification's approach favors substantive representation to the exclusion of descriptive representation. Correspondingly, to the extent that descriptive representation is normatively desirable, that end is best pursued by an antisubordination approach, mediated by race consciousness. A constitutional framework that favors anti-classification will necessarily be hostile to descriptive representation and will only tolerate descriptive representation as a necessary evil for remedying racial discrimination. And once the Court perceives, rightly or wrongly, that racial discrimination is no longer a significant barrier to political participation—see *Cooper* and *Shelby County*—the Court's appetite for ratifying state action that attempts to effectuate descriptive representation will also wane.<sup>205</sup> Thus, saving descriptive representation, if it is worth saving, will require voting rights scholars, jurists, and activists to move “beyond the discrimination model” to a different model that is compatible with the aims of VRA, facilitating meaningful and effective participation in the political process for voters of color.<sup>206</sup>

#### CONCLUSION

*Cooper v. Harris*, which signals the latest installment in a line of cases we term the new racial gerrymandering cases, is the most recent case to wrestle with these issues. These cases have a lineage that traces back to the *Shaw* cases of the 1990s, a time when the Court began to struggle with the state of the doctrine as well as its understanding of the proper conception of representation. The trade-offs between descriptive and substantive representation made these questions as difficult as any question faced by the Court. The fundamental question posed by the new racial gerrymandering cases is, how should the Court think about descriptive representation in a country that is highly and increasingly polarized along racial and political identity? This is a question of immediate concern as we edge closer to another round of apportionment and redistricting. The new racial gerrymandering cases seemed to have moved

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205. See, e.g., Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349 (2010).

206. See, e.g., Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013)

the Court toward colorblindness in redistricting and away from descriptive representation. If we are right, this means that section 2 of the VRA is as incompatible with the Court's equal protection approach as it has ever been.