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The Dangers of Racial Gerrymandering in the Frontline Fight for Free and Fair Elections

Laura Odujinrin*

Since its founding, the United States has counted democratic elections as a fundamental tenet of democracy. Redistricting ensures that elections are free, fair, and representative of the people. This process requires that every ten years, after the national census, congressional, state, and local districts are redrawn, if necessary, to reflect changes in population to ensure that district populations are equal. What should be a simple calculation, has become step one in a political party's bid to maintain or gain power. This has led to countless legal battles and minority populations left without adequate representation. In turn, this lack of representation perpetuates the systemic racism upon which this country was founded. Gerrymandering, particularly racial gerrymandering, is a foundational step in ensuring the exclusion of underrepresented communities from voting. The 2020 election concluded with many seat flips by a slim margin of votes, along with the record voter turn-out and resulting litigation, which suggests that the battle of redistricting following the 2020 census is bound to be an intense one.

This Comment defines gerrymandering, its types, and strategies as well as lays out the legal framework for racial gerrymandering litigation. It focuses past on censuses and what can be expected

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out of the 2020 census results. The impact of racial gerrymandering on minority and underrepresented communities including voter suppression, systematic racism, and a lack of representation in government cannot be understated. The Comment concludes with possible solutions to prevent racial gerrymandering in the future. Ultimately, the author demonstrates that the fight for fair and free access to voting is stronger than ever.

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INTRODUCTION

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."[1] Since its founding, the United States has counted democratic elections as one of its most important principles and legacies. A fundamental tenet of democracy is that elections be free, fair, and representative of the people living in the community. Yet, for many, the reality of fair elections that are truly representative of the people is far from this ideal.

One way to ensure that elections are free, fair, and representative of the people is through redistricting. Redistricting requires that every ten years, after the national census, congressional, state, and local districts are redrawn, if necessary, to reflect changes in population to ensure that district populations are equal. What should be a simple calculation, has become step one in a political party's bid to maintain or gain power. This has led to countless legal battles and minority populations left without adequate representation. In turn, this lack of representation perpetuates the systemic racism upon which this country was founded. Gerrymandering, particularly racial gerrymandering, is a foundational step in ensuring that minority voters are left without representation and disenfranchised by a system that purports to be fair and free. The 2020 election concluded with many seat flips by a slim margin of votes, along with the record voter turn-out and resulting litigation, which suggests that the battle of redistricting following the 2020 census is bound to be an intense one.

Already, the fight between restricting and expanding voting rights is underway. State legislators have introduced more than 425 bills aimed at restricting voter laws in forty-nine states.[2] These bills are being introduced at an alarming rate—from February 2021 to March 2021, 108 restrictive voting bills were introduced—a forty-three percent increase from the previous month.[3] Of the 425 bills, thirty-three have been signed into law in nineteen states.[4] To counter, 843 bills have been introduced with provisions aimed at expanding equal access to voting in forty-seven states, and "25 states [have] enacted 62 laws with provisions that expand voting access."[5]

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1 Reynolds v. Sims, 377 U.S. 533, 555 (1964).

2 *Voting Laws Roundup: October 2021*, BRENNAN CENTER FOR JUSTICE (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/W6P3-DWSH].

3 *Voting Laws Roundup: March 2021*, BRENNAN CENTER FOR JUSTICE (Apr. 1, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021 [https://perma.cc/JUT3-5LVG].

4 *Voting Laws Roundup: October 2021*, *supra* note 2.

5 *Id.*

This flurry of activity signals one thing: the fight for fair and free access to voting is stronger than ever. Given this, the fight over redistricting will be just as fierce and just as fast, because, as former U.S. Attorney General Eric Holder recently said, " . . . the same Republican state legislatures who are pushing forward on hundreds of anti-voter bills at the state level have been very clear that they intend to manipulate the redistricting process to lock in their power."[6]

Part I of this Comment defines gerrymandering, its types, and strategies. Part II lays out the legal framework for racial gerrymandering litigation. Part III focuses on the 1990, 2010, and 2020 censuses, discussing the legislation resulting out of the prior censuses, and what can be expected out of the 2020 census results. Part IV discusses the impact of racial gerrymandering on minority and underrepresented communities including voter suppression, systematic racism, and a lack of representation in government. The Comment concludes with possible solutions to prevent racial gerrymandering in the future.

I. DEFINING GERRYMANDERING

Gerrymandering is "the practice of dividing or arranging a territorial unit into election districts in a way that gives one political party an unfair advantage in elections."[7] The term was first used in 1812 after districting in Massachusetts resulted in fantastically-shaped districts, with one district in particular shaped like a salamander.[8] The Boston Gazette printed an illustration of the district with wings, clawed feet, and a salamander-like head, and the paper called the process and illustration a Gerrymander after Governor Elbridge Gerry, who approved the apportionment bill and allowed it to become law.[9]

Since 1812, gerrymandering has evolved from partisan gerrymandering to racial gerrymandering and prison gerrymandering. These adaptations do more than just ensure one political party remains or regains political power, they systematically target and dilute minority voting power and representation.[10] While this Comment focusses on racial

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6 Dan Merica & Liz Stark, *Census Bureau Announces 331 Million People in US, Texas Will Add Two Congressional Seats*, CNN (Apr. 26, 2021, 6:53 PM), https://www.cnn.com/2021/04/26/politics/us-census-2020-results/index.html [https://perma.cc/9SVY-SM9S].

7 *Gerrymandering*, MERRIAM-WEBSTER.

8 ELMER CUMMINGS GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 16-18 (1907).

9 *Id.*

10 Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as A Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 269 (2018).

gerrymandering, a discussion of racial gerrymandering would be incomplete without a brief overview and understanding of partisan gerrymandering and prison gerrymandering.

a. Partisan Gerrymandering

Partisan gerrymandering, with its roots dating back to the 1800's, is the creation of county districts to favor or weaken "one political party, person, or constituency."[11] Partisan gerrymandering, while contentious, unjust, and never-ending, "presents political questions beyond the reach of the federal courts."[12] As recently as 2019, in *Rucho v. Common Cause*, the Court concluded that, "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."[13]

b. Prison Gerrymandering

Prison gerrymandering occurs when prisoners are counted in the census where they are imprisoned for the purpose of redistricting.[14] Since 1790, the Census Bureau's "usual residence rule" determines a person's residence by where they "live and sleep most of the time."[15] For prisoners, this means being counted as residents of the county where they are incarcerated, even though, for the most part, they have no right to vote and no ties to the county outside of their incarceration.[16]

Much like racial gerrymandering, prison gerrymandering has far-reaching, systemic impacts on communities of color. In 2018, African Americans made up thirty-three percent of the prison population, nearly three times their twelve percent share of the total U.S. adult population, and Hispanics made up twenty-three percent of the prison population despite being only sixteen percent of the total U.S adult population.[17] In contrast, whites make up sixty-three percent of the total U.S population yet only thirty percent of the prison population.[18] The racial disparities in

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11 *Gerrymandering*, BALLOTPEDIA.

12 Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019).

13 *Id.* at 2507.

14 Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1483 (2017).

15 *2020 Census Residence Criteria and Residence Stations*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html [https://perma.cc/TM4F-V2LV].

16 Skocpol, *supra* note 14, at 1484.

17 John Gramlich, *Black Imprisonment Rate In the U.S. has Fallen by a Third Since 2006*, PEW RESEARCH CTR. May 6, 2020, https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in- prison-2018-vs-2006/.

18 *Id.*

incarceration rates have led to "a massive transfer of population from urban areas to rural ones" leading to noticeable population growth of these rural counties for redistricting purposes.[19] The end result is that "'[t]he strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in prison, while the inner- city communities these prisoners come from suffer a proportionate loss of political power and representation.'"[20]

To date, prison gerrymandering litigation has not been successful,[21] but there has been a movement to ban prison gerrymandering on a local level, with "ten states pass[ing] legislation to end prison-based gerrymandering and count incarcerated people at home for redistricting purposes."[22]

c. Racial Gerrymandering

Racial gerrymandering occurs when district boundaries are drawn to dilute minority voting strength.[23] Three techniques are used to achieve dilution: "cracking," "packing," and "stacking."[24] "Cracking" occurs when minority voters are drawn into many districts so that no one minority will have the majority in any district.[25] "Packing" occurs when minority voters are drawn into as few districts as possible so that there are fewer districts where minority voters have the majority, diluting their overall influence.[26] "Stacking" occurs when a concentration of minority voters are drawn into districts with existing high concentrations of majority voters to ensure the minority voters do not become the majority.[27] Whatever the method, the goal—dilute the minority vote—and the impact—systemic racism and racial inequality—are the same.

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[19] Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 362 (2011).

[20] *Id.* at 360 (quoting LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, AND TRANSFORMING DEMOCRACY 189-90 (2002)).

[21] Tatiana S. Liang, *Seeing in Color: The Voting Rights Act As A Race-Conscious Solution to Prison-Based Gerrymandering*, 50 SETON HALL L. REV. 499, 507 (2019).

[22] Prison Gerrymandering Project, PRISON POLICY INITIATIVE, https://www.prisonersofthecensus.org/ [https://perma.cc/A4D8-4VN7].

[23] Nina Rose Gliozzo, *Judicial Embrace of Racial Gerrymandering Cases*, 70 HASTINGS L.J. 1331, 1335 (2019).

[24] AM. CIVIL LIBERTIES UNION ("ACLU"), EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT REDISTRICTING 6-7 (2001).

[25] *Id.*

[26] *Id.*

[27] *Id.*

II. LEGAL FRAMEWORK

Under the U.S. Constitution Article 1, Section 4, "the Time, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by Legislature,"[28] giving "State legislatures . . . the initial power to draw districts for federal elections."[29] But, the Framers granted Congress the ability to, "at any time by Law make or alter such Regulations."[30] Congressional oversight has resulted in four important Constitutional and legal limitations on the power to draw districts: (1) the Fifteenth Amendment; (2) the one person, one vote standard; (3) the Equal Protection Clause of the Fourteenth Amendment[31] (4) and the Voting Rights Act of 1965.[32]

a. The Fifteenth Amendment

The Fifteenth Amendment guarantees that "[the] right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[33] One of the Court's earliest racial gerrymandering cases was raised under the Fifteenth Amendment in 1960. In *Gomillion v. Lightfoot*, black citizens of Macon County, Alabama, sued the state, alleging an unconstitutional gerrymander that "den[ied] them the right to vote in defiance of the Fifteenth Amendment."[34] The district at issue, originally a square shape, was redrawn into "a strangely irregular twenty-eight sided figure" that in effect, "remove[d] from the city all save four or five of its 400 [black] voters while not removing a single white voter or resident."[35] The Court unanimously agreed with the plaintiffs, finding that the state violated the Fifteenth Amendment because the state was unable to provide any other reason for the redistricting other than "segregating white and colored voters by fencing [black] citizens out of town so as to deprive them of their pre-existing municipal vote."[36] Racial gerrymandering claims are no longer raised under the Fifteenth Amendment as a result of subsequent common and statutory law, but under one of the following legal frameworks—the one person, one vote standard, the Equal Protection Clause, or Section 2 of the Voting Rights Act ("VRA").

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28 U.S. CONST. art. 1, §4.
29 Veith v. Jubelirer, 541 U.S. 267, 275 (2004).
30 U.S. CONST. art. 1, §4.
31 Gliozzo, *supra* note 23, at 1338 (quoting Miller v. Johnson, 515 U.S. 900, 904 (1995)).
32 *Id.*
33 U.S. CONST. amend. XV.
34 364 U.S. 339, 340 (1960).
35 *Id.* at 341.
36 *Id.*

b. One Person, One Vote

The one person, one vote standard maintains that every person's voting power in a state be roughly the same regardless of where they live in the state, whether it be a rural or an urban district.[37] In a series of cases in the 1960's, the Supreme Court, after first finding that malapportionment claims are justiciable in *Baker v. Carr*,[38] established, in *Gray v. Sanders*, the one person, one vote standard as a way to measure voting power and equality.[39] The Court reasoned:

> How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.[40]

The Court concluded, "the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing – one person, one vote."[41] The one person, one vote standard was extended to legislative[42] and congressional[43] districts in two subsequent 1964 cases.

Since 1964, the Court has further defined the scope of the one person, one vote standard. When drawing Congressional districts, states must, "make a good-faith effort to achieve precise mathematical equality"

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37 *One-person, one-vote rule*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE.
38 369 U.S. 186 (1962).
39 372 U.S. 368, 381 (1963).
40 372 U.S. at 379-80.
41 *Id.* at 381.
42 Reynolds v. Sims, 377 U.S. 533, 587 (1964).
43 Wesberry v. Sanders, 376 U.S. 1, 6 (1964).

between districts, and any population variance, no matter how small, must be properly justified.[44] When drawing local districts, deviations within ten percent are allowed if necessary for the state to meet other valid objectives, including "preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness."[45] To determine whether there is district equalization, a state may use its total population rather than just its voter-eligible population.[46] In effect, if the Census shows dramatic shifts in a state's population, the state must redraw its districts to "as close to equal populations as practicable, to avoid diluting the voting power of residents in overpopulated districts or enhancing the voting power of residents in underpopulated districts."[47]

c. The Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment guarantees all persons in the United States "equal protection of the laws."[48] One of the Clause's "central mandate[s] is racial neutrality in governmental decision making," and any "laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition."[49] Governmental classifications based on race receive strict scrutiny review, meaning any race-based law must be narrowly tailored to achieve a compelling government interest.[50]

Following the 1990 census, two cases established the Equal Protection framework and strict scrutiny standard for racial gerrymandering cases —*Shaw v. Reno*[51] and *Miller v. Johnson*.[52] In *Shaw*, the Court found that racial gerrymandering cases are justiciable under the Equal Protection Clause, and subject to strict scrutiny review when a law is, on its face, racially discriminatory, or facially neutral but "so bizarre . . . that it is unexplainable on grounds other than race."[53] In *Miller*, the Court found that where race is a "predominant, overriding factor," a law will fail under the Equal Protection Clause unless it can satisfy strict scrutiny review.[54]

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44 Kirkpatrick v. Preisler, 394 U.S. 526, 530-531 (1969).

45 Brown v. Thomson, 462 U.S. 835, 842 (1983); Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016).

46 *Evenwel*, 136 S. Ct. at 1123.

47 Gliozzo, *supra* note 23, at 1338.

48 U.S. CONST. amend. XIV §1.

49 Miller v. Johnson, 515 U.S. 900, 904 (1995); *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

50 *Miller*, 515 U.S. at 904.

51 509 U.S. 630 (1993).

52 515 U.S. 900 (1995).

53 *Shaw*, 509 U.S. at 644 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429
U.S. 252, 266 (1977)).

54 *Miller*, 515 U.S. at 920.

Expanding on *Shaw*, the *Miller* Court held that a plaintiff "may rely on evidence other than bizarreness to establish race-based districting . . . either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose."[55]

Therefore, to succeed under a Fourteenth Amendment claim, a plaintiff must meet the standards set in either *Shaw* or *Miller*, and if successful, the burden then shifts to the state to survive strict scrutiny.

d. The Voting Rights Act of 1965

Lauded by the Department of Justice as "the single most effective piece of civil rights legislation ever passed by Congress,"[56] the Voting Rights Acts of 1965 ("VRA") prohibits discrimination in voting practices and procedures on the basis of race to ensure equal access to voting and the ability to cast meaningful votes, as guaranteed by the Fourteenth and Fifteenth Amendments to the U.S. Constitution.[57] The VRA was a landmark piece of critically important legislation because, as described by Supreme Court Justice Ginsburg:

> A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens.[58]

The effects of the VRA were almost immediate. In Selma, Alabama, just eight days after the VRA was signed into law, 381 new black voters were registered in a single day, resulting in more black registered voters than the county had ever had in the previous sixty-five years.[59] Three

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55 *Id.* at 913, 916.

56 *The Effect of the Voting Rights Act*, U.S. DEP'T. OF JUSTICE (Aug. 6, 2015), https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0 [https://perma.cc/3KWT-ETZU].

57 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); U.S. Const. amends. XIV, XV.

58 Shelby Cty. v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting) (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1996)).

59 James C. Cobb, *The Voting Rights Act at 50: How It Changed the World*, TIME (Aug. 6, 2015, 9:30 AM).

months later, that same county had 8,000 new black registered voters.[60] In Mississippi, black registered voters increased from seven percent to sixty-seven percent registered in five years.[61] In southern states with a history of racially discriminatory voting practices, black elected officials increased from seventy-two in 1965 to nearly 1,000 by 1975.[62] The success of the VRA led to strong bipartisan support and its reauthorization multiple times, including most recently in 2006 when it was reauthorized for twenty-five years.[63]

Three provisions in the VRA deal specifically with racial gerrymandering: section 2, which concerns racially discriminatory large-scale election schemes, voting practices, and procedures; section 4(b), which contains a coverage formula to identify states and counties with a history of racially discriminatory voting practices and procedures; and section 5, which requires that any jurisdictions covered under section 4(b) receive preclearance by the government before changing or enacting any new voting practices or procedures.[64] Sections 2, 4(b) and 5 lay the foundation for racial gerrymandering claims raised under the VRA.[65]

i. Section 2 of the Voting Rights Act

Section 2 of the VRA prohibits redistricting that is either intentionally racially discriminatory or has a racially discriminatory effect.[66] A racial gerrymander is in violation of section 2 if it lessens minority voters' "ability to elect their preferred candidate."[67] The Court, in *Thornburg v. Gingles*, articulated three criteria necessary to successfully establish a claim of racial gerrymandering under Section 2: (1) "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "the minority group . . . is politically cohesive;" and (3) the majority of white voters would vote as a bloc, enabling them to defeat the minority group's preferred candidate.[68] The first criteria has since been refined in the Court's 2009 decision, *Bartlett v. Strickland*, which held that the minority group alone, without crossover from white voters or other districts, must make up more than fifty percent

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60 *Id.*
61 *Id.*
62 *Id.*
63 *Voting Rights Act Reauthorization 2006*, NAACP LEGAL DEFENSE FUND (Feb. 16, 2018), https://www.naacpldf.org/case-issue/voting-rights-act-reauthorization-2006/ [https://perma.cc/V3ZD-2WF2].
64 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (Section 4(b) *invalidated by* Shelby Cty. v. Holder, 570 U.S. 529(2013)).
65 *Redistricting Information*, U.S. DEP'T. OF JUSTICE (Mar. 11, 2020).
66 *Id.*
67 Thornburg v. Gingles, 478 U.S. 30, 48 (1986).
68 *Id.* at 48-51.

of the voting- age population.[69] Only after a plaintiff has proven the three *Gingles/Bartlett* factors does the court determine, under a totality of the circumstances analysis, whether the redistricting violated section 2 of the VRA.[70]

ii. Section 5 and Section 4(b) of the Voting Rights Act

Section 5 of the VRA ensures that counties or states with a history of discriminatory voting practices are unable to make voting changes that further restrict the right to vote due to race.[71] Section 5 requires that certain covered jurisdictions, before redistricting, show that their redistricting plan has neither a racially discriminatory purpose nor effect.[72] In order to make any redistricting changes, these covered jurisdictions must get preclearance, either from the Attorney General or the U.S. District Court in D.C., by showing that "it's [redistricting] changes would not have the effect of making minority voters worse off or have an unconstitutional or retrogressive purpose."[73]

From the time the VRA was enacted in 1965, and until 2013, covered jurisdictions subject to the Section 5 preclearance requirement were those with a history of racially discriminatory redistricting practices, as defined by section 4(b) of the VRA, often referred to as the coverage formula.[74] The two-part coverage formula was designed to identify areas of the country where racial discrimination in voting was prevalent.[75] The first part of the test was satisfied if the state or county had a "test or device" designed to restrict a voter's ability to register and/or vote, including literacy tests or proof of good moral character.[76] Part two of the test was satisfied if more than fifty percent of eligible voters were either not registered to vote or had not voted in the prior presidential election.[77] When the bill was first enacted in 1965, seven states and four counties met the section 4(b) coverage formula, becoming covered jurisdictions subject to section 5 preclearance.[78] In 1975, the "test or device" element was

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69 Bartlett v. Strickland, 556 U.S. 1, 25-26 (2009).

70 *Id.* at 11-12.

71 *About Section 5 of the Voting Rights Act*, U.S. DEP'T. OF JUSTICE (Sept. 11, 2020).

72 *Redistricting Information*, *supra* note 65.

73 *Id.*

74 Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 Ala. L. Rev. 365, 368 (2015); Dep't. of Justice Civil Rights Division, *Section 4 of the Voting Rights Act*, U.S. DEP'T. OF JUSTICE (May. 5, 2020), https://www.justice.gov/crt/section-4-voting-rights-act [https://perma.cc/BQ5L-LLU9].

75 *Section 4 of the Voting Rights Act*, U.S. DEP'T. OF JUSTICE (May. 5, 2020), https://www.justice.gov/crt/section-4-voting-rights-act [https://perma.cc/E7Q9-R2PZ].

76 *Id.*

77 *Id.*

78 *Id.*

expanded to combat discrimination against language minority groups; states or counties that provided voting materials only in English would meet this element.[79] This resulted in three states becoming entirely covered and parts of six additional states becoming covered jurisdictions.[80]

In 2013, the Court, in a controversial 5-4 majority in *Shelby County v. Holder*, found the coverage formula unconstitutional.[81] As a result, jurisdictions are no longer subject to the section 4(b) coverage formula or section 5 preclearance.[82] At the time of the *Shelby County* decision, nine states, fifty-six counties, and two townships had engaged in racially discriminatory voting practices, meeting the section 4(b) formula coverage requirements and subject to section 5 preclearance.[83] While the Court issued no holding in regard to section 5 specifically, its decision regarding section 4(b) and its coverage formula effectively voided section 5 since no future claims could be raised under section 5 without a jurisdiction first meeting the coverage requirements in section 4(b).[84] By leaving section 5 void, but intact, the Court left the door open for Congress to draft and propose a new coverage formula that would reinstate section 5.[85] However, as of November 2021, Congress has yet to do so.[86]

Declaring section 4(b) unconstitutional and rendering section 5 void, led to swift and damaging consequences that are ongoing today. Less than a day after *Shelby County* was decided, "Texas announced that it would implement a strict voter ID law" that would disenfranchise around 600,000 registered voters, and "[t]wo other states, Mississippi and Alabama, also began to enforce photo ID laws that had previously been barred because of federal preclearance."[87] Texas, Mississippi, and Alabama were three of the nine states that were wholly covered by section 5 when *Shelby County* was decided.[88] North Carolina, two months after *Shelby County*, enacted HB589, which "instituted a strict photo ID requirement; curtailed early voting; eliminated same day registration; ended annual voter registration drives; and eliminated the authority of county board of elections to keep

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79 *Id.*

80 *Id.*

81 Shelby Cty. v. Holder, 570 U.S. 529, 556-57 (2013). *See infra* Part III.c.i. for a full discussion of the Court's reasoning in *Shelby*.

82 *Id.*

83 *Arguments for and Against Restoring Section 5 Preclearance under the Voting Rights Act*, BALLOTPEDIA.

84 *Shelby Cnty.*, 570 U.S. at 557.

85 *Id.*

86 *See generally* Elizabeth M. Yang, *Restoring the Voting Rights Act in the Twenty-First Century*, AMERICAN BAR ASSOCIATION (Mar. 4, 2021).

87 *The Effects of Shelby County v. Holder*, BRENNAN CENTER FOR JUSTICE (Aug. 6, 2018).

88 *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T. OF JUSTICE (Sept. 11, 2020).

polls open for an additional hour."[89] HB589 was eventually struck down three years later by the U.S. Court of Appeals for the Fourth Circuit, "finding that it targeted 'African Americans with almost surgical precision.'"[90] Without the protections and governmental oversight of sections 4(b) and 5, there is one less "institutional check on white power."[91] States and counties with histories of voter suppression and discrimination based on race are able to continue to redraw district lines in order to maintain "white racial hegemony" in government.[92]

III. GERRYMANDERING AND THE CENSUS

a. 1990 Census

Following the 1990 census, over 150 gerrymandering lawsuits, around a dozen of which concerned racial gerrymandering, were filed in forty-one states and the District of Colombia.[93] The Supreme Court granted certiorari in ten of the cases and their subsequent appeals.[94] The Court delivered a landmark opinion in *Shaw v.* Reno *(Shaw I)*,[95] making claims of racial gerrymandering justiciable under the Equal Protection Clause, and further clarifying the legal standard for racial gerrymandering claims under the Equal Protection Clause in *Miller v. Johnson*.[96]

i. Shaw v. Reno (*Shaw I*) and Shaw v. Hunt (*Shaw II*)

Following the 1990 census, North Carolina gained a twelfth seat in the U.S. House of Representatives, requiring the state to reapportion its districts and create a new, twelfth district in the state.[97] What resulted was

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89 *The Effects of Shelby County v. Holder*, *supra* note 87.

90 *Id.*; NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

91 Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, THE ATLANTIC (July 10, 2018), https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/ [https://perma.cc/UKP8-2KZ7].

92 *Id.*

93 *1990's Redistricting Case Summaries*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/redistricting/1990s-redistricting-case-summaries.aspx [https://perma.cc/JX5E- Q3NG].

94 *See* Shaw v. Reno, 509 U.S. 630 (1993); DeWitt v. Foley, 507 U.S. 901 (1993); Voinovich v. Quilter, 507 U.S. 146
(1993); U.S. v. Hays, 515 U.S. 737 (1995); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Hunt, 517 U.S. 899
(1996); Bush v. Vera, 517 U.S. 952 (1996); Meadows v. Moon, 521 U.S. 1113 (1997); Silver v. Diaz, 522 U.S. 801
(1997); Hunt v. Cromartie, 526 U.S. 541 (1999); Easley v. Cromartie, 532 U.S. 234 (2001).

95 509 U.S. 630 (1993).

96 515 U.S. 900 (1995).

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

an incredibly bizarre-shaped district "resembl[ing] the most egregious racial gerrymanders of the past," leading to a new constitutional doctrine and the justiciability of racial gerrymander claims under the Equal Protection Clause.[98]

In *Shaw v. Reno (Shaw I)*[99], five white residents filed suit, alleging an unconstitutional racial gerrymander under the Equal Protection Clause regarding the State's two majority-black districts—District 1 and the new District 12.[100] District 12 was "160 miles long and, for much of its length, no wider than I-85 corridor. It [wound] in snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobble[d] in enough black neighborhoods.'"[101] The district was so narrow that one official stated that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."[102]

The Court held that because "racial classifications of any sort pose the risk of lasting harm to our society . . . [and] reinforce the belief . . . [that] the individuals should be judged by the color of their skin," any race-based redistricting falls under the Equal Protection Clause's prohibition on racial discrimination and requires strict scrutiny review.[103] A claim is valid under the Equal Protection Clause where the redistricting is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts based on their race" without sufficient justification.[104]

Finding that a claim was properly raised under the Equal Protection Clause, the case was remanded back to the District Court to determine whether North Carolina's plan passed strict scrutiny.[105] The District Court determined that although the redistricting was based on race, the State's plan survived strict scrutiny.[106] The case made its way back to the Supreme Court in *Shaw v. Hunt (Shaw II)*,[107] where the Court reversed, finding that

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98 *Id.* at 641-42.

99 *Id.*

100 *Id.* at 635-37.

101 *Id.* at 635-36.

102 *Id.* (quoting Washington Post, Apr. 20, 1993, p.A4).

103 *Id.* at 642, 657.

104 *Id.* at 658. Prior to raising this claim of racial gerrymandering, a claim was raised under section 5 of the VRA. Forty percent of the districts in North Carolina fell under section 5 review for prior racially discriminatory voting practices, and the Attorney General did not object to the State's revised redistricting plan. Following the court's dismissal of political gerrymandering claims, this suit was brought.

105 *Id.* at 658.

106 Shaw v. Hunt, 517 U.S. 899, 901-02 (1996).

107 *Id.*

North Carolina's redistricting scheme did not pass strict scrutiny, violating the Equal Protection Clause.[108]

ii. Miller v. Johnson

The Court further clarified, and expanded the ways in which a plaintiff may raise an Equal Protection claim of racial gerrymander under *Shaw* two years later in *Miller v. Johnson*.[109] Similar to North Carolina, Georgia, following the 1990 census, was granted an additional congressional seat, and had to redraw its congressional districts to add the newly granted eleventh district.[110] Georgia, having engaged in prior discriminatory voting practices, was a covered jurisdiction under section 4(b) of the VRA, and subject to section 5 preclearance by the Attorney General.[111] After two redistricting preclearance failed attempts, Georgia's third redistricting plan, described as "[g]eographically . . . a monstrosity," was approved, and three black candidates were elected to Congress from Georgia's newly redrawn three majority-black districts.[112]

Five white voters from the eleventh district filed suit, claiming the district was a racial gerrymander in violation of the Equal Protection Clause as defined in *Shaw*.[113] On appeal, the appellants argued that classification based on race alone is not enough to satisfy *Shaw*, and that there must be a showing that the district's shape is "so bizarre that it is unexplainable other than on the basis of race."[114] The Court clarified that bizarreness is not a threshold requirement under *Shaw*, but rather evidence of a state's redistricting rational.[115] The Court concluded that a claim is sufficient under *Shaw* where race is a dominant and controlling factor in redistricting, evidenced by circumstantial evidence such as shape, compactness, contiguity, political affiliations, racial considerations, or more direct evidence of legislative purpose.[116]

b. 2010 Census

The litigation arising out of the 2010 census was arguably the most detrimental to protecting and enhancing voter's rights. The landmark case,

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108 *Id.*
109 Miller v. Johnson, 515 U.S. 900 (1995).
110 *Id*. at 906.
111 *See infra* Part II.c.ii.
112 *Miller*, 515 at 908-09 (The three majority-black districts were the second district, the fifth district, and the eleventh district).
113 *Id.* at 909
114 *Id.* at 901-911.
115 *Id.* at 912-913.
116 *Id.* at 916.

Shelby County,[117] highlighted a fundamental flaw in our country and in the highest court's reasoning: the belief that because the oversight provisions of the VRA were working, it somehow meant that racism and white supremacy were a thing of the past, no longer requiring the core protections of the VRA. As Justice Ginsberg so aptly stated, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory change is like throwing away your umbrella in a rainstorm because you are not getting wet."[118] The effects of *Shelby County* were felt quickly and made their way into other racial gerrymandering cases arising out of the 2010 census as discussed below.

i. Shelby County v. Holder

The Court dealt one of its biggest blows to voting rights and opened the floodgates to a new era of voter suppression laws in its 2013 decision, *Shelby County v. Holder*.[119] The plaintiff, Shelby County, Alabama, brought suit against the U.S. Attorney General, Eric Holder, seeking a declaratory judgment that section 4(b) and section 5, the coverage formula and preclearance requirements, respectively, of the VRA were unconstitutional.[120]

The 5-4 majority found section 4(b) unconstitutional.[121] The Court gave a few reasons for its decision. First, under the guise of equal state sovereignty, the Court concluded that states have a constitutional right to keep to themselves and "determine the conditions under which the right of suffrage may be exercised."[122] Second, the Court concluded that the coverage formula was initially meant to only last five years even though it had been repeatedly reauthorized with broad bipartisan support.[123] Finally, and most disturbingly, the Court concluded that the coverage formula was no longer necessary because the same racial disparities that were alive and well in 1965 no longer existed.[124] As Chief Justice Roberts explained:

> [A] statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it

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117 Shelby Cty. v. Holder, 570 U.S. 529 (2013).
118 *Id.* at 590 (Ginsburg, J., dissenting).
119 *Id.*
120 *Id.* at 540-42.
121 *Id*. at 556-57.
122 *Id*. at 543-45.
123 *Id*. at 553.
124 *Id*. at 550-51.

> targets." The coverage formula met that test in 1965, but no longer does so.
>
> Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.
>
> In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.[125]

The dissenting opinion, written by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan, describes in detail, with a litany of examples of blatant, egregious voter suppression,[126] why sections 4(b) and 5 are critical to ensuring equal access to voting as guaranteed by the Fourteenth and Fifteenth Amendments:

> All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. Congress found that the majority of DOJ objections included findings of discriminatory intent, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process."[127]
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> Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for

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125 *Id.* (emphasis added).
126 *See, e.g., id,* at 573-75, 583-85 (Ginsburg, J., dissenting).
127 *Id.* at 571.

> passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice."

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. In other words, even while subject to the restraining effect of § 5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement.[128]

The effects of *Shelby County* were immediate, devastating, and far-reaching.[129] By ruling section 4(b) unconstitutional, the Court rendered section 5 intact, but void. The cases immediately following *Shelby County* were impacted, and today, states and counties with known histories of voter suppression and discrimination are moving swiftly in response to the 2020 election and census results. As stated previously, without the protections and governmental oversight of sections 4(b) and 5, there is one less "institutional check on white power."[130] States and counties with histories of voter suppression and discrimination based on race can continue to redraw district lines to maintain "white racial hegemony" in government.[131]

ii. Bethune-Hill v. Virginia State Board of Election

In the late 1990's, Virginia's State Senate and House of Delegates shifted from Democratic to Republican control.[132] In the House of Delegates, a two-thirds majority (sixty-seven votes), is required to override a veto, and the Republican party in 2009 controlled only fifty-nine seats.[133]

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128 *Id.* at 581-82 (Ginsburg, J., dissent).
129 *See infra* Part II.c.i.
130 Vann R. Newkirk II, *supra* note 93
131 *Id.*
132 *Virginia House of Delegates*, BALLOTPEDIA.
133 *Id.*

Following the 2010 census, the Republican-controlled redistricting committee "packed" black voters into twelve of the 100 districts, giving each district a black voting-age population ("BVAP") over fifty-five percent.[134] The result—in 2011 Republicans picked up eight seats to meet the two-thirds, sixty-seven vote majority.[135]

Plaintiffs brought suit (*Bethune I*) against Virginia alleging racial gerrymandering violations under the VRA and Equal Protection Clause for all twelve districts.[136] Virginia was a covered jurisdiction under section 4(b) of the VRA, and thus subject to the preclearance requirements under section 5 of the VRA.[137] However, following the Court's decision in *Shelby County,*[138] the Court focused its opinion on the claims raised under the Equal Protection Clause.[139] The Court, holding that perceived threshold requirements for raising a claim were not required, again lowered the bar for claims under the Equal Protection Clause.[140]

At issue in *Bethune I* was the lower court's misinterpretation of the threshold requirements to raise a racial gerrymander claim under the Equal Protection Clause, and whether there needed to be "an actual conflict between the enacted plan and traditional redistricting principles."[141] The Court followed its line of reasoning in *Miller*,[142] holding that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory recondition in order for a challenger to establish a claim of racial gerrymandering," but rather can be used as "persuasive circumstantial evidence tending to show racial predomination."[143] The case was remanded back to the District Court.

The District Court struck down the redistricting plan, and the case was appealed back to the Supreme Court in *Virginia House of Delegates v. Bethune-Hill (Bethune II)*.[144] The Supreme Court dismissed the appeal for lack of jurisdiction, meaning that the "court-ordered maps that favored

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134 *Id.*

135 Bethune-Hill v. Virginia State Bd. of Elections, 137 S.Ct. 788 (2017).

136 *Id.* at 795; *see infra* Part II.c.ii.

137 *See infra* Part II.c.ii.

138 *Bethune-Hill*, 137 S.Ct. at 795.

139 *Id.* at 797.

140 *Id*. at 797-98.

141 Miller v. Johnson, 515 U.S. 900 (1995) (holding that a bizarre district shape is not required to establish a claim of racial gerrymandering).

142 *Bethune-Hill (Bethune I)*, 137 S.Ct. at 799.

143 139 S.Ct. 1945 (2019).

144 *Id.* at 1956; *see* Ariane de Vogue, et al., *Supreme Court Hands Democrats a Win in Virginia Racial Gerrymander Case*, CNN (June 17, 2019, 4:09 PM), https://www.cnn.com/2019/06/17/politics/supreme-court-racial-virginia- gerrymandering-case/index.html [https://perma.cc/K8W2-AX7D].

Democrats [would] continue to be used."[145] The Attorney General of Virginia, Mark Herring, stated, "The US Supreme Court has rejected Virginia Republicans' efforts to protect racially gerrymandered districts. Virginia's elections this fall will take place in fair, constitutional districts. It's a good day for democracy in Virginia."[146] Former U.S. Attorney General, Eric Holder – the Attorney General at the time of *Shelby County*, noted that *Bethune II* was:

> [A]n important victory for African Americans in Virginia who have been forced since 2011 to vote in racially gerrymandered districts that unfairly diluted their voting power . . . With a new, fair map in place, all Virginians will now – finally – have the opportunity this fall to elect a House of Delegates that actually represents the will of the people.[147]

In the next election, control of the House of Delegates went back to the Democrats with a ten seat lead, 55-45.[148]

iii. Cooper v. Harris

North Carolina's first and twelfth districts found themselves back in front of the Supreme Court following the 2010 census in *Cooper v. Harris*.[149] After the 1990 census, the two districts were designed to be majority black districts, which prompted white voters to file suit challenging the districts as unconstitutional racial gerrymanders in *Shaw I*[150] and *Shaw II*.[151] Following the 2000 census, the two districts were drawn with a BVAP of less than fifty percent.[152] Despite a BVAP of less than fifty percent, the candidates elected in the following five general elections were the African-American voters' preferred candidates.[153]

The 2010 census necessitated redistricting to comply with the one-person, one-vote constitutional standard, and the Republican-led

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145 *Id.*
146 De Vogue, *supra* note 132.
147 *Id*.
148 *Virginia House of Delegates*, *supra* note 132.
149 137 S.Ct. 1455 (2017) (involving the same districts, North Carolina Districts 1 and 12, that were at issue in Shaw v. Reno, 509 U.S. 630 (1993), Shaw v. Hunt, 517 U.S. 889 (1996), Hunt v. Cromartie, 526 U.S. 541 (1999), and Easley v. Cromartie, 532 U.S. 234 (2001)).
150 509 U.S. 630 (1993); *see infra* Part III.a.i.
151 517 U.S. 889 (1996).
152 *Harris*, 137 S.Ct. at 1465 (District 1 had a BVAP of 48%, and District 12 had a BVAP of 43%).
153 *Id.* at 1465-66.

redistricting committee "packed" Districts 1 and 12 with black voters by extending the boundaries of Districts 1 and 12 to catch more black voters and dispel white voters, raising the BVAP in those two districts above fifty percent and in effect, diluting the black vote in other districts.[154] District 1's BVAP increased four percent, from 48.6 percent to 52.7 percent.[155] District 12's BVAP increased nearly seven percent, from 43.8 percent to 50.7 percent—the result of gaining 35,000 voting-age African-Americans and losing 50,000 voting age white Americans.[156] Black voters brought suit against North Carolina, alleging unconstitutionalracial gerrymanders.[157] The district court agreed, and the Supreme Court affirmed, finding "that racial considerations predominated in designing both District 1 and District 12."[158]

Harris was decided only four years after *Shelby County*, yet the effects of the Court's decision to invalidate section 4(b), gutting the core of the VRA's protections, were obvious. At the time of the *Shelby County* decision, forty counties in North Carolina fell under the section 4(b) coverage formula, requiring section 5 preclearance.[159] District 1's "appendages"[160] stretched into twenty-three counties, nearly a quarter of the State's 100 counties,[161] twenty-two of which were subject to section 5 preclearance due to a history of racially discriminatory voting practices.[162] District 12's "snakelike body"[163] slithered into six counties, one of which, Guilford County, was subject to section 5 preclearance.[164] Without the protection and oversight that sections 4(b) and 5 of the VRA provide, states like North Carolina, with a history of discriminatory and suppressive voting practices, are able to repeatedly redraw counties after each census

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154 *Id.* at 1466.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 1481-82.

159 *Jurisdictions Previously Covered by Section 5*, *supra* note 88.

160 *Harris*, 137 S.Ct. at 1465.

161 *NC County Formation*, STATE LIBRARY OF NORTH CAROLINA, https://statelibrary.ncdcr.gov/research/genealogy- and-family-history/family-records/nc-county-formation [https://perma.cc/99V5-EP6Z].

162 *Harris*, 137 S.Ct. at 1482-85 (Appendix to the Opinion of the Court) (District 1 counties subject to section 5 preclearance were: Beaufort County, Bertie County, Chowan County, Craven County, Edgecombe County, Franklin County, Gates County, Granville County, Greene County, Halifax County, Hertford County, Lenoir County, Martin County, Nash County, Northampton County, Pasquotank County, Perquimans County, Pitt County, Vance County, Washington County, Wayne County, and Wilson County); *see also Jurisdictions Previously Covered by Section 5*, *supra* note 88.

163 *Harris*, 137 S.Ct. at 1466.

164 *Id.* at 1482-85 (Appendix to the Opinion of the Court); *see also Jurisdictions Previously Covered by Section 5*, *supra* note 88.

in order to "pack," "stack," or "crack" the minority vote, often of Black voters, where the only remedy is costly and timely litigation.

c. 2020 Census

i. 2020 Census Results

The initial 2020 census results were released on April 26, 2021.[165] Texas gained two seats in the U.S. House of Representatives, and five other states—Colorado, Florida, Montana, North Carolina, and Oregon—each gained one additional seat.[166] Seven states—California, Illinois, Michigan, New York, Ohio, Pennsylvania, and West Virginia—each lost one Congressional seat.[167]

The 2020 census has been fraught with controversy since before it began counting its results. There are serious doubts as to its accuracy given the COVID-19 pandemic and unprecedented wildfire and hurricanes in parts of the country, all of which halted in-person counting.[168] Additionally, and most impactfully, was the decision by the Trump administration to cut short the amount of time the Census Bureau had to follow up with unresponsive households, check for duplicate entries, and confirm the total count.[169] The effect of this cannot be understated. For example, if New York had counted just eighty-nine more people, and every other State's count had remained the same, New York would not have lost a congressional seat.[170] The Trump administration tried, and failed, to include a citizenship question on the 2020 census, which would have excluded all nondocumented persons from the census results.[171] This thinly-veiled attempt at "accuracy" harkened back to a time when black enslaved persons were counted as three-fifths of a free person, or as recently as the 1940 census when "the Census Bureau determined the

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165 *2020 Census Apportionment Results*, U.S. CENSUS BUREAU (Apr. 26, 2021), https://www.census.gov/data/tables/2020/dec/2020-apportionment-data.html [https://perma.cc/QH2S-TW48].

166 Merica & Stark, *supra* note 8.

167 *Id.*

168 *Id.*; *see also* Hansi Lo Wang, et al., *Here's How the 1st 2020 Census Results Changed the Electoral College, House Seats*, NPR (Apr. 26, 2021, 3:56 PM), https://www.npr.org/2021/04/26/983082132/census-to-release-1st-results-that-shift-electoral-college-house-seats [https://perma.cc/6D8E-8KUE].

169 *Id.*

170 Merica & Stark, *supra* note 6.

171 Hansi Lo Wang, *Immigration Hard-Liner Files Reveals 40-year Bid Behind Trump's Census Obsession*, NPR (Feb. 15, 2021, 5:01 AM), https://www.npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession [https://perma.cc/DC5Y-SFJX].

phrase 'excluding Indians not taxed' could no longer omit some American Indians from the apportionment counts."[172]

ii. Expected Impact

Any state that won or lost a congressional seat and experienced a population shift in areas of the state, undergoes redistricting, thus affecting both state and federal seats. Of the six states gaining at least one congressional seat following the 2020 census, half were either fully or partially covered by section 5 of the VRA.[173] Texas was fully covered, five Florida counties were covered, and nearly half (forty) of North Carolina's counties were covered.[174] The impact of the census on redistricting, and the potential for racial gerrymandering is not limited to the states with congressional seat changes. Each state has the opportunity to claw back or hold tight to power, suppressing and disenfranchising voters along the way. The next section will look specifically at expected impacts in the three previously covered states that gained at least one congressional seat—Texas, North Carolina, and Florida.

1. Texas

Texas, a once staunchly and reliably red state, has found itself turning purple in recent years.[177] Despite the fact that Texas: (1) found itself in front of the Supreme Court for racial gerrymandering as recently as 2018 in *Abbott v. Perez*;[175] (2) has some of the most restrictive voting laws in the county; and (3) "Republicans have worked hard to raise economic barriers to voting, passing strict voter-ID laws, refusing to allow voters to register online, making it extremely difficult for third parties to register voters, and gerrymandering the state so effectively is to lock Democrats out of power." The work of on-the-ground grassroots and local activist efforts to register and encourage left-leaning voters, however, is starting to pay off.[176] In 2018, a number of local offices shifted from Republican to Democrat, and most notably, in the Senate midterm elections, Democrat Robert "Beto" O'Rourke almost unseated the incumbent Republican senator, Ted Cruz, losing by just three points.[177]

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172 *Id.*

173 *See* Merica & Stark, *supra* note 6 (the six states gaining at least one seat are: Colorado, Florida, Montana, North Carolina, Oregon, and Texas); *see also Jurisdictions Previously Covered by Section 5*, *supra* note 88.

174 *Jurisdictions Previously Covered by Section 5*, *supra* note 88.

175 Abbott v. Perez, 138 S.Ct. 2305 (2018).

176 Serwer, *supra* note 177

177 *Id.*

This shift from red to purple, coupled with the invalidation of sections 4(b) and 5 of the VRA, has renewed Republican efforts to move the state back into firm Republican control. As of April 2021, Texas had introduced 49 bills, two of which attack, "with a laser focus" laws that have increased voter turnout in recent years.[178] The changes are far reaching, broad, and target nearly every part of the voting process. Changes include: encouraging registrars to purge voters by fining them personally, which would remove thousands of recently naturalized citizens; removing 24-hour voting access and setting a 12-hour per day limit on early voting; banning drive-by voting; prohibiting the proactive sending of mail-in ballots; reducing precincts in the five, urban, democratic-held counties; making it nearly impossible to kick out poll watchers placed at polling places for the purpose of intimidating black voters; and extending voter ID requirements.[179]

Given the push by Republicans to systematically target and disenfranchise minority voters and the state's history of racial gerrymandering, the fight will not stop at voting laws, but will find its way into redistricting, the first step in the battle for votes, power, and control.

2. North Carolina

North Carolina, a state that has seen party control shift back and forth throughout the years, is no stranger to racial gerrymandering. It has found itself in front of the Supreme Court on numerous occasions,[180] was a partially covered jurisdiction under the VRA,[181] and given the Republican party's narrowing control of the state,[182] it is unlikely that the addition of a congressional seat will not impact redistricting. Like Texas, North Carolina has already started attacking voting access for future elections by proposing legislation that would require absentee ballots to arrive by 5:00 PM on election day, rather than be postmarked by that date and time, to be counted.[183]

The addition of a fourteenth congressional seat for North Carolina will allow the Republican-led redistricting committee to try to broaden its

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178 *See* Zach Beauchamp, *The Next Big Voting Rights Fight is in Texas*, VOX (Apr. 19, 2021, 8:00 AM), https://www.vox.com/policy-and-politics/2021/4/19/22374521/texas-voting-laws-sb7-hb6 [https://perma.cc/8XV3- C7NK]; *see also Voting Laws Roundup: March 2021*, *supra* note 4.

179 *Id.*

180 *See infra* Part III.

181 *Jurisdictions Previously Covered by Section 5*, *supra* note 90.

182 *North Carolina U.S. Senate Results*, POLITICO (Jan. 6, 2021, 1:41 PM), https://www.politico.com/2020- election/results/north-carolina/senate/

183 Nate Rau, *Special Report: The GOP's National Effort to Make Voting More Difficult*, NC POLICY WATCH (Mar. 3, 2021).

party's hold in the state, after losing two seats to the Democrats in 2020.[184] Even though population growth in the state has been largely confined to dense, urban, Democrat-led cities, the Republican-controlled legislature is responsible for redistricting.[185] "The fact that North Carolina is such a purple state leads to no-holds-barred politics [because] [i]f you fail to act, you could be out of power for a decade."[186] And, because the Democratic Governor cannot veto the redistricting plans, the only threat Republicans face is the possibility of a lawsuit, which would take years to make its way through the legal system, and given the state's legal history—it is a fight the state is willing to take on.[187]

3. Florida

Florida is no stranger to racial gerrymandering, suppressive voting laws, or hotly contested state and federal elections. In early 2021, Florida introduced a state bill, SB 90, targeting the absentee voting system.[188] "The bill would ban ballot drop boxes, limit assistance with ballot delivery to immediate family members, and shorten the length of time that a person can stay on an absentee voter list."[189] Before the 2020 election, Florida's twenty-seven congressional seats were almost evenly split: Democrats had thirteen seats and Republicans had fourteen seats.[190] After the 2020 election, power shifted considerably to Republicans, giving them sixteen seats and leaving Democrats with eleven seats.[191] Now, with twenty-eight congressional seats to fill, the fight for the Republican-led redistricting committee[192] to further strengthen its hold on Congress will intensify.

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184 Will Doran & Lucille Sherman, *How N.C. Republicans May Handle Redistricting in 2021 is Causing Concern*, THE RALEIGH NEWS & OBSERVER (Jan 12, 2021).

185 *Id.*

186 *Id.*

187 *Id.*

188 *United States House of Representatives Elections in Florida, 2020*, BALLOTPEDIA, https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Florida,_2020 [https://perma.cc/2Z9F-YCVP].

189 *Id.*

190 *Id.*

191 *Id.*

192 Beatrice Zin, et al., *Which States are Gaining House Seats in 2022 – and Which are Losing Out*, POLITICO (Apr. 26, 2021, 12:27 PM).

IV. IMPACT

"Systemic racism is naming the process of white supremacy."[193] It is the "systems and structures that have procedures or processes in place to disadvantage African Americans."[194] It is "the complex interaction of culture, policy and institutions that holds in place the outcomes we see in our lives."[195]

Racial gerrymandering, aside from affecting who is or is not elected, has deep, profound, and long-lasting impacts. One of the more obvious results of racial gerrymandering—a lack of representation of minority candidates—enforces systemic racism and encourages voter suppression to ensure that the status quo is maintained and those currently in power remain in power. By packing, cracking, and stacking the minority vote, states can dilute the minority voting strength ensure that the people and policies that allow systemic racism and voter suppression to maintain such strong hold on the Unites States remain in power.[196]

Racial gerrymandering ensures that "the country's voting systems empower white voters at the expense of voters of color, resulting in an unequal system of governance in which those communities have little voice and representation, even in policies that directly impact them."[197] Racial gerrymandering is at the frontline of the battle against systemic racism and white supremacy. With racial gerrymandering in play, it doesn't matter how many people get out and vote. Their votes may be so diluted that even perfect turnout wouldn't affect the outcome. As Reverend Jesse L. Jackson wrote:

Voting is not enough when gerrymandering schemes in Michigan, Pennsylvania, Ohio, North Carolina, Georgia, Texas, Wisconsin and other closely divided states intentionally pack minority voters into as few districts as possible, maximizing the power of suburban whites and rural conservatives — diluting votes in Detroit, Philadelphia, Charlotte, Austin,

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193 N'dea Yancey-Bragg, *What is Systemic Racism? Here's What it Means and How You Can Help Dismantle It*, USA TODAY (Jun. 15, 2020, 8:53 AM), https://www.usatoday.com/story/news/nation/2020/06/15/systemic-racism- what-does-mean/5343549002/ [https://perma.cc/4BHK-4CNB].

194 *Id.*

195 *Id.*

196 Meaghan Winter, *Want to Dismantle Structural Racism in the US? Help Fight Gerrymandering*, THE GUARDIAN (Aug. 20, 2020).

197 ReNika Moore & Rakim Brooks, *To End Systemic Racism, Ensure Systematic Equality*, ACLU (Feb 9, 2021), https://www.aclu.org/news/racial-justice/ending-systemic-racism-requires-ensuring-systemic-equality/ [https://perma.cc/89G6-RFXE].

San Antonio, Atlanta, and Milwaukee — and locking in GOP control of state legislatures.[198]

V. SOLUTIONS

Solutions to racial gerrymandering are varied and because of the power awarded to the

states in *Shelby County*,[199] the likelihood of a nationwide solution is, at the moment, slim. The following section proposes four solutions to this growing problem.

a. Reinstate Sections 4(b) and 5 of the Voting Rights Act

The coverage formula and preclearance requirement of the VRA were the only federal preventative measures in place to try to stop racial gerrymandering before it could take effect. Removing this check on blatant racism, white supremacy, and government power grabs has opened the floodgates to not only racial gerrymandering, but systematic and deliberate voter suppression laws targeting minority votes.

Although Chief Justice Roberts claimed that the U.S. is "no longer divided among [racial] lines,"[200] it is, in fact, more divided than ever. Eighty percent of Americans believe there is discrimination against African-Americans, seventy-six percent believe there is discrimination against Hispanic-Americans, and seventy percent believe there is discrimination against Asian-Americans.[201] The number of recent hate crimes against Asian-Americans has prompted the Senate to pass, 94-1, legislation condemning Asian hate crimes and expediting the Department of Justice's review process.[202] And seemingly daily, there is a new report of an unarmed black man, woman, or child, being gunned down by police. Black Americans, even though they represent less than thirteen percent of

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198 Rev. Jesse L. Jackson & David Daley, *Voter Suppression is Still One of the Greatest Obstacles to a More Just America*, TIME (Jun. 12, 2020, 11:16 AM).

199 *See infra* Part III.c.i.

200 Shelby Cty. v. Holder, 570 U.S. 529, 550-51 (2013).

201 Andrew Daniller, *Majorities of Americans See at Least Some Discrimination Against Black, Hispanic and Asian People in the U.S.*, PEW RESEARCH CENTER (Mar. 18, 2021), https://www.pewresearch.org/fact- tank/2021/03/18/majorities-of-americans-see-at-least-some-discrimination-against-black-hispanic-and-asian-people- in-the-u-s/ [https://perma.cc/T6QF-54MJ].

202 Rebecca Shabad, *Senate Passes Hate Crime Bill Responding to Wave of Violence Against Asian Americans*, NBC NEWS (Apr. 22, 2021, 12:24 PM), https://www.nbcnews.com/politics/congress/senate-passes-hate-crime-bill- responding-wave-violence-against-asian-n1264949 [https://perma.cc/4QZH-597L].

the U.S. population, "are killed by police at more than twice the rate of white Americans."[203]

Reinstating sections 4(b) and 5 of the VRA will not solve these problems, nor will it completely get rid of the racial gerrymander, but it will ensure that there is a check in place to stop states from enacting future laws and redistricting with the purpose and effect of suppressing, diluting, or disenfranchising the minority vote. This in turn will ensure that those elected into state and federal legislatures pass policies that combat systemic racism, fight America's history of white supremacy, and benefit all people.

b. Independent Redistricting Commissions

An independent redistricting commission ("IRC") is, as the name suggests, an independent "body separate from the legislature that is responsible for drawing the districts used in congressional and state legislative elections."[204] When effectively run, an IRC follows strict guidelines, holds public hearings, and makes redistricting data and maps available to the public.[205] IRCs are not without their own controversy. Opponents argue that IRCs violate the U.S. Constitution by excluding legislatures from their own state's redistricting process.[206] However, in 2015, the Supreme Court, in a 5-4 ruling, held that IRCs do not violate the Elections Clause of the U.S. Constitution.[207]

Currently, eight states use IRCs for congressional redistricting, and fourteen states use IRCs for state legislative redistricting.[208] Depending on the state, IRCs can either be made up entirely by non-political members, or they may allow political members.[209] However, as one journalist noted:

Independent commissions are only as good as the criteria they are given to draw districts with, and the people who staff them. Most states fill

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[203] *Fatal Force*, THE WASHINGTON POST (April 27, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/WXQ8- MYR2].

[204] *Independent Redistricting Commissions*, CAMPAIGN LEGAL CENTER, https://campaignlegal.org/democracyu/accountability/independent-redistricting-commissions [https://perma.cc/8T4R-PCUE].

[205] *Id.*

[206] *Redistricting Commissions*, BALLOTPEDIA.

[207] Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S.Ct. 2652 (2015).

[208] *Redistricting Commissions*, *supra* note 207 (the eight states that use IRCs for congressional redistricting are: Arizona, California, Colorado, Hawaii, Idaho, Michigan, New Jersey, and Washington. The fourteen states that use IRCs for state legislative redistricting are: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Michigan, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington).

[209] *Id.*

these commissions with partisans and political appointees. They end up being incumbent protection rackets, or in the case of Arizona, pushing an already secretive process deeper into the shadows.[210]

IRCs are a relatively new phenomena and given that many of the states that currently use IRCs are not those with a history of racial gerrymandering, it is unclear how effective they truly are.

c. Proportional Representation

Proportional representation is "an electoral system in which the number of seats held by a political group or party in a legislative body is determined by the number of popular votes received."[211] Proportional representation means that if ten percent of the voters in a state voted for party A, then ten percent of the representative seats would go to party A. In effect, proportional representation gets rid of the redistricting process since candidates would no longer be elected by representatives in a single district, but by the state as a whole.[212] Proponents of proportional representation argue that it "minimize[s] wasted votes and ensure[s] that the parties are representedin proportion to the votes they receive."[213]

Proportional representation is considered a radical solution that could upend the two-party system that the United States is known for. Opponents argue that proportional representation would only create more political, racial, religious, and economic divides and essentially create a stalemate in politics where no one party would ever have enough control to get any legislation passed.[214] While unlikely that a proportional representative system could work effectively in the United States, the idea that those elected to office proportionally represent the voters is an attractive one.

d. Algorithms

The final possible solution is a complete move towards technology to let computer-run algorithms draw state and federal district maps. The use of algorithms in redistricting has been around for decades, yet for a long time it was expensive, available only to those with advanced skill and knowledge, and like many possible solutions to racial gerrymandering,

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210 Daniel Oberhaus, *Algorithms Supercharged Gerrymandering. We Should Use Them to Fix It*, VICE (Oct. 3, 2017, 12:11 PM).

211 *Proportional Representation*, MIRIAM-WEBSTER.

212 Matthew Yglesias, *The Real Fix for Gerrymandering is Proportional Representation*, VOX (Nov. 6, 2017, 12:38PM).

213 Douglas J. Amy, *How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems*, FAIRVOTE.

214 Douglas J Amy, *Common Criticisms of PR and Responses to Them*, FAIRVOTE, https://www.fairvote.org/common_criticisms_of_pr_and_responses_to_them [https://perma.cc/HUA4-WWSK].

faced intense scrutiny and backlash.[215] With advances and the public's increased trust and comfortability with technology, algorithms and computer programs have been available for political parties to use when redistricting, but rather than provide a neutral solution, political parties have been able to manipulate the algorithms to suit their intended use and end goals.[216]

In 2016, an algorithm was created with the help of a supercomputer to generate all potential districting options in effort to root out racial and political bias.[217] This type of analysis is a step in the right direction, but as one expert points out, "[a]lgorithms are a terrific tool and there could definitely be a role for them. But like independent commissions, they are only as good as the criteria that govern them. The meaningful structural reform that we need involves the way we think about voting and districting itself."[218] Recent studies have shown that data is rarely, if ever, truly race neutral because someone has to build the algorithm, input the data, and run the program.[219] Considering that many jurisdictions already use algorithms,[220] and there is now acknowledgment of the racism that underlies the data systems,[221] there is an opportunity for significant improvement and adoption of algorithms to provide the solutions needed to redistrict in a non-partisan and non- race based manner.

CONCLUSION

Racial gerrymandering is as steeped in American politics and culture as our belief that we are a nation built on democratic, free, and fair elections. States and the federal government have made significant progress in addressing the problems surrounding voter suppression and racial gerrymandering. But, with a history of white supremacy and racist ideology, systemic and insidious attacks persist on the U.S. Constitution's protections and guarantees that each and every citizen has a right to vote and to have that vote counted equally. None of the solutions to the problem are perfect, but each provide the opportunity for states individually, and the federal government more generally, to rethink, redraw, and repair the

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215 Oberhaus, *supra* note 211

216 *Id.*

217 *Id.*

218 *Id.*

219 Deborah Raji, *How Our Data Encodes Systematic Racism*, MIT TECHNOLOGY REVIEW (Dec. 10, 2020), https://www.technologyreview.com/2020/12/10/1013617/racism-data-science-artificial-intelligence-ai-opinion/ [https://perma.cc/RK74-UDRC].

220 Oberhaus, *supra* note 211.

221 Raji, *supra* note 219

damage that hundreds of years of discriminatory voting practices and racial gerrymandering has caused.

If 2020 has taught Americans anything, it is that our elections are not immune to false narratives, mass hysteria, and blatant, unfounded attacks. Fighting against racial gerrymandering will help to ensure that everyone has an equal opportunity to vote, that every vote is counted equally, and that each person is equally represented by those elected to public office.