Chapter 23

The state of play in voting rights

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CHAPTER SUMMARY

So where are we now, and where are we going? Civil rights attorneys Clarke and Gordon recount key history, situate the current litigation landscape, and look to the future in a timely overview of redistricting and voting rights for the nation.

1 HOW WE GOT HERE

Many view the U.S. presidential election as a central determinant of American policy, both at home and abroad. Although the redistricting process will never drum up the same kind of headlines or excitement as a presidential election, it arguably has as significant an impact on policy decisions. Who gets counted in the Census and how district maps are drawn have important implications far beyond the elections that are conducted in those districts.[1] These decisions determine not just who is able to get elected, but can also impact how limited resources such as water and electricity are distributed, which roads get repaired, what is taught in schools, and, in the case of judicial districts with jurisdiction over capital cases, even who gets put to death. Yet, rather than ensuring that these critical decisions are made in a dispassionate fashion, the United States arguably stands alone among democratic nations in allowing self-interested legislators to draw their own districts [19].

[1] In this volume, Buck and Hachadoorian talk more about Census practices, and Gall, Mac Donald and our LCCR colleague Fred McBride give some nitty gritty views on mapmaking.

Because of the Supreme Court's devastating 2013 *Shelby* decision, discussed more below, the redistricting cycle following the 2020 Census marks the first time since the civil rights movement of the 1960s that redistricting will occur without the full protections of the Voting Rights Act (VRA). The *Shelby* ruling has sparked a years-long effort to push Congress to respond to the Court's ruling and restore the full vitality of the Act. As such, it is a particularly appropriate time to examine current issues in redistricting.

In our work for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), we bring lawsuits that protect the rights of Black people and others from historically marginalized backgrounds to have an equal opportunity to participate in all stages of the electoral process. Since its founding in 1963 at the request of President John F. Kennedy, the Lawyers' Committee has been at the forefront of the fight for voting rights and has brought many of the most significant cases impacting voting rights in our country. Today, our docket of voting rights lawsuits remains incredibly comprehensive and far-reaching.[2]

The vast majority of lawsuits concerning redistricting include claims under the VRA, a landmark piece of federal legislation from 1965 that has been discussed throughout this book.[3] We will offer a brief recap here, because current voting rights contestation is best understood with a long view of American voting rights history.

1.1 HISTORICAL SIGNIFICANCE

In 1857, the Supreme Court's infamous *Dred Scott* decision held that African Americans could not be U.S. citizens, whether enslaved or free. Black people were constitutionally recognized as full citizens only after the Civil War, via the 14th and 15th Amendments (ratified in 1868 and 1870 respectively). Despite formal citizenship, they faced considerable challenges in running for office or even registering to vote across the Southern U.S. throughout the Reconstruction Era. More systematic repression took hold in 1877, when a deal brokered in Washington removed federal troops from the South and left the new civil rights laws unenforced.[4] The Jim Crow Era—the long period of official anti-Black laws and practices that followed—is often given 1877 as its start date and 1965, the passage of the VRA, as its end.

The VRA came about because of the demonstrations and protests that were carried out by people like the great civil rights leader John Lewis. There was one march in particular during the 1960s—a march from Selma, Alabama to Montgomery, Alabama in March 1965—where peaceful demonstrators were preparing to cross the Edmund Pettus Bridge when they were attacked by police officers armed with billy clubs and dogs.[5] John Lewis was struck across the head and bore scars from

[2] You can find an overview of some of this work here: `https://lawyerscommittee.org/project/voting-rights-project/`

[3] Chapter 6 of this volume gives a quick overview of the VRA's origins and key provisions, and Chapter 7 includes a detailed discussion of its most important legal challenges to date.

[4] For an unparalleled history of the Reconstruction Era, see Eric Foner's books Reconstruction: America's Unfinished Revolution, 1863–1877 (2014) and How the Civil War and Reconstruction Remade the Constitution (2019) [7, 8].

[5] The bridge was built in 1940 and named for an Alabama senator and Klansman.

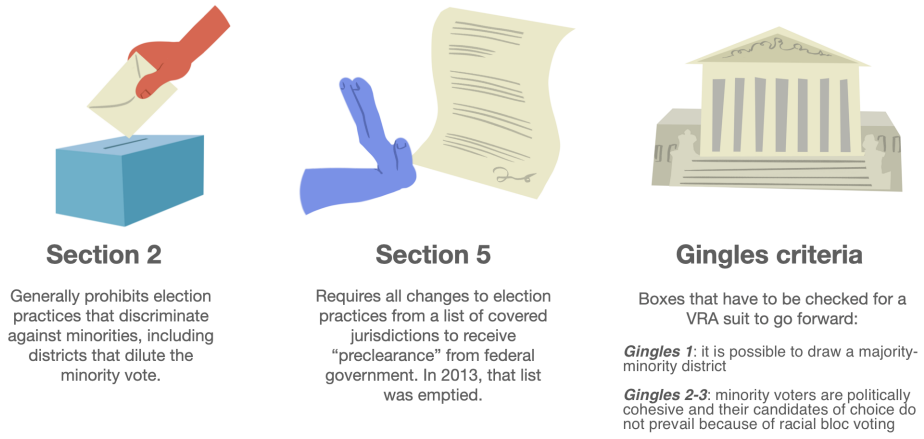

Figure 1: A brief recap of Sections 2 and 5 of the VRA and the Gingles criteria

this incident for the rest of his life. But the painful marches and protests from the Civil Rights Era are what gave rise to the Voting Rights Act. Images of the march across the Edmund Pettus Bridge and other civil rights demonstrations were televised across the globe and became an impetus for President Lyndon B. Johnson to act. The law was passed by the Senate on May 26 of that year and Johnson signed the bill into law on August 6, with Martin Luther King and other civil rights leaders present for the signing ceremony.

The Voting Rights Act banned outright literacy tests, grandfather clauses, and other Jim Crow tools that had been used to disenfranchise minority voters. But the Voting Rights Act contains other strong provisions as well. The two sections you hear about most are Section 2 and Section 5 (see Figure 1 for a brief overview of both, as well as the Gingles criteria). Section 2 applies nationally, prohibiting jurisdictions from states to small localities from putting in place laws that may dilute minority voting strength or deny minority voters access to the polls. Litigators often work with statisticians to use Section 2 as a tool to challenge redistricting plans that fail to provide minority voters with an equal opportunity to elect candidates of choice.

There's another provision of the Voting Rights Act that has sadly been the subject of a lot of controversy in the courts: the Section 5 "preclearance" provision. At the time that this law was put into place, there were some parts of the country where voting discrimination seemed intractable and truly presented a problem that required strong medicine to heal. Alabama, site of the Pettus Bridge attack, was one of those places; Mississippi, Louisiana, South Carolina, parts of North Carolina, Texas, Arizona, parts of California, Florida, parts of New York: all of these states,16 in total, were subject to the enormously important provision of the Voting Rights Act that required federal review before any change could be made to any voting law or procedure. It was intended to make sure that jurisdictions didn't turn the clock back and worsen the position of minority voters. Preclearance helped to block hundreds of discriminatory voting changes, including discriminatory

redistricting plans, over the course of the past few decades.

Kilmichael, Mississippi provides one powerful example of how Section 5 operated long after initial VRA passage. This is a small community off the beaten path in Mississippi where 2000 census data revealed that African Americans had become a majority of the population. It's a town governed by a five-member Council and a mayor—all White throughout the town's history up to then—but because of the demographic shift, a number of African Americans decided to run for seats on the council and even the mayoral seat. So the council decided to change the rules of the game: they voted to simply cancel the 2001 election. The DOJ stepped in, the election went forward, and the town elected three of five Black councillors and a Black mayor. This demonstrates the importance of the Voting Rights Act—it is a law that's helped open up access to democracy across our country, from members of Congress to the mayor of Kilmichael.

It is worth highlighting just how involved the U.S. Congress has been over the long life of the VRA. The law was resoundingly passed in 1965, but its "coverage formula" (the list of places that were subject to preclearance) was only supposed to last five years. In 1970, 1975, 1982, and again in 2006, Congress went back to examine whether the VRA and preclearance in particular had served its purpose, and each time they opted for renewal or even extension.

One moment from the 2005-2006 House debate over reauthorizing Section 5 stands out as a vivid visual: Republican Congressman Jim Sensenbrenner was discussing the recent history of voting changes blocked by preclearance (Figure 2). He began to pile the books and files onto a table, showing the volume of evidence amassed by his staff, to the point that it tipped over and books started to fall onto the floor. It was a very powerful illustration of this Congress doing its job, and doing its homework, to really study carefully the need for an important law like this. At the end of the debate, the law was reauthorized 98-0 in the Senate and 390-33 in the House. By an overwhelming bipartisan margin, Congress agreed that Section 5 of the Voting Rights Act was still playing a vital role in our democracy.[6]

1.2 LIFE AFTER PRECLEARANCE

In 2005, just as Congress began to debate the latest VRA extension, the Roberts Court was born. Here is Justice John Roberts in a 2009 case, presenting a rosy view of the world:

> "The historic accomplishments of the Voting Rights Act are undeniable. When the act was first passed, unconstitutional discrimination was rampant, and the racial gap in voter registration and turnout... was great. Today that gap has been dramatically diminished, and most of the barriers to equal voting rights have long been abolished."[7]

Section 5 survived that earlier constitutional challenge mounted by a Texas municipal utility district, but it was an Alabama case, *Shelby County v. Holder*, where it

[6] It is fascinating to watch the CSPAN coverage of the House debate: `https://www.c-span.org/video/?193337-1/house-session`

[7] *Northwest Austin Municipal Utility District No. 1 v. Holder* (No. 08-322) 573 F. Supp. 2d 221.

Figure 2: In the 2006 hearings, Sensenbrenner cataloged DOJ activity under preclearance from 1982 to 2006. Georgia: 91 objections; Texas: 105 objections; Mississippi: 112 objections; Louisiana: 96 objections; South Carolina: 73 objections; North Carolina: 45 objections; Alabama: 46 objections; Arizona: 17 objections. He detailed dozens of voting rule changes that were withdrawn by those states under DOJ pressure and hundreds of federal observers assigned to monitor elections in just the four years prior to this debate. He concluded: "We have put in the work on this. We've done the hearings. The record is replete... let's go down in history as the house that did the right thing."

finally gave way in 2013. The Supreme Court's *Shelby* decision didn't strike down the preclearance provision, but instead nullified the coverage formula which set forth the states and localities that were covered, effectively ending preclearance. *Shelby* has fundamentally changed the field and landscape for voting rights attorneys and advocates. Before the *Shelby* decision, advocates were alerted to changes in the works when a covered jurisdiction sought preclearance from the Department of Justice or the D.C. District Court; this allowed advocates and voting rights attorneys to preemptively work to stop changes that would hurt minority communities. In the aftermath of *Shelby*, changes large and small can be implemented without stakeholders receiving any notice. As a result, the work of voting rights attorneys and advocates has shifted from preventing problematic rule changes to a game of "whack-a-mole," where lawsuits and other advocacy efforts are of a more reactive nature. In practice, a discriminatory change to an electoral process must often be implemented and disenfranchise voters before that harm can be the basis of a court challenge.

This more reactive process is particularly troubling because state governments have moved boldly in the post-*Shelby* world. In the days after the Supreme Court handed down its decision, several states that were previously covered moved swiftly to enact conspicuous changes. Within months, restrictive voter ID requirements

were introduced in four states (Alabama, Mississippi, North Carolina, and Texas) and a number of states (including Florida, Georgia and Virginia) carried out mass purges of their voter rolls [3].[8]

Mid-decade redistricting is a sure tell that some states were ready to take advantage of the withdrawal of oversight. Georgia was a particularly bad actor, and in fact their re-redistricting was so egregious that advocates filed suit. Consider District 105 in their 180-member state House. As constituted after the 2010 Census, this district had a White population of 48.6% and a combined Black and Latino population of 51.6%. Its 2012 election was extremely competitive, with a challenger largely backed by minority voters coming within 554 votes of an incumbent backed by White voters, and nearly as close again in 2014. The state went in and carved up the district in 2015, shifting the population to make the district Whiter by about 4%. The 2016 outcome was the closest yet, a margin of just 222 votes for the incumbent, leaving it pretty clear that the incumbent was saved by those race-conscious adjustments.

1.3 RESIDENTIAL SHIFTS

Decades after the initial passage of the Voting Rights Act, the need to keep governments in check has not dissipated, although some conditions on the ground have certainly shifted. To set the stage for today's developments, it's worth looking at changes in human geography. The country is more racially and ethnically diverse today than ever before, and the trend is not slowing. Census statistics tell us that in 1965, just 5% of the U.S. population was born abroad; today, that number has more than doubled to 14%. The Hispanic and Latino population is expected to grow from 18.73% in 2020 to 27% by 2060.[9] In the same timeframe, the Asian population will grow from just over 6% to 9%. Because of this growth, the Pew Research Center estimates that by 2055 no racial or ethnic group will be a majority group in the United States [13].

Where you live is bound up with where you can work, where you attend school, how you are policed, where you can vote, and who's on your ballot. Housing policy, school policy, policing, race, and voting have always been intertwined. VRA practice reminds us of this fundamental role of geography by requiring that plaintiffs show that the minority group is sufficiently concentrated to constitute the majority in a district (Gingles 1).

But the flip side of concentration is segregation. Segregation can make it easy for a group's voting strength to be diluted through a practice known as packing (see Chapter 0, Chapter 2). And even when districts are favorable at one level for communities of color, it may be difficult for minority candidates from a tightly clustered community to be elected to higher office, such as an at-large county commission seat or a larger congressional district.[10]

[8] None too subtle, Texas announced its intended voter ID changes on the very afternoon of the *Shelby* decision.

[9] Projected Race and Hispanic Origin: Main Projections Series for the United States, 2017–2060. U.S. Census Bureau, Population Division: Washington, DC (released Sept. 2018).

[10] We can turn to the major VRA historical survey by Katz et al. to see that courts have noted both effects at work: "[T]he district court in the Charleston County litigation noted severe societal and housing segregation and found that this ongoing racial separation 'makes it especially difficult for

Cities and counties themselves have had their borders constantly made and remade along race and class lines.[11] As human geography is transformed through processes of immigration, gentrification, and resettlement, changes are sometimes accompanied by contortions in electoral and school districts to maintain a racial status quo. As social scientist Meredith Richards explains in her geospatial study of school redistricting: "[l]ike congressional districts, school zones are highly gerrymandered; the gerrymandering of school zones serves to worsen the already severe racial segregation of public schools" [15, 16]. Because public schools are largely funded by property taxes levied by local governments, an intense feedback loop of housing, schooling, and voting can severely exacerbate divisions. We should be vigilant when districting magnifies inequality.

In addition to the political, housing, and educational implications of changing demographics, an explosion in mass incarceration that disproportionately targets certain demographic groups has amounted to a transfer of residential population whose consequences for redistricting we will explore further below.

While the vast majority of Section 2 cases have historically been brought on behalf of African American communities, immigration and demographic growth will likely mean that Latino and Asian plaintiffs become more common in the future.[12] And these groups have different population patterns, molded in part by decades of policy that has circumscribed where people of color are able to live.

Increasingly, counties, cities, school districts, and other jurisdictions may have Black and brown communities making up a majority of the population—meaning that successful Section 2 vote dilution cases may be more likely—but only when one considers these groups collectively (e.g., when one combines Black and Asian populations, or Latino and Native American communities).

2 WHERE WE'RE GOING

The shifting landscape has brought major setbacks but has also opened up promising new frontiers. We'll look at the local level, discuss prison gerrymandering, overview the state of coalition claims, and touch on state-level VRAs.

African American candidates seeking county-wide office to reach out to and communicate with the predominately White electorate from whom they must obtain substantial support to win an at-large elections [sic].' The district court in the Neal litigation likewise concluded that similar segregation meant 'that whites in the County have historically had little personal knowledge of or social contact with blacks....Quite simply, whites do not know blacks and are, as a result, highly unlikely to vote for black candidates'" [12].

[11] Municipal annexation and de-annexation often follow conspicuous racial patterns.

[12] In 2005, just seven Section 2 cases were brought with an Asian American plaintiff, compared to 268 with an African American plaintiff [12]. See also *Diaz v. Silver*, 978 F. Supp. 96, 129 (E.D.N.Y. 1996), aff'd, 522 U.S 801 (1997) (successful § 2 claim by Asian Americans in Chinatowns of Manhattan and Brooklyn); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); Chen and Lee, Reimagining Democratic Inclusion [4] (discussing the lack of success of Asian Americans in § 2 claims and proposing reforms); Ingram, The Color of Change (discussing changing demographics and VRA claims) [11].

2.1 LOCAL CHALLENGES

While redistricting challenges have been historically directed toward U.S. congressional maps, state legislatures, county commissions, and local school boards, advocates are increasingly applying these same principles to challenge vote dilution in other electoral bodies. Judicial districts are one new frontier. In 2016, for instance, the Lawyers' Committee filed a lawsuit aimed at ending the discriminatory practices by which judges in Texas are elected. The suit alleged that the state's practice of electing judges statewide to the Texas Supreme Court and the Texas Court of Criminal Appeals (the two highest courts in the state) violated the Voting Rights Act. Latinos comprised 26% of the voting age population of Texas in the 2010 Census, while White residents made up 56.4%. Because voting in Texas is heavily polarized, Latino-preferred judicial candidates have had difficulty getting elected to these two courts. In fact, in the past seven decades, just two of the 48 judges serving on the Court of Appeals have been Latino. Similarly, just five of the 77 judges serving on the Texas Supreme Court have been Latino.[13] Clearly, these numbers are not representative of Texas demographics; more importantly, there is reason to believe that they will not lead to equal justice for Texans. Unfortunately, in 2018, the court found against plaintiffs noting that plaintiffs "failed to satisfy their burden of demonstrating that the lack of electoral success by Hispanic-preferred candidates for high judicial office is on account of race rather than other factors, including partisanship."

Although Section 2 challenges against K-12 school districts are not uncommon, claims challenging districting decisions of bodies governing higher education are a newer development. In 2013, the Lawyers' Committee filed suit in Arizona Superior Court challenging the method used for electing the Governing Board of the Maricopa County Community College District.[14] The lawsuit was initiated after the Arizona Legislature enacted H.B. 2261 in 2010, requiring that two at-large seats be added to the Governing Board, increasing the size of the Board from five to seven, amounting to a new system of election by creating two new seats that would be very difficult for minority-preferred candidates to secure. The lawsuit alleged that H.B. 2261 violated the Arizona State Constitution because it only applied to counties with at least three million residents, effectively singling out Maricopa County because no other county had even one million residents. The suit alleged that H.B. 2261 violated the state Constitution's prohibition against local or special laws and the Constitution's privileges and immunities clause. This lawsuit went from Arizona Superior Court to the state Court of Appeals and finally the state Supreme Court, ultimately ending unfavorably for the plaintiffs.

In addition to extending redistricting claims to judicial bodies and community college districts, voting rights attorneys have also challenged redistricting decisions concerning so-called special districts such as utility districts. In 2000, for instance, the United States Department of Justice filed a lawsuit against the Upper San Gabriel Valley Municipal Water District in Ventura County, California—water

[13] See plaintiffs' brief in *Lopez et al. v. Abbott*, available at `https://lawyerscommittee.org/wp-content/uploads/2016/07/Texas-Courts-Complaint_07-20-16_FINAL.pdf`

[14] *Gallardo et al. v. Arizona*. See `https://www.lawyerscommittee.org/wp-content/uploads/2015/06/0444.pdf`

districts are of crucial policy importance in the drought-ridden Southwest.[15] Although the district was approximately 46% Hispanic at the time the lawsuit was filed, and although nine Hispanic candidates had run for a board position, no Hispanic resident had ever been elected.[16] The United States argued that the water district improperly split the Hispanic population across the five divisions making up the district, "with the result that Hispanics d[id] not constitute a citizen voting-age majority in any of the five Divisions."[17] After the complaint was filed, the District adopted new division borders that no longer diluted Hispanic voting strength, and so the court dismissed the suit as moot.[18]

While the work rooting out discrimination at the federal level and in state legislatures and in county councils is not done, challenging voter suppression as it occurs in electoral bodies that have not traditionally been the focus of vote dilution challenges is equally important. Advocates must continue to think creatively to target discrimination in judicial election processes, community college districts, utility districts, and elsewhere. This won't just be through litigation, but will just as importantly involve candidate recruitment, community organizing, and voter education.

2.2 PRISON MALAPPORTIONMENT

Incarceration rates in the U.S. have grown dramatically in recent decades, from about 150 people per 100,000 in the mid 1970s to 707 people per 100,000 in 2012. Today, approximately 2.2 million people are incarcerated in the United States, up from just 300,000 in 1970 [14, 20].

These staggering incarceration rates have had a disproportionate impact on Black and brown communities: 60% of incarcerated individuals are people of color, even though they account for just 30% of the general U.S. population. While just 1 in every 106 White men are incarcerated, the rates for African American and Hispanic men are drastically higher, with 1 in 15 African Americans and 1 in 36 Hispanic men incarcerated [14, 17].

[15] *United States v. Upper San Gabriel Valley Mun. Water District.*, 2000 WL 33254228 (C.D. Cal, 8 September, 2000).

[16] Complaint, *Upper States v. Upper San Gabriel Valley Mun. Water District*, No. CV 00-07903 (C.D Cal, 21 July, 2000), at 3–4 (available at `https://www.justice.gov/crt/case-document/file/1175831/download`). For case overview, see Katz et al. [12].

[17] Complaint, *Upper San Gabriel Valley*, at 5.

[18] *U.S. v. Upper San Gabriel, et al.* 2:00CV07903, (C.D. Cal.), Stipulation and Order by Judge A. H. Matz entered 16 June, 2003 (docket entry 52).

23.1 FIXING PRISON MALAPPORTIONMENT

LITIGATION

Advocates working to address prison gerrymandering have employed varied litigation strategies, bringing lawsuits in numerous states. In Florida, the ACLU sued Jefferson County. According to the 2010 Census, the county had a total population of 14,761, of which 1,157 were incarcerated at Jefferson Correctional Institution (JCI), a state prison. Only nine of those inmates were convicted in the county. Districts for county commission and school board had roughly 2,900 residents each, so JCI made up almost half of a district. The court found that the massive up-weighting of voting strength for the non-incarcerated population of District 3 was "clearly an equal protection violation," ordering defendants to submit a new districting plan.

In a similar case brought in Rhode Island, the First Circuit declined to follow the Florida example, instead finding that "the Constitution does not require [a jurisdiction] to exclude... inmates from its apportionment process" and "gives the federal courts no power to interfere" with a jurisdiction's decision. Given the relatively scarce and substantively scattered case law, advocates must tread carefully when considering litigation on the issue.

LEGISLATION

The most comprehensive approach to fixing prison gerrymandering would require the Census to change how and where it counts prisoners. However, given that such an approach has yet to be implemented federally, various state and local actors have taken steps to address the issue. Since 2010, at least 20 states and more than 200 counties and municipalities have introduced legislation to address prison gerrymandering. As of this writing, more than half a dozen states have passed legislation addressing the issue, including California, Delaware, Maryland, New York, Washington, New Jersey, and Nevada, with Maryland and New York taking steps to address how prisoners were counted prior to the 2020 redistricting cycle.

Maryland's legal fix, broadly similar to many of these states, applies to districts at every level from congressional and state legislative to counties and municipalities. Mapmakers must allocate incarcerated individuals "at their last known residence before incarceration if the individuals were residents of the state." It also requires federal and state correctional facilities to be excluded from population counts.

New York's prison gerrymandering law is somewhat narrower, as it does not include congressional districts and does not require federal prisoners to be reallocated to a previous address for counting purposes. The law requires the New York State Legislative Task Force on Demographic Research and Reapportionment (LATFOR) to "reallocate people in correctional facilities back to their home communities for purposes of drawing state and local districts."[a] In order to make this possible, the State Department of Corrections is required to send information regarding the residential address of offenders prior to their incarceration. The task force then must match the previous residential addresses of incarcerated individuals with the appropriate census block and maintain a database to track this information for use in drawing state legislative districts.

[a] Part XX of Chapter 57 of the Laws of 2010

But what do these high rates of incarceration and the disproportionate imprisonment in Black and brown communities have to do with redistricting? The answer relates back to the fact that the Census counts inmates as residents of the jurisdiction in which they are incarcerated,[19] and states and other jurisdictions then rely on that Census data in redrawing their electoral districts. During the explosion of incarceration rates in the 1980s and 1990s, many new prisons were built in largely rural areas. Prison construction and maintenance followed, creating economic opportunities and jobs in these rural areas.[20] As a result, "fewer than half of all prisons were located in non-metropolitan areas in the 1960s and 1970s," while "rural communities developed hundreds of new prisons during the 1980s and 1990s" with almost two-thirds of new prison development occurring in rural areas by the mid-1990s.[21]

This trend meant that, while urban centers where Black and brown communities are concentrated are disproportionately targeted for arrests, convicted offenders are often relocated to prisons in rural areas with majority-White populations to serve their time. Because incarcerated individuals lose their right to vote in nearly every state,[22] the vast majority of incarcerated people are unable to vote in the jurisdiction in which the Census counts them as a resident.

2.3 COALITION CLAIMS

The shifting demographics we outlined above have created new opportunities to bring coalition claims, in which more than one minority group comes together to plead a VRA violation. Given the changing landscape, lawyers and other advocates fighting for equal voting rights will need to consider the dynamics between different ethnic and racial groups when bringing claims under Section 2. What do these coalition claims look like and what do they mean for future redistricting decisions? We will focus on articulating the broader trends and the best legal approaches being taken in approaching them.[23]

Unlike many other voting rights issues, the legal framework for coalition claims under Section 2 is still being defined, with courts in some circuits more friendly to these claims (e.g., the Fifth Circuit), than others (e.g., the Sixth Circuit).[24] Yet,

[19] *Calvin v. Jefferson County Board of Commissioners* 172 F.Supp.3d 1292, 1297 (N.D.Fla., 2016).

[20] Pfaff writes "In Pennsylvania, the state laid off only three guards when it closed two entire prisons in 2013 . . . [M]any legislators and citizens believe that prisons provide vital economic support, even beyond guard salaries, to the disproportionately rural communities in which so many are located" [14].

[21] Michael Skocpol says that "Areas classified as rural are home to 20% of the overall U.S. population but 40% of all prisoners" [18].

[22] Currently, only two states (Maine and Vermont), as well as the District of Columbia, allow incarcerated individuals to vote while serving time.

[23] Hopkins gives an excellent survey of the state of aggregate minority claims under Section 2 as of 2012 [10]. Elmendorf and Spencer find high cohesion in Asian American and Latino communities and argue that this "implies that Asians and Latinos ought to have considerable success bringing 'coalitional' vote dilution claims under Section 2" [6]. The previous chapter features Espinoza-Madrigal and Sellstrom taking an in-depth look at one recent Asian/Latino coalition case.

[24] Friendly Fifth Circuit examples include *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993)("if blacks and Hispanics vote cohesively, they are legally a single minority group, and elections with a candidate from this single minority group are elections with a viable minority candidate."); *Campos v. City of Baytown*, 840 F.2d 1240, 1241 (5th Cir. 1988) (emphasizing that voting patterns among the

recognizing changing demographics, advocates have brought a number of lawsuits using coalition claims. For instance, consider *Arbor Hill v. Albany*, a case in which plaintiffs argued that Black and Hispanic voting strength was being diluted by the districting plan. In the decision, the Northern District of New York articulated some conditions for the success of a coalition claim by specifying that "Black and Hispanic groups are politically cohesive when most members of the two groups vote for the same candidates in most elections" and that, in determining whether groups are cohesive, courts should also consider "whether black groups and Hispanic groups have worked together to form political coalitions and promote the same candidates."[25] The court went on to find that plaintiffs in Arbor Hill successfully showed cohesion between Black and Hispanic groups and pointed to evidence including, among other things, the fact that leaders in the Black and Hispanic communities "attest[ed] without contradiction" that the groups "joined together to further each other's political and social interests" by supporting "various events and projects of interest" to the groups, such as sporting events and festivals. In addition, the court noted that the groups "jointly publish a bilingual community newspaper," and that there was anecdotal evidence that "blacks and Hispanics joined to support candidates preferred by one group or the other."

More recently, voting rights advocates have broken new ground and brought coalition claims joining more than two racial minority groups. In *Georgia Conference of the NAACP v. Gwinnett County*, attorneys with the Lawyers' Committee argued that the district maps for the county board of commissions and school board of Gwinnett County, Georgia, violated Section 2 by diluting the voting strength of African Americans, Latinos, and Asian Americans. Together, African American, Latino and Asian American voters comprise approximately 43% of the voting age population of Gwinnett County. However, at the time the suit was filed in 2016, no minority candidate had ever won election to the County Board of Commissioners or Board of Education.

Gwinnett County's maps pack approximately 74.4% of the African American, Latino, and Asian American voters into one of the County's five districts, while splitting the balance of the minority population across the other four districts such that African Americans, Latinos, and Asian Americans do not constitute a majority in any of those districts. The complaint alleged that the districts should be re-drawn to include a second majority-minority district for both the school board and the board of commissioners so that minority voters have a fair opportunity to elect candidates of their choice to those bodies. It also argued that one majority-minority coalition district could be drawn among the four single member County Board of Commission districts (excluding the chair).

The case in Gwinnett was voluntarily dismissed in 2019 after non-White candidates were elected to the Board of County Commissioners and School Board for the first

minority groups are particularly important to a showing of political cohesiveness). A less friendly Sixth Circuit example is *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393 (6th Cir. 1996) (rejecting the notion that coalitions of more than one racial or ethnic minority can bring a Section 2 claim).

[25] *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. County of Albany*, 2003 WL 21524820, at *8 (N.D.N.Y., 2003) (citing *League of United Latin Am. Citizen Council v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (focusing on elections with minority candidates) and *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990)).

time in the county's history, though similar cases are likely in the future. It is clear that, in order to successfully assert a coalition claim under Section 2, plaintiffs must be sure to include substantial evidence showing cohesion between the various racial minority groups. Multiple courts have rejected coalition claims when evidence of minority group cohesion is slim. For instance, in *Johnson v. Hamrick*, the Eleventh Circuit rejected a claim that the Black and Hispanic communities of Gainesville, Georgia were politically cohesive. Plaintiffs' evidence of cohesion in this case failed to include any "statistical evidence that blacks and Hispanics voted together in any election," and instead relied solely on anecdotal evidence of individuals in the community. In rejecting plaintiffs' claim the court explained that it would "not indulge the presumption that blacks and Hispanics vote together merely because a few have worked together on various, non-electoral, community issues."[26]

Despite the challenges of bringing coalition claims, changing demographics demand that voting rights advocates take this avenue seriously and develop tools for demonstrating cohesion.

2.4 STATE VOTING RIGHTS ACTS

A final development in recent years worth noting is that several states have introduced their own state-level voting rights acts, which sometimes echo the federal VRA (so that they would serve to keep its protections in place even if it is struck down) and sometimes differ in interesting ways.

First on the scene was the California Voting Rights Act (CVRA)[27], passed in 2001. Its key difference from the federal VRA is that plaintiffs must only show racial polarization (Gingles 2–3) and do not need to demonstrate the existence of potential majority-minority districts (Gingles 1) to press a case. The CVRA was designed to dismantle at-large elections for localities around the state, and its impact has been enormous, as cities and counties have scrambled to redesign their elections. In 2016, the California legislature put a "safe harbor" provision in place for 45 days, allowing all localities that moved to create districts in that period of time to be shielded from litigation.[28] A white paper by civil rights organizations cites the research of political scientist Morgan Kousser in enumerating at least 335 localities (school and community college boards, city councils, utilities districts, and so on) that shifted their system of election under the CVRA as of 2018. Kousser's work found major impacts: for instance, affected school districts had a 60% increase in Latino representation in a ten-year span. Interestingly, most of this happened without litigation. Of the cases enumerated in Kousser's study, 12% had a lawsuit as the precipitating event, 25% were triggered by a demand letter (which attorneys use to put localities on notice of a potential lawsuit), and the remaining 63% were preemptive switches.

The rest of the West Coast followed suit, with a Washington VRA and an Oregon

[26] *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1368 (N.D. Ga. 2001) aff'd, 296 F.3d 1065 (11th Cir. 2002).
[27] California Voting Rights Act of 2001, Cal. Elec. Code § 14025 (West 2017).
[28] Cal. Elec. Code § 10010.

VRA now on the books as of 2018 and 2019 respectively.[29] The Oregon VRA applies specifically to school districts; the Washington VRA is broader and expressly calls for the consideration of alternative remedies, so that ranked choice options can be considered in addition to districts. Quite a few other states have legislation in various stages of preparation for their own state-level VRAs, including New York.

3 CONCLUSION: WHY IT MATTERS

So why does all of this matter? We believe that fair redistricting has a direct correlation with the quality of people's lives in our country. If you care about issues like the school-to-prison pipeline, then having a school board that fairly reflects the diversity of the community served by that school board is key. If you care about issues like unjustified police shootings of unarmed individuals, particularly of African Americans, then the makeup of your city council is key—city councils sometimes have a say in police chiefs and whether or not those police chiefs are held accountable for how their police departments are run. If we collectively believe in an inclusive democracy, then we want a democracy in which our local governments, our state governments, and our federal government reflects the diversity of the communities they serve. Diverse governing bodies help to increase public confidence that elections reflect the will of the people, and ultimately boost confidence in the work of government.

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