

RACIAL GERRYMANDERING AFTER *RUCHO V. COMMON CAUSE*: UNTANGLING RACE AND PARTY

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In 2019, the Supreme Court slammed the federal courthouse doors on partisan gerrymandering claims from contested state redistricting plans in Rucho v. Common Cause. Yet racial gerrymandering claims remain justiciable. Judicial review of contested redistricting plans is therefore suspended in a state where racial gerrymandering is unconstitutional at the same time that partisan gerrymandering is nonjusticiable, leaving federal courts in the cumbersome position of splitting a stubborn atom: race or party?

As critics have long pointed out, the question is a false dichotomy in a hyperpolarized political environment. Federal courts have nonetheless repeatedly resolved this question as racial gerrymandering claims have been increasingly met with partisanship defenses. The dilemma for courts in the next decade is not the novelty of this configuration, but parsing the Supreme Court’s vague guidance on how courts should disentangle race from party based on the available evidence. To illuminate a path forward, this Note presents a bottom-up synthesis of redistricting cases since 2010 addressing the race-or-party question in order to identify common factors—or not—within three analytical models: race-exclusivity, totality of the circumstances, and race-as-proxy.

This exercise clarifies federal courts’ struggles with applying predictable standards to muddled evidence of racial and political motive. By taking one political thicket off the table, the Supreme Court only stranded courts in an adjacent one. With 2020 serving as a redistricting inflection point, this Note then argues that federal courts in the new decade must resist Rucho’s temptation to turn a blind eye to the intertwined nature of race and partisan motive.

INTRODUCTION	1886
I. POLITICS, RACE, AND REDISTRICTING: THE “BIG MESS” OF RACIAL GERRYMANDERING	1889
A. From Vote Dilution to the <i>Shaw</i> Doctrine	1889
B. Post-2010 Racial Gerrymandering	1894
1. <i>Cooper v. Harris</i> and the Racial Gerrymandering Revival	1895

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2. <i>Rucho v. Common Cause</i> : A Race-or-Party Reckoning.....	1898
II. RACE-OR-PARTY MODES OF ANALYSIS IN THE LOWER COURTS	1901
A. Untangling Partisan and Racial Motive: Three Modes of Analysis	1902
B. Race-Exclusivity: “Race for Its Own Sake”	1904
C. An Unpredictable Totality of the Circumstances: The Qualitative Status Quo	1907
1. Explicit Racial Markers: Direct Statements and Slip-Ups....	1907
2. Mechanical Racial Targets and Racial Quotas.....	1910
3. The Shape of Things: Compactness, “Bizarreness,” and Split Precincts	1911
4. Statistical Analysis and Experts.....	1912
D. Race as Partisan Proxy: The <i>Cooper</i> Model.....	1913
III. RACIAL GERRYMANDERING’S RACE-OR-PARTY FUTURE.....	1915
A. Lower Courts’ Race-or-Party Models Amount to a Malleable Standard	1916
B. The Trouble with <i>Rucho</i> : Reinvigorating the Partisanship Defense	1920
C. Race-as-Proxy: The Best Approach for Now.....	1924
CONCLUSION	1927

INTRODUCTION

In *Rucho v. Common Cause*, the Supreme Court held that partisan gerrymandering claims present a nonjusticiable political question, effectively depriving federal courts of jurisdiction over redistricting claims falling into this category.¹ Yet racial gerrymandering remains a justiciable doctrine, one even affirmed in the last few years.² *Rucho* therefore leaves judicial review of redistricting suspended in a state where racial gerrymandering is unconstitutional at the same time that partisan gerrymandering is nonjusticiable, leaving federal courts in the cumbersome position of splitting a stubborn atom: race or party?³

1. 139 S. Ct. 2484, 2506–07 (2019) (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.”).

2. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 802 (2017); *Ala. Legis. Black Caucus v. Alabama (ALBC)*, 135 S. Ct. 1257, 1262–63 (2015).

3. This Note borrows this framework from Professor Richard Hasen, who developed it prior to *Rucho*. 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, 1840–41 (2018) [hereinafter Hasen, *Race or Party*].

Scholars and commentators decry the race-or-party inquiry as impossible under modern conditions of conjoined political and racial polarization.⁴ Because race and party-line voting substantially overlap, critics charge that a doctrine requiring fine factual assessments of legislative motives based on this false dichotomy invites judicial arbitrariness.⁵ Nonetheless, federal courts repeatedly encountered and resolved this question over the last decade as racial gerrymandering claims have been increasingly met with partisanship defenses.⁶ With *Rucho* closing the door on an independent constitutional limit to partisan gerrymandering, this familiar dynamic—a claim that legislators unconstitutionally sorted voters on the basis of race, a defense that voters were sorted not on impermissible racial grounds but on the legitimate basis of party, and courts choosing one motivation over the other—is the now-unavoidable pattern of gerrymandering cases.⁷ The dilemma going

4. See Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 Ohio St. L.J. 867, 869 (2016) (defining conjoined polarization as “[t]he more consistent alignment of race, party, and ideology since 1965”).

5. See, e.g., Hasen, *Race or Party*, supra note 3, at 1856 (analyzing the “race or party” approach and concluding that “[i]t blinks reality to see these as two separate and independent claims”); Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 67 Ala. L. Rev. 365, 381 (2015) [hereinafter Hasen, *Questionable Revival*] (“The intersection of race and party makes the search for a predominant motive impossible.”); Michael Li & Yuri Rudensky, *Rethinking the Redistricting Toolbox*, 62 How. L.J. 713, 735 (2019) (“[C]ourts . . . [are in] the world of having to embrace the artificial dichotomy that race and politics are completely distinct. As the [C]ourt found, however, untangling race and politics was cumbersome in the extreme”); Joshua S. Sellers, *Politics as Pretext*, 62 How. L.J. 687, 688 (2019) (“The extraordinary overlap between ‘race and party’ often renders the ‘race or party’ debate absurd.”); Nicholas Stephanopoulos, *Walking the Line: Modern Gerrymandering and Partisanship*, Keynote Address at the *Georgia Law Review Symposium* (Feb. 2, 2018), in 52 Ga. L. Rev. 1009, 1011 (2018) [hereinafter Stephanopoulos, *Walking the Line*] (arguing that because the Court developed redistricting doctrines in a relatively nonpartisan political environment, its surviving doctrines work poorly in the hyperpartisan present); The Supreme Court, 2016 Term—Leading Cases, 131 Harv. L. Rev. 303, 310 (2017) (reviewing *Cooper v. Harris* and observing that “‘race or party’ is a false dichotomy because both are usually present, at least in effect and oftentimes in motive, justification, and methodology”); Olga Pierce & Kate Rabinowitz, *‘Partisan’ Gerrymandering Is Still About Race*, ProPublica (Oct. 9, 2017), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race> [<https://perma.cc/2DA3-PR6S>] (“The record shows that the reliably Democratic voters in communities of color are crucial chess pieces in the partisan game that is redistricting.”).

6. See Nina Rose Gliozzo, Note, *Judicial Embrace of Racial Gerrymandering Cases*, 70 Hastings L.J. 1331, 1333, 1347 (2019) (surveying 141 redistricting lawsuits filed since 2010 and finding that defendants raised a partisanship defense “[i]n slightly more than half of the racial gerrymandering cases”).

7. Litigation alleging improper racial motive in gerrymandering will carry on regardless of the parallel world of partisan gerrymandering jurisprudence. See *id.* at 1333 (acknowledging that racial gerrymandering claims are justiciable regardless of the nonjusticiability of political gerrymandering claims). However, as this Note argues, unlike prominent pre-*Rucho* partisan gerrymandering cases, the concern is not that courts will avoid redistricting challenges through procedural dismissal. Rather, it is that any fair evaluation of the merits of racial gerrymandering claims is confounded by the entanglement

forward is not the novelty of this configuration, but parsing the Supreme Court's vague guidance on how courts should disentangle race from party, a task made even more ambiguous by *Rucho*'s apparently categorical treatment of partisan motives as exempt from judicial scrutiny.⁸

Rucho's most prominent justification for partisan gerrymandering's nonjusticiability rests on the lack of manageable standards to guide courts' assessments of just when partisan redistricting is extreme enough to violate the Constitution.⁹ Yet as this Note argues, the abstract racial gerrymandering predominant motive standard does not reliably guide federal courts' factual analyses and ensnares courts in political warfare anyway, revealed by muddy evidentiary approaches when confronted with the race-or-party conundrum.¹⁰ To illuminate a path forward for courts and the racial gerrymandering doctrine after *Rucho*, this Note presents a bottom-up synthesis of federal cases since 2010¹¹ addressing the race-or-party question to identify common factors—or not—that tease racial motive apart from political motive, organizing judicial approaches into three analytical models: race-exclusivity, unpredictable totality of the circumstances (including a subcategory where explicit racial markers are present), and race-as-proxy.

Part I summarizes the race-or-party redistricting dilemma and traces recent Supreme Court treatment of the question. Part II reviews lower court applications of the doctrine and describes the models that explain their analyses in weighing the key kinds of facts in the race-or-party question. Part III analyzes commonalities that sway courts one way or the other and concludes that courts' scattershot approaches provide insufficient guidance to litigants or future courts to “accurately” detect unconstitutional reliance on race across a range of factual circumstances.

between race and party and creates a trivially exploited partisanship loophole in racial gerrymandering cases. See *infra* section III.B.

8. See, e.g., Joey Fishkin, *Rucho*: A Sinkhole Dangerously Close to the House (*Rucho* Symposium), Election L. Blog (July 1, 2019), <https://electionlawblog.org/?p=105928> [<https://perma.cc/535T-4JGK>].

9. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

10. See *infra* Part II.

11. This review is limited to the post-2010 cycle, both because it is the most relevant period for understanding how courts will likely evaluate evidence of unconstitutional racial motive after the 2020 reapportionment, and because 2010 marked the beginning of the now-prevalent dynamic of a “race claim” followed by a “politics defense” in gerrymandering cases. See Gliozzo, *supra* note 6, at 1347 (noting that the partisanship defense was raised in “slightly more than half of the racial gerrymandering cases” reviewed in the 2010 cycle). Gerrymandering also reemerged as a hotly debated political issue since the 2010 election cycle left an unprecedented number of state houses in unified Republican hands during a census year. See Ed Kilgore, *How the Republicans Did It*, *New Republic* (Nov. 3, 2010), <https://newrepublic.com/article/78903/how-the-republicans-did-it> [<https://perma.cc/S93S-N9EG>] (reporting that Republicans gained control of fifteen state legislative chambers). For background on how Republicans unprecedentedly gerrymandered state maps to their political advantage in 2010, see generally David Daley, *Ratf**ked: Why Your Vote Doesn't Count* (2017) [*hereinafter* Daley, *Ratf**ked*].

Section III.B argues that this, as a result, leaves the doctrine vulnerable to circumvention by *Rucho*'s signal permitting unfettered partisan gerrymandering. Finally, this Note recommends that courts upgrade the totality of the circumstances mode of analysis that characterized the 2010s to the nuanced race-as-proxy approach in order to salvage the utility of a constitutional doctrine that, after *Rucho*, may be otherwise rendered null in the new decade.

I. POLITICS, RACE, AND REDISTRICTING: THE "BIG MESS" OF RACIAL GERRYMANDERING

A. *From Vote Dilution to the Shaw Doctrine*

Gerrymandering, the practice of drawing representative election districts for political advantage, is achieved through simple mechanics.¹² "Packing" draws targeted populations into a single district, minimizing those voters' electoral influence in adjacent districts, while "cracking" splinters concentrated voter pools across multiple districts so that minority groups cannot outvote the majority (usually white voters).¹³ These tools scatter the evidentiary clues courts rely on to detect racial gerrymandering, which is typically challenged under two doctrinal frameworks: vote dilution, where the voting strength of racial minorities as a group has been intentionally weakened often through packing and cracking, and the *Shaw* doctrine, where race has been relied on excessively even without any dilution of a racial group's voting strength.¹⁴

Beyond malapportionment challenges,¹⁵ most redistricting litigation flowed from Section 2 of the Voting Rights Act of 1965 (VRA), which prohibits racially discriminatory voting practices and creates a statutory cause of action against racial vote dilution.¹⁶ After the Supreme Court

12. ACLU Found. Voting Rts. Project, Everything You Always Wanted to Know About Redistricting but Were Afraid to Ask 11 (2010), https://www.aclu.org/sites/default/files/field_document/2010_REDISTRICTING_GUIDE_web_0.pdf [<https://perma.cc/X4V4-K6Z3>].

13. *Id.*

14. See, e.g., *Perez v. Abbott (Perez D)*, 250 F. Supp. 3d 123, 218–19 (W.D. Tex. 2017) (hearing challenges to Texas districts on multiple theories of vote dilution and racial sorting).

15. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562, 568 (1964) (applying the principle of one person, one vote to state legislative districts); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (adopting the principle of one person, one vote for congressional districts).

16. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (2018); see also *White v. Regester*, 412 U.S. 755, 765 (1973) (defining vote dilution as "invidiously . . . cancel[ling] out or minimiz[ing] the voting strength of racial groups"). Vote dilution is not the same as vote denial, which includes now-obvious barriers to equal voting access like poll taxes and less-obvious modern burdens like onerous voter identification laws. See Nicholas O. Stephanopoulos, *Disparate Impact*, *Unified Law*, 128 *Yale L.J.* 1566, 1609 n.237 (2019) (distinguishing vote dilution cases, which are concerned with racial group representation and election *outcomes*, from vote denial cases, which are concerned with individual representation and political *participation*).

stymied early efforts to establish an independent constitutional challenge to vote dilution based on disparate racial impact,¹⁷ Congress amended Section 2 to allow vote dilution claims to be heard through discriminatory effects alone (“results” liability).¹⁸ *Thornburg v. Gingles* laid out the Section 2 threshold test: that (1) the minority group is large and compact enough to be a majority in the district; (2) the minority group votes as a bloc; and (3) the majority-white population also votes as a bloc.¹⁹

The *Gingles* plurality did not go so far as to require that plaintiffs also show that causes other than race—like party preference—were not the *actual* reason for racial bloc voting, but concurring opinions undermined this dicta.²⁰ This made space for the Fifth Circuit to validate partisanship as a defense to a dilution claim in *League of United Latin American Citizens, Council No. 4434 v. Clements (LULAC)*, rejecting the allegation that it was “bring[ing] the intent standard . . . through the back door”²¹ by holding that the VRA was not violated if defendants demonstrated that partisanship, *not* race, was the actual reason for disparate racial impact in election outcomes.²²

The Fifth Circuit’s 1993 determination that race-or-party was a permissible, and in fact decisive, dichotomous inquiry in vote dilution

17. *City of Mobile v. Bolden*, 446 U.S. 55, 66–68 (1980) (holding that under principles of equal protection, minority groups must prove not only that the challenged system or law had a discriminatory effect on them but also that the lawmaking body acted with discriminatory intent).

18. Section 2 of the Voting Rights Act, DOJ, <https://www.justice.gov/crt/section-2-voting-rights-act> [<https://perma.cc/Z3UH-HVSA>] (last updated Sept. 11, 2020). Some scholars expect Section 2 to be eventually found unconstitutional based on the development of the race-excessiveness principle of equal protection in the *Shaw* line of cases, which would leave that doctrine and intentional vote dilution as the only legal claims available to challenge gerrymandering. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Abbott v. Perez*, Race, and the Immodesty of the Roberts Court, *Harv. L. Rev. Blog* (July 31, 2018), <https://blog.harvardlawreview.org/abbott-v-perez-race-and-the-immodesty-of-the-roberts-court> [<https://perma.cc/6QWS-BCJC>] [hereinafter Charles & Fuentes-Rohwer, *Immodesty*] (“It is inevitable that the Court will resolve the tension that i[t] sees between the VRA and the Constitution. And it is unlikely that the Court will resolve it in favor of section 2.”).

19. 478 U.S. 30, 48–51 (1986) (plurality opinion).

20. See *id.* at 62 (“For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates . . .”); see also Hasen, *Race or Party*, *supra* note 3, at 1856–57. But see *Gingles*, 478 U.S. at 83 (White, J., concurring) (criticizing the lack of a causation requirement as “interest-group politics rather than a rule hedging against racial discrimination”); *id.* at 100 (O’Connor, J., concurring in the judgment) (“I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race . . . I do not agree, however, that such evidence can never affect the overall vote dilution inquiry.”).

21. Hasen, *Race or Party*, *supra* note 3, at 1858.

22. 999 F.2d 831, 855–59, 861 (5th Cir. 1993) (en banc) (“Because the evidence in most instances unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, we conclude that plaintiffs have failed to establish racial bloc voting . . .”).

claims even under a regime of results liability coincided with the birth of a separate equal protection-based racial gerrymandering claim: the *Shaw* doctrine. This purely constitutional basis for striking down maps that excessively “used race” was recognized after the 1990 reapportionment cycle spurred a Republican effort to undermine both perceived DOJ overenforcement of the VRA and Democratic control of state governments.²³ In *Shaw v. Reno*, white voters in North Carolina successfully charged that a bizarrely shaped, majority-minority congressional district, newly drawn by Democrats purportedly to comply with the VRA, overly relied on an arbitrary racial classification.²⁴ *Shaw* broke from then-familiar vote dilution and intentional racial discrimination frameworks; the simple fact that the government used racial categories to sort voters into bizarrely shaped districts—even remedially and in compliance with the VRA—was now sufficient to trigger strict scrutiny.²⁵ *Shaw* therefore created an “analytically distinct” doctrine where even unintentional, nondiscriminatory governmental race-usage could earn constitutional redress.²⁶ *Miller v. Johnson* then refined this inchoate racial sorting theory by pushing the strict scrutiny trigger beyond bizarre visual shape into legislative intent, requiring challengers to show that the state had a *predominant* racial motive that subordinated “traditional race-neutral districting principles.”²⁷ Thus,

23. Section 5 of the VRA requires DOJ preclearance of any change to electoral practices that may have a retrogressive effect on minorities in covered counties, and the DOJ enforced Section 2 and Section 5 in combination. See Voting Rights Act of 1965 § 5, 52 U.S.C. § 10304 (2018). After *Shelby County v. Holder*, 570 U.S. 529 (2013), struck down the coverage formula in Section 4(b) of the VRA that determined which jurisdictions were subject to Section 5 preclearance, DOJ enforcement activity dried up. See Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, Atlantic (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707> [<https://perma.cc/52YN-BW2X>].

24. 509 U.S. 630, 637–38, 644, app. at 659 (1993).

25. See Hasen, *Race or Party*, *supra* note 3, at 1846–47. The substantive constitutional harm gerrymandering inflicts on the rights of voters continues to be difficult to articulate. See Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 Cornell J.L. & Pub. Pol’y 397, 418–21 (2005) (arguing, in the wake of *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that a robust understanding of the precise constitutional injury caused by partisan gerrymandering is necessary to avoid crashing into the Court’s justiciability concerns).

26. *Shaw*, 509 U.S. at 644–45 (holding that “redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race’ demands the same close scrutiny” given to “other state laws that classify citizens by race” regardless of the underlying motivations (internal citation omitted) (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977))). By “bizarre,” Justice O’Connor (writing for a 5-4 majority) referred to the district’s odd shape, which the Court found could be sufficiently indicative of an improper use of race to “call for an explanation.” *Id.* at 647 (internal quotation marks omitted) (quoting *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring)). With this thin intent standard, *Shaw* advanced a mechanical, “color-blind” constitutional theory of equal protection. See Hasen, *Race or Party*, *supra* note 3, at 1847.

27. 515 U.S. 900, 916 (1995) (“The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence

some indeterminate level of race-consciousness could still survive a constitutional challenge so long as it did not dominate the mapmaking process as determined by a basic two-step analysis: (1) plaintiffs must show that race predominantly motivated a district's design, and (2) the government must show that the racially-motivated design was narrowly tailored to serve a compelling purpose.²⁸

Since *Shaw* and *Miller*, both the nature of the constitutional harm that the racial gerrymandering doctrine appears to vindicate and how courts weigh circumstantial evidence of legislative motive when both race and party play significant roles have become less clear. Just a year after *Miller*, *Bush v. Vera*—presenting the Court with its first race-or-party question—demonstrated that the doctrinal premise that racial and political polarization could be separated through either-or analysis had already been outpaced by political reality.²⁹ *Vera* challengers alleged that three bizarrely shaped, majority-minority districts in Texas demonstrated predominant racial motive.³⁰ The state defended by admitting use of racial data to draw maps in an advanced computer program, but argued that race was just a proxy for party-line voting to protect Democratic

going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.”). Traditional redistricting principles include compactness, contiguity, and the preservation of political subdivisions and shared communities of interest. *Id.*; see also Richard L. Hasen, Resurrection: *Cooper v. Harris* and the Transformation of Racial Gerrymandering into a Voting Rights Tool, 1 *Am. Const. Soc'y Sup. Ct. Rev.* 105, 105 (2017) [hereinafter Hasen, Resurrection].

28. Outlining this threshold in *Miller*, Justice Kennedy, writing for the majority, distinguished racial gerrymandering from vote dilution by leaning on O'Connor's anticlassification perspective: “[T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts.” 515 U.S. at 911; see also Gliozzo, *supra* note 6, at 1339.

29. See 517 U.S. 952, 965–68 (1996). *Shaw's* backstory reveals a hint of this difficulty by illustrating how race and partisanship were already bound up together in the genesis of the doctrine: *Shaw* was the plaintiffs' second effort to obtain judicial intervention in North Carolina's Democratic maps after their initial partisan gerrymandering challenge had been dismissed. See *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992) (dismissing equal protection, First Amendment, and privileges and immunities claims because “redistricting is an inherently political process”), *aff'd*, 506 U.S. 801 (1992). Professor Nicholas Stephanopoulos describes the Court's blitheness to this emerging reality as a result of the *Shaw* doctrine arriving just after the “Golden Age of nonpartisanship” ended, much later than other voting rights doctrines, explaining why the doctrine's initial intent and effect were “nonpartisan . . . at least in the short run.” Stephanopoulos, *Walking the Line*, *supra* note 5, at 1029. As Stephanopoulos acknowledges, his general theory—that voting rights jurisprudence was designed in an American political landscape without conjoined polarization—is slightly less well-fitting for racial gerrymandering due to its arrival in the 1990s, the same time period when extreme political polarization had begun to take shape. *Id.* Nonetheless, that the Court still adopted a “Golden Age” perspective on the separation of race and party in the doctrine's early days is borne out by its treatment of the race-or-party dichotomy in *Vera*.

30. 517 U.S. at 957.

incumbents—a legitimate partisan end.³¹ The Court nonetheless found that the use of race data, even as a correlate value for an otherwise permissible partisan objective and with validly mixed motives by mapmakers, was sufficiently predominant to invite strict scrutiny.³²

But *Vera*'s hard line against legislatures seeking partisan ends by racial means only lasted as long as the next reapportionment cycle. *Easley v. Cromartie* (*Cromartie II*) opened a partisanship loophole in yet another racial gerrymandering challenge to North Carolina's Twelfth Congressional District.³³ *Cromartie II* made it to the Supreme Court after the lower court had rejected Democrats' defense that partisan intent to maximize safe party seats explained the district's bizarre shape.³⁴ Despite emphasizing the deferential clear error standard of review owed to the lower court's factual findings, Justice Breyer picked apart the evidentiary record to conclude that, notwithstanding suspicious factors that the Court had once credited as almost per se evidence of predominant racial motive in *Shaw* and *Vera*, this time the district had been molded for a constitutionally sound partisan purpose.³⁵

31. *Id.* at 959–64.

32. *Id.* at 975–76, 979–81. Justice O'Connor rejected the race-as-proxy-for-party defense: "If the State's goal is otherwise constitutional political gerrymandering, it is free to use the [neutral] kind of political data But to the extent that race is used as a proxy for political characteristics, a racial stereotype . . . is in operation." *Id.* at 968 (citations omitted). This early treatment of race-as-proxy, where partisan ends may be achieved so long as race data does not figure into the execution of a redistricting scheme, is quaint in retrospect. Present-day gerrymandering is achieved via sophisticated computer programs (like Maptitude) that no longer need to rely on blunt inputs like racial demographics alone to sort voters on the basis of their race into districts optimized for partisan advantage. See Brief of Amici Curiae Pol. Sci. Professors in Support of Appellees and Affirmance at 13–25, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Nos. 18-422, 18-726), 2019 WL 1167919 [hereinafter Amici of Political Science Professors] ("[A] wealth of granular voter data now available to mapmakers enables them to predict voter behavior with an unprecedented degree of accuracy . . . [and] new and advanced statistical and map drawing applications enable partisans to translate voting data and analysis into districts that maximize partisan advantage.").

33. 532 U.S. 234, 237 (2001); see also Hasen, *Race or Party*, *supra* note 3, at 1849. As its shorthand implies, *Cromartie II* was the case's second tour through the Supreme Court, returning from a retrial in the lower court after the Court reversed summary judgment in *Cromartie I*. *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541, 553–54 (1999). The case was remanded with instructions to account for evidence that constitutional partisan motive explained the legislature's disregard for traditional redistricting criteria. *Cromartie II*, 532 U.S. at 238–39. The lower court again found that race predominated, and the case returned to the Supreme Court, finally setting it up to decide the race-or-party question head-on. *Id.* at 241.

34. *Cromartie II*, 532 U.S. at 239–40.

35. *Id.* at 258. *Cromartie II* also suggested that the clear error standard of appellate review in racial gerrymandering cases was malleable and that the Court might bend over backwards to explain away race-based evidence so that it would not control in a predominance inquiry. See *id.* at 259–60 (Thomas, J., dissenting) ("The Court does cite cases that address the correct standard of review, and does couch its conclusion in 'clearly erroneous' terms. But these incantations of the correct standard are empty gestures,

Cromartie II also introduced an imperfect evidentiary solution to distinguish between correlated racial and partisan motives by requiring plaintiffs to submit an alternative map showing that no other configuration would achieve the state's partisan goals while also spreading racial minorities more evenhandedly across districts.³⁶ With the alternative-map requirement imposing a high barrier where race and party were highly polarized, racial gerrymandering cases entered a period of quiescence.³⁷ Race and party polarization grew even more correlated throughout the 2000s, and the race-or-party question in redistricting remained mostly untouched by the Supreme Court until 2010, when the previous script—Republicans challenging Democratic maps—flipped dramatically.

B. *Post-2010 Racial Gerrymandering*

The 2010 redistricting cycle continues to be litigated even as the 2020 cycle threatens to transform the gerrymandering landscape.³⁸ Republicans seized massive wins in state houses and radically redrew electoral maps, unleashing a flood of racial and partisan gerrymandering challenges.³⁹ Although Justice Kennedy in *Vieth v. Jubelirer* left the door open for litigants to present a “judicially manageable standard” that the Court could use to identify when political gerrymandering had gone far enough for judicial review,⁴⁰ he departed the bench in 2018 without blessing any offered solutions.⁴¹ Meanwhile, racial gerrymandering claims (now wielded by civil rights groups and Democrats against Republican maps) were more frequently met with partisanship defenses,⁴² confronting courts

contradicted by the Court's conclusion that it must engage in “extensive review.” (citations omitted)).

36. *Id.* at 258 (majority opinion); see also Hasen, *Race or Party*, *supra* note 3, at 1849–50.

37. Stephanopoulos, *Walking the Line*, *supra* note 5, at 1031 (“[A]fter *Easley v. Cromartie* was decided by the Supreme Court, many fewer racial gerrymandering cases were filed and many fewer succeeded as well.”). Stephanopoulos attributes this dormancy to a classic pattern that all voting rights doctrines created in the “Golden Age” underwent as they adjusted to modern hyperpartisanship. *Id.* Hasen points to wilier elected officials drawing less visually suspect maps and concealing direct evidence of racial motivation, in addition to the DOJ's retreat from VRA enforcement. Hasen, *Race or Party*, *supra* note 3, at 1850.

38. See Justin Levitt, *Litigation in the 2010 Cycle, All About Redistricting*, <http://redistricting.ils.edu/cases.php> [<https://perma.cc/U9XN-CRNU>] (last updated Aug. 1, 2019) (counting 256 total redistricting cases filed and sixteen still active by mid-2019).

39. See Daley, *Ratf**ked*, *supra* note 11, at 15–16.

40. See *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring).

41. See Mark Joseph Stern, *Partisan Gerrymandering Is About to Get Much Worse*, *Slate* (June 28, 2018), <https://slate.com/news-and-politics/2018/06/partisan-gerrymandering-is-going-to-be-much-worse-after-anthony-kennedys-retirement.html> [<https://perma.cc/V4HQ-Y8XJ>] (reporting on Justice Kennedy's resignation).

42. See Hasen, *Resurrection*, *supra* note 27, at 113. Challengers again trained their fire on majority-minority districts, only this time for overpacking minorities into fewer districts to achieve statewide Republican majorities out of proportion to popular vote totals (“bleaching” surrounding districts). *Id.* Unlike *Shaw* and *Miller*, these new cases were not

with complex, massive trial records attempting to disentangle race-or-party motivations district by district.⁴³ At the same time, the Supreme Court lowered the threshold burden to bring a *Shaw* claim but further muddled its already nebulous guidance on weighing evidentiary indicators of motive to lower courts.⁴⁴

1. *Cooper v. Harris and the Racial Gerrymandering Revival.* — The Supreme Court decided four racial gerrymandering cases after 2010. *Alabama Legislative Black Caucus v. Alabama (ALBC)*⁴⁵ and *Bethune-Hill v. Virginia State Board of Elections*⁴⁶ adjusted the weight that courts should assign to evidence of prioritized equal population and racial quotas in the predominant motive prong, but otherwise mostly elided the race-or-party problem. *Abbott v. Perez*, coming up to the Supreme Court from a convoluted racial vote dilution challenge in Texas, avoided addressing the race-or-party dialogue in the split lower court panel by holding that legislatures are entitled to such a presumption of good faith that evidence

litigated on an anticlassification theory of constitutional harm, but on an antistatutory theory that *statewide* dilutionary harm to minorities' electoral power was caused by the government's excessive use of race in overpacked districts. This prompted Virginia's attorney Paul Clement to argue that this doctrinal blurring broke down the *Shaw* doctrine's analytical distinctions: "People are bringing junior varsity dilution claims under the guise of calling them *Shaw* claims, and I think it's really distorted the law." Transcript of Oral Argument at 43, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (No. 15-680), 2016 WL 7057558.

43. See Nina Totenberg, Supreme Court Considers Race, Politics and Redistricting in 2 Cases, NPR (Dec. 5, 2016), <https://www.npr.org/2016/12/05/504467218/supreme-court-considers-racial-gerrymandering-in-separate-cases> [<https://perma.cc/J64W-U263>] (reporting on oral arguments in *Bethune-Hill* and *Cooper*, including Justice Breyer's exasperation that without "standards that enable them to separate the 'sheep from the goats'" the Supreme Court will have to continue "spending the entire term reviewing 5,000-page records" (quoting Transcript of Oral Argument at 15, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (No. 15-1262), 2016 WL 7209693)).

44. See *infra* note 61 and accompanying text.

45. 135 S. Ct. 1257, 1270–71 (2015) (holding that prioritizing equal population is not "one factor among others" that should weigh against racial predominance or comprise a compelling state interest because it is a baseline expectation in redistricting). On the racial predominance inquiry, *ALBC* noted that the state's "policy of prioritizing mechanical racial targets above all other districting criteria" without good reason was relevant circumstantial evidence of racial motive. *Id.* at 1267. The Court also reiterated that the basic unit of analysis in redistricting review is district-by-district, not the design of districts statewide as an "undifferentiated 'whole.'" *Id.* at 1265 (quoting *Ala. Legis. Black Caucus v. Alabama (ALBC I)*, 989 F. Supp. 2d 1227, 1287 (M.D. Ala. 2013)).

46. 137 S. Ct. at 799 (holding that a direct conflict between a district plan and traditional redistricting criteria is persuasive evidence, but not required to show that racial motivation predominated over race-neutral redistricting principles). Complicating the holding of *ALBC*, *Bethune-Hill* also affirmed that one district's high Black voting-age population percentage target—purportedly to comply with the VRA's nonretrogression requirement—served a compelling state interest even if the state couldn't be sure that such a high quota was actually required by the VRA, because the state had a "strong basis in evidence" to believe it necessary. *Id.* at 801–02.

of past discrimination in a prior map cannot be carried forward to a new map.⁴⁷

Cooper v. Harris, however, delivered in spades.⁴⁸ The lower court had found North Carolina's District 1 and District 12, challenged by Democrats as overpacked, majority-minority districts, to be racial gerrymanders, despite Republicans defending District 1 as merely VRA compliant and District 12 as a permissible partisan gerrymander intended to dilute Democratic, *not* Black, votes.⁴⁹ The Court first unanimously affirmed the lower court's finding of District 1 as a "'textbook example' of race-based districting"⁵⁰ and introduced a hypothetical *Gingles* plaintiff test to evaluate when Section 2 VRA compliance defenses should be rejected.⁵¹

The Court then split 5-4 on District 12, the legality of which "turn[ed] solely[] on which of two possible reasons"—race or party—"predominantly explains its most recent reconfiguration."⁵² Justice Kagan, writing for the majority, acknowledged that conjoined polarization presents a daunting factual problem for trial courts, which "must make a sensitive inquiry" to "disentangle race from politics."⁵³ But unlike VRA-compliance defenses, *Cooper* did not set out cognizable guidance for lower courts to perform this "sensitive inquiry." Stressing the clear error standard of review,⁵⁴ Kagan instead acknowledged that the Court could have surveyed the same evidence the lower court had in finding predominant racial motive and plausibly come out on the other side of the

47. 138 S. Ct. 2305, 2324–25 (2018); see also *infra* note 57.

48. 137 S. Ct. at 1472–73. *Cooper* concerned the same North Carolina Twelfth Congressional District as *Cromartie II*. Justice Kagan remarked on this in the majority opinion: "We now look west to District 12, making its fifth(!) appearance before this Court." *Id.* at 1472.

49. *Id.* at 1468–69, 1472–74.

50. *Id.* at 1469 (quoting *Harris v. McCrory*, 159 F. Supp. 3d 600, 611 (M.D.N.C. 2016)). Pointing to ample evidence of predominant racial motive, the Court relied on outward statements by elected officials expressing the desire to maintain a mechanical racial target above 50% and the fact that boundaries were adjusted only to swallow areas with heavy Black populations while splitting precinct and county lines. *Id.* at 1468–69; see also *infra* notes 113–114 and accompanying text.

51. *Cooper*, 137 S. Ct. at 1469–70 (holding that when crossover voting for Black candidates by white voters results in a hypothetical Section 2 plaintiff failing *Gingles's* racial polarization prong, the district is presumed to be already compliant with the VRA and thus a high mechanical racial target is not narrowly tailored).

52. *Id.* at 1472–73.

53. *Id.* at 1473 (internal quotation marks omitted) (quoting *Cromartie I*, 526 U.S. 541, 546 (1999)).

54. *Id.* at 1474–77. The weightiest evidence supporting predominant racial motive was the stated intent by the two legislators leading redistricting and their mapmaker to raise Black voter concentration in the district, an intention reiterated in the state's preclearance submission to the DOJ. *Id.* Moreover, expert analysis concluded that lawmakers moved blocs of Black voters in and white voters out of the district in a manner that exacerbated racial imbalance. *Id.* All of this was stacked against the state mapmaker's countervailing testimony that he only used prior election data and no racial data while making maps on his computer, which the trial court deemed not credible. *Id.*

race-party divide.⁵⁵ Yet the divided Court continued *ALBC* and *Bethune-Hill*'s trend toward emphasizing holistic factual analysis while cabining *Cromartie II* by removing the alternative-map requirement, demoting it to a merely persuasive evidentiary tool showing that race, not party, drove the state's mapmaking decisions.⁵⁶ Presuming that the next racial gerrymandering case to reach the Supreme Court does not play fast and loose with the standard of review,⁵⁷ *Cooper* vests the outcomes of race-or-party inquiries almost entirely in the hands of lower federal courts with only ambiguous Court guidance.

But Justice Kagan also signaled that a more functional analytical approach to the race-or-party inquiry could be available by evaluating race as a *proxy* for party, which Professor Rick Hasen notes "seemed subversive of the entire racial gerrymandering enterprise."⁵⁸ Unlike race *or* party, this approach readily acknowledges that the two are not discrete categories and allows redistricting actions taken for political advantage to be nonetheless evaluated as primarily race-motivated when exploiting race yields partisan benefits.⁵⁹ This apparent advance in the race-or-party puzzle

55. See *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—and it is only *this* which matters—we are far from having a 'definite and firm conviction' that the District Court made a mistake . . .").

56. *Id.* at 1480. As Hasen notes, alternative maps are probative of nothing in highly racially and politically polarized conditions, because if all the racial minorities in a region are Democrats and only they are moved around districts to boost Republican electoral chances, it is likely that race motivated the change. Hasen, *Resurrection*, *supra* note 27, at 126. However, it would still be impossible to design another map that replicates partisan Republican goals *and* evenly spreads minority populations. *Id.* at 125–26.

57. Presuming in vain, perhaps, given the outcome of *Abbott* in the Court's following term. Justice Alito, writing for the majority, reversed the lower courts' deep evidentiary analysis finding that the Texas state legislature intended to dilute Hispanic votes and sidestepped the clear error standard of review by categorizing the Court's task as reviewing the trial court's application of burden of proof rather than its evidentiary analysis—a plenary question of law. *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018). This distinction won Justice Thomas's approval, who concurred with both the *Abbott* and *Cooper* majorities, even though his vote in *Cooper* seemed primarily driven by the majority's paean to the deferential standard of review. See Hasen, *Race or Party*, *supra* note 3, at 1883–84.

58. Hasen, *Race or Party*, *supra* note 3, at 1884.

59. *Id.* at 1865. Hasen notes that *Cooper*'s advance toward a predominance inquiry evolution is buried in "three footnotes of great significance." *Id.* at 1884. The first and second footnotes rely on *Vera* for the proposition that the use of race data to reach political goals is evidence of predominance by means alone, and identify Section 2 VRA and partisanship defenses as insufficient to avoid strict scrutiny since permissible ends may not be routed through impermissible means. See *Cooper*, 137 S. Ct. at 1464 n.1, 1473 n.7. The third footnote all but directly supports racial gerrymandering's transformation into a voting rights doctrine, illustrating the vast distance traveled since *Shaw*: "[State lawmakers] may resort to race-based districting for ultimately political reasons, leveraging the strong correlation between race and voting behavior to advance their partisan interests. Or, finally—though we hope less commonly—they may simply seek to suppress the electoral power of minority voters." *Id.* at 1480 n.15 (citation omitted). Kagan's approach comprises

stirred excitement and consternation at the time because partisan gerrymandering also appeared to be on the cusp of its own breakthrough.⁶⁰ Even as *Cooper* broke little doctrinal ground and failed to deliver a race-or-party test that lower courts could easily apply, the Court appeared to acknowledge that partisan motivation could be used to—and here *was* used to—obfuscate unconstitutional racial intentions, heralding a way out of the race-or-party thicket.⁶¹ But since this reading is drawn from footnotes and subtext in dialogue between Justice Kagan in the majority and Justice Alito in the dissent, *Cooper's* once-promising paradigm shift will likely prove ephemeral for post-*Rucho* challengers.⁶²

2. *Rucho v. Common Cause: A Race-or-Party Reckoning.* — *Rucho* does not directly alter racial gerrymandering doctrines, as partisan gerrymandering claims were virtually unanimously dismissed throughout the decade.⁶³ Yet *Rucho's* reasoning nonetheless suggests that racial redistricting litigation may be dependent on whether courts have adopted meaningful methods to distinguish race-or-party motives in redistricting.⁶⁴ Since *Cooper* and *Rucho* take fundamentally at-odds approaches to the role

one of the modes of analysis that some lower courts have utilized in the past decade. See *infra* section II.D.

60. *Gill v. Whitford*, a high-profile partisan gerrymandering challenge, had been granted certiorari and aimed to deliver the most promising judicially manageable standard yet devised, raising hopes that extreme gerrymanders could be challenged on their own merits rather than through the limited lens of racial gerrymandering. 138 S. Ct. 1916 (2018); see also, e.g., Hasen, *Race or Party*, *supra* note 3, at 1879–80 (looking to *Gill* as “the best opportunity in a decade” to resolve the race-or-party problem); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 884–99 (2015) (describing the doctrinal application of the efficiency gap, a mathematical formula for measuring “wasted votes” due to gerrymandering).

61. See Justin Levitt, *Race, Redistricting, and the Manufactured Conundrum*, 50 Loy. L.A. L. Rev. 555, 595 (2017) [hereinafter Levitt, *Manufactured Conundrum*]. *Cooper's* real-world implications were hotly debated at the time. Compare Andrew Brasher, *Symposium: A Recipe for Continued Confusion and More Judicial Involvement in Redistricting*, SCOTUSblog (May 23, 2017), <https://www.scotusblog.com/2017/05/symposium-recipe-continued-confusion-judicial-involvement-redistricting> [https://perma.cc/RT64-5CQ5] (“[T]he Supreme Court . . . lowered the bar for plaintiffs to show that race predominates in a district. This glide path to strict scrutiny is contrary to the way the court evaluated racial gerrymandering claims when it created the cause of action in the 1990s.”), with Anita Earls, *Symposium: Bringing Sanity to Racial-Gerrymandering Jurisprudence*, SCOTUSblog (May 23, 2017), <https://www.scotusblog.com/2017/05/symposium-bringing-sanity-racial-gerrymandering-jurisprudence> [https://perma.cc/B9LZ-LDRA] (“Kagan’s opinion in *Cooper*[] should put to rest the false dichotomy of ‘is it race or is it party’ that threatened to turn racial-gerrymandering doctrine into a meaningless standard.”).

62. See Kristen Clarke & Jon Greenbaum, *Gerrymandering Symposium: The Racial Implications of Yesterday’s Partisan Gerrymandering Decision*, SCOTUSblog (June 28, 2019), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-the-racial-implications-of-yesterdays-partisan-gerrymandering-decision> [https://perma.cc/B6HK-HX3P] (projecting that *Rucho* will have a negative impact on advocates seeking fair maps).

63. See Gliozzo, *supra* note 6, at 1353–75 (charting the procedural dismissal of partisan gerrymandering claims).

64. See *infra* section III.B.

of politics in redistricting, Justice Kagan's invitation to a race-or-party evolution may be practically blunted.⁶⁵ For one thing, Justice Alito and the *Cooper* dissent comprised the *Rucho* majority while Justice Kagan there penned the dissent, implicitly signaling that Justice Alito's dichotomous race-or-party viewpoint has the current Court's support.⁶⁶ Alito in fact displayed a reticence in *Cooper* to decide gerrymandering cases at all, concerned that "federal courts will be transformed into weapons of political warfare."⁶⁷ This tendency toward judicial retreat was affirmed in the parallel partisan gerrymandering line of cases with the demise of *Gill v. Whitford*⁶⁸ and then by *Rucho*'s final word on nonjusticiability.⁶⁹

As Part III argues, *Rucho* indirectly strengthens partisanship defenses to racial gerrymandering challenges in the lower courts. Partisan and racial gerrymandering remain doctrinally distinct, as *Rucho* took pains to emphasize.⁷⁰ But Chief Justice Roberts's reasoning that the judiciary is

65. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Dirty Thinking About Law and Democracy in *Rucho v. Common Cause*, 2 Am. Const. Soc'y Sup. Ct. Rev. 293, 315 (2019) [hereinafter Charles & Fuentes-Rohwer, Dirty Thinking] (arguing that *Rucho* represents a normative defense of dirty politics, or the "traditional Darwinian view of politics").

66. See Hasen, Resurrection, *supra* note 27, at 125–29 (foreseeing a conflict between the Court's liberal and conservative justices in adjudicating partisan gerrymandering claims just after *Cooper*). Compare *Cooper v. Harris*, 137 S. Ct. 1455, 1488–89 (2017) (Alito, J., concurring in the judgment in part and dissenting in part) (arguing for a dichotomous race-or-party approach and deferentially crediting the state witness's testimony that politics explained District 12's remapping as dispositive on the question of motive), with *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) ("In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core.").

67. *Cooper*, 137 S. Ct. at 1490 (Alito, J., concurring in the judgment in part and dissenting in part) (warning of "a danger where race and politics correlate" and that "[u]nless courts 'exercise extraordinary caution' in distinguishing race-based redistricting from politics-based redistricting, they will invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena" (citation omitted)). Alito also seemed reluctant to involve the Court in redistricting in *Abbott*, decided in the interim between *Cooper* and *Rucho*, where his majority opinion sympathized with the "legal obstacle course" created for legislatures by the VRA's race-conscious redistricting requirements and the Equal Protection Clause's prohibition on excessive use of race. See *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018); see also Charles & Fuentes-Rohwer, *Immodesty*, *supra* note 18 ("Abbott points to the slow-moving collision between what the Court clearly views as the inconsistent commitments of the Constitution and the VRA."). *Abbott* affirmed just a single state house district as a racial gerrymander, but focused on the "use of race" to shift relative populations between representation of two minority groups (Black and Latino voters) in a Democratic district, suggesting a willingness to get courts involved only when cross-partisan implications were muted. See *Abbott*, 138 S. Ct. at 2333–35.

68. 138 S. Ct. 1916, 1933–34 (2018) (remanding Wisconsin voters' partisan gerrymandering claim for lack of standing, and implicitly rejecting plaintiff's mathematical "efficiency gap" standard as a manageable measure of excessive partisanship).

69. *Rucho*, 139 S. Ct. at 2506–07.

70. *Id.* at 2502 ("Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence . . .").

categorically incapable of weighing political motives under principles of equal protection conceptually bolsters the dichotomous race-or-party approach and scrambles *Cooper*'s signal that lower courts should shrewdly evaluate whether partisanship masks racialized motive.⁷¹ Since *Rucho* shut the door on judicial review of purely partisan redistricting, voters have no choice but to go through race to win a judicial remedy for a race *and* politics problem that may, by design, be functionally impossible for them to vote their way out of.⁷² Yet without a clear race-or-party test handed down by the Court in this decade, *Rucho*'s bright line rule may overcome racial gerrymandering's predominant motive totality of the circumstances analysis—creating, as Professor Joey Fishkin puts it, a “sinkhole” where meritorious racial gerrymandering claims may go to die.⁷³

Post-*Rucho*, redistricting challenges must be made exclusively through the lens of race, or not at all. Yet the correlation between race and party, particularly in the South, makes evaluating circumstantial evidence unpredictable. Courts must draw inferences of controlling motive from outcomes that are plausibly traced to both racial and partisan motives, while direct evidence of motive (statements of legislative purpose) is trivially easy to conceal or omit in court.⁷⁴ And because the demise of VRA preclearance⁷⁵ and subsequently diminished DOJ civil rights activity shifts the locus of voting rights enforcement to private action, the partisanship defense presents the key threshold inquiry in racial gerrymandering cases going forward—putting even more pressure on federal courts to approach

71. See *infra* section III.B.

72. See Amici of Political Science Professors, *supra* note 32, at 30 (describing the partisan entrenchment effect and durable resistance to wave elections that extreme partisan gerrymanders create). Partisans using the courts as battlegrounds for political warfare is precisely what *Rucho* and Justice Alito in *Cooper* hoped to avoid. See *supra* notes 66–67 and accompanying text. Yet without constitutional or political recourse due to party entrenchment, a legal gerrymandering remedy without a racial angle must either come from Congress, individual state legislatures and their courts, or the Supreme Court itself in the form of a *Rucho* reversal—which incentivizes federal court litigants on both sides to recast true political purposes in the language of available race-based doctrines. See Hasen, *Questionable Revival*, *supra* note 5, at 379–80 (discussing the “feigned positions” of Republican lawmakers and Democratic-aligned civil rights lawyers that “mask the real power struggle” of political competition waged through the post-2010 iteration of racial gerrymandering).

73. Fishkin, *supra* note 8 (“The effective federal-court[] safe harbor for partisan gerrymanders creates a too-obvious cover story for racial gerrymanders, not to mention mixed gerrymanders with both racial and partisan components—a sinkhole into which some valid claims of race discrimination in districting will inevitably fall.”).

74. See, e.g., Clarke & Greenbaum, *supra* note 62 (discussing, from a practitioner’s perspective, how partisan gerrymandering’s nonjusticiability is likely to lend almost dispositive weight to lawmakers’ mere statements of partisan motive in racial gerrymandering claims).

75. See *Shelby County v. Holder*, 570 U.S. 529, 553 (2013) (nullifying the VRA’s preclearance provision by striking down the formula used to determine which states are subject to it).

the abstract race-or-party predominance test with clear and consistent principles of analysis.

II. RACE-OR-PARTY MODES OF ANALYSIS IN THE LOWER COURTS

As Part I describes, the Supreme Court has provided little guidance on prohibited or dispositive inferences when it comes to untangling racial from political motives in available evidence.⁷⁶ Since the 2010 cycle began, it has only stressed that the lower courts exercise extreme caution⁷⁷—but what that caution looks like can only be divined from the example set by the Court, which exacerbated the ambiguity post-2010 by adding more evidentiary nuances that seem to tug in opposing directions.⁷⁸ This lack of guidance is untenable after *Rucho*, which will likely incentivize partisans to lean heavily on the racial gerrymandering doctrine to “shadowbox” political contests in the courts.⁷⁹ The key question for federal courts after

76. See *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 141 F. Supp. 3d 505, 523 (E.D. Va. 2015) (noting that, while the racial gerrymandering standard offers “conceptual grace,” it provides courts with “an uncomfortable amount of discretion . . . to strike down or uphold legislative districts without much guidance in how to do so”), *aff’d in part, vacated in part*, 137 S. Ct. 788 (2017).

77. See *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (“[A] trial court has a formidable task: It must make ‘a sensitive inquiry’ into all ‘circumstantial and direct evidence of intent’ to assess whether the plaintiffs have managed to disentangle race from politics” (quoting *Cromartie I*, 526 U.S. 541, 546 (1999))); *Bethune-Hill*, 137 S. Ct. at 800; *ALBC*, 135 S. Ct. 1257, 1267 (2015).

78. See Levitt, *Manufactured Conundrum*, *supra* note 61, at 595. That the Court has also not overruled any of its prior proclamations makes it easy to pick and choose propositions at will. To summarize: *Shaw* and *Miller* emphasized that legislative motive should be largely divined from bizarre district appearances. See *supra* notes 24–28 and accompanying text. *Vera* stressed that mere racial awareness could suffice to overcome a partisanship defense, but *Cromartie II* countered that more substantial proof of racial motive through an alternative map would be needed to overcome a competing partisanship explanation. See *supra* notes 33–36 and accompanying text. *ALBC* stressed that mechanical racial targets are strong evidence of racial predominance. See *supra* note 45. On the other hand, *Bethune-Hill* instructed courts not to weigh fixed racial targets too highly, and also not to require evidence of direct conflicts between district lines and traditional redistricting criteria to find racial motive. See *supra* note 46. *Cooper* hinted that evidence of race used as a proxy for party weighs in favor of predominant racial motive and that the lack of an alternative map does not automatically count against racial motive. See *supra* section I.B.1. Yet the Court’s latest decision, *Abbott*, reemphasized that legislatures begin with a good faith presumption of nonracial intent, such that evidence of past racial discrimination cannot be evidence of motive in subsequent legislative adoptions of new maps even if they share relevant features with prior impermissible maps. See *supra* notes 47, 57 and accompanying text.

79. Richard L. Hasen, *Opinion, The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, N.Y. Times (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html> (on file with the *Columbia Law Review*) [hereinafter Hasen, *Into the Mud*] (predicting that, post-*Rucho*, North Carolina will experience a foreseeable pattern where Republicans openly gerrymander for political advantage, Democrats sue maps as “a racial gerrymander in disguise,” and federal courts are left to sort it out). There is also, of course,

2020 will be when and how to credit state defenses that districting choices were made with partisan motive to the exclusion of racial motive. When are redistricting choices the result of a partisan gerrymander, and when are they the result of a racial gerrymander? After all, the observable outcomes of redistricting are often plausibly attributable to both motives.⁸⁰ While the future is hard to predict, it behooves voters and legislatures to know what their burden of proof is likely to be and what factors have persuaded courts to cast the die on race over party in this murky inquiry.

This Part reviews a decade of racial gerrymandering cases and organizes modes of analysis—sketched at a high level of generality—that the lower courts have employed when facing a race-or-party predominance question to discern if and how the trial courts have exercised review in a way that may illuminate replicable principles across cases. Section II.A delineates the parameters and methodology of this Note’s review to sketch the partisanship defense’s overall picture of success in racial redistricting challenges. The following sections then describe the three primary types of analysis within the confines of the race-or-party issue: the narrow race-exclusive model, the unpredictable totality of the circumstances model (including explicit racial markers), and the broad race-as-proxy model.

A. *Untangling Partisan and Racial Motive: Three Modes of Analysis*

In order to focus on lower court analyses of the race-or-party problem, this Note’s review is limited to redistricting challenges on racial and constitutional grounds since 2010 that reached a decision on the merits, including those cases remanded for additional analysis.⁸¹ This Note analyzed twenty discrete cases (including those cases consolidating multiple claims) comprising 155 districts where lower courts came to a

a question of public perception and legitimacy that looms over the courts when they wade into the “political thicket” to make rulings that unavoidably favor one party over the other. See Hasen, *Race or Party*, supra note 3, at 1880 (observing that the divide between Democratic- and Republican-appointed judges in willingness to police racial gerrymandering claims does not bode well for public confidence in judicial impartiality). A lack of objective judicial standards for sorting between racial and political motives fuels charged public criticism about court bias and calls for guidance that does not invite speculation about the political motivations of judges themselves.

80. See *Cooper*, 137 S. Ct. at 1473; Levitt, *Manufactured Conundrum*, supra note 61, at 570 (explaining that where 90% of Black voters vote Democratic and 90% of white voters vote Republican, it can be impossible to distinguish between race-based or party-based motives).

81. See Sara Tofighbakhsh, *District-by-District Race-Party Analysis Spreadsheet* (2020) (on file with the *Columbia Law Review*) [hereinafter *Analysis Spreadsheet*]. Because the purpose of the exercise is to assess courts’ analyses of the merits of the race-or-party problem, this review excludes redistricting cases that were dismissed on procedural grounds (such as for lack of standing, for mootness, or on the pleadings), voluntarily dismissed after settlement, or decided on grounds other than racial discrimination, intentional vote dilution, or a *Shaw* claim. For a discussion of gerrymandering cases since 2010 and an analysis of their disposition procedurally or on the merits, see generally Gliozzo, supra note 6.

conclusion on legislative intent or predominant motive.⁸² Fifty-four district-level or statewide challenges were met with some form of partisanship defense (either to protect incumbents or to disadvantage the opposing party's chances of winning at the ballot box). The partisanship defense failed in twenty-one of these districts (38.9%) and succeeded in thirty-three (61.1%).⁸³ In other words, as a matter of topline numbers, once a federal court reached the merits of a race-based redistricting challenge, a partisanship defense succeeded in deterring judicial scrutiny of a state's redistricting choices more than half the time.

Notably, however, the partisanship defense was far more effective in *Shaw* predominant motive analyses than it was in racial discrimination or vote dilution intent analyses. The defense succeeded in 74.2% of districts where a *Shaw* claim required analyzing predominant racial motive, but it only succeeded in 50% of districts where intentional vote dilution claims required analyzing discriminatory purpose.⁸⁴ These observations are consistent with expectations. In intentional vote dilution claims, discriminatory purpose alone is sufficient to trigger strict scrutiny even if partisan advantage is another plausible motivation. But in a *Shaw* claim, even when bare racial motive is established, it must also be *more compelling* than a competing plausible partisan motive.⁸⁵ Thus, it is reasonable that the partisanship defense is more effective in *Shaw* claims than intentional vote dilution claims. Yet while this meaningful difference between racialized intent standards exists, evidence of one form of intent sometimes supports another. Because of this, and because the race-or-party inquiry appears in all types of redistricting claims, courts' intent

82. Analysis Spreadsheet, *supra* note 81. For the purposes of comparing analytical approaches, an opinion that analyzed a challenged map on a statewide basis or as a cluster of districts (in cracking claims, for example) counts as one base unit for analysis. For the sake of simplicity, this Note refers to any unit subject to court analysis as "districts."

83. *Id.*

84. See *id.* These percentages do not equal 100% because some districts were challenged on both *Shaw* and intentional claims. The partisanship defense prevailed in 80% of those "overlapping claim" districts. *Id.*

85. To summarize, these claims are: (1) disparate impact vote dilution under Section 2 of the VRA, requiring a showing of discriminatory *effect*, Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (2018); (2) intentional vote dilution under Section 2 and the Fourteenth Amendment, requiring a showing of both discriminatory effect *and* intent, *City of Mobile v. Bolden*, 446 U.S. 55, 69 (1980); and (3) *Shaw*-type racial gerrymandering under the Fourteenth Amendment, requiring a showing of *predominant* racial motive, *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The intensive district-by-district analysis juggling multiple claims in the *Perez* line of cases in Texas illustrates these distinctions well. See, e.g., *Perez v. Abbott (Perez III)*, 274 F. Supp. 3d 624, 652 (W.D. Tex. 2017) (finding intentional racial vote dilution and *Shaw*-style racial gerrymandering in the 2013 congressional and state house map); *Perez v. Abbott (Perez II)*, 253 F. Supp. 3d 864, 973 (W.D. Tex. 2017) (same in the 2011 congressional map); *Perez I*, 250 F. Supp. 3d 123, 180 (W.D. Tex. 2017) (same in the 2011 state house map).

analyses in both vote dilution and racial discrimination claims are included here.⁸⁶

Finally, this Part only describes ways courts conceive of motive or intent in redistricting cases with common approaches that move the race-or-party needle, whether those modes are articulated in the majority or dissent. This review is not intended to suggest that these models describe every possible judicial approach to the race-or-party question in every type of redistricting condition. Rather, this Part primarily describes approaches from opinions in the Fourth, Fifth, and Eleventh Circuits where conjoined polarization is most prevalent, and thus where the race-or-party question has largely been addressed.

B. *Race-Exclusivity: "Race for Its Own Sake"*

The narrowest approach to the race-or-party problem is articulated in dissent.⁸⁷ The race-exclusive model treats racial and partisan motivations as mutually exclusive and conceives of the predominance test as a bright-line rule, burdening plaintiffs with showing that "the state acted, in regard to a given voter or group of voters, on the ground that the voter's race was *significant in and of itself* and not for some other, non-invidious reason."⁸⁸ This simple notion treats evidence of racial motive as predominant only when mixed motives are not at issue, so it is unmistakably clear that race was the exclusive overriding redistricting factor.⁸⁹ Judge Jerry Smith's dissents in the long-running *Perez* cases exemplify race-exclusivity, casting racial gerrymandering law as prohibiting only the bluntest examples of "race for its own sake" and as "forbid[ding] the racial *purpose* of state action, not its stark manifestation."⁹⁰ In practice, this approach would

86. See Hasen, *Questionable Revival*, *supra* note 5, at 365. Even though both intentional vote dilution and *Shaw* claims are considered in this review, the scope of this Note mostly considers *Shaw*'s predominant motive test because the doctrine has grown into a voting rights tool where it was not before. See *id.* at 378–79. Lower court redistricting cases are rich fodder for comparing competing modes of evidentiary analysis, as federal law mandates that constitutional redistricting claims against congressional or statewide legislative maps be heard by a three-judge panel including at least one circuit judge, with decisions directly appealable to the Supreme Court. See 28 U.S.C §§ 1253, 2284(a) (2018); *Shapiro v. McManus*, 136 S. Ct. 450, 455–56 (2015).

87. Or rather, in multiple dissents, since the three-judge panel in the *Perez* cases issued several hundred-plus-page opinions in multicircuit racial gerrymandering challenges to Texas's congressional and state legislative maps. See *Perez II*, 253 F. Supp. 3d at 973 (Smith J., dissenting); *Perez I*, 250 F. Supp. 3d at 219 (Smith J., dissenting).

88. *Perez II*, 253 F. Supp. 3d at 983 (Smith, J., dissenting) (emphasis added).

89. *Id.*; see also *Perez I*, 250 F. Supp. 3d at 221–22 (Smith, J., dissenting).

90. *Perez I*, 250 F. Supp. 3d at 225 (Smith, J., dissenting) (internal quotation marks omitted) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017)). The main result of the *Perez* cases was the finding that Texas acted with racially discriminatory intent to dilute Hispanic votes when it designed its 2011 maps, but the partisanship defense was present throughout its region-by-region analysis and in some *Shaw* claims as well. See *id.* at 218–19 (majority opinion). Judge Smith, meanwhile, dissented with the majority's intent analysis by directly citing Professor Hasen's race-or-party framework.

mean that dominant racial motive is evident only when both the methods *and* goals of sorting residents into districts are racialized; thus, when partisan ends are asserted, any correlated racial motive inferable from the evidence must give way because partisanship is a constitutionally permissible redistricting principle.⁹¹

Contrasting the *Perez* majority's treatment of the race-or-party question in a district where it rejected the partisanship defense against Judge Smith's alternate analysis illustrates the boundaries of race-exclusivity.⁹² Texas's Thirty-Fifth Congressional District (CD35) was packed with a high percentage of Hispanic voters, and Republicans defended their choice as legitimately partisan because of their goal to unseat a white Democratic congressman by drawing his house out of the district.⁹³ Yet the evidence suggesting reliance on racial means (precinct splits in Hispanic and white neighborhoods and statistical evidence showing that race predicted changes more than political affiliation) persuaded the majority to reject Republicans' partisan defense.⁹⁴ In dissent, Judge Smith wholly credited Republicans' "partisan offense" goal as displacing all circumstantial evidence of racial means employed to achieve political ends.⁹⁵ Under the race-exclusive model, a "qualitatively

See *id.* at 222 (Smith, J., dissenting). Judge Smith argued that race-or-party, as opposed to race-as-party, was the only possible approach allowable by precedent under *Cromartie II* and *Clements*, rejecting Hasen's preference for the latter. *Id.* at 222–24. Judge Smith's approach to the race-or-party question is even narrower than Hasen's framework, as his conception of race-or-party is strikingly absolute. See *infra* notes 95–96 and accompanying text.

91. See *Perez I*, 250 F. Supp. 3d at 225 (Smith, J., dissenting) ("The majority is right only if the State sought, as its ultimate end, not to exploit partisan advantage but, instead, to disadvantage voters . . . because they were members of a racial or ethnic class and were, for that reason, inherently unworthy of equal treatment under the law.").

92. The largest claims in the *Perez* cases were vote dilution under Section 2 of the VRA and the Fourteenth Amendment, and the primary inquiry was whether the state acted with intent to dilute Hispanic voting strength in order to return likely Republican electoral results while maintaining the faux appearance of Section 2 compliance. See *Perez II*, 253 F. Supp. 3d at 875. Because of this focus, *Shaw* claims were minimal in comparison; only one plaintiff adequately pleaded *Shaw* claims in the first round of 2011 state house maps, for example, and only to some districts. See *Perez I*, 250 F. Supp. 3d at 182–83 (finding predominant racial motive in one district where Hispanic minorities were sorted to meet a mechanical racial target, but not in other districts also featuring racial targets where the purpose of protecting incumbency was dominant). The districts discussed in this Note are mostly those where a *Shaw* analysis applied.

93. See *Perez II*, 253 F. Supp. 3d at 892–97.

94. *Id.* at 894 ("[W]hile other factors did play some role in shaping the district, racial criteria had a qualitatively greater influence on the drawing of district lines and selection of district population, such that race predominated . . ."). It is unclear what is "qualitatively" distinct about objective measures of racial motive here other than, perhaps, a rough intuition that there are more discrete actions to shift around lines attributable to race than actions attributable to partisanship. This "qualitative" treatment of the race-or-party inquiry exemplifies the third, unpredictable mode of analysis presented here. See *infra* section II.C.

95. See *Perez II*, 253 F. Supp. 3d at 984–86 (Smith, J., dissenting) ("[I]f a partisan political majority can exercise its legislative weight to protect its friends, it can do that to

greater influence” from race-based criteria is nonsensical when partisanship adequately explains the state’s reliance on race.⁹⁶

If a partisan objective is not a confounding alternative explanation, however, judges may still find predominant racial motive under a race-exclusivity approach. For example, in Texas’s Twenty-Sixth Congressional District (CD26), Republicans did not raise a partisanship defense to evidence of Hispanic and Black communities getting shifted in and out of the district.⁹⁷ The majority found the mapmaker’s use of racial shading and explicit instructions to avoid splitting racial communities sufficient to conclude that racial motive dominated the line-drawing process.⁹⁸ Unlike CD35, Judge Smith agreed; in the absence of a claim to a legitimate political motive, joining “disparate Latino communities . . . looks more like race for the sake of race.”⁹⁹

A wrinkle in the race-exclusive model explains why this austere “race for its own sake” approach is idiosyncratic.¹⁰⁰ The majority criticized Judge Smith’s approach as erroneously conflating vote dilution, where discriminatory intent is required for liability, with *Shaw*, where even nondiscriminatory intent can suffice in the predominant motive analysis; thus in the vote dilution claims, any “amount” of legislative intent to dilute minority votes is enough even if it does not “outweigh” also-present partisan motives.¹⁰¹ Yet as the majority conceded, Judge Smith correctly perceived that these different forms of intent can be satisfied by the same facts.¹⁰² Moreover, the race-exclusivity model coherently applies to the race-or-party problem in both the racial vote dilution and *Shaw* intent standards when, as Judge Smith describes, the court’s goal is not to weigh race and party in a competition for motivational dominance, but to decide

punish its enemies for political, non-racial reasons. The main point still is that by no stretch of the imagination can . . . [CD35] be chalked up to racial motive.”).

96. See *id.*

97. *Id.* at 934–38 (majority opinion).

98. *Id.*

99. *Id.* at 986 (Smith, J., dissenting). In CD26, the mapmaker used race data in the mapping computer program to select minority populations and move them in and out of the district, admitting that he used this method because of his personal unfamiliarity with the region. The majority and Judge Smith both considered this strong circumstantial evidence of primary reliance on race. See *id.* at 936–37 (majority opinion) (relying on *Bush v. Vera*, 517 U.S. 952, 967 (1996), for the proposition that mere use of racial data to presume shared political interests is “evidentially significant”).

100. This Note’s review of lower court cases did not uncover cases that applied this stark approach in majority opinions, or at least could not perceive of such an approach that did not look like the third model instead. See Analysis Spreadsheet, *supra* note 81; see also *infra* section II.D.

101. See *Perez I*, 250 F. Supp. 3d 123, 181–83, 217–18 (W.D. Tex. 2017) (majority opinion); *id.* at 220–29 (Smith, J., dissenting).

102. *Id.* at 217–18 (majority opinion).

whether racialized motive exists at all rather than being misperceived for what it actually is—a partisan motive with only incidental racial effects.¹⁰³

C. *An Unpredictable Totality of the Circumstances: The Qualitative Status Quo*

It is hardly surprising that the outcomes of most racial gerrymandering cases are difficult, if not impossible, to pin down to a few factors. The majority of post-2010 racial gerrymandering analyses—81.5% of districts involving a race-or-party question of motivation or intent—therefore fall into the totality category.¹⁰⁴ While some common factual conditions weigh in favor of establishing the *presence* of racial motive across cases, no consistent set of factors explains when that motive will have had a “qualitatively greater influence” on redistricting over a competing partisan explanation.¹⁰⁵ Thus, the holistic approach makes it difficult to predict the weight of circumstances that, either individually or in combination, are likely to raise a compelling inference that race—not politics—drove redistricting decisions. Nonetheless, a few common factors hinting at racial motive are generally identifiable, even if they are not guaranteed to overcome bare assertions of partisanship.

1. *Explicit Racial Markers: Direct Statements and Slip-Ups.* — The most probative direct evidence of racial purpose comes from mapmakers’ explicit statements of intent to achieve racial goals, which is strong enough to overcome political defenses and support the confident inference that racial considerations dominated mapmaking decisions. Direct admissions of motive are often unmistakable. *Page v. Virginia State Board of Elections*, an early-decade *Shaw* challenge to Virginia’s overpacked, majority-minority Third Congressional District, is an example of this kind of direct statement influencing the court’s evidentiary analysis.¹⁰⁶ Although

103. See *id.* at 226–27 (Smith, J., dissenting) (rejecting the possibility that race can be a proxy for partisanship based on *Cromartie II*, which supports interpreting majority-Black precincts being moved into a district as showing legitimate partisan intent to move reliable Democrats into the district).

104. See Analysis Spreadsheet, *supra* note 81; see also, e.g., *Ga. State Conf. of the NAACP v. Georgia*, 312 F. Supp. 3d 1357, 1368 (N.D. Ga. 2018) (denying a preliminary injunction in a *Shaw* challenge to Republicans’ mid-decade redistricting for failure to show likelihood of success on the merits against a partisanship defense despite compelling circumstantial evidence of racial motive); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 560–65 (D.S.C. 2012) (finding that *Shaw* plaintiffs failed to meet their burden either through a sitting Democratic legislator’s testimony about political opponents’ legislative purposes or circumstantial evidence of expert statistics), *aff’d*, 568 U.S. 801 (2012); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 901–03 (D. Md. 2011) (finding that race did not predominate in gerrymandered Maryland districts because the fact that “the vast majority of African-American voters are registered Democrats” better explained their bizarre shapes), *aff’d*, 567 U.S. 930 (2012).

105. See, e.g., *Perez II*, 253 F. Supp. 3d 864, 894 (W.D. Tex. 2017); see also *supra* text accompanying note 83 (finding the partisanship defense succeeded in 61.1% of districts and failed in 38.9% of districts).

106. 58 F. Supp. 3d 533, 543–44 (E.D. Va. 2014), vacated sub nom. *Cantor v. Personhuballah*, 575 U.S. 931 (2015).

“partisan political considerations . . . played a role” in drawing the district,¹⁰⁷ the mapmaker’s “clear words” that “[o]ne of the paramount concerns and considerations that was not permissive and nonnegotiable . . . is that the [district] not retrogress in minority voter influence” allowed the conclusion that race predominated.¹⁰⁸ The dissent’s lengthy criticism of the majority’s interpretation of these “admissions” in order to support the opposing view that political motives best explained the district’s configuration is a clue that these direct statements served as the pivotal fact.¹⁰⁹

The *Perez* court’s treatment of one state house district (HD90) also falls into this model.¹¹⁰ Both the majority and dissent relied on a direct statement from the district’s representative, who had introduced the amendment shifting HD90’s boundaries on the state house floor with the declaration that there were “too many white people” and that one precinct needed to be sorted in because “[i]t’s low income and Hispanic.”¹¹¹ Despite the representative’s in-court justification that the amendment’s ultimate purpose was simply to protect his incumbency—an otherwise permissible end—these statements were held “as naked a confession as

107. *Id.* at 548. Republican legislators claimed the VRA required packing more Black voters into the district, but challengers countered that this rose to the level of arbitrary racial sorting because a concentrated increase in the Black voting age population is unwarranted under the VRA when the ability to elect a Black incumbent was not under threat of retrogression. See *id.* at 543, 552–53. This is a classic example of the kind of post-2010 *Shaw* claim challenging minority overpacking. Overpacking claims cannot be made under vote dilution theories because there is no question that descriptive representation (voting for preferred candidates of the same race) is not burdened by increasing minority voter populations in a given district, even when substantive representation (voting for ideologically aligned candidates not of the same race but of the same party) is diminished statewide by “bleaching” surrounding districts.

108. *Id.* at 543–44 (omission in original) (quoting the testimony of Delegate William Janis). This statement was not evaluated in isolation—supporting evidence of racial motive included oddities in the district’s shape, “land bridges” connecting minority populations to the district’s core, split political subdivisions, and an expert witness’s analysis. See *id.* at 543–46, 571. The court cited *Vera* for the proposition that pure race-based motives are not necessary to trigger strict scrutiny, illustrating the difference between this model and Judge Smith’s dissents in the *Perez* cases. See *id.* at 548. Distinguishing *Cromartie II*, the court also dismissed the state’s “post-hoc political justifications” as belied by evidence that, of the populations available to be packed into the district, the legislature more blatantly sorted in high-Black voter populations and sorted out white Democrats. *Id.* at 548–50.

109. See *id.* at 559–63, 576 (Payne, J., dissenting) (“[A]t all times and in all the decisions it made, the predominant factor in the General Assembly’s redistricting decisions was the protection of incumbents, not race.”).

110. See *Perez v. Abbott (Perez IV)*, 267 F. Supp. 3d 750, 788–94 (W.D. Tex. 2017), *aff’d* in part and *rev’d* in part, 138 S. Ct. 2305 (2018).

111. *Id.* at 790–91 (internal quotation marks omitted) (quoting Representative Lon Burnam).

there can be to moving voters into and out of districts purely on the basis of race.”¹¹²

Mapmakers changing their stories also constitutes weighty direct evidence of racial purpose that overcomes partisanship defenses. In North Carolina, challengers brought vote dilution and *Shaw* claims against maps overpacking Black voters into a few districts, which Republicans defended as legitimate partisan efforts to dampen Democratic voting strength statewide.¹¹³ The courts rejected this defense as “more of a post-hoc rationalization than an initial aim” because the same state actors had

112. *Id.* at 793. HD90, a safe Democratic seat, also demonstrates a limitation of this model’s application to the race-or-party issue. Rather than gaining partisan advantage *between* parties in a general election, HD90’s redistricting was the subject of *intra*-Democratic party politicking, with the “benign” goal of achieving incumbency protection within the primary by adjusting the relative racial balance of Latino and Black populations. See Anna M. Tinsley, Judges OK Political Map in Fort Worth, Saying New Boundaries No Longer Discriminate, Fort Worth Star-Telegram (June 10, 2019), <https://www.star-telegram.com/news/state/texas/article231258903.html> (on file with the *Columbia Law Review*). So, the “political motive” defense in this district did not implicate the more fraught race-or-party question pitting typically Democratic-voting minority residents against Republican-voting white residents, making it plainer to view racial motive as the independent variable controlling the decision to advantage one minority at the expense of another. This exemplifies how courts appear to recognize a latent distinction between *defensive* political tactics to secure intraparty incumbencies as opposed to *offensive* partisan tactics to dampen the other party’s base of support.

HD90 also demonstrates the key difference between *Shaw*’s predominant motive standard and the kind of invidious intent required for racial discrimination. The court reasoned that the purpose of HD90’s racially motivated redistricting was first, to return a community to its historic home, and second, to forestall a challenger in the primary election, triggering *Shaw*. *Perez IV*, 267 F. Supp. 3d at 794. But while the *Shaw* claim succeeded on these facts, the intentional discrimination claim did not because in an *intraparty* contest between minority groups, the use of race to advantage one over the other can be predominant without being motivated by animus. See *id.*

Finally, there is a coda to HD90’s legal fate. Justice Alito, writing for the *Abbott* majority on appeal, reversed the district court’s finding of intentional racial discrimination for all districts in one fell swoop, but preserved its conclusions that a *Shaw*-style racial gerrymander had occurred in just one: HD90. See *Abbott*, 138 S. Ct. at 2334.

113. *E.g.*, *Covington v. North Carolina*, 316 F.R.D. 117, 124, 130 (M.D.N.C. 2016), *aff’d*, 137 S. Ct. 2211 (2017); *Harris v. McCrory*, 159 F. Supp. 3d 600, 619–20 (M.D.N.C. 2016) (recounting defendants’ partisanship defense to make the district “an even more heavily Democratic district and make the surrounding counties better for Republican interests” in order to “enable Republican control” and “insulate the plan from challenges such as the instant one”), *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). *Harris* was the lower court’s opinion later affirmed in *Cooper*. Aiding the court’s more streamlined analysis of motive here was the fact that the North Carolina maps were exclusively drawn by the same cast of characters: Dr. Thomas Hofeller, the consultant mapmaker, and the 2011 state legislative redistricting committee chairs, Senator Robert Rucho and Representative David Lewis, limiting the universe of relevant legislative “intentions” for the court’s review. *Covington*, 316 F.R.D. at 126–27.

previously downplayed the partisan nature of the gerrymander in a press release prior to litigation.¹¹⁴

The trouble with courts relying on direct statement evidence to sort between race-or-party motives is that contemporaneous expressions of racialized purpose even being available is realistically dependent on fortuity—and therefore rare.¹¹⁵ Of forty-four districts where courts approached the facts with a holistic analysis, only five were swayed by explicit statements of motivation.¹¹⁶ If a court's race-or-party factfinding inquiry is considered like an empirical test for "true intent," a holistic approach reliant on direct statements errs on the side of false negatives in detecting predominant racial motive.¹¹⁷ Distinguishing race from party mostly where purpose statements are available over-relies on judicial assessments of witness credibility even when corroborated by circumstantial evidence of subordinated race-neutral criteria.¹¹⁸ Moreover, courts that highly weigh direct statements may conversely infer that the *absence* of direct admissions weighs against finding predominant racial motive. Basically, to show that racial motive controlled districting decisions over an asserted partisanship defense, challengers must catch mapmakers unwittingly slipping up.¹¹⁹

2. *Mechanical Racial Targets and Racial Quotas.* — A mechanical racial target is a population metric set by mapmakers to pack minorities into a voting district, like aiming for 55% Black voter population concentration,

114. *Harris*, 159 F. Supp. 3d at 620; see also *Covington*, 316 F.R.D. at 139; Levitt, *Manufactured Conundrum*, supra note 61, at 592 n.188 (describing how the *Harris* court perceived the partisanship argument as mere "strategic litigation choices once a *Shaw* claim had been asserted" that did not "credibly represent the motives of those actually drawing the lines at the time").

115. Cf. Dale E. Ho, *Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 *Wm. & Mary L. Rev.* 1887, 1915–16 (2018) (noting that "[e]vidence of discriminatory intent is hard to come by").

116. See Analysis Spreadsheet, supra note 81.

117. Identifying objective truth is obviously not the goal of adversarial litigation, but as a model for neutrally untangling racial and partisan motives the predominance test can be conceptualized as a sort of empirical test. See Levitt, *Manufactured Conundrum*, supra note 61, at 590 n.167.

118. *Id.* at 592–93.

119. A widely reported example of this kind of "slip-up" in partisan gerrymandering is Representative Lewis's statement to colleagues explaining North Carolina's remedial plan: "I propose that we draw the maps to give a partisan advantage to 10 Republicans and three Democrats because I do not believe it's possible to draw a map with 11 Republicans and two Democrats." Robert Barnes, *North Carolina's Gerrymandered Map Is Unconstitutional, Judges Rule, and May Have to Be Redrawn Before Midterms*, *Wash. Post* (Aug. 27, 2018), https://www.washingtonpost.com/politics/courts_law/2018/08/27/fc04e066-aa46-11e8-b1da-f7faa680710_story.html (on file with the *Columbia Law Review*). This kind of admission of partisan intent in a racial gerrymandering claim would likely be dispositive evidence that racial intent did not predominate under the race-exclusive and explicit racial markers models.

and is another straightforward signal of racial motive.¹²⁰ In states with sufficiently large and compact minority populations, majority-minority or ability-to-elect districts may be required by the VRA, so state legislatures often cannot avoid setting racial targets for remedial purposes.¹²¹ Nonetheless, post-2010 courts have repeatedly found these targets (sometimes referred to as racial quotas) to be good evidence that racial criteria overrode race-neutral considerations in the mapmaking process when combined with indicators that legislators aimed higher than what the VRA requires, resulting in excessively odd district boundaries.¹²² But mechanical racial targets alone are insufficiently probative of racial intent, and they are often not compelling indicators of dominant racial motive where political motives are a defense. For example, the *Perez* court found predominant racial motive in one Texas state house district with a mechanical target and split precincts but not in another with the same features where the sitting Democratic legislator asserted an incumbency protection purpose that presented a “close question” of motive, even though the court considered the use of race to be unjustified.¹²³

3. *The Shape of Things: Compactness, “Bizarreness,” and Split Precincts.* — Appearance is a classic gerrymandering signature. Numerical compactness measures and “eyeballing” the bizarreness of district shapes are usually folded into courts’ analyses of whether traditional redistricting criteria have been subordinated. But split voting precincts can be a clue that race, not party, drove the mapmaking process because extremely precise divisions may not be possible without census-block racial data only available at the sub-precinct level.¹²⁴ Still, no rough number of split

120. See *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill II)*, 326 F. Supp. 3d 128, 139–41 (E.D. Va. 2018).

121. See Hasen, *Race or Party*, supra note 3, at 1852 (explaining the difficulty of achieving “goldilocks nirvana” between VRA and constitutional liability); Levitt, *Manufactured Conundrum*, supra note 61, at 600 n.220 (criticizing the “goldilocks” complaint by state legislators as laziness, obfuscation, or both); see also *Perez I*, 250 F. Supp. 3d 123, 229 (W.D. Tex. 2017) (Smith, J., dissenting) (lamenting the “Scylla and Charybdis” facing legislatures between the demands of the VRA and the Constitution).

122. See, e.g., *Ala. Legis. Black Caucus v. Alabama (ALBC II)*, 231 F. Supp. 3d 1026, 1042–43 (M.D. Ala. 2017). The court in *ALBC II*, on remand from the Supreme Court, wisely began its 324-page district-by-district opinion by setting inferential ground rules, one being that showing a statewide policy to meet mechanical racial targets did not weigh toward predominance without further proof that those targets were actually met, that this policy did not create a rebuttable presumption of predominance in favor of plaintiffs, and that precinct splits alone were insufficient to prove predominance. *Id.* at 1049–61.

123. *Perez I*, 250 F. Supp. 3d at 180–83.

124. See, e.g., *Bethune-Hill II*, 326 F. Supp. 3d at 148 (inferring racial motive from a plethora of subdivisions divided at the census-block level where election data was not yet available); *Ga. State Conf. of the NAACP v. Georgia*, 312 F. Supp. 3d 1357, 1365 (N.D. Ga. 2018) (weighting split precinct evidence highly in favor of racial predominance); see also Levitt, *Manufactured Conundrum*, supra note 61, at 570–71 (describing how split precincts that show a pattern of separating Black from white voters on the census block level can be a hint of racial sorting because “partisan performance data is often aggregated by precinct, while racial data is aggregated by more granular census blocks”).

precincts or compactness measures consistently assists courts in untangling alleged racial motives from competing partisan motives.¹²⁵ As Justice Kagan observed in *Cooper*, appearance evidence “loses much of its value when the State asserts partisanship as a defense, because a bizarre shape . . . can arise from a ‘political motivation’ as well as a racial one.”¹²⁶ Thus in Georgia, despite an expert’s persuasive evidence that “precise and effective” precinct splits to protect Republican seats could only have been achieved with sub-precinct racial data surgically separating Black and white residential blocks, the court felt that the state’s bare partisanship defense and less-egregious district shape compelled the conclusion that the challengers were not substantially likely to prevail on the merits.¹²⁷ Lack of compactness has therefore provided judges with declining insight about the extent of race reliance sufficient to distinguish it from partisanship.¹²⁸

4. *Statistical Analysis and Experts.* — The “battle of the experts” is a common feature in redistricting cases, and statistical analysis can be powerful circumstantial evidence that a district’s observable features are more likely to be correlated with racial indicators, such as minority concentration, than with partisan indicators, like past election results and party affiliation.¹²⁹ Statistical regression moved the needle in favor of racial

125. See *ALBC II*, 231 F. Supp. 3d at 1049–61 (stating that precinct splits alone are insufficient to prove racial predominance); Gliozzo, *supra* note 6, at 1349 (describing how states raising partisanship defenses concede lack of compactness but simply dispute the racial explanation for the contortions).

126. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (quoting *Cromartie I*, 526 U.S. 541, 547 n.3 (1999)).

127. *Ga. NAACP*, 312 F. Supp. 3d at 1365–66 (“If the redistricters just guessed, based on estimates of party affiliation, that splitting precincts the way they did would result in favorable outcomes for their candidates, they got pretty lucky. This is not direct evidence of racial gerrymandering, but it is circumstantial evidence that we find persuasive.”). Granted, the court’s opinion was issued under a preliminary injunction standard requiring a *substantial* likelihood of success, and the court was unwilling to grant an “extraordinary remedy” when the race-or-party question on these facts came down to a credibility contest between the plaintiffs’ witnesses and the map drawer’s testimony under oath that she did not use race to split precincts as she did. *Id.* at 1366–67.

128. See, e.g., *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 591–92 (N.D. Ill. 2011) (considering a partisan interest to preserve “relationships among constituents and their Democratic representatives” a better explanation than race for an oddly shaped district packed with a high Latino population, even though diminished polarization over time meant the VRA likely did not require the continued maintenance of a majority-minority district).

129. See, e.g., David Daley, *How to Get Away with Gerrymandering*, *Slate* (Oct. 2, 2019), <https://slate.com/news-and-politics/2019/10/alec-meeting-gerrymandering-audio-recording.html> [<https://perma.cc/4MCN-F27C>] [hereinafter Daley, *How to Get Away*] (quoting complaints that Republicans “are outgunned by the litigation power and the expert witnesses on the side of fair maps Republicans have only five or six expert witnesses, while Democrats have between 18 and 20 ‘really outstanding and smart people’ able to explain ‘newfangled theories’ about identifying gerrymanders”).

predominance in some Texas districts in *Perez*,¹³⁰ and the *Bethune-Hill II* court on remand heavily credited evidence by experts who compared the old Virginia maps to the new and concluded that they exhibited telltale statistical measures of “race-based maneuvering” as essentially dispositive in dispelling the state’s partisanship defense.¹³¹

But there is a point where circumstantial empirical analysis does not adequately explain ex ante legislative motivation. In *Rodriguez v. Harris County*, the expert presenting an electoral outcomes analysis of racial bloc voting in county commissioner districts admitted that it was nearly impossible to empirically distinguish the effects of race or party preference from one another.¹³² And in *Backus v. South Carolina*, the court determined that the expert whose analysis constituted the bulk of the plaintiff’s case had based his conclusion on unreliable methodology.¹³³ So while expert witnesses and statistical evidence are common, they are vulnerable to negative reliability and credibility assessments and do not lend consistent weight to distinguishing between race-or-party motives across circumstances.

D. *Race as Partisan Proxy: The Cooper Model*

At the far end of the race-or-party spectrum is Justice Kagan’s race-as-proxy model hinted at in *Cooper*.¹³⁴ This approach departs from the dichotomous race-or-party treatment that underlies the preceding two models because it treats state actors’ knowledge that race and party are correlated as functionally the same as intent to exploit that correlation on the basis of race, tipping analyses in favor of finding that race was the predominant factor even when state actors intended to further partisan goals.¹³⁵ The race-as-proxy approach counsels judges to reason that if minority populations were sorted just because they are reliable party voters, and reliable party voters are mostly minorities, districting choices

130. See *Perez II*, 253 F. Supp. 3d 864, 897 (W.D. Tex. 2017).

131. See *Bethune-Hill II*, 326 F. Supp. 3d 128, 139–40, 146 (E.D. Va. 2018).

132. 964 F. Supp. 2d 686, 775 (S.D. Tex. 2013). The partisanship defense prevailed in the *Shaw* claim, where the county argued that even though it was aware of racial voting patterns and split precincts, the end goal was merely to improve favorable Republican electoral outcomes. *Id.* at 803–04. The court found that all race amounted to was political jockeying: “Although the Court is mindful of the testimony that Latinos in Harris County tend to vote Democratic and Anglos tend to vote Republican, these proclivities, without more, cannot transform partisanship into race discrimination.” *Id.* at 804.

133. See 857 F. Supp. 2d 553, 562 (D.S.C. 2012) (determining that the plaintiff’s expert relied on incomplete information by neglecting to consider important sources in reaching his conclusion), *aff’d*, 568 U.S. 801 (2012).

134. See *supra* notes 58–59 and accompanying text.

135. See Hasen, *Race or Party*, *supra* note 3, at 1872–73 (arguing that in the vote denial and race discrimination context, race-as-party “follows the common sense view . . . that when it comes to intent, having the purpose to do something and acting with the knowledge that a consequence is substantially certain to occur should be treated similarly”); see also Li & Rudensky, *supra* note 5, at 734–35.

to capture or suppress the resulting party-line vote should be enough to overcome bare assertions of legitimate political goals as nonetheless unjustifiably reliant on race. Thus, using racial means to achieve partisan ends is still racially motivated conduct and the partisanship defense is “no safe harbor.”¹³⁶

Twenty percent of challenged districts with a political defense analyzed by lower courts since 2010 have applied a race-as-proxy analysis in redistricting cases, albeit in analyzing discriminatory intent and based on evidence that mapmakers themselves subjectively perceived no difference between race or party.¹³⁷ The vast majority of those analyses were undertaken by the *Perez* court, which rejected Texas’s defense that cracking new populations of Hispanic voters to diminish Democratic gains statewide was a legitimate partisan motive.¹³⁸ The court’s determination largely rested on internal communications referring to both in the same breath, which constituted evidence that mapmakers and legislators subjectively equated their hostility toward Democrats with hostility to Hispanics.¹³⁹ And the *Patino v. City of Pasadena* court rejected the city’s partisanship defense as mere pretextual cover for racially discriminatory intent because the relevant official “thought of ‘Hispanic’ as a proxy for Democratic voters and ‘Anglos’ as a proxy for Republican voters.”¹⁴⁰

Of course, these are race-as-proxy applications in vote dilution cases, where intent to dilute is sufficient to incur liability regardless of whether that intent is a primary or secondary consideration. By contrast, the difficulty in *Shaw* claims is that showing that *some* discriminatory intent likely motivated action, or even a purpose or practice of equating race with party, is insufficient to meet the predominant motive standard if race cannot be shown to have *controlled* decisionmaking.¹⁴¹ But under a race-as-proxy approach, if race is practically the same thing as partisanship because of their close correlation, then an inference of motive to maximize partisan advantage elevates the instrumental exploitation of racial means to do so to a starring role, making it easier for courts to push aside partisanship defenses in close cases.¹⁴²

136. Hasen, *Race or Party*, supra note 3, at 1884.

137. See Analysis Spreadsheet, supra note 81.

138. See, e.g., *Perez II*, 253 F. Supp. 3d 864, 950 (W.D. Tex. 2017).

139. *Id.* (“[T]he record indicates not just a hostility toward Democrat districts, but a hostility to minority districts, and a willingness to use race for partisan advantage.”).

140. 230 F. Supp. 3d 667, 704, 727 (S.D. Tex. 2017) (“Partisan goals can be a pretext for invidious intent behind legislation. When, as here, the party in power stands to gain partisan advantage by diluting Latino votes, pursuing partisan advantage can . . . mean intending to dilute Latino votes.”). A unique feature of this case, however, was that the new redistricting plan had been adopted by a popular vote that prevailed only on a very narrow margin, starkly exposing racial polarization between Latino and white voter preferences and directly demonstrating that Latino votes would be diluted. See *id.* at 701–04.

141. For an illustration of the fine difference between invidious discrimination and predominant motive, see supra note 112.

142. See Hasen, *Race or Party*, supra note 3, at 1884.

Judge Myron Thompson's partial dissent in *ALBC II* on remand forwarded this nuanced view of how race-as-proxy would work in *Shaw* claims, albeit at a level of generality that situates partisan politics as one of many racial correlates.¹⁴³ Because of the opportunity for after-the-fact pretext, Judge Thompson argued that courts should not end factual analysis at the point where purportedly "race-neutral" criteria like party *could* serve as an explanation for a district's boundaries—in essence, where race-or-party motives are equally attractive explanations—but should go on to consider if those criteria were actually *likely* to have been the driving motive.¹⁴⁴ Thus, evidence that the state acted with secondary intent to discriminate against minority voters could also contextualize an accompanying *Shaw* claim in cases where partisanship is a plausible motivator but the more likely primary explanation is that racial motive predominated.

III. RACIAL GERRYMANDERING'S RACE-OR-PARTY FUTURE

Part II describes how even though lower courts throughout the decade have resolved the race-or-party problem and relied on similar evidentiary clues to do so, judicial modes of interpretation range from the relatively blunt analysis of Judge Smith to the subtleties of Judge Thompson. The prevailing approach, however, falls squarely in the blurry middle where very little guidance can be gleaned.¹⁴⁵ This is, in a way, admirable; having repeatedly held that courts should not view any one piece of evidence as necessary or sufficient to find constitutional liability, the Supreme Court's post-2010 *Shaw* decisions trended toward encouraging courts to engage in even more localized, holistic inquiries.¹⁴⁶ Part II's review confirms that courts have largely done so.¹⁴⁷ By sacrificing predictability, however, the doctrine is vulnerable to either renewed

143. See *ALBC II*, 231 F. Supp. 3d 1026, 1355 (M.D. Ala. 2017) (Thompson, J., concurring in part and dissenting in part).

144. *Id.* at 1369–71 (“[T]hat a drafter could have drawn a boundary in a particular way to achieve ends other than race does not prove that racial considerations did not in reality predominate over race-neutral ones in the State’s ultimate design of the district.”). As an example, Judge Thompson argues that where a district boundary was shifted to swallow a majority Black community while excluding a majority white community, the fact that race-neutral contiguity and compactness criteria might also explain the district’s shape should be insufficient to conclude that race did not predominate in light of Alabama’s statewide policy to meet mechanical racial targets contextualizing the state’s fixation on race. *Id.* at 1370–71. The majority, however, criticized Judge Thompson’s interpretation as improperly shifting the burden of proof to the defendant to show that race was not the but-for cause of the district’s shape and for overly relying on the state’s use of mechanical racial targets. *Id.* at 1056–58 (majority opinion).

145. See *supra* section II.C.

146. See Levitt, *Manufactured Conundrum*, *supra* note 61, at 595.

147. See *supra* text accompanying note 104 (finding that 80% of districts involving a race-or-party analysis were approached holistically).

dormancy or unprecedented abuse after 2020 by potentially opening a pathway for *Rucho* to externally influence courts' discretion.

Section III.A compares Part II's three judicial modes of analysis and concludes that little guidance is forthcoming from courts' past approaches. Section III.B then explains how, given the manipulability of outcomes along the continuum of these models, *Rucho*'s particular reasoning in contrasting partisan and racial gerrymandering may prompt a judicial retreat to race-exclusivity by bolstering the partisanship defense as an analytical safe harbor even without directly altering the racial gerrymandering doctrine. Section III.C then argues that this encroachment is the reason why federal courts, in order to fairly carry out their constitutional duties, should instead adopt the nuanced race-as-proxy model to sort through litigants' unavoidable incentives to wage "political warfare"¹⁴⁸ through the racial gerrymandering doctrine in the wake of *Rucho*.

A. *Lower Courts' Race-or-Party Models Amount to a Malleable Standard*

The race-exclusivity model in *Shaw* claims would find predominant racial motive in very few circumstances where a bare partisan explanation is asserted, as it is more likely to consider circumstantial evidence of racialized means, like mechanical racial targets, to be merely secondary effects of legitimate partisanship.¹⁴⁹ It therefore comes closest to limiting constitutional liability only to circumstances where race can be clearly shown to have occupied a "single-minded racial obsession" in redistricting decisionmaking, rather than one weighty factor among a thicket of aggregated interests.¹⁵⁰ This high bar also narrowly fulfills one of *Shaw*'s apparent original interests in protecting against "expressive" racial stereotyping because it would prohibit only uses of race so egregious that they are not plausibly confused with mere partisanship at a glance.¹⁵¹ Naturally, legislatures trying to avoid constitutional liability and courts seeking to lighten their analytical loads would find the race-exclusivity model advantageous due to its near-categorical simplicity. For minority voters and civil rights groups, however, this approach would detect constitutional violations only where the race-or-party question is really just a race-or-nothing question, making claims all but impossible to prove if partisanship is available as a defense.

148. *Cooper v. Harris*, 137 S. Ct. 1455, 1490 (2017) (Alito, J., concurring in the judgment in part and dissenting in part).

149. See *supra* section II.A.

150. See Levitt, *Manufactured Conundrum*, *supra* note 61, at 567.

151. 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, 500–09 (1993) (developing the theory of expressive harms based on *Shaw*'s unclear language).

Meanwhile, the totality model that most courts have settled on is appealing for applying a sensitive approach to a sensitive subject. Professor Justin Levitt argues that this trade-off—unpredictability for holistic review—is an acceptable bargain given the *Shaw* doctrine’s preference for “textured nuance over artificial clarity” that properly encourages courts and legislatures to do “hard work with fewer shortcuts.”¹⁵² That common categories of evidence are not consistently evaluated across cases is much of the point: After all, intensive, fact-based analysis dependent on a multitude of localized factors that have changed over time and geography demands nothing less than a rigorous review of the totality. Moreover, the Court’s trajectory toward encouraging ever more holistic analysis leading up to *Cooper* suggests that it is willing to live with this state of affairs even if the predominant motive standard is imperfect.

Of course, this vaguely bounded analysis still provides little guidance for practitioners, legislatures, and future courts. And Part II’s review indicates that there is an unclear point where “hard work” applied to evidence of externalized manifestations of motive ceases to satisfyingly untangle race from party.¹⁵³ Certainly, the presence of explicit racialized statements by mapmakers are most probative, but not every case can depend on the fortuity of a damning statement slipping out.¹⁵⁴ The North Carolina slip-ups are unlikely to be repeated; after *ALBC*, *Bethune-Hill*, and *Cooper*, state lawmakers are on notice that *Shaw* claims can successfully incur constitutional liability because of careless language.¹⁵⁵ The novelty of *Shaw*’s post-2010 transformation into a double-edged sword that can directly target racial discrimination (instead of just restraining the VRA’s race-conscious remedy for discrimination) has had time to wear off. Legislators wary of litigation will be cautious about making unambiguous statements out loud after the 2020 reapportionment, forcing courts to resort to parsing circumstantial evidence to disentangle race from party.¹⁵⁶ Thus, courts relying on the presence of direct admissions to pave the way to a confident resolution of motive are likely to be disappointed. This approach would also bind minority voters outside the mapmaking process into relying on expensive and time-consuming discovery to find evidence

152. See Levitt, *Manufactured Conundrum*, supra note 61, at 595; see also supra note 77 and accompanying text.

153. See supra section II.C.

154. See supra section II.C.1.

155. See Levitt, *Manufactured Conundrum*, supra note 61, at 597 (describing initial *Shaw* claims brought by minority groups as “tentative” allegations); see also Daley, *How to Get Away*, supra note 129 (reporting on leaked audio from a redistricting seminar for state legislators recommending destroying any notes that could turn up in discovery).

156. See Hasen, *Into the Mud*, supra note 79.

of legislative purpose in a redistricting Golden Snitch: legislators' loose lips.¹⁵⁷

Moreover, while blunt indicators of racial reliance like mechanical targets and empirical studies move the ball to varying degrees, this evidence is assigned inconsistent weight across cases and judges. Courts are obliged to reinvent the wheel district by district, weighing voluminous proffers of circumstantial evidence of racial motive against the credibility of partisan defenses, only to eventually make a “qualitative” choice echoing Justice Stewart’s infamously subjective obscenity test.¹⁵⁸ If either outcome can be entirely logical when race and party are highly correlated because of minute factual differences, it is trivial for judges to reason backwards from a desired result. Thus, from a public perception perspective, the totality approach puts courts on shakier ground.¹⁵⁹ Given that many cases under this model are decided by split-panel judges disagreeing over the weight of competing race-or-party motives, judicial analysis can be perceived as susceptible to motivated reasoning, as Judge Smith’s *Perez* dissent floridly suggested of the majority.¹⁶⁰

The race-as-proxy model, however, supports *Shaw*’s utility as a voting rights tool protective of substantive political representation rather than just a constitutional limit on the VRA’s descriptive representation remedy.¹⁶¹ If sorting reliable minority voters in the off-party in order to capture the political benefits of the race-party correlational relationship evinces a racial motive, then plaintiffs could theoretically meet their burden by proving generalized intent to discriminate without needing to distinguish between which motive loomed largest. And plaintiffs might also meet their burden by showing dilutionary effects on racial minorities’

157. See, e.g., *Favors v. Cuomo*, No. 11 Civ. 5632(RR)(GEL)(DLI)(RLM), 2014 WL 2154871, at *1–2 (E.D.N.Y. May 22, 2014) (dismissing plaintiffs’ racial gerrymandering claims after two years of discovery for failure to produce evidence of racial animus).

158. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it . . .”); see also *supra* note 94 and accompanying text.

159. See *Hasen, Race or Party*, *supra* note 3, at 1880 (describing how, in vote denial cases, Democratic-appointed judges and Republican-appointed judges dividing along those lines bodes ill for the “development of fair standards” and “public confidence in the impartiality and fairness of the judiciary”).

160. *Perez I*, 250 F. Supp. 3d 123, 227 (W.D. Tex. 2017) (Smith, J., dissenting) (“[The majority] weaves a complex, widespread conspiracy of scheming and plotting, by various legislators and staff, carefully designed to obscure the alleged race-based motive in an effort to achieve their objectives and—by necessary implication—intentionally to deprive minority citizens of their political and civil rights.”); see also *Hasen, Race or Party*, *supra* note 3, at 1852.

161. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 *Wm. & Mary L. Rev.* 1559, 1598–99 (2018) [hereinafter Charles & Fuentes-Rohwer, *Representation Revisited*] (arguing that the new *Shaw* cases demonstrate the Court’s consensus on a colorblind view of equal protection that rejects descriptive representation as a normative good, making the VRA’s explicit race-conscious remedies to enhance minority representation unconstitutional).

ability to elect preferred *substantive* representatives—strategically sorting Black Democrats to reduce their ability to elect white Democratic candidates broadly supportive of their interests, for example—without proving racial animus.

Of course, like the race-exclusivity model, this approach blurs the distinction between the vote dilution and *Shaw* intent standards. Yet the Supreme Court’s trend toward demanding holistic approaches from lower courts suggests that policing hard analytical borders should be in the doctrine’s past, and creatively using race to achieve partisan goals should still amount to unconstitutional racial sorting.¹⁶² And unlike race-exclusivity’s categorical simplicity, the race-as-proxy model is a more sophisticated upgrade to the usual totality approach because it closes the gap that circumstantial racial evidence cannot entirely fill. As Judge Thompson describes, the race-as-proxy approach searches for likely *ex ante* decisionmaking reasons, not plausible *ex post* decisionmaking justifications.¹⁶³ Thus, race-as-proxy would allow partisanship to be an entirely plausible explanation of a state’s actions while not taking its dominance at face value when a contextual political incentive to advance partisan interests and suppress minority votes is, in many cases, a two-for-one deal.¹⁶⁴

Courts may appreciate race-as-proxy as a serviceable heuristic realistically reflecting multifaceted legislative motivations, and voting rights groups may celebrate the *Shaw* doctrine’s greater utility in combatting shrewder forms of racial discrimination.¹⁶⁵ Legislatures, of course, would decry this approach as throwing open the doors to unrestrained judicial intervention in their legitimate redistricting authority by undoing the thin separation between race and party that justified constitutional interest in one area but not the other. As the next section argues, after *Rucho*, they may have the Supreme Court’s support.¹⁶⁶

Part II’s review was undertaken in hopes of drawing out a pattern of evidentiary factors hinting at common principles for disentangling racial

162. See *id.* at 1567 (“Post-*Cooper*, there is really no such category as an analytically distinct *Shaw* claim.”); see also *supra* note 59 and accompanying text.

163. See *ALBC II*, 231 F. Supp. 3d 1026, 1358 (M.D. Ala. 2017) (Thompson, J., concurring in part and dissenting in part).

164. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1480 n.15 (2017); see also Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L. Rev. F. 205, 206 (2013) (showing that racial polarization increased in jurisdictions previously governed by Section 5 and “even when controlling for partisan identification, race is a statistically significant predictor of vote choice”).

165. See Earls, *supra* note 61. But see Charles & Fuentes-Rohwer, Representation Revisited, *supra* note 161, at 1599 (arguing that the *Shaw* doctrine’s anticlassification viewpoint is supported by *Cooper* and will gut the VRA’s descriptive remedy for historical racial discrimination).

166. See *infra* section III.B.

motives from political ones that may resist blowback from *Rucho*'s final word on partisan gerrymandering. But ultimately, unclear standards guide courts in the factual task of splitting the race-or-party hair, which in turn emphasizes the vague boundaries of the predominant motive standard. The takeaway from this review of courts' modes of interpretation appears to be that those occasions where the partisanship defense has failed depended mostly on accidental admissions and direct evidence of mindset.¹⁶⁷ This state of affairs does not inspire confidence that, for all of the courts' rigorous analyses, the final race-or-party decision does not just come down to a gut feeling of what kind of legislative redistricting conduct the *Shaw* doctrine should be policing—remedial race-consciousness or discriminatory race-consciousness? More importantly, the range of possible interpretive models exposes the predominant motive test as a malleable standard open to doctrinally external influence. Beyond 2020, that influence comes from *Rucho*.

B. *The Trouble with Rucho: Rein vigorating the Partisanship Defense*

Whether the doctrinal scaffolding of racial gerrymandering claims can bear the weight of meaningfully distinguishing between race-or-party motives given the carte blanche *Rucho* lends to the pursuit of partisan advantage is doubtful as a matter of judicial practice. The largely holistic analytical approaches of lower courts since 2010 do not signal a path forward where partisanship is a potent defense to racial redistricting challenges. While that state of affairs may be tolerable, *Rucho*'s emphasis on the competence of the courts to even analyze partisan intent lest it result in a remedy of proportional representation suggests that the status quo is not viable where race and party motives are intertwined.

To begin with, Chief Justice Roberts's analysis in *Rucho* subtly departs from Justice Scalia's treatment of race versus partisanship in *Vieth*, which until then had been the controlling word on partisan gerrymandering and ensured that no claim prevailed throughout the 2010s.¹⁶⁸ This matters in terms of *Rucho*'s potential spillover effect in racial redistricting litigation because both cases supported the nonjusticiability of partisan gerrymandering claims in part by defining the Court's constitutional role as policing excessive race discrimination—but pointedly not excessive partisanship—in redistricting.¹⁶⁹ *Vieth* and *Rucho* both conclude that racial gerrymandering claims are permitted while partisan gerrymandering claims are not for two reasons: (1) because equal protection clearly demands a remedy for racial classifications and does not clearly do so for political ones and (2) because courts are capable of applying a manageable standard to detect when a sufficiently egregious racial classification has

167. See *supra* sections II.C–D.

168. See, e.g., *Gill v. Whitford*, 138 S. Ct. 1916, 1933–34 (2018).

169. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019); *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004).

occurred, while no such standard exists for sufficiently egregious political classifications. These distinctions support the ultimate conclusion that racial gerrymandering principles cannot be imported into a purely partisan context.¹⁷⁰ Justice Scalia emphasized the former justification while conceiving of race in redistricting as a clear but rare instance where the Court is obligated to intervene (in contrast to the very ordinariness of political redistricting), because race is never constitutionally permissible unless used remedially.¹⁷¹ Chief Justice Roberts, however, distinguishes racial gerrymandering from partisan gerrymandering by emphasizing manageability under the specter of proportional representation, which he characterizes—at length—as an unworkable vision of “fairness.”¹⁷² This focus in *Rucho* centralizes the lack of a manageable standard for the courts to analyze as the key failure of partisan gerrymandering. It seems to go a step further than *Vieth* by suggesting that the Court cannot provide a remedy for racial redistricting unless it results in curing straightforward racial classifications without upsetting partisan intentions.

Thus, the importance of manageability in *Rucho*’s analysis matters where political defenses appear in racial redistricting contexts. As previous sections argue, the predominant racial motive and intentional discrimination standards are susceptible to a range of factfinding approaches in the lower courts that appear guided by too-subtle principles, reflecting what Chief Justice Roberts himself would likely recognize as a “notoriously manipulable” standard.¹⁷³ The manageability of the predominant motive test in light of the continuously frustrating race-or-party question casts doubt on the clarity of the line between racial and partisan gerrymandering.¹⁷⁴ Nonetheless, this reasoning reinforces the Court’s commitment to the dichotomous race-or-party legal fiction

170. See *Rucho*, 139 S. Ct. at 2502; *Vieth*, 541 U.S. at 284–86.

171. *Vieth*, 541 U.S. at 286 (contrasting partisan gerrymandering with racial gerrymandering by claiming that “the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered”). Justice Scalia conceded that the racial gerrymandering standard left something to be desired: “[C]ourts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which . . . is clear [in racial gerrymandering]; whereas they are not justified in inferring a judicially enforceable constitutional obligation [in partisan gerrymandering] which is both dubious and severely unmanageable.” *Id.*

172. See *Rucho*, 139 S. Ct. at 2499–501 (“Partisan gerrymandering claims invariably sound in a desire for proportional representation.”).

173. See Robert Barnes, Justices Seem to Want to Avoid Extremes in Clean Water Act Case, *Wash. Post* (Nov. 6, 2019), https://www.washingtonpost.com/politics/courts_law/justices-seem-to-want-to-avoid-extremes-in-clean-water-act-case/2019/11/06/68c3e90c-001a-11ea-8501-2a7123a38c58_story.html (on file with the *Columbia Law Review*) (reporting on oral arguments in another case and quoting Justice Roberts’s description of proximate cause in these terms).

174. See *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (criticizing the majority’s lack-of-manageable-standards argument for failing to credit the test the lower courts had already developed, and stating that “in throwing up its hands, the majority misses something under its nose: What it says can’t be done *has* been done”).

underlying the race-exclusive and totality approaches, in turn undermining the doctrine's development toward a race-as-proxy model that *Cooper* appeared to suggest was its future.

On the issue of a distinction between remedies, Chief Justice Roberts stresses that a key difference between partisan and racial gerrymandering is the immodesty of challengers' end goals, because "a racial gerrymandering claim does not ask for a fair share of political power and influence."¹⁷⁵ This contention is dubious; the post-2010 *Shaw* cases are notable because claimants sought a power-altering judicial correction to the disproportionately dampened political influence of overpacked minority Democrats.¹⁷⁶ And the original *Shaw* claim sought no voter participation or representational remedies by disputing Democratic favoring, majority-minority districts only after an initial partisan gerrymandering challenge failed.¹⁷⁷ Correcting for the perception of unfairly distributed political power and influence with a new map is all there is to be remedied in a redistricting claim—victorious plaintiffs win no other tangible reward beyond a potentially fairer electoral arena.¹⁷⁸ But this underlying partisan interest lurks in the subtext of racial gerrymandering claims.¹⁷⁹ By ignoring this context, Chief Justice Roberts reinforces the other resilient fiction exacerbating the race-or-party dilemma that *Cooper* seemed poised to depart from: There is something distinctly harmful about racial classification independent of partisan advantage-seeking that courts can cure without affecting a "fair share" of political power.¹⁸⁰ Thus, another way *Rucho* may lead a judicial retreat from racial gerrymandering is by revitalizing the strict categorical nature of the

175. *Id.* at 2502 (majority opinion). But see *id.* at 2523 (Kagan, J., dissenting) (criticizing the majority's assumption that the only judicial remedy to partisan gerrymandering is an invariably proportional reallocation of political power).

176. See Nicholas Stephanopoulos, The Erasure of Racial Vote Dilution Doctrine, Election L. Blog (June 28, 2019), <https://electionlawblog.org/?p=105855> [<https://perma.cc/U7D3-SA2B>] (reacting to *Rucho*'s ominous omission of any reference to the constitutional racial vote dilution doctrine in its reasoning); cf. Steven Mulroy, Rethinking US Election Law: Unskewing the System 89–90 (2018) (describing the *Shaw* doctrine's recent success in curtailing efforts to "bleach" districts adjacent to racially overpacked, majority-minority districts with even higher concentrations of white voters to deliver safe Republican seats).

177. See *supra* note 29.

178. In theory, the constitutional injury caused by racial gerrymandering is a process injury of being individually classified by the government on the irrational basis of race. See Levitt, *Manufactured Conundrum*, *supra* note 61, at 564. But the tangible sting of such an injury to individual voters has never been described as curing a measurable loss in electoral influence or even the psychic pain of having been so classified; the only remedy is the elimination of the classification, which means redrawing maps without race so forwardly in mind and not anything else. So remedial maps must, at least on the margins, effectively reallocate some political power between voters and representatives from different parties and racial groups.

179. See Hasen, *Questionable Revival*, *supra* note 5, at 379–80.

180. See *Rucho*, 139 S. Ct. at 2502.

race-party dichotomy that leads courts to eventually decide between race-or-party based on a “gut check” decision, or shy away from partisanship claims altogether.

Another way *Rucho* undermines the efficacy of racial gerrymandering claims is its less overt message to courts and legislatures that the partisanship defense is not just an innocuous alternative explanation for racialized outcomes, but a justifiable good in itself—how “democracy is supposed to work.”¹⁸¹ Professors Guy-Uriel Charles and Luis Fuentes-Rohwer argue that *Rucho* should be understood not as judicial restraint¹⁸² but “as a normative defense of the practice of partisanship.”¹⁸³ This view also supports Professor Hasen’s pre-*Rucho* prediction that the Supreme Court might ultimately resolve the race-or-party question with a “*to the victor goes the spoils* approach,” where it has rejected both partisan gerrymandering claims and the minority rights-protective line of *Shaw* cases by allowing political winners to “‘run roughshod’ over the rights of (political and racial) minority voters.”¹⁸⁴ *Rucho* suggests that the Court does, in fact, intend to head in this direction. And in keeping with this messaging, lower courts evaluating racial gerrymandering may feel influenced toward applying the race-exclusivity model in order to give partisanship defenses an analytical wide berth.¹⁸⁵ After all, if partisan ends are a normative good, and norms break ties in the race-or-party inquiry, courts may reasonably exercise their discretion to weigh partisanship

181. *Id.* at 2511 (Kagan, J., dissenting).

182. This term here is somewhat tongue-in-cheek, as the same authors argued in the wake of *Abbott* that the Roberts Court is unusually quick to strike district courts’ findings in voting rights cases. See Charles & Fuentes-Rohwer, *Immodesty*, *supra* note 18.

183. Charles & Fuentes-Rohwer, *Dirty Thinking*, *supra* note 65, at 314.

184. Hasen, *Race or Party*, *supra* note 3, at 1885–86 (quoting *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part)).

185. The general idea that the Supreme Court sends “messages” that change political behavior in its rulings is not new. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 *Harv. L. Rev.* 236, 269 (2018) (arguing that the Court’s intervention into redistricting in *Shaw* caused political elites to refrain from excessive reliance on race in the pursuit of political advantage as the possibility of judicial review constrained the appetite to pursue self-interested objectives).

Nor is the specific prediction that lower courts are likely to import a partisan-intent free-for-all into election law analyses from *Rucho* speculative. In an opinion on appeals from a complicated set of challenges to election law changes in Wisconsin, the Seventh Circuit relied on *Rucho* to overturn the district court’s findings that early-voting hour reduction and photo identification provisions evinced racial discrimination because state legislatures knew of the disparate effect the changes would have on Black voters. *Luft v. Evers*, 963 F.3d 665, 670–71 (7th Cir. 2020). Even though the district court found that “race and politics are correlated” and “black voters are likely to prefer Democratic candidates,” Judge Frank Easterbrook breezily dismissed the inference that the legislature intended to burden Black voters. *Id.* at 671. Rather, “given the holding of *Rucho* that legislators are *entitled* to consider politics when changing the rules about voting . . . the basis for inferring discrimination evaporates. . . . [T]he legislators who voted for the contested statutes [did not] care[] about race; they cared about voters’ political preferences.” *Id.*

defenses higher across the board against even strong evidence of racial reliance.

The racial gerrymandering doctrine will remain a legal option for voting rights challengers.¹⁸⁶ But the malleability of evidentiary approaches currently employed by courts suggests the factual race-or-party inquiry is vulnerable to a spillover effect, which may in practice raise plaintiffs' burdens to prove predominant racial motive in the face of Court-sanctioned partisan gerrymandering. By both reaffirming the categorical race-or-party question and protecting partisan motives as constitutionally legitimate state action even at the extremes, the Supreme Court has potentially restored an evidentiary barrier nearly as high as the alternative-map requirement demoted by *Cooper*. The next question, then, is this: Should the lower courts ignore Justice Kagan's dicta and adopt an austere race-exclusive mode of evaluating race-or-party evidence or move forward with a race-as-proxy model that nonetheless discounts *Rucho* and deigns to grant partisanship defenses at face value?

C. *Race-as-Proxy: The Best Approach for Now*

Federal courts are unlikely to avoid direct confrontation with the race-or-party problem after 2020.¹⁸⁷ After *Rucho*, legislatures, unencumbered by the threat of judicial intervention, are free to pursue maximum partisan advantage, and civil rights groups seeking to challenge the resulting maps must do so through the only legal frameworks left on the table.¹⁸⁸ The incentive to obfuscate true objectives in court will therefore be as high as ever for both legislatures and challengers.¹⁸⁹ Courts, however, should resist the temptation to meet instances of partisan manipulation of the racial makeup of electoral districts with the disregard for political context on

186. See Rebecca Green, A Spade Is a Spade (*Rucho* Symposium), Election L. Blog (July 5, 2019), <https://electionlawblog.org/?p=106071> [<https://perma.cc/9N9S-VVR5>] (regretting that *Rucho* missed an opportunity to straighten out redistricting doctrines that incentivize partisans to misrepresent their true intentions in court but predicting that the racial gerrymandering doctrine will continue on its present trajectory).

187. See Hasen, Questionable Revival, *supra* note 5, at 379–80. Even when the possibility of a successful partisan gerrymandering claim remained on the table, the racial gerrymandering doctrine was an arena for partisan political fights to find expression in the courts as much as it was a successful alternative cause of action to combat racially discriminatory redistricting effects. See *id.*

188. See Nina Totenberg, Domenico Montanaro & Miles Parks, Supreme Court Rules Partisan Gerrymandering Is Beyond the Reach of Federal Courts, NPR (June 27, 2019), <https://www.npr.org/2019/06/27/731847977/supreme-court-rules-partisan-gerrymandering-is-beyond-the-reach-of-federal-court> [<https://perma.cc/NXS5-J3NS>] (quoting Professor Justin Levitt's prediction that states with one-party control after *Rucho* will be emboldened to press their partisan advantage through redistricting).

189. Hasen, Into the Mud, *supra* note 79 (“The bottom line is that the *Rucho* opinion has not ended courts' involvement in redistricting cases The opinions yet to come will enmesh the federal courts in ugly battles over race and partisanship, and they are likely to solidify the court's growing reputation as a partisan institution.”).

which the race-exclusive model is dependent.¹⁹⁰ Rather, in order to give meaningful effect to the line *Rucho* drew between partisan and racial gerrymandering, courts should endeavor to apply the predominant motive test with the goal of policing the kind of race-reliance that violates equal protection in the manner that partisan gerrymandering purportedly does not. In other words, to fill the void *Rucho* created, courts should meet post-2020 partisan savviness with savviness of their own by adopting Justice Kagan's race-as-proxy model.

Such an approach is not unprecedented, as lower courts have already undertaken race-as-proxy analyses in both redistricting and intentional vote denial contexts. In a 2016 racial discrimination challenge to North Carolina's voter identification law (among other post-*Shelby County* election law changes), a Fourth Circuit panel rejected facial neutrality as a sufficient explanation of the state legislature's intent, finding that the law "target[ed] African Americans with almost surgical precision."¹⁹¹ It grounded its analysis in the context of the legislature's strong political incentive to predictably use race to achieve partisan ends: "[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. . . . A state legislature acting on such a motivation engages in intentional racial discrimination" ¹⁹² Given that the choices made in redistricting are almost always driven by the predictability of outcomes signaled by a multitude of indicators, this emphasis on a legislature "acting on" predictable racial indicators as a proxy for partisan advantage has natural application in assessing impermissible motivations in *Shaw* claims as well.

Professors Christopher Elmendorf and Douglas Spencer have also proposed a similar "disparate impact plus political incentives" approach for courts to fill the preclearance enforcement vacuum in VRA Section 2 cases after *Shelby County*.¹⁹³ In their formulation, where plaintiffs can show racially disparate voter suppression and that extremely high race-party correlation creates a political incentive for partisans to facilitate that suppression, courts should shift the burden of proof to defendants to show that racial discrimination did *not* drive their motives.¹⁹⁴ A parallel situation exists in the *Shaw* doctrine after *Rucho*: Partisan gerrymandering capitalizing on racial classification could earn a judicial blind eye because of the ease with which the observable characteristics of both ends are confused for one another. Unlike Section 2 claims, however, proof of

190. See *supra* section II.B.

191. *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

192. *Id.* at 222–23.

193. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 *Colum. L. Rev.* 2143, 2172–73 (2015).

194. *Id.* at 2147–49 ("By shifting the burden of persuasion to defendants, the courts acknowledge that partisan motives do not merit the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional.").

“partisan payoffs” need not formally shift the burden to the defendant in a predominant motive analysis as a matter of law; instead, proof of political incentives would become a factual circumstance discounting the weight of partisanship where other evidence of racial discrimination exists.¹⁹⁵

Of course, the race-as-proxy model is not a perfect solution.¹⁹⁶ But it provides courts with the best analytical approach currently proposed within the judiciary itself to realistically evaluate the ersatz race–politics divide. If both racially discriminatory and partisan interests can be rationally served by similar conduct and it is in the interest of legislatures to obfuscate their intent through opportunistic “regulatory arbitrage,”¹⁹⁷ courts should infer that states acting under incentives to leverage race for partisan advantage weighs against finding partisan intentions predominant. This is even truer when those incentives are elevated after *Rucho*, as described above.¹⁹⁸

This approach does not remove courts’ obligations to weigh circumstantial factors like mechanical racial targets, split precincts, and statistical relationships, as corroborating evidence soundly contextualizes the conclusion that race did, in fact, act as a proxy characteristic for partisan gain. It also does not require a wholesale replacement of the race-or-party dichotomy with a realist race-and-party framework, as courts must

195. See *supra* text accompanying notes 161–165.

196. See Elmendorf & Spencer, *supra* note 193, at 2172–73 (noting, in the context of Section 2 claims, that the one-way effect of a doctrine that would likely find Republican maps unconstitutional more often than Democratic maps may “make the presumption too politically fraught for the courts to adopt”). The asymmetry argument is persuasive for courts straining to avoid the perception of partisan bias in their rulings. See Hasen, *Race or Party*, *supra* note 3, at 1874 (highlighting that Republican-favoring voting laws under a race-as-proxy approach will “run afoul of the protections of the Voting Rights Act” more often than a Democratic-favoring counterpart). But a wealth of commentary supports the counterargument that party-line asymmetry in racially suppressive election law practices likely reflects real asymmetry between Republican and Democratic utilization of those practices. For examples, see generally Thomas E. Mann & Norman J. Ornstein, *It’s Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*, at xv (2012) (arguing the Republican Party has become more polarized “in terms of both policy and process”); Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 *Colum. L. Rev. Online* 85, 88 (2019) (“Over the past several decades, Republicans have more frequently engaged in antidemocratic beanball, both by making voting more difficult for targeted groups and extreme gerrymandering.”). And the post-*Rucho* status quo favors Republican state lawmakers, at least for now. See *State Partisan Composition*, Nat’l Conf. of State Legislatures (Aug. 1, 2020), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/SM62-PP2V>] (showing that as of August 2020, Republicans hold complete state governmental control in twenty-one states, Democrats hold fifteen states, and the remaining thirteen are divided); see also Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 *Sup. Ct. Rev.* 111, 178 (“Running like a red thread through the Roberts Court’s anti-*Carolene* decisions [including *Rucho*] is perceived, and actual, partisan advantage. Both when the Court intervenes and when it stays on the sidelines, its actions are consistent with the recommendations of conservative elites.”).

197. Charles & Fuentes-Rohwer, *Representation Revisited*, *supra* note 161, at 1580.

198. See *supra* section III.B.

still ultimately select between race-or-party predominance as a matter of law. But it does expand the scope of the factual inquiry beyond the mechanical gerrymandering features that inconsistently guide courts in resolving the race-or-party divide to drawing meaning from political incentives to mask racial classification.¹⁹⁹ And race-as-proxy continues racial gerrymandering's evolution into a more sophisticated holistic inquiry capable of detecting insidious motives to benefit politically from race discrimination, a capability that an avoidant reaction to *Rucho* would render null.

CONCLUSION

As the 2020 reapportionment cycle arrives, the next decade could see either another resurgence of claims in accordance with the 2010 voting-rights line or a dormancy reminiscent of the 2000s. Voters in gerrymandered districts who seek to vindicate their constitutional right against racial sorting will face legislatures that have learned from the mistakes of past officials. These lawmakers can be expected to take full advantage of *Rucho*'s normative signal that redistricting for partisan advantage is not a matter for judicial concern.

Untangling the race-or-party inquiry in racial gerrymandering law is an opaque task for courts. But since 2010, the *Shaw* doctrine has demonstrated utility as a voting rights doctrine, even if only an unstable one that post-*Rucho* courts may feel obliged to stymie by adopting an austere race-exclusivity approach to the race-or-party dilemma. Courts should resist the temptation. To give meaning and effect to the racial gerrymandering doctrine where the race-or-party dichotomy provides an all-too-easy opportunity for pretext, they should instead take Justice Kagan's invitation to acknowledge that the race-or-party dichotomy can be so artificial that even careful efforts to untangle them look no different from arbitrary randomness. This Note catalogues the judicial menu of interpretive approaches within the boundaries of racial gerrymandering law and concludes that courts share little commonality in how they weigh circumstantial evidence of race-consciousness against partisanship defenses. It endeavors to show that the manipulability of the totality approach argues for greater sophistication so that case outcomes are not perceived for what gerrymandering's justiciability critics charge it is: the expression of judges' mere political preferences.²⁰⁰ Judges do not have to encroach into hazardous partisan gerrymandering grounds to adopt a sophisticated approach to *Shaw*'s abstract motivational inquiry by

199. See Sellers, *supra* note 5, at 709–10 (explaining how an institutional analysis may change the mechanical framework of traditional voting law doctrines).

200. See, e.g., Hasen, Race or Party, *supra* note 3, at 1880; Hans von Spakovsky, Symposium: The Goldilocks Principle of Redistricting, SCOTUSblog (May 23, 2017), <https://www.scotusblog.com/2017/05/symposium-goldilocks-principle-redistricting> [<https://perma.cc/SP54-C6SQ>].

declining to fictionally divide what is not meaningfully separable in reality. While imperfect, the race-as-proxy model would help shore up the predominance analysis against judicial temptation to overly credit partisanship defenses when party is, by all substantial factual interpretations, an equivalent characteristic to race.