

## Chapter 7

# *Race and redistricting: The legal framework*

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### CHAPTER SUMMARY

Legal scholar Ellen Katz gives a 60-year history of American jurisprudence around race and redistricting, from the cases that set the stage for the Voting Rights Act to its current precarity in the Roberts Court.

## 1 INTRODUCTION

This chapter examines the federal legal framework governing questions of race and redistricting in the United States. Organized chronologically, it examines the foundational laws and cases that define the ways in which race *may not* be used in the redistricting process, as well as the ways in which race *must* be used in that process. It explores the tension between the prohibited and required uses of race in redistricting.

**Stage I: Into the Thicket** tracks the Supreme Court's development of a constitutional framework to address issues of race and redistricting. It begins with the Court's 1960 decision, *Gomillion v. Lightfoot*,<sup>1</sup> which struck down an Alabama gerrymander that redefined the borders of the City of Tuskegee so as to exclude almost every African American resident from the municipality. This Part discusses how *Gomillion* led the Court to enter a realm Justice Felix Frankfurter once described

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<sup>1</sup>364 U.S. 339 (1960).

as the “political thicket”<sup>2</sup> and subsequently to develop the concept of racial vote dilution in *Whitcomb v. Chavis*,<sup>3</sup> *White v. Regester*,<sup>4</sup> and *Mobile v. Bolden*.<sup>5</sup>

**Stage II: Elaboration** turns to the 1982 amendments Congress made to the Voting Rights Act (VRA). Those amendments were, in part, a response to the Supreme Court’s ruling that the Constitution prohibits racial vote dilution only when policymakers intentionally draw district lines to burden minority voters. The 1982 amendments to Section 2 prohibit electoral practices that “result” in discriminatory burdens, regardless of the intent underlying their enactment.<sup>6</sup> This Part examines the contours of the new statutory prohibition, the so-called “Senate Factors” that Congress indicated should guide interpretation of the provision, and the substantial gloss that the Supreme Court placed on this statutory claim in *Thornburg v. Gingles*.<sup>7</sup>

**Stage III: Uneasiness** examines the decisions of the Rehnquist Court during the 1990s that show the Court’s increasing discomfort with what has long been the preferred remedy for racial vote dilution, namely, the majority-minority district. This Part describes the Court’s development of a new constitutional injury in *Shaw v. Reno*<sup>8</sup> and its progeny,<sup>9</sup> one that limited the ways in which jurisdictions may rely on race when drawing electoral districts.

**Stage IV: Hostility** shows how judicial uneasiness about the role of race in redistricting evolved into outright hostility in the Roberts Court. The Part traces the development of this hostility from Chief Justice Roberts’ early description of efforts to comply with the VRA as “a sordid business, this divvying us by race,”<sup>10</sup> to sweeping decisions such as *Bartlett v. Strickland*<sup>11</sup> and *Shelby County v. Holder*<sup>12</sup> that substantially reduced the reach of the VRA. This Part closes by examining the Roberts Court development of the *Shaw* doctrine in a series of recent cases.<sup>13</sup>

A brief conclusion considers how federal law addressing race and redistricting might develop in the coming years.

<sup>2</sup>See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); see also *Colegrove v. Green*, 328 U.S. 549 (1946).

<sup>3</sup>403 U.S. 124 (1971).

<sup>4</sup>412 U.S. 755 (1973).

<sup>5</sup>446 U.S. 55 (1980).

<sup>6</sup>See 52 U.S.C. §10301 (formerly 42 U.S.C. §1973).

<sup>7</sup>478 U.S. 30 (1986).

<sup>8</sup>509 U.S. 630 (1993).

<sup>9</sup>See *Bush v. Vera*, 517 U.S. 952 (1996), *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

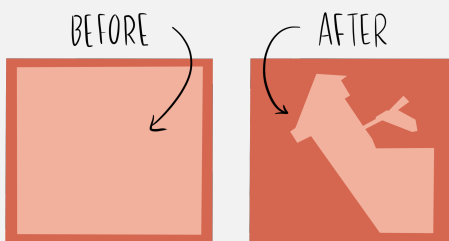
<sup>10</sup>*League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

<sup>11</sup>556 U.S. 1 (2009).

<sup>12</sup>570 U.S. 529 (2013).

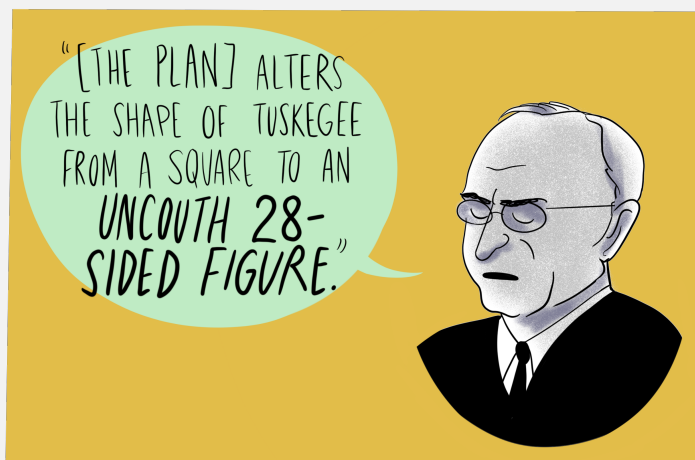
<sup>13</sup>See *Cooper v. Harris* 137 S.Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788 (2017); *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015).

## 7.1 GOMILLION V LIGHTFOOT, 1960



*Can the city of Tuskegee legally redraw its own boundaries, shrinking itself to less than half of its former size, in a manner that exploits racial segregation to change the city population from 80% Black to 100% White with the stroke of a pen?*

**The Court says no, 9-0.**



Calling the map "uncouth" and "irregular," Justice Frankfurter wrote that,

"[T]antamount for all practical purposes to a **mathematical demonstration**... that the legislation is solely concerned with segregating White and colored voters by fencing Negro citizens out of town so as to deprive them of their **pre-existing** municipal vote."

He also sought to make a distinction between this case and *Colegrove* (of "political thicket" fame):

"The appellants in *Colegrove* complained only of a **dilution** of the strength of their votes... The petitioners here complain that affirmative legislative action **deprives** them of their votes and the consequent advantages that the ballot affords."

## 2 INTO THE THICKET: THE CONSTITUTIONAL FRAMEWORK

In July, 1957, Alabama's legislature voted unanimously to redraw the boundaries of the City of Tuskegee. The City had been home to a highly educated African American population ever since Booker T. Washington set up his renowned institute there in 1881. By 1957, Tuskegee had long been a majority-Black city. The new law changed that by redefining the city limits from a square into what Justice Felix Frankfurter would describe as an "uncouth twenty-eight-sided figure."<sup>14</sup> This action removed "all save four or five" of the Tuskegee's African American voters "while not removing a single White voter or resident."<sup>15</sup>

Charles Gomillion, a sociology professor at the Tuskegee Institute and president of the Tuskegee Civic Association, was one of twelve Black voters who challenged the new boundaries as unconstitutional. The lower courts tossed out the claim, but a unanimous Supreme Court agreed with the *Gomillion* plaintiffs. Writing for the Court, Justice Frankfurter held that Alabama's action was "not an ordinary exercise in redistricting even within familiar abuses of gerrymandering." Recognizing that states normally have wide latitude to draw municipal boundaries as they see fit, Frankfurter nevertheless held Alabama's plan unconstitutional, finding that the State's purpose was to segregate White and Black voters by "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." The Court held that the new city limits were an illegitimate racial gerrymander barred by the Fifteenth Amendment.<sup>16</sup>

The illegality of Alabama's action seems patent today. Whatever leeway States enjoy to draw district lines, excising a racially defined population from a city falls well outside the realm of the permissible. But what seems clear to the contemporary observer was far from self-evident in 1960 when the Court decided *Gomillion*. At the time, the non-justiciability of districting lines was firmly established. The Court, in an earlier opinion by none other than Justice Frankfurter, had held unequivocally that it lacked "competence to grant" relief from discriminatory electoral lines, and, that it "ought not enter this political thicket."<sup>17</sup> In *Gomillion* itself, Justice Whittaker thought that Alabama's action amounted to "unlawful segregation of races of citizens" but nevertheless did not deny anyone the right to vote "inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside."<sup>18</sup>

Justice Frankfurter insisted his opinion in *Gomillion* did nothing to unsettle existing precedent. The ruling, he wrote, carved a very narrow exception to the non-justiciability of district lines. For Frankfurter, it was Alabama's affirmative decision to withdraw what was a "pre-existing" vote that critically distinguished

<sup>14</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960)

<sup>15</sup> *Id.* at 341

<sup>16</sup> *Id.*

<sup>17</sup> *Colegrove v. Green*, 328 U.S. 549, 552, 557 (1946).

<sup>18</sup> *Gomillion*, at 349 (Whittaker, J., concurring).

the gerrymander from what he viewed to be non-justiciable electoral disputes.<sup>19</sup> Cases like *Colegrove v. Green* involved a complaint “only of a dilution of the strength of ... votes as a result of legislative inaction over a course of many years.”<sup>20</sup> The *Gomillion* plaintiffs, by contrast, challenged “affirmative legislative action” that gave state “approval ... to unequivocal withdrawal of the vote solely from colored citizens.”<sup>21</sup>

Justice Frankfurter’s effort to maintain immunity for legislative inaction of this sort failed. Shortly after *Gomillion*, the Court held that malapportionment resulting from such inaction was non-justiciable, with *Gomillion*’s holding that electoral lines are not untouchable paving the way. *Baker v. Carr*<sup>22</sup> rejected the idea that challenges to malapportionment among electoral districts were justiciable political questions, at least under the newly crafted standard for assessing political questions that the Court adopted in and for the dispute.<sup>23</sup> Justice Brennan’s opinion for the Court held that a state apportionment scheme that yielded electoral districts with vastly different populations was subject to constitutional challenge in federal court and that the Equal Protection Clause offered “well developed and familiar” standards for judicial assessment of the claim.<sup>24</sup>

Justice Frankfurter dissented, complaining that *Colegrove v. Green* (1946) had rejected the same claim as being beyond judicial competence and should control the result in this case as well. The dissent added that the majority’s approach in *Baker* was incoherent. Justice Frankfurter wrote that “[t]alk of ‘debasement’ or ‘dilution’ is circular talk” because “[o]ne cannot speak of ‘debasement’ or ‘dilution’ of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.”<sup>25</sup> For Frankfurter, opening the door to legal challenges to malapportionment meant that the Court would need “to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of [state] government.” Justice Frankfurter was convinced that the Court was ill-equipped to engage in this inquiry.<sup>26</sup>

Two years after *Baker*, *Reynolds v. Sims*<sup>27</sup> located within the Equal Protection Clause the principle of one person, one vote. Chief Justice Earl Warren wrote that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”<sup>28</sup> Deeming the Alabama districting plans challenged in the litigation incompatible with this principle and hence “irrational,” *Reynolds* mandated that legislatures, including many that had not altered district

<sup>19</sup>Id. at 346–347.

<sup>20</sup>Id. at 346.

<sup>21</sup>Id. at 347 (emphasis added).

<sup>22</sup>369 U.S. 186 (1962).

<sup>23</sup>Id. at 226–227.

<sup>24</sup>Id. at 226.

<sup>25</sup>Id. at 300 (Frankfurter, J., dissenting).

<sup>26</sup>Id.

<sup>27</sup>377 U.S. 533 (1964).

<sup>28</sup>Id. at 568. See also *Wesberry v. Sanders*, 376 U.S. 1 (1964) (locating the same principle in Article I, section 2 of the U.S. Constitution as governing congressional districts).

boundaries for decades, equalize the population among electoral districts.

Justice Harlan dissented alone. (Justice Frankfurter had retired shortly after *Baker*.) His dissent emphasized “the cold truth that cases of this type are not amenable to the development of judicial standards.”<sup>29</sup> Echoing earlier voiced concerns about “political philosophy,” Justice Harlan objected to the Court’s selection of population equality as the controlling principle, pointing out that “people are not ciphers and that legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live.”<sup>30</sup>

The Court’s foray into the political thicket soon moved beyond malapportionment. Plaintiffs alleging racial vote dilution challenge electoral rules that they claim minimize or “dilute” the voting strength of a specific, racially defined group with which they identify. In 1971, African American voters in Indianapolis pressed such a claim, arguing that a countywide multi-member districting plan allowed them “almost no political force or control over legislators because the effect of their vote is cancelled out by other contrary interest groups.”<sup>31</sup> In *Whitcomb v. Chavis*, plaintiffs argued that replacing the multi-member structure with single-member districts would allow them to elect legislators who were more responsive to their interests.<sup>32</sup>

*Whitcomb* held that federal courts are available to entertain claims of this sort. The Court thus rejected Justice Harlan’s objection, raised in his dissent, that claims asserting minority vote dilution should not be cognizable in a majoritarian system.<sup>33</sup> Justice White’s opinion for the Court nevertheless concluded that the *Whitcomb* plaintiffs had failed to establish a constitutional violation on the facts they presented. Justice White noted the absence of evidence indicating either that the multi-member districting plan “was conceived or operated as purposeful devices to further racial . . . discrimination” or that the plaintiffs confronted meaningful obstacles when registering to vote, joining the political party of their choice, participating in party affairs, and selecting party candidates responsive to their needs.<sup>34</sup> Finding no “built-in” bias against the plaintiffs, Justice White dismissed the allegation that Black voting power was “cancelled out” as a “mere euphemism for defeat at the polls.”<sup>35</sup> Justice White made clear that the absence of proportional representation was not alone sufficient to support a viable vote dilution challenge, and rejected the idea that “any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single member district.”<sup>36</sup>

Two years later in 1973, a group of African American and Mexican American plain-

<sup>29</sup>Reynolds, at 621 (Harlan, J., dissenting).

<sup>30</sup>Id. at 623-624.

<sup>31</sup>403 U.S. 124, 129 (1971).

<sup>32</sup>Id. at 129.

<sup>33</sup>Id. at 166 (Harlan, J., dissenting).

<sup>34</sup>Id. at 149-150.

<sup>35</sup>Id. at 153.

<sup>36</sup>Id. at 156.

tiffs in Texas succeeded where the *Whitcomb* plaintiffs had failed. In *White v. Regester*,<sup>37</sup> the Supreme Court held unanimously that Texas violated the Equal Protection Clause by relying on multi-member legislative districts in Dallas and Bexar counties. Justice White explained that “multimember districts are not per se unconstitutional” and that “it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.”<sup>38</sup> Instead, plaintiffs challenging multi-member districts (and district lines generally) must “produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”<sup>39</sup>

Black plaintiffs from Dallas made the requisite showing by establishing a number of crucial factors, specifically, the state’s history of racial discrimination in voting; its reliance on majority vote requirements and a “place” system not tied to residency; the existence of a White-controlling slating organization that ignored the African American interests; the prevalence of racial appeals in elections; the absence of Black elected officials; and the insufficient responsiveness of the officials elected.<sup>40</sup> The Mexican American plaintiffs from Bexar County established unconstitutional dilution by showing socioeconomic discrimination in education, employment, and housing; cultural and language barriers that inhibited political participation; the lack of Mexican American elected representatives; and the insufficient responsiveness of the elected county delegation to their interests.<sup>41</sup>

In both communities, the trial court had found that the multi-member district left the plaintiffs with less opportunity than other residents to participate in the process and elect representatives of choice. In affirming that holding and the order to replace the multi-member structure with single-member districts, *White v. Regester* emphasized that findings of unconstitutional racial dilution depended not on a single factor but instead on the “totality of circumstances” evaluated through an “intensely local appraisal.”<sup>42</sup> Lower courts developed this framework in dilution cases in the years that followed.<sup>43</sup>

The Court, however, jettisoned *White v. Regester*’s approach to racial vote dilution in its 1980 decision, *Mobile v. Bolden*.<sup>44</sup> African American residents in Mobile challenged the city’s longstanding reliance on at-large elections to select members of a three-person city commission. At the time the case was brought, African Americans comprised approximately one-third of the city’s population, White and Black voters consistently supported different candidates, and no African American candidate had ever won a seat on the commission. Housing remained segregated, Black city employees were concentrated in the lowest city salary classification, and

<sup>37</sup> 412 U.S. 755 (1973).

<sup>38</sup> *Id.* at 765–766.

<sup>39</sup> *Id.* at 766.

<sup>40</sup> *Id.* at 766–767.

<sup>41</sup> *Id.* at 767–769.

<sup>42</sup> *Id.* at 769.

<sup>43</sup> See *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

<sup>44</sup> 446 U.S. 55 (1980).



“a significant difference and sluggishness” characterized the city’s provision of city services to Black residents when compared to those provided to Whites.<sup>45</sup>

Both the federal district and appellate courts used the framework set forth in *White v. Regester* to find that Mobile’s at-large system unconstitutionally diluted Black voting strength.<sup>46</sup> A divided Supreme Court reversed, holding that Mobile’s at-large system was permissible so long as the plaintiffs were unable to demonstrate that the city adopted it intentionally to dilute Black voting strength. Justice Stewart’s controlling plurality opinion dismissed as inconsequential evidence that no African American commissioner had ever been elected to the city commission; that the commission itself was not only unresponsive to African American interests but affirmatively discriminated against Black residents in city employment and the provision of public services; that Alabama had a long history of employing racially discriminatory practices in voting; and that the city’s at-large system relied also on majority vote requirements and number posts, devices long recognized to limit minority influence. Unless the plaintiffs could show the city adopted the at-large system for the purpose of discriminating against Black residents, the plaintiffs had no claim.<sup>47</sup>

All the while, Justice Stewart insisted that *Mobile v. Bolden* was charting no new ground. *White v. Regester*, he argued, both required and found evidence of discriminatory intent,<sup>48</sup> while the evidence in *Mobile* simply mandated a different result on intent. For his part, Justice White, who authored *White v. Regester*, agreed that the earlier decision required and found discriminatory intent; Justice White thought, however, that the plaintiff’s evidence in *Mobile* made the requisite showing as well.<sup>49</sup> Justice Marshall, joined by Justice Brennan, argued that *White v. Regester* had applied a “discriminatory-effect standard,” and that electoral practices may be unconstitutionally dilutive notwithstanding the absence of evidence showing that the practice was adopted with discriminatory intent.<sup>50</sup> He wrote, “Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest.”<sup>51</sup> Justice Marshall added that insofar as intent was to be required, “foreseeability” rather than “but-for” causation should satisfy the requirement.<sup>52</sup>

*White v. Regester*, like *Whitcomb v. Chavis*, was far more equivocal on the question of intent than the various opinions in *Mobile* suggested. Written before the Court explicitly limited the Equal Protection Clause’s proscription to acts of intentional discrimination,<sup>53</sup> Justice White’s opinions in both cases include language

<sup>45</sup> *Bolden v. City of Mobile*, 423 F. Supp. 384, 391 (S.D. Ala. 1976).

<sup>46</sup> 446 U.S. at 58.

<sup>47</sup> On remand, the district court struck down Mobile’s at-large system based on its conclusion that the City had indeed adopted the contested at-large system with the invidious purpose of diluting Black voting strength. *Bolden v. Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982).

<sup>48</sup> *Mobile v. Bolden*, 446 U.S. at 69.

<sup>49</sup> Id. at 101 (White, J., dissenting).

<sup>50</sup> Id. at 112 (Marshall, J., dissenting).

<sup>51</sup> Id. at 121.

<sup>52</sup> Id. at 136–137.

<sup>53</sup> *Washington v. Davis*, 426 U.S. 229 (1977).



suggesting that evidence of intent was required, but also some suggesting that a discriminatory effect sufficed. In *Whitcomb*, Justice White noted that the plaintiffs did not allege that the challenged districts “were conceived or operated as purposeful devices” to dilute, but the opinion nevertheless proceeded to analyze and reject their claim.<sup>54</sup> *White v. Regester*, meanwhile, queried whether the challenged multi-member districts were being used “invidiously” but also focused on various factors, sounding in effect, that diminished opportunities for the plaintiffs to participate and elect representatives of choice.<sup>55</sup>

*Mobile v. Bolden* nevertheless held that an electoral practice is not unconstitutionally dilutive unless a jurisdiction specifically adopted it in order to dilute minority voting strength. The ruling was both controversial and consequential. Attorney Armand Derfner called *Mobile* “devastating” and wrote that it brought “[d]ilution cases . . . to a virtual standstill; existing cases were overturned and dismissed, while plans for new cases were abandoned.”<sup>56</sup> Congress noticed, and soon took action in response.<sup>57</sup>

### 3 ELABORATION: THE STATUTORY FRAMEWORK

Prior to the Voting Rights Act of 1965, state and local officials, primarily in the South, had relied on various mechanisms or “devices” to exclude African Americans from the franchise. Tactics ranging from outright violence to explicit race-based exclusions to “grandfather clauses,” literacy tests, and redistricting practices successfully prevented African American voters from participating in local, state, and federal elections.<sup>58</sup> Lawsuits brought to displace these mechanisms were both expensive and time-consuming. They produced some victories but little progress, as state and local officials simply replaced invalidated electoral practices with new discriminatory measures that would require more litigation to displace.

In 1965, Congress enacted the VRA to address this entrenched opposition by targeting the most recalcitrant and discriminatory jurisdictions and subjecting them to intrusive requirements designed to secure African American access to the ballot. Among the VRA’s most notable features was the manner in which it targeted jurisdictions in which disenfranchisement was most widespread. Section 4(b) designated jurisdictions “covered” if they presently used a “test or device” to limit registration or voting, and less than half the jurisdiction’s eligible citizens were either registered to vote on November 1, 1964 or actually cast ballots in the presidential election that year.<sup>59</sup> Section 4(a) prohibited jurisdictions covered under 4(b) from denying the

<sup>54</sup>403 U.S. 124, 149 (1971)

<sup>55</sup>412 U.S. 755, 756, 765-770 (1973).

<sup>56</sup>See Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in *Minority Vote Dilution* 161 (Chandler Davidson, ed. 1989).

<sup>57</sup>See *infra* notes and accompanying text.

<sup>58</sup>See *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990*, at 3 (Chandler Davidson & Bernard Grofman eds., 1994).

<sup>59</sup>52 U.S.C. §10303 (b).

right to vote to any person who failed to comply with a test device.<sup>60</sup> Section 5 required that covered jurisdictions obtain federal approval, known as “preclearance,” before changing any aspect of their voting rules, and specifically, demonstrating that the changes they proposed were not discriminatory in purpose or effect.<sup>61</sup>

As originally crafted and construed, the VRA targeted literacy tests and other barriers to accessing to the ballot. But the statute also took aim at districting practices that limited minority influence. Such practices, which came to be known as “second-generation” devices and more prominent objects for concern beginning in the 1970s, predated the VRA by decades.<sup>62</sup> Such practices stand with the racially exclusive White primary, the literacy test, the poll tax, and other tactics that were used concurrently in the Jim Crow South to ensure that African American citizens lacked meaningful opportunities to participate in the electoral process. As such, the practices grouped as “second generation” were, in fact, part and parcel of the practices the original statute targeted.<sup>63</sup>

The Supreme Court recognized as much in 1969 when it held that the decision to replace single-member electoral districts with an at-large system was a change with respect to voting for which preclearance was required.<sup>64</sup> Chief Justice Warren observed that “[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.”<sup>65</sup> Justice Harlan objected, claiming that Congress meant for the preclearance obligation to apply only to “tests and devices” and not to districting structures.<sup>66</sup> The Court, however, identified congressional intent to give the Act “the broadest possible scope,” and that the statute encompassed a move from districted elections to an at-large system given that it might “nullify” the ability of members of a racial minority “to elect the candidate of their choice just as would prohibiting some of them from voting.”<sup>67</sup> Subsequent cases applied the VRA to a host of districting decisions. Congress made no effort to displace these rulings<sup>68</sup> and, indeed, expressly affirmed these rulings when it amended and extended the statute in 1970 and 1975.<sup>69</sup>

By contrast, the Court’s 1980 ruling in *Mobile v. Bolden* generated considerable opposition in Congress. *Mobile*’s conclusion that racial vote dilution is illegal only when intentionally imposed prompted Congress to amend Section 2 of the VRA to create an explicit “results” based test for discrimination in voting. Section 2 as amended made clear that plaintiffs need not establish discriminatory intent to establish dilution.<sup>70</sup> Instead, Congress codified the more expansive standard from

<sup>60</sup>52 U.S.C. §10303 (a).

<sup>61</sup>52 U.S.C. §10304 (a).

<sup>62</sup>See generally *Quiet Revolution in the South* (Chandler Davidson and Bernard Grofman, eds. 1994).

<sup>63</sup>See Ellen D. Katz, *What was Wrong With the Record?*, 12 Elec. L. J. 329–331 (September 2013).

<sup>64</sup>*Allen v. Board of Elections*, 393 U.S. 554, 567 (1969).

<sup>65</sup>*Id.* at 569.

<sup>66</sup>*Id.* at 585 (Harlan, J., concurring in part and dissenting in part).

<sup>67</sup>*Id.* at 567, 569.

<sup>68</sup>See, e.g., *Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971).

<sup>69</sup>See *Shelby County v. Holder*, 570 U.S. 529, 564 (2013) (Ginsburg, J., dissenting).

<sup>70</sup>52 U.S.C. §10301(a) (formerly cited as 42 U.S.C. §1973(a)) (providing that “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in

*White v. Regester*, and provided that, to prevail under Section 2, plaintiffs must demonstrate that, “based on the totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority].” Plaintiffs need to show that members of these protected classes “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” Relevant to the inquiry is “the extent to which members of a protected class have been elected to office in the State or political subdivision,” although the statute is explicit in that it creates no right to proportional representation.<sup>71</sup>

A report of the Senate Judiciary Committee accompanying the 1982 amendments identified several factors to guide courts when assessing whether a challenged practice violates Section 2. Derived from *White v. Regester* and a subsequent appellate decision,<sup>72</sup> these so-called “Senate Factors” include the extent to which the jurisdiction (1) has a history of discrimination in voting; (2) has elections that are marked by racially polarized voting; (3) relies on majoritarian electoral devices that enhance opportunities for discrimination against minority groups; (4) denies minority voters access to candidate slating; (5) includes minority group members who suffer from the effects of discrimination in education, employment, and health in ways that hinder their ability to participate in the political process; (6) has experienced racial appeals during campaigns; (7) elected members of the minority group to office. The Senate Report added that courts might also assess any lack of responsiveness to minority interests by elected officials and the extent to which the policy supporting the challenged practice is tenuous.<sup>73</sup>

With the 1982 amendments, Congress rejected a bright-line rule for Section 2 liability, opting instead for what *White v. Regester* labelled as an “intensely local appraisal” of the challenged “in the light of past and present reality, political and otherwise.”<sup>74</sup> The result is an intentionally complex inquiry, and one that quickly led to disagreements among federal courts called upon to adjudicate whether a particular electoral rule results in a denial or abridgement of the right to vote under Section 2.

The Supreme Court attempted to simplify the inquiry in *Thornburg v. Gingles*.<sup>75</sup> Addressing “a claim of vote dilution through submergence in multimember districts,” Justice Brennan’s controlling opinion acknowledged that while “many or all of the factors listed in the Senate Report may be relevant” to a Section 2 injury, a multimember district typically will not violate Section 2 unless three “preconditions” are met. Specifically, plaintiffs must be able to demonstrate that the minority group is “sufficiently large and geographically compact to constitute a majority in a single member district” and that both minority and White voters vote cohesively and in opposition to one another—i.e., evidence of racially polarized voting.<sup>76</sup>

section 10303(f)(2) of this title, as provided in subsection (b).”).

<sup>71</sup>52 U.S.C. §10301(b) (formerly cited as 42 U.S.C. §1973(b)).

<sup>72</sup>See *Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973).

<sup>73</sup>S. Rep. No. 417, 97th Cong., 2d Sess. 1, 28 (1982).

<sup>74</sup>See *White v. Regester*, 412 U.S. 755, 769–770 (1973).

<sup>75</sup>478 U.S. 30 (1986).

<sup>76</sup>*Id.* at 48–49.

Justice O'Connor objected both to the distillation of "preconditions" and to the substance of preconditions selected. She noted "an inherent tension between what Congress wished to do and what it wished to avoid" when it amended Section 2; namely, it wanted to prohibit racial vote dilution without creating a right to proportional representation.<sup>77</sup> The problem, Justice O'Connor wrote, is that "any theory of vote dilution must necessarily rely . . . on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large."<sup>78</sup> In Justice O'Connor's view, the Court's preconditions exacerbated this tension by measuring minority voting strength "solely in terms of the minority group's ability to elect candidates it prefers" when concentrated as a voting majority in a single-member district. This measure, Justice O'Connor argued, assumes that undiluted minority voting strength "means the maximum feasible minority strength." As such, she argued, it necessarily mandates liability whenever a challenged electoral rule fails to yield proportional representation.<sup>79</sup>

A majority of the Court, however, was not persuaded. It concluded that the *Gingles* factors, as they quickly became known, both comported with congressional intent and provided useful guidance for the evaluation of Section 2 claims. In short order, lower courts were applying the *Gingles* factors to both single-member and multi-member districts challenged under Section 2. In both contexts, plaintiffs who successfully established the *Gingles* factors typically prevailed, while those unable to satisfy one or more of them did not.<sup>80</sup>

In the years following *Gingles*, districting plans began including a greater proportion of districts in which members of a racial minority constituted a majority of a district's electorate. *Gingles* itself did not mandate the formation of these "majority-minority" districts,<sup>81</sup> but the framework it established nevertheless encouraged their creation both to remedy and to avoid Section 2 violations.<sup>82</sup> Such districts provide a meaningful remedy for dilution insofar as they allow for minority influence when voting is racially polarized, and, as several scholars have argued, may help to erode racial polarization among voters.<sup>83</sup> Voters in these districts largely, albeit not exclusively, elected minority candidates to office. By the mid-1990s, more minority representatives were serving on school boards, city councils, state legislatures, and

<sup>77</sup>Id. at 84 (O'Connor, J., concurring in the judgment).

<sup>78</sup>Id. at 89–91.

<sup>79</sup>Id.

<sup>80</sup>See Ellen Katz et al., Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982. Final Report of the Voting Rights Initiative, University of Michigan Law School, 39 U. Mich. J.L. Reform 643, 660 (2006).

<sup>81</sup>See *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006); see also Ellen D. Katz, Reviving the Right to Vote, 68 Ohio St. L.J. 1163, 1165, 1178–1179 (2007). *Gingles* also prompted jurisdictions subject to the VRA's preclearance requirement to include more majority-minority districts in proposed districting plans than they had done previously, in part because compliance with the preclearance requirement was understood to require compliance with Section 2 (at least until the Court ruled otherwise in 1997). See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997); see also 28 C.F.R. §51.55(b)(2) (1996).

<sup>82</sup>See generally Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 238–239 (2009); Reviving the Right to Vote, *supra* note, at 1178–1179.

<sup>83</sup>See, e.g., Dale Ho, Minority Vote Dilution in the Age of Obama, 47 U. Rich. L. Rev. 1041, 1070–75 (2013); Christopher S. Elmendorf, Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes, 160 U. Pa. L. Rev. 377, 395–400 (2012); Michael S. Kang, Race and Democratic Contestation, 117 Yale L.J. 734, 773–88 (2008); David T. Canon, Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts 204–205, 261 (1999).

in the U.S. House of Representatives than at any time since Reconstruction.<sup>84</sup>

## 4 UNEASINESS: RECASTING FRAMEWORKS IN THE 1990S

As the number of majority-minority districts proliferated in the 1990s, critics of the VRA grew increasingly uneasy about the race consciousness inherent in their creation and both the type of political participation and quality of representation critics said the districts fostered. These concerns shaped a number of Supreme Court decisions that restricted reliance on the majority-minority district.<sup>85</sup>

Most directly, the Court read the VRA narrowly to limit the instances in which liability might arise and a new majority-minority district might be required or adopted. In the 1994 case *Holder v. Hall*,<sup>86</sup> for instance, African American voters in Bleckley County, Georgia, had challenged the County's reliance on a single-member county commission, arguing that a five-member commission elected from single-member districts—a structure widely used throughout the State—would provide Black voters with the ability to elect a preferred candidate to the Commission.<sup>87</sup> Justice Kennedy's controlling opinion in *Holder* rejected this claim, holding that the size of a legislative body was not subject to challenge under Section 2 of the VRA.<sup>88</sup> Justice Thomas, joined by Justice Scalia, agreed, but would have gone much further and scrapped Section 2's application to vote dilution claims entirely. Justice Thomas equated the creation of majority-minority districts, fostered by Section 2 and the Court's construction of it, to “an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of ‘political apartheid.’”<sup>89</sup>

Decided the same day as *Holder*, *Johnson v. DeGrandy*<sup>90</sup> adopted a more sympathetic stance toward the majority-minority district, but still urged jurisdictions to resist drawing them unless “necessary.” Justice Souter's opinion for the Court rejected the plaintiffs' argument that a Florida districting plan needed to include more majority-minority districts given that the challenged plan contained “majority-minority districts in substantial proportion to the minority's share of voting-age population,”<sup>91</sup> Justice Souter distinguished such proportionality from proportional representation, which linked the success of minority candidates (rather than majority-minority districts) to the population, and stated, “One may suspect vote dilution from political famine, but one is not entitled to suspect (much less

<sup>84</sup>See Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 Harv. L. Rev. 1359, 1364–1365 & n.31 (1995) (book review).

<sup>85</sup>See Ellen D. Katz, *Enforcing the Fifteenth Amendment*, in *Oxford Handbook on the U.S. Constitution* (Tushnet, Levinson & Graber eds., 2015).

<sup>86</sup>512 U.S. 874 (1994).

<sup>87</sup>*Id.* at 878 (plurality opinion of Kennedy, J.).

<sup>88</sup>*Id.* at 885.

<sup>89</sup>*Id.* at 90 (Thomas, J., concurring in the judgment) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1994)).

<sup>90</sup>512 U.S. 997 (1994).

<sup>91</sup>*Id.* at 1013.

infer) dilution from mere failure to guarantee a political feast.”<sup>92</sup>

Justice Souter went on to warn against drawing majority-minority districts in circumstances that do not absolutely require them. Such districts, he explained, have “virtues . . . as remedial devices,” and are something necessary, given “society’s racial and ethnic cleavages, . . . to ensure equal political and electoral opportunity,” but they nevertheless “rely on a quintessentially race-conscious calculus aptly described as the ‘politics of second best.’”<sup>93</sup> As such, majority-minority districts should not be used in communities where meaningful cross-racial coalitions are possible, even when such coalitions elect candidates who “may not represent perfection to every minority voter.” No voter is “immune from the obligation to pull, haul, and trade to find common political ground.”<sup>94</sup>

Decisions like *Holder* and *DeGrandy* limited the creation of new majority-minority districts by construing Section 2 of the VRA narrowly. The Supreme Court further curbed the proliferation of such districts with a series of constitutional rulings that significantly limited the circumstances in which such districts could be drawn. Specifically, in *Shaw v. Reno*<sup>95</sup> and its progeny,<sup>96</sup> the Court recognized a new “analytically distinct” injury under the Equal Protection Clause that arose when jurisdictions created oddly shaped majority-minority districts that were not absolutely required by the VRA.<sup>97</sup> By design, this new constitutional injury discouraged jurisdictions from drawing majority-minority districts prophylactically to avoid liability under the VRA.<sup>98</sup>

*Shaw* itself arose in North Carolina, where, at the time, African American residents comprised twenty percent of the State’s population but a majority in only five of its 100 counties. A covered jurisdiction subject to the VRA’s preclearance obligation, North Carolina needed federal approval in order to implement a new redistricting plan after the 1990 census. The Attorney General objected to the first plan North Carolina proposed, noting that only one of its 12 proposed congressional districts would be majority-minority. North Carolina’s second plan created an additional majority-minority district—District 12—which, in contrast to the one the Justice Department recommended, was highly irregular in shape, crossing multiple town and county lines as it wound along the I-85 corridor. White voters challenged the plan as an unconstitutional racial gerrymander.

*Shaw* held that these voters stated a cognizable claim. Emphasizing that reapportionment is “one area in which appearances do matter,”<sup>99</sup> Justice O’Connor’s majority opinion stated that, “a reapportionment plan may be so highly irregular

<sup>92</sup>Id. at 1014 & n. 11.

<sup>93</sup>Id. at 1020 (quoting B. Grofman, L. Handley, & R. Niemi, *Minority Representation and the Quest for Voting Equality* 136 (1992)).

<sup>94</sup>Id. at 1020.

<sup>95</sup>509 U.S. 630 (1993).

<sup>96</sup>See *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996), *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

<sup>97</sup>*Shaw v. Reno*, 509 U.S. at 653.

<sup>98</sup>See, e.g., *Holder v. Hall*, at 905 (Thomas, J., concurring in the judgment) (characterizing *Shaw* and the cases that would follow as an “attempt[] to undo, or at least to minimize, the damage wrought by the system we created.”) (citing, inter alia, *Shaw v. Reno*, 509 U.S. 630 (1993)).

<sup>99</sup>*Shaw v. Reno*, 509 U.S. at 647.





Figure 1: Maps from the *Bush v. Vera* decisions. On the top, two unconstitutional districts from the majority opinion. On the bottom, two constitutional districts from Justice Stevens' dissent.

that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race."<sup>100</sup> Justice O'Connor thus likened what North Carolina did to create District 12 to Alabama's expulsion of African American residents from Tuskegee four decades earlier. The opinion states that aggregating individuals "who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."<sup>101</sup>

In the cases that followed *Shaw*, the Court came to understand the injury at issue as an "expressive" one, i.e., linked to the message a State sends to its citizens when it uses race as the predominant factor to draw district lines without a sufficiently

<sup>100</sup>Id. at 646–647 (quoting *Gomillion v. Lightfoot*, 364 U.S. at 341)).

<sup>101</sup>Id. at 647.



compelling reason for doing so.<sup>102</sup> *Shaw's* progeny made clear that “bizarre” shape was not a prerequisite to a *Shaw* claim, but instead “circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”<sup>103</sup> As distilled, the *Shaw* test posited that race may permissibly predominate in the drawing of district lines only when such predominance is necessary and narrowly tailored to achieve a compelling governmental interest.<sup>104</sup> *Shaw's* progeny assumed that compliance with the VRA was a compelling interest but held that the VRA did not mandate the race based moves evident in the plans challenged in those cases.<sup>105</sup>

The *Shaw* cases presented a serious concern during the round of redistricting following the 2000 census as jurisdictions confronted the confounding challenge of crafting districting plans that met both their obligations under Sections 2 and 5 of the VRA and the constitutional restrictions the *Shaw* cases imposed.<sup>106</sup> The Supreme Court’s 2001 decision in *Easley v. Cromartie*<sup>107</sup> initially seemed to make the task even more complex. Ostensibly applying clear error review, the Court reversed a lower court ruling that race predominated over traditional districting principles when North Carolina redrew its congressional districts to comply with *Shaw's* requirements. Justice Breyer’s majority opinion examined the trial record in excruciating detail and found insufficient evidence to support the conclusion that “race, rather than politics, predominantly accounts” for the challenged districting lines.<sup>108</sup>

*Cromartie* was widely read to compound the difficulties jurisdictions faced in complying with *Shaw* and its progeny. The decision portended that amorphous, uncertain, fact-intensive judicial scrutiny would be the norm going forward. Surveying precedent in 2002, Pam Karlan observed that *Cromartie* itself “cannot be explained in any sort of principled terms that provide guidance for future cases.”<sup>109</sup> And yet, the widely predicted flood of *Shaw* litigation after 2001 never materialized, due, in part, to *Cromartie* itself. The decision implied, and accordingly, advised, that saying “party” instead of “race” would disprove a racial motivation,<sup>110</sup> as discussed in the previous chapter. Articulating the goal of protecting incumbents performed a similar function. Officials involved in the districting process understood this as advice, and their resulting professions of partisan motivation immunized plans that might otherwise have been subjected to scrutiny under the *Shaw* doctrine.

At the same time, jurisdictions controlled by Democrats began a concerted effort to disperse rather than concentrate minority voters in majority-minority districts.

<sup>102</sup>See Richard H. Pildes and Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election–District Appearances after *Shaw v. Reno*, 92 Mich. L. Rev. 483, 506–507 (1993).

<sup>103</sup>*Miller v. Johnson*, 515 U.S. 900, 913 (1995).

<sup>104</sup>*Bush v. Vera*, 517 U.S. 952, 957 (1996); *Shaw v. Hunt*, 517 U.S. 899, 902 (1996).

<sup>105</sup>*Bush v. Vera*, 517 U.S. at 982; *Shaw v. Hunt*, 517 U.S. at 917.

<sup>106</sup>See Pamela S. Karlan, Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. Rev. 667 (2002).

<sup>107</sup>532 U.S. 234 (2001).

<sup>108</sup>*Id.* at 257.

<sup>109</sup>Karlan, *supra* note, at 677.

<sup>110</sup>Richard H. Pildes, The Supreme Court, 2003 Term–Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 67–69 (2004).

Declines in racial bloc voting in certain parts of the country allowed for the formation of viable cross-racial coalitions, a development that meant minority voters need not always comprise a majority of a district's electorate to elect representatives of choice.<sup>111</sup> Democratic legislators, moreover, saw how the concentration of minority voters, particularly of African American voters in the South, helped make legislatures more Republican overall.<sup>112</sup> As a result, when Democrats found themselves in control of the districting process after 2001, they sought systematically to reduce the percentage of minority voters in majority-minority districts, with the hope that strategically dispersing their most reliable voters would enable Democrats to preserve and even gain legislative seats.<sup>113</sup>

In 2001, for instance, Democratic control led Georgia to adopt a redistricting plan for its State Senate that substantially reduced the African American voting-age population, or BVAP, in a number of majority-minority districts. A highly politicized dispute followed, in which Georgia Republicans, the U.S. Department of Justice, and the ACLU argued that the plan discriminated against African American voters in Georgia by making it more difficult for them to elect representatives of choice. Democratic members of the Georgia legislature, many of whom were African American, countered that the plan was valid under the VRA, because, they claimed, it provided Black voters more influence in the political process than would have a plan that concentrated these voters in fewer districts.<sup>114</sup>

In *Georgia v. Ashcroft*,<sup>115</sup> the Supreme Court sided with Georgia's Democrats, holding that the challenged plan satisfied Section 5's mandate to avoid changes that worsened participatory opportunities for minority voters. Justice O'Connor's majority opinion emphasized that, under Section 5, Georgia had discretion to choose what type of districting plan best serves minority voters. Georgia, she explained that, chose not to concentrate African American voters in a few "safe" majority-minority districts, but instead to disperse Black voters among so-called "coalition" districts "in which it is likely—although perhaps not quite as likely" that they will elect candidates of their choice. Justice O'Connor noted that the plan also placed large numbers of minority voters in districts in which they would be unable to elect representatives of choice but where "'candidates elected without decisive minority support would be willing to take the minority's interests into account.'"<sup>116</sup> Justice O'Connor's opinion recognized Georgia's power to disperse minority voters in this way. "The State may choose, consistent with §5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters."<sup>117</sup>

Justice Souter's dissent pointed out that Georgia never substantiated its claim

<sup>111</sup> See, e.g., *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001).

<sup>112</sup> See, e.g., Grofman, Handley & Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. Rev. 1383 (2001).

<sup>113</sup> David Lublin, *The Paradox of Representation* 99 (1997).

<sup>114</sup> Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?* 104 Colum. L. Rev. 1710, 1716–1717 (2004).

<sup>115</sup> 539 U.S. 461 (2003).

<sup>116</sup> *Id.* at 481 (quoting *Thornburg v. Gingles*, 478 U.S. at 100 (O'Connor, J., concurring)).

<sup>117</sup> *Id.* at 483.

that Black voters would be able to elect representatives of choice in the identified coalition districts, and that, in fact, the uncontested record indicated that they would not.<sup>118</sup> Justice Souter also questioned whether African American voters enjoyed meaningful or even measurable influence in districts in which the elected representative won without their support, and how various suggested measures of influence could be assessed or meaningfully compared.<sup>119</sup> More broadly, the dissent argued that the majority's ruling gutted Section 5, substituting what had been a critical review of state action that diminishes a minority group's ability to elect representatives of choice with an approach that simply deferred to state judgments as to optimal arrangements. If the Court "allows the State's burden to be satisfied on the pretense that unquantifiable influence can be equated with majority-minority power, §5 will simply drop out as a safeguard against the 'unremitting and ingenious defiance of the Constitution' that required the procedure of preclearance in the first place."<sup>120</sup>

Congress responded to *Georgia v. Ashcroft* in the Voting Rights Act Reauthorization and Amendments Act of 2006. It amended the preclearance standard to prohibit a covered jurisdiction from adopting an electoral change that "has the purpose of or will have the effect of diminishing the ability of [the minority group] to elect their preferred candidates of choice."<sup>121</sup> In so doing, Congress embraced the position advanced by the dissent in *Georgia v. Ashcroft* that the Section 5 retrogression standard should bar electoral changes that deprive or diminish the ability of minority voters to elect candidates of choice.<sup>122</sup> Controversial from its enactment, this amendment had far less impact than intended given other dramatic changes the Court would soon make to the VRA.

## 5 HOSTILITY: RACE, REDISTRICTING, AND THE ROBERTS COURT

The rules governing race and redistricting shifted dramatically after John Roberts became Chief Justice in 2005 and Justice Samuel Alito joined the Court in 2006. Within a just a few years, the Roberts Court markedly narrowed the reach of Section 2 of the VRA, and effectively eliminated Section 5 as a constraint. More recently, it has reinvigorated the *Shaw* doctrine as a foundational restriction on the use of race in the redistricting process and thereby limited yet further permissible applications of the VRA.

The Roberts Court decided its first redistricting case on June 28, 2006. *LULAC v. Perry*<sup>123</sup> involved a multi-party challenge to the congressional redistricting plan Texas adopted in 2003. That plan supplanted a court-drawn plan adopted two years

<sup>118</sup>Id. at 492–493 (Souter, J., dissenting)

<sup>119</sup>Id. at 494–496.

<sup>120</sup>Id. at 497 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

<sup>121</sup>52 U.S.C. §10304(b); see also §10304(d) (the "purpose of subsection (b) ... is to protect the ability of such citizens to elect their preferred candidates of choice").

<sup>122</sup>*Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1273 (2015).

<sup>123</sup>548 U.S. 399 (2006).

earlier after the Texas Legislature had been unable to agree to one. Republicans gained control of the Texas House of Representatives in 2002 and with that control, acquired the ability to adopt a new districting plan without Democratic support. Designed to maximize Republican influence, the 2003 plan promised to (and, in fact, did) replace six Democratic members of Texas's congressional delegation with Republican representatives. Texas Democrats challenged the plan as the blatant partisan gerrymander it was.<sup>124</sup>

The Supreme Court was unable to identify a constitutional problem with either the partisanship that propelled the Texas plan or the partisan effects it yielded.<sup>125</sup> A majority of the Court nevertheless concluded that a portion of that gerrymander diluted minority voting strength in the southwest portion of the State. More specifically, the Court held that Texas violated Section 2 of the VRA when it displaced 100,000 Latino residents from a congressional district in Laredo to protect the Republican incumbent they did not support.<sup>126</sup> Justice Kennedy's majority opinion observed that, "the State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district."<sup>127</sup> As Justice Kennedy explained, Texas "took away the Latinos' opportunity because Latinos were about to exercise it," and thereby violated Section 2 of the VRA.<sup>128</sup>

Chief Justice Roberts, joined by Justice Alito, argued in dissent that the State had provided adequate representation to Latino voters in southwest Texas.<sup>129</sup> The new Justices did not join a separate dissent by Justice Scalia and Justice Thomas, which adhered to their view that Section 2 does not prohibit racial vote dilution and hence could not constrain actions of the sort Texas took in Laredo.<sup>130</sup> More limited in scope, the Chief Justice's dissent nevertheless voiced a deep aversion to the VRA and the type of race-based decision-making it was understood to mandate. Chief Justice Roberts wrote, "It is a sordid business, this divvying us up by race."<sup>131</sup>

This sentiment propelled subsequent decisions that dramatically limited the VRA. Decided in 2009, *Bartlett v. Strickland*<sup>132</sup> rejected the claim that Section 2 protects the ability of minority voters to form cross-racial coalitions to elect representatives of their choice. Resolving a question that had been left open since *Gingles*,<sup>133</sup> *Bartlett* held that Section 2 offers no protection to minority voters who are too few in number to comprise the majority of a single-member district. As such, Section 2 neither required district lines that allowed for the formation of cross-

<sup>124</sup>Id. at 412–413.

<sup>125</sup>Id. at 416–423.

<sup>126</sup>Id. at 442. See generally Ellen D. Katz, Reviving the Right to Vote, 68 Ohio St. L.J. 1163 (2007).

<sup>127</sup>LULAC, 548 U.S. at 441.

<sup>128</sup>Id. at 440.

<sup>129</sup>Id. at 502–503 (Roberts, C.J., concurring in part and dissenting in part).

<sup>130</sup>Id. at 512 (concurring in the judgment and dissenting in part). See also *supra* notes and accompanying text.

<sup>131</sup>548 U.S. at 511 (2006) (Roberts, C.J., concurring in part and dissenting in part).

<sup>132</sup>556 U.S. 1 (2009).

<sup>133</sup>See *Thornburg v. Gingles*, 478 U.S. 30, 46 n. 12 (1986). Cf. *LULAC v. Perry*, 548 U.S. at 443–447 (holding that Section 2 does not prohibit Texas's dismantling of a district in Fort Worth in which African American voters comprised less than half the district's electorate because the pervasive lack of competition meant that meaningful voter preferences could neither be expressed nor ascertained).

racial coalitions, nor did it preclude lines that actively stymied them.

*Bartlett* rejected a broad reading of Section 2 that would have made more conduct subject to challenge under the statute and thus would have increased the junctures in which districting officials needed to consider race to comply with the regime. The narrow reading, however, cut off an application of the VRA that promised to encourage the type of political participation the Court has long claimed it wants to promote—namely, the type that yields cross-racial coalitions. Justice Souter highlighted this point in dissent, arguing that Section 2 should be read to promote drawing a “crossover district,” which he described as “superior to a majority-minority district precisely because it requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions.”<sup>134</sup> Invoking *DeGrandy*’s observation that minority-opportunity districts implicate a “quintessentially race-conscious calculus,” the dissent argued that Section 2’s application in this context would “moderat[e] reliance on race as an exclusive determinant in districting decisions.”<sup>135</sup> The *Bartlett* majority, however, was unpersuaded, and unwilling to read Section 2 in a manner that would expand its reach.

This aversion to the VRA found even stronger expression when the Court confronted a constitutional challenge to the VRA’s preclearance regime in *Shelby County v. Holder*. Congress enacted Sections 4 and 5 of the VRA as time-limited measures in 1965, but repeatedly extended them. The last reauthorization was in 2006, when Congress extended preclearance for twenty-five more years. The 2006 amendments reversed the VRA rulings adopted in *Georgia v. Ashcroft* and another decision,<sup>136</sup> but otherwise left the statute to operate as it long had. In particular, Congress neither added nor removed jurisdictions from coverage and instead maintained the statute’s pre-existing geographic reach by preserving the Section 4(b) formula it last altered in 1975.<sup>137</sup>

A constitutional challenge to the 2006 amendments was filed within days of its enactment.<sup>138</sup> The Supreme Court had previously upheld broad congressional power to enact the preclearance regime,<sup>139</sup> but a series of decisions in the 1990s adopted a more restrictive view of Congress’s power and thus raised significant questions about the validity of the preclearance regime going forward.<sup>140</sup> Supporters of reauthorization argued that the 15,000-page record Congress produced after 21 hearings provided ample evidence showing both that preclearance continued to play a critical role in covered jurisdictions, and that the discrimination that

<sup>134</sup>556 U.S. at 35 (Souter, J, dissenting). See also Richard Pildes, Is Voting Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C. L. Rev. 1517, 1547–1548 (“Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution”).

<sup>135</sup>*Bartlett*, at 34 (quoting *Johnson v. DeGrandy*, 512 U.S. at 1020).

<sup>136</sup>See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2(b)(6), 120 Stat. 577, 578 (2006) (overturning *Georgia v. Ashcroft* and *Reno v. Bossier Parish Sch. Bd.*).

<sup>137</sup>*Shelby County, Ala. v. Holder*, 570 U.S. 529, 539 (2013).

<sup>138</sup>*Id.*

<sup>139</sup>See *supra* notes and accompanying text.

<sup>140</sup>See *City of Boerne v. Flores*, 521 U.S. 507 (1997). See also Ellen D. Katz, Justice Ginsburg’s Umbrella, in *A Nation of Widening Opportunities? The Civil Rights Act at Fifty* (Samuel Bagenstos and Ellen D. Katz, eds., 2015), at 268.

persisted in these regions remained distinct. Opponents countered that minority voters no longer faced distinct obstacles in places subject to Section 5 and thus that the preclearance requirement was no longer justified.<sup>141</sup>

In *Shelby County*<sup>142</sup>, a divided Court voted to scrap the statute's coverage formula and thereby render the preclearance regime inoperative. Writing for the majority, Chief Justice Roberts posited that the Section 4(b) formula once "made sense" but was no longer justified by "current conditions."<sup>143</sup> Observing that "things have changed dramatically," the Chief Justice wrote that the tests and devices that had triggered coverage had long been outlawed, voter turnout and registration rates in covered jurisdictions had risen dramatically, minority officials had been elected to office, and overt discrimination was no longer pervasive. These improved conditions meant that a formula that had been "rational in both practice and theory" in 1965 was no longer responsive to "current political conditions."<sup>144</sup>

Justice Ginsburg's dissent chided the majority for making "no genuine attempt to engage with the massive legislative record Congress assembled" to support reauthorization.<sup>145</sup> The dissent argued that the Court focused too narrowly on registration and turnout data, and ignored critical record evidence, including the scores of documented instances of intentional racial discrimination in voting; hundreds of Department of Justice (DOJ) objections interposed to proposed electoral changes; hundreds more that were withdrawn after the DOJ began investigating; the scale of racially polarized voting in covered jurisdictions; and comparative evidence that showed "that the coverage formula continues to identify the jurisdictions of greatest concern."<sup>146</sup> This record, Justice Ginsburg wrote, amply supported Congress's determination that preclearance was effective and should be retained. The dissent stated: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."<sup>147</sup> Justice Ginsburg closed: "[h]ubris is a fit word for [the majority's] demolition of the VRA."<sup>148</sup>

Disdain is another word Justice Ginsburg might have invoked. Animating *Shelby County*'s willingness to discard the preclearance regime was the majority's belief that the disputed provisions were not only obsolete but also the source of affirmative harm. True, the Justices comprising the *Shelby County* majority likely thought that the conditions on the ground were less dire than Justice Ginsburg described and the record documented.<sup>149</sup> And yet, the *Shelby County* ruling suggests that had these Justices shared the dissent's view of "current conditions," they would have still scrapped the preclearance regime because they thought that it made matters worse. Justice Scalia made this point when, at oral argument, he characterized

<sup>141</sup> See Justice Ginsburg's Umbrella, *supra*, at 266.

<sup>142</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>143</sup> *Id.* at 553, 554.

<sup>144</sup> *Id.* at 546–548, 552 (quoting Katzenbach, 383 U.S. at 308; NAMUDNO, 557 U.S. at 204).

<sup>145</sup> *Id.* at 580 (Ginsburg, J., dissenting).

<sup>146</sup> *Id.* at 570–579. See also Ellen D. Katz, Mission Accomplished? 117 Yale L.J. Pocket Part 142, 145 (2007).

<sup>147</sup> 570 U.S. at 590 (Ginsburg, J., dissenting).

<sup>148</sup> *Id.* at 587.

<sup>149</sup> Justice Ginsburg's Umbrella, *supra* note, at 267.



preclearance and the VRA more generally as “a racial entitlement.” Similarly, Chief Justice Roberts’ majority opinion described the 2006 amendments as requiring measures that “favored” minority voters through the creation of majority-minority districts.<sup>150</sup> These arguments dismissed the primary mechanism used to elect minority-preferred candidates as objectionable “favored” treatment rather than as a means of implementing the VRA’s longstanding commitment to equality of political opportunity.<sup>151</sup> Put differently, *Shelby County* bluntly resolved the Court’s longstanding discomfort with the creation of majority-minority districts under the VRA by eliminating a key mechanism that fostered their creation.<sup>152</sup>

Previously covered jurisdictions responded quickly to *Shelby County*, and imposed new electoral rules that preclearance had, or would have, blocked.<sup>153</sup> These new rules included districting plans that reduced or restructured majority-minority districts, and a deluge of measures wholly unrelated to districting, including new stringent voter identification requirements,<sup>154</sup> which will be discussed further in Chapter 23. Legal challenges followed, raising claims under Section 2 of the VRA and the Constitution itself. Plaintiffs prevailed in some of these actions, but lost a good deal more.

Meanwhile, plaintiffs challenged several post-2010 redistricting plans as racial gerrymanders. Invoking *Shaw* and its progeny (which had been largely dormant for more than decade), these plaintiffs objected to what they claimed was an excessive concentration of minority voters in specific districts. State defendants countered that the challenged redistricting lines either were not race-based or were necessary to comply with Sections 2 and 5 of the VRA. These cases resembled the *Shaw* claims of the 1990s, only now the state officials were Republicans, and the plaintiffs were primarily African American Democrats.<sup>155</sup>

The Supreme Court upheld one challenged district in Virginia as necessary to comply with the VRA,<sup>156</sup> but otherwise held that the statute did not mandate the race-based population percentages used in the challenged plans.<sup>157</sup> The Court also refined the *Shaw* doctrine to make racial gerrymanders easier to establish. It held unanimously, for instance, that a plan’s compliance with traditional districting principles does not neutralize a racially predominant motive.<sup>158</sup> It also expanded the ways in which plaintiffs may establish that race, rather than partisanship, predominantly shaped district lines.<sup>159</sup> Both moves allowed *Shaw* plaintiffs to

<sup>150</sup>570 U.S. at 549.

<sup>151</sup>Ellen D. Katz, A Cure Worse Than the Disease?, 123 Yale L.J. Online 117 (2013), <http://www.yalelawjournal.org/forum/a-cure-worse-than-the-disease>.

<sup>152</sup>Charles & Luis Fuentes-Rohwer, The Voting Rights Act in Winter: The Death of a Superstatute, 100 Iowa L. Rev. 1389, 1393 (2015).

<sup>153</sup>See, e.g., Michael Cooper, After Ruling, States Rush to Enact Voting Laws, N.Y. Times (July 5, 2013), at <http://www.nytimes.com/2013/07/06/us/politics/after-supreme-court-ruling-states-rush-to-enact-voting-laws.html>.

<sup>154</sup>See generally Ellen D. Katz, Section 2 After Section 5: Voting’s Race to the Bottom, 51 Wm & Mary L. Rev. 1961 (2018).

<sup>155</sup>See *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788 (2017); *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015).

<sup>156</sup>See *Bethune-Hill*, 137 S.Ct. at 800–802.

<sup>157</sup>See *Cooper*, 137 S. Ct. at 1460; *Alabama Legislative Black Caucus*, 135 S.Ct. at 1273.

<sup>158</sup>See *Bethune-Hill*, 137 S.Ct. at 796–797.

<sup>159</sup>See *Cooper*, 137 U.S. at 1481 (disavowing language in *Cromartie* that suggested plaintiffs must



prevail more easily.

This resurrection of *Shaw* is a notable development, but whether it is a productive one remains to be seen. Consider *Cooper v. Harris*, which held that a disputed majority-minority district in North Carolina was a racial gerrymander under *Shaw*. Justice Kagan's majority opinion observed that a sufficient number of White voters supported Black-preferred candidates so as to make a majority-minority district unnecessary. *Cooper* accordingly found that Section 2 of the VRA did not require the district to be majority-minority and hence could not be used to justify the race-based moves evident in the district's creation.<sup>160</sup>

The editors of a leading casebook predict that *Cooper* will help to foster cross-racial political coalitions by barring the “mechanical creation” of unnecessary majority-minority districts. The decision, they write, “opens up more space for the creation of coalitional or cross-over districts in which minority and White political coalitions unite behind the same candidates.”<sup>161</sup> In a narrow sense, this is correct. *Cooper* and the other recent *Shaw* cases provide plaintiffs with a mechanism to displace the undue packing of minority voters and thus provide jurisdictions that are so inclined with “space” to craft electoral districts that foster cross-racial coalitions.

These recent *Shaw* cases, however, do not require jurisdictions to do so. They invalidated or called into question “packed” districts that the Court thought relied unduly on race. New districting lines that do not predominantly rely on race will wholly remedy that identified injury, regardless of whether the new lines aggregate previously packed minority voters in numbers sufficient to exert meaningful influence. Put differently, the recent *Shaw* cases do nothing to prevent States from dispersing “excess” minority voters among numerous districts in which they will be too few in number to influence, much less control, electoral outcomes. The cases make clear that minority voters may be so dispersed either because the VRA does not independently require their aggregation in a majority-minority district, or because the voters at issue are not needed to create such a required district.

Back in the 1990s, *Shaw* and its progeny self-consciously articulated an analytically distinct constitutional injury that differed both from dilution and conventional intentional discrimination. The harm came to be understood as an expressive one, inflicted on and experienced by individuals when state action relies too heavily on race without sufficient justification. This injury never hinged on electoral outcomes, and arose regardless of whether elected representatives behaved as though beholden or indifferent to particular district residents.<sup>162</sup> The new *Shaw* cases continue to understand the injury in these terms. They do so, however, at a time when the VRA no longer provides a vigorous check on redistricting practices. Section 5 is inoperative and Section 2 inapplicable to minority communities that are either too small to constitute a majority in a single-member district or enjoy minimal support from White neighbors.<sup>163</sup>

present alternate maps in order to establish that race, rather than partisanship, motivated a challenged plan).

<sup>160</sup>See *id.* at 1471–1472.

<sup>161</sup>See Samuel Issacharoff et al., 2018 Supplement to the Law of Democracy 96 (5th ed. 2018).

<sup>162</sup>See *supra* notes and accompanying text.

<sup>163</sup>See *supra* notes and accompanying text.

Indeed, the new *Shaw* cases narrow the VRA even further by subjecting the deliberate creation of majority-minority districts, including ones that otherwise comport with traditional districting principles, to rigorous judicial scrutiny. *Cooper* found that race “furnished the predominant rationale” for a disputed district given that “[u]ncontested evidence . . . shows that the State’s mapmakers . . . purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population.”<sup>164</sup> The Court thus dismissed efforts to comply with the VRA as involving the pursuit of “a racial target.” Whether or not this characterization and the resurrection of the *Shaw* doctrine more generally portend the demise of the VRA in its entirety,<sup>165</sup> the new *Shaw* cases expose just how minimally the VRA presently limits the redistricting process. Whether it will provide any meaningful limits in the years ahead remains to be seen.

## 6 CONCLUSION: FUTURE OF THE VRA

As a new round of redistricting got underway following the 2020 Census, the Supreme Court further narrowed the reach of the VRA’s Section 2. First, *Brnovich v. Democratic National Committee* involved a Section 2 challenge to Arizona’s practice of discarding rather than partially counting ballots cast by voters outside their assigned precincts, and its refusal to allow third parties to collect absentee ballots.<sup>166</sup> Sitting *en banc*, the Court of Appeals for the Ninth Circuit held that both practices violated Section 2, emphasizing how each imposed significant and disproportionate burdens on minority voters in the State. The *en banc* court further held that Arizona acted with racially discriminatory intent when it adopted the ballot collection ban.<sup>167</sup> The Supreme Court, voting 6-3, reversed.<sup>168</sup>

Writing for the Court, Justice Alito’s opinion offered a template for addressing Section 2 claims that arose outside of the redistricting context. The opinion identified “several important circumstances” that, while not exhaustive, critically inform such claims. For instance, an electoral practice is more likely to violate Section 2 the larger the burden it imposes and the greater the racial disparity it produces. Neither a “[m]ere inconvenience” nor the “mere fact there is some disparity in impact” is itself sufficient. Practices that were “in widespread use” at the time of the 1982 amendments are less likely to run afoul of the statute, as are those that become less burdensome when evaluated in light of “the opportunities provided by a State’s entire system of voting.” Finally, practices supported by strong state interests are likely to comport with Section 2, even if the challenged practice is not the only or even the best means by which the interest might be advanced. Turning to the case at hand, the Court held that consideration of the identified “circumstances” established that the challenged Arizona practices passed muster under Section 2.<sup>169</sup>

<sup>164</sup>See *Cooper*, 137 S.Ct. at 1468

<sup>165</sup>See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA, 59 William & Mary L. Rev. 1559, 1567 (2018) (arguing that the new *Shaw* cases are on a “collision course” with the mandates of Section 2).

<sup>166</sup>*Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (2021).

<sup>167</sup>*Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020).

<sup>168</sup>*Brnovich*, 141 S.Ct. 2330.

<sup>169</sup>*Id.* at 2338-2340.

Joined by Justices Breyer and Sotomayor, Justice Kagan's dissenting opinion charged the majority with "creat[ing] a set of extra-textual exceptions and considerations to sap the [Voting Rights] Act's strength... This Court has no right to remake Section 2." On Justice Kagan's reading, the appellate court got it right when it concluded that the challenged practices denied minority voters in Arizona the equal opportunity guaranteed by Section 2.<sup>170</sup>

The limits *Brnovich* read into Section 2 are not directly applicable in the redistricting context. Still, the decision confirmed the present Court's inclination to narrow the reach of Section 2 and suggests that it remains deeply unhappy with the race-based considerations that statute mandates.

Second, an emergency ruling issued as this volume went to press suggests that Section 2's application in the redistricting contest is likely to be reduced yet further, and perhaps drastically so. In *Merrill v. Milligan*, the Court noted probable jurisdiction and stayed the ruling of a three-judge District Court that had held that Alabama's new congressional redistricting plan violated Section 2.<sup>171</sup> The lower court concluded that Alabama ran afoul of the statute by failing to include a second majority-Black district when the *Gingles* factors and totality of circumstances review dictated that an additional district was required. Chief Justice Roberts, who dissented from the order issuing the stay, stated that "the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction."<sup>172</sup> Justices Kagan, joined by Justices Breyer and Sotomayor, likewise objected to the stay, noting that the lower court "did everything right under the law existing today" and that "[s]taying its decision forces Black Alabamians to suffer what under that law is clear vote dilution."<sup>173</sup>

*Merrill* promises to restructure dramatically Section 2's application to the redistricting process. The Chief Justice indicated as much, stating that while he thought the stay was improper, he nevertheless agreed that the Court should review the decision on its merits. His opinion posited that "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim" and that the Court should "resolve the wide range of uncertainties" that arise under existing doctrine.<sup>174</sup>

Together, *Brnovich* and *Merrill* signal that Section 2 is likely to occupy, at best, a diminished role in future electoral disputes involving racial and language-based discrimination. For now, the redistricting plans produced following the 2020 Census—the first in more than a half century enacted absent the constraints of the VRA's Section 5—remain subject to Section 2. But the impact of that provision on districting practices is likely to be limited.

Decades ago, Congress crafted Section 2, and the VRA more broadly, to promote equality of opportunity in the electoral process. The deluge of restrictive electoral restrictions enacted in the years since Shelby County make clear that equality of

<sup>170</sup>Id. at 2373 (Kagan, J., dissenting).

<sup>171</sup>*Merrill v. Milligan*, 2022 WL 354467 (Feb. 7, 2022).

<sup>172</sup>Id. at \*4 (Roberts, C.J., dissenting).

<sup>173</sup>Id. at \*4 (Kagan, J., dissenting).

<sup>174</sup>Id. at \*4 (Roberts, C.J., dissenting).

opportunity remains unrealized. Section 2 might yet be read as it was intended. It might still be applied widely to developing problems and resurgent practices and implemented to ensure that all voters have an equal opportunity to participate in the electoral process. Recent judicial rulings and the sentiments they manifest nevertheless suggest that this prospect is most unlikely.