DEREGULATED REDISTRICTING

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From the civil rights movement through the Obama administration, each successive redistricting cycle involved ever-greater regulation of the mapmaking process. But in the past decade, the Supreme Court has rewritten the ground rules for redistricting. For the first time in fifty years, Southern States will redistrict free of the preclearance process that long protected minorities from having their political power diminished. Political parties can now openly engage in egregious partisan gerrymandering.

The Court has withdrawn from the political thicket on every front except race. In so doing, the Court has engaged in decision-making that is both activist and restrained, but the end result is a deregulated redistricting process. This tactical retreat, however, has left more questions that it has answered. In light of these decisions, the question whether redistricting plans are discriminating on the basis of race or partisanship is more important than ever. The long-standing practice of redistricting based on total population is up for grabs, as conservative activists push to use citizen voting age population as the relevant denominator for equalizing districts. Doubts about the constitutionality of Section 2 of the Voting Rights Act have grown.

This Article canvasses the redistricting decisions of the 2010s and forecasts how they will impact the 2020 redistricting cycle. Instead of treating each decision in isolation, this Article synthesizes the relevant cases, predicts how they will interact, and answers unresolved questions. In short, it puts the pieces of the redistricting puzzle together.

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INTRODUCTION

The 2010s brought monumental change to voting rights. Most prominently, the Supreme Court invalidated the Voting Rights Act's (VRA) coverage formula in *Shelby County v. Holder*[1] and ended the long-running campaign to recognize

[1] 570 U.S. 529, 557 (2013). Although this Article was published in spring 2022, the last substantive revisions were made in late 2021. In the intervening months, several redistricting suits have been filed and decided. For instance, the Supreme Court issued a per curiam opinion invalidating Wisconsin's General

partisan gerrymandering claims in *Rucho v. Common Cause*.[2] And in a series of decisions beginning with *Alabama Legislative Black Caucus v. Alabama*,[3] the Court revived *Shaw*'s cause of action against racial gerrymandering—a doctrine developed in the 1990s to dismantle majority-minority districts[4]—and transformed it into a tool in support of minority voting rights.[5] In less than a decade, the Court rewrote the redistricting rulebook.

The Court also upheld the conventional practice of equalizing state legislative districts based on total population in *Evenwel v. Abbott*.[6] The Court, however, did not decide whether that practice is constitutionally mandated,[7] leaving the door open to a jurisdiction using voting age population (VAP) or citizen voting age population (CVAP) as the denominator in the redistricting process. Because Hispanics are disproportionately younger and have lower rates of citizenship,[8] this practice would have dramatic consequences for Hispanic politi-

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Assembly plan on *Shaw* grounds. *See* Wis. State Legislature v. Wis. Elections Comm'n, __ S. Ct. __, 2022 WL 851720 (Mar. 23, 2022). The Court also stayed the issuance of a preliminary injunction and granted cert in a Section 2 case involving Alabama's congressional districts, a case that will be heard in the October 2022 Term. *See* Merrill v. Milligan, 142 S. Ct. 879 (2022). A federal district court in Florida ordered the State to be "bailed-in" to the Voting Rights Act's preclearance regime for certain election changes for a period of ten years, though that ruling will be appealed. *See* League of Women Voters of Florida v. Lee, 2022 WL 969538 (N.D. Fla. Mar. 31, 2022); *infra* subpart II.A.3. Finally, while there is always the prospect of litigation, Missouri will use total population for its state legislature's redistricting denominator. *See infra* subpart IV.C. Given the constraints imposed by the publishing process and that we are still very early in the post-2020 litigation cycle, this Article focuses on the 2010 redistricting cases.

2 139 S. Ct. 2484, 2506–07 (2019). The Court had dodged the question in seven prior cases, including twice in the immediately preceding Term. *See, e.g.*, Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (per curiam) (affirming denial of preliminary injunction seeking to enjoin partisan gerrymander); Gill v. Whitford, 138 S. Ct. 1916, 1933–34 (2018) (resolving partisan gerrymandering claim on standing grounds); *see also infra* notes 272–302.

3 575 U.S. 254, 258 (2015).

4 *See* Shaw v. Reno, 509 U.S. 630, 642 (1993).

5 *See* Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 366 (2015) [hereinafter Hasen, *Racial Gerrymandering*] ("There was great irony in the use of the racial gerrymandering cause of action by minority voters who had rejected it in the 1990s, in its acceptance by liberal justices, and in the defense of race-based redistricting by Alabama Republicans and some conservative Supreme Court justices.").

6 578 U.S. 54, 58 (2016).

7 *See id.* at 75 ("[W]e need not and do not resolve whether . . . . States may draw districts to equalize voter-eligible population rather than total population.").

8 *See infra* note 461 (providing CVAP data); *see also* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (plurality opinion) (noting that "Latinos make up a large share of the unauthorized alien population").

cal power and representation.[9] Indeed, the Trump administration's failed effort to add a citizenship question to the 2020 Census was an attempt to generate data for CVAP-based redistricting.[10]

Despite their headline-grabbing nature, the full consequences of these decisions have not yet been felt. The redistricting process occurs against the backdrop of current doctrine,[11] and thus the maps in place at the end of the 2010 cycle largely did not incorporate decisions like *Shelby County*, *Rucho*, and *Alabama Legislative Black Caucus*.[12] The Court's decisions of the 2010s will come home to roost in the 2020 redistricting cycle.

Under normal circumstances, the 2020 redistricting cycle would have begun in early 2021. The Secretary of Commerce would have delivered census data for congressional apportionment by December 31, 2020, and shortly thereafter the President would have transmitted that information to Congress.[13] By April, the Census Bureau would have provided more detailed data used for drawing congressional and state-legislative districts. The redistricting cycle would have then begun in earnest, with most States completing the line-drawing process by the end of summer 2021.[14]

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9 *See* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 775 (2011) [hereinafter Persily, *Census*] (explaining that citizen-based redistricting would "destabilize districting plans in every area containing a large noncitizen population").

10 *See id.* at 774 (noting the "lack of national citizenship data on a par with census population data"); Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1394–95 (2019) (discussing the Trump administration's motives in adding a citizenship question); *see also* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575–76 (2019) (finding that the Secretary of Commerce's stated reason for adding a citizenship question to the census was pretextual).

11 *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1922 (2018) [hereinafter Karlan, *Nonapportionment*] (explaining that, in each redistricting cycle, "line-drawers will once again be crafting their maps under a set of legal constraints that has changed since the previous round").

12 A handful of maps were challenged mid-decade based on *Alabama Legislative Black Caucus*. *See, e.g.*, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1949–50 (2019) (discussing procedural history of challenges to twelve Virginia state house districts); Cooper v. Harris, 137 S. Ct. 1455, 1466, 1482 (2017) (invalidating two North Carolina congressional districts).

13 *See* SARAH J. ECKMAN, CONG. RSCH. SERV., R45951, APPORTIONMENT AND REDISTRICTING PROCESS FOR THE U.S. HOUSE OF REPRESENTATIVES 1, 6 (2019), https://fas.org/sgp/crs/misc/R45951.pdf [https://perma.cc/EU6H-9XP6] (outlining the original 2020 redistricting timeline).

14 YURIJ RUDENSKY, MICHAEL LI & ANNIE LO, BRENNAN CTR. FOR JUST., HOW CHANGES TO THE 2020 CENSUS TIMELINE WILL IMPACT REDISTRICTING, 1 (2020), https:/

But these are not normal times. The double whammy of the coronavirus pandemic and the Trump administration's machinations have upended the timeline for the census and, in turn, the upcoming redistricting cycle.

At the beginning of the pandemic, the Commerce Department asked Congress for permission to delay the release of census data until July 31, 2021, pushing back the process by several months.[15] Congress failed to act on that request, and the Supreme Court entered an order that cut short the census notwithstanding several past statements by government officials that it was impossible to complete in time.[16]

Separately, in July 2020, President Trump issued a memorandum purporting to exclude undocumented immigrants for purposes of apportioning seats amongst the States in the U.S. House of Representatives and allocating votes in the Electoral College.[17] Three district courts enjoined that policy on statutory and constitutional grounds.[18] But in December 2020, the Supreme Court ruled that the plaintiffs in those suits lacked standing and that the issue was not yet ripe.[19]

The Trump administration ultimately failed to meet the statutory deadline to release apportionment figures given the pandemic and difficulties associated with developing reliable data without a citizenship question.[20] With the clock running

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/www.brennancenter.org/sites/default/files/2020-05/2020_04_RedistrictingMemo.pdf [https://perma.cc/R8ER-AC4Q].

15 *See id.* Unsurprisingly, States have pushed back their own deadlines for completing the redistricting process. *See, e.g.*, Legislature v. Padilla, 469 P.3d 405, 413 (Cal. 2020) (postponing deadline for new redistricting maps from August 15, 2021 to December 15, 2021).

16 *See* Ross v. Nat'l Urban League, 141 S. Ct. 18, 18 (2020) (granting stay); *id.* at 19 (Sotomayor, J., dissenting) (discussing past government statements).

17 Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

18 *See* New York v. Trump, 485 F. Supp. 3d 422, 477 (S.D.N.Y. 2020) (statutory grounds), *vacated and remanded*, 141 S. Ct. 530 (2020); City of San Jose v. Trump, 497 F. Supp. 3d 680, 686 (N.D. Cal. 2020) (statutory and constitutional grounds), *vacated and remanded*, 141 S. Ct. 1231 (2020); Useche v. Trump, No. 8:20-cv-02225-PX-PAH-ELH, 2020 WL 6545886, at *1 (D. Md. Nov. 6, 2020) (statutory grounds), *vacated and remanded*, 141 S. Ct. 1231 (2020).

19 *See* Trump v. New York, 141 S. Ct. 530, 535 (2020). An earlier—and aborted—lawsuit brought by Alabama unsuccessfully sought to exclude undocumented immigrants from the reapportionment process. *See* Alabama v. U.S. Dep't of Commerce, 396 F. Supp. 3d 1044, 1046 (N.D. Ala. 2019) (concluding that Alabama has Article III standing to bring this suit); Order of Dismissal, Alabama v. U.S. Dep't of Commerce, No. 2:18-cv-00772-RDP (N.D. Ala. May 3, 2021), ECF No. 214 (granting Alabama's joint motion for dismissal without prejudice).

20 *See* Hansi Lo Wang, *Census Missed Year-End Deadline for Delivering Numbers for House Seats*, NPR (Dec. 30, 2020), https://www.npr.org/2020/12/30/951566925/census-to-miss-year-end-deadline-for-delivering-numbers-for-

down, the Trump administration sought to release a report with data on non-citizens, but that effort also failed.[21] Shortly after entering office, President Biden rescinded the Trump memorandum, meaning that congressional seats and Electoral College votes would be divvied up based on total population and that detailed citizenship data would not be released as part of the census.[22]

Notwithstanding this development, the Census Bureau was unable to play catch-up. It published apportionment data in late April 2021, revealing that States in the Rustbelt lost seats in Congress at the expense of States in the South and West.[23] It then released population data that is used for redistricting in mid-August 2021.[24] Thus, the 2020 redistricting cycle started several months behind schedule.

States must have maps in place for the 2022 midterm elections.[25] Regardless of the exact timing, litigation against the new maps will inevitably begin shortly thereafter—indeed, it has already begun. And because challenges to statewide redistricting plans are heard by three-judge district courts with a

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house-seats [https://perma.cc/DN9L-ZBRF] (citing issues such as delays and last-minute changes).

21 *See* Hansi Lo Wang, *Census Bureau Stops Work on Trump's Request for Unauthorized Immigrant Count*, NPR (Jan. 13, 2021), https://www.npr.org/2021/01/13/956352495/census-bureau-stops-work-on-trumps-request-for-unauthorized-immigrant-count [https://perma.cc/77UN-X8QB] ("Justice Department attorneys confirmed that none of the data Trump would need to alter the congressional apportionment counts would be released before Trump's term ends.").

22 Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, 86 Fed. Reg. 7015, 7016 (Jan. 20, 2021).

23 *See* Hansi Lo Wang, Connie Hanzhang Jin & Zach Levitt, *Here's How the 1st 2020 Census Results Changed Electoral College, House Seats*, NPR https://www.npr.org/2021/04/26/983082132/census-to-release-1st-results-that-shift-electoral-college-house-seats [https://perma.cc/SDD4-Y6QD] (last updated Apr. 26, 2021). Specifically, California, Illinois, Michigan, New York, Ohio, Pennsylvania, and West Virginia each lost a seat in Congress. By contrast, Colorado, Florida, Montana, North Carolina, and Oregon each gained a seat, and Texas received two seats. *Id.*

24 *See* Grace Panetta, *Post-2020 Redistricting Cycle Kicks Off with Release of Long-Delayed Census Data*, BUS. INSIDER (Aug. 12, 2021), https://www.businessinsider.com/redistricting-cycle-kicks-off-with-long-awaited-census-data-2021-8 [https://perma.cc/32J6-2QRU].

25 Some States and localities hold off-cycle elections, raising unique problems given the delay in census data. In New Jersey, for example, voters passed a constitutional amendment that kept the 2010 cycle maps in place for the 2021 state-legislative election and mandating the use of new maps in 2023. *See* Matt Friedman, *Redistricting Delay Could Create Some Awkward Situations for Incumbents in 2023*, POLITICO (Sept. 20, 2021), https://www.politico.com/states/new-jersey/story/2021/09/20/redistricting-delay-could-create-some-awkward-situations-for-incumbents-in-2023-1391195 [https://perma.cc/27UN-LDFS].

direct appeal—not a cert petition—to the Supreme Court,[26] there will be another wave of landmark redistricting decisions in the mid-2020s.[27]

This Article provides a comprehensive guide to the 2020 redistricting process for mapmakers, lawyers, judges, and scholars.[28] Instead of treating each redistricting decision in isolation, this Article synthesizes the relevant cases and predicts how they will interact. It also seeks to answer unresolved questions that remain on the horizon. Although other scholars have analyzed the major redistricting decisions of the 2010s, they have done so incrementally, predicting how one line of cases influences another.[29] This Article is the first to bring together the entirety of the 2010s redistricting caselaw in one place. It puts the pieces of the redistricting puzzle together.

Although the Court's decisions may appear haphazard, a few themes emerge. Most significantly, the Court is retreating from the "political thicket"[30] on every front but race *qua* race. The Court greenlighted partisan gerrymandering and kneecapped federal oversight of the States formerly covered by the VRA. Put simply, the Court has substantially deregulated the next redistricting cycle and left it to the political process to sort out those disputes. The significant exception to this non-interventionist trend is the Court's revival and transformation of racial gerrymandering claims.

Furthermore, the Court has repeatedly relied on federalism and separation of powers principles to justify its tactical retreat. The Court has not invoked the far more expansive doc-

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26 *See* Shapiro v. McManus, 577 U.S. 39, 40–41 (2015).

27 *See* Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 433–34 (2019) (noting that direct appeal cases often take years to reach the Supreme Court).

28 This Article focuses on federal redistricting law and does not purport to provide a comprehensive analysis of each State's redistricting statutes. Indeed, several States have passed their own Voting Rights Acts to protect against racial vote dilution. *See infra* note 413.

29 *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1593 (2018) [hereinafter Charles & Fuentes-Rohwer, *Race and Representation*] (discussing *Shaw*'s second wave and its implications for Section 2); Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2151–52 (2015) [hereinafter Elmendorf & Spencer, *Administering*] (discussing *Shelby County*'s impact on Section 2); Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 167–69 (2019) [hereinafter Stephanopoulos, *Anti-*Carolene] (focusing on *Rucho*'s normative impact and spending only a few paragraphs on its implications for the VRA).

30 Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

trines of equal protection and Congress's enforcement authority. Take, for example, the Court's invalidation of the VRA's coverage formula. Although the Court's decision has had profound real-world consequences for minority voters,[31] *Shelby County* sounds in federalism rather than an interpretation of the Reconstruction Amendments.[32] The equal sovereignty principle does not speak to Congress's authority to pass *nationwide* enforcement authority nor does it say anything about how States *themselves* may combat racial discrimination in voting. And even though the decision was activist in its invalidation of a landmark statute,[33] the end-result was less federal oversight and fewer opportunities for judicial entanglement in politics.[34]

In canvassing the redistricting decisions of the 2010s, this Article also predicts how those decisions will impact the next cycle. Will Southern States—now freed from Section 5's prohibition on retrogression—dismantle majority-minority districts? How will Section 2 litigation proceed in a world without preclearance? Will the VRA's bail-in provision usher in a new era of targeted preclearance that protects against racial discrimination in the redistricting process? Will *Shaw* be used by Democrats to dismantle crossover districts and spread out minority voters, sacrificing minority descriptive representation in favor of substantive representation? How will courts decide whether a redistricting plan discriminates based on race as

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31 *See* THURGOOD MARSHALL INST., NAACP LEGAL DEF. & EDUC. FUND, INC., DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-*Shelby County, Alabama v. Holder* 4–34 (2018), https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local-Threats-to-Voting-Post-Shelby-County-Alabama-v.-Holder.pdf [https://perma.cc/C267-9R58] (cataloging racially discriminatory election laws passed after *Shelby County*).

32 *See* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1168 (2016); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1575–76 (2020) [hereinafter Crum, *Superfluous*]; Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1259 (2016).

33 Throughout this Article, I use the terms "judicial activism" and "judicial restraint" as antonyms and in purely descriptive terms. A decision is activist if the Court invalidates a statute or policy. By contrast, a decision is restrained if it maintains the status quo. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 41–44 (2005). I am not necessarily using the term as an "insult" the way that a conservative commentator may criticize a liberal Justice or vice versa. *Id.* at 42.

34 *Cf.* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 240 (2018) [hereinafter Charles & Fuentes-Rohwer, *Judicial Intervention*] (arguing, in the context of partisan gerrymandering, that "the Court ought to occasionally make strategic interventions in the domain of law and politics . . . where doing so is reasonably likely to avoid future problems that would lead to greater interventions").

opposed to partisanship? Can mapmakers redistrict using CVAP as the relevant denominator in contravention of the long-standing practice of using total population? Is Section 2 of the VRA imperiled by *Shelby County*'s equal sovereignty principle or *Rucho*'s disavowal of proportional representation or *Brnovich*'s high standard for bringing a vote-denial claim?

Admittedly, there is risk to predicting how the Court's past decisions will dictate the future.[35] And here, I must acknowledge the two elephants in the room. First, our democracy is facing its gravest crisis since the Jim Crow era. The political battles of the past few decades have been characterized by norm-busting and constitutional hardball,[36] and it is quite possible that the 2020s will see longstanding redistricting norms—such as the presumption against mid-decade redistricting[37]—break down entirely. Even more troubling, Trump's repeated and flagrant lies about widespread voter fraud have poisoned our politics. Disturbingly high numbers of Republicans believe that the election was stolen.[38] The consequences of these lies were on full display on January 6, 2021, when the U.S. Capitol was sacked and our Nation's longstanding tradition of peaceful transitions of power was shattered.[39]

It is beyond the scope of this Article to diagnose the underlying causes of these pathologies and prescribe the strong medicine needed to heal our democracy. Public confidence that votes are counted accurately and losing candidates' graceful concessions are bedrock principles of a democracy. Rebuilding these norms will take time and effort.

Second, the Court that handed down many of the decisions of the 2010 redistricting cycle no longer exists. Justice Ken-

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35 *See* Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998) [hereinafter Karlan, *Fire*] (observing that redistricting decisions interact "in unforeseen and sometimes perverse ways").

36 Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018).

37 *See* Justin Levitt & Michael P. McDonald, *Taking the "Re" Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1248 (2007) (discussing a handful of mid-decade redistrictings in the 2000s).

38 *See, e.g.*, *Most Republicans Still Believe 2020 Election was Stolen from Trump—Poll*, GUARDIAN (May 24, 2021) (reporting that an "opinion poll f[ound] that 53% of Republicans believe Trump is the 'true president'"), https://www.theguardian.com/us-news/2021/may/24/republicans-2020-election-poll-trump-biden [https://perma.cc/78K7-EWP6].

39 A popular American myth is that our elections have been conducted peacefully for centuries, but elections were marred by widespread violence during Reconstruction. *See, e.g.*, RON CHERNOW, GRANT 623 (2017) (discussing the 1868 election); EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 112 (2016) (discussing the 1872 election).

nedy's replacement by Justice Kavanaugh likely sealed the fate of partisan gerrymandering claims given Kennedy's repeated refusal to definitively foreclose such claims.[40] And Justice Ginsburg's untimely death and replacement by Justice Barrett weeks before the 2020 presidential election will reverberate for decades to come. At the beginning of the 2010s, it really was Kennedy's Court, with Roberts playing a steadying hand in high-profile cases where the Court's legitimacy was at stake. By the end of 2020, the Chief was no longer the median Justice on a 6-3 conservative Court.

This Article engages with the Court that we have on the bench and the laws that exist on the books.[41] In focusing on

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40 *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in judgment) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.").

41 Several scholars have condemned the Roberts Court's rejection of democratic principles and the pro-Republican biases of its decisions. *See* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 50 (2020) [hereinafter Hasen, *Pro-Partisanship*] (arguing that "[t]he United States Supreme Court's conservative majority has taken the Court's election jurisprudence on a pro-partisanship turn that gives political actors freer range to pass laws and enact policies that can help entrench politicians—particularly Republicans"); Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12 (2012) [hereinafter Karlan, *Disdain*] (discussing the Roberts Court's "institutional . . . and substantive distrust" of Congress); Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 231 (2020) (predicting that "a Republican Court will not protect democracy from Republican efforts to undermine it or check the authoritarian tendencies of a Republican President in any substantial way"); Stephanopoulos, *Anti-*Carolene, *supra* note 29, at 113–14 (claiming that the Roberts Court has rejected political process theory).

Throughout this Article, I presume that Congress fails to pass any significant voting rights reforms. Although the John R. Lewis Voting Rights Advancement Act, the Freedom to Vote Act, and the For the People Act are high on the Democratic agenda, it is totally unclear at this time whether these bills will survive a Republican filibuster in any watered-down form or whether Democrats are willing to nuke the filibuster to pass them. *See* Grace Panetta, *Lisa Murkowski was the Sole GOP Senator to Vote to Advance a Major Democratic Voting Rights Bill*, BUS. INSIDER (Nov. 3, 2021), https://www.businessinsider.com/lisa-murkowski-is-sole-gop-senator-to-vote-to-advance-voting-rights-bill-2021-11 [https://perma.cc/G5AN-BPNQ] (discussing attempts to amend the VRA); Travis Crum, *Revising Sections 2 and 5 in the John Lewis Voting Rights Advancement Act of 2021*, ELECTION L. BLOG (Aug. 17, 2021), https://electionlawblog.org/?p=124147 [https://perma.cc/X9Y2-YC45] (summarizing proposed revisions to the VRA); Juana Summers & Deidre Walsh, *Democrats' Biggest Push for Voting Rights Fails with No Republicans on Board*, NPR (Oct. 20, 2021), https://www.npr.org/2021/10/20/1040238982/senate-democrats-are-pushing-a-voting-rights-bill-republicans-have-vowed-to-bloc [https://perma.cc/6D3V-Q5X9] (discussing Democrats' failure to push forward on the Freedom to Vote Act); Adam Liptak, *Constitutional Challenges Loom Over Proposed Voting Bill*, N.Y. TIMES (May 5, 2021), https://www.nytimes.com/2021/05/05/us/voting-rights-bill-legal.html [https://

the past decade's precedent, this Article seeks to understand the Court's decisions on their own terms, respond to them with a lawyerly insight for distinctions, and draw connections between them. And in showing what these precedents command and where they lead, this Article demonstrates that any future deviations can be attributed, in part, to the Court's right-ward shift.

This Article is organized as follows. Part I outlines the redistricting ground rules that have remained stable over the past decade. Part II analyzes several major Supreme Court decisions—and a handful of prominent lower court decisions—from the 2010s that implicate the redistricting process. Part III canvasses the normative takeaways from the past decade of redistricting litigation and how the Court has exited the political thicket on nearly every front but race. Part IV identifies and answers numerous doctrinal questions that have arisen in the wake of these decisions.[42]

I
REDISTRICTING GROUND RULES

This Part provides an overview of the redistricting ground rules that have not undergone significant change since 2010. It begins by explaining the role that the decennial census and traditional redistricting principles play in the redistricting cycle and then differentiates the concepts of reapportionment and redistricting. Next, it addresses the one-person, one-vote case law and introduces the concept of a redistricting denominator. It concludes by canvassing racial vote-dilution doctrine under the Constitution and Section 2 of the VRA.

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perma.cc/2HXA-6VZF] (last updated May 6, 2021) (describing the For the People Act).

42 Given this Article's wide target audience, readers may find different parts more useful. Generalists and those unfamiliar with election law will probably find the first half helpful in providing background material and Part IV for sketching out the post-2020 landscape. By contrast, scholars and election law experts will likely find the back half more compelling, though the first half provides useful context.

One final point about style. Although the norms on this issue are still evolving, I have opted to capitalize both Black and White when used as racial identifiers. *See* Kwame Anthony Appiah, *The Case for Capitalizing the* B *in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/ [https://perma.cc/8LWY-G5N8] ("Black and white are both historically created racial identities—and whatever rule applies to one should apply to the other.").

A. The Decennial Redistricting Process

Like salmon swimming upstream to spawn and die, the redistricting cycle follows a predictable pattern.[43] To accomplish congressional reapportionment, the Constitution mandates a decennial census.[44] And given the requirements of the one-person, one-vote doctrine,[45] the census also sets in motion the redistricting process for congressional and state legislative seats.[46] Armed with detailed census data,[47] mapmakers draw lines in accordance with constitutional and statutory requirements,[48] as well as traditional redistricting principles like compactness, contiguity, avoiding splits to counties or precincts, respect for communities of interests, preserving the cores of old districts, and protecting incumbents.[49]

Here, it is important to distinguish between reapportionment and redistricting, even though the terms are often used

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43 *Cf.* Persily, *Census*, *supra* note 9, at 756 (noting the "rhythmic and ritualistic dance to the courtroom every ten years").

44 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2561 (2019) (discussing U.S. CONST. art. I, § 2, cl. 3 and *id.* amend. XIV, § 2).

45 *See infra* subpart I.B.

46 *See* Wisconsin v. City of New York, 517 U.S. 1, 5–6 (1996). Although States frequently engaged in mid-decade redistricting throughout the late nineteenth century, redistricting is now heavily concentrated in the year following the decennial census. *See* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 62 fig. 4.1 (2013) (depicting this pattern); Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1392 (2020) ("Between 1862 and 1896, at least one state in the country redistricted its congressional lines during *every election year but one* in that span. The state of Ohio by itself redistricted seven times between 1878 and 1892." (footnote omitted)); *see also* Levitt & McDonald, *supra* note 37, at 1258–66 (detailing state-level restrictions on mid-decade redistricting); League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 418–19 (2006) (opinion of Kennedy, J.) ("The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own.").

47 Although the Constitution dictates only an "actual Enumeration," U.S. CONST. art. I, § 2, cl. 3, the census has collected additional demographic information since the Founding. *See Dep't of Commerce*, 139 S. Ct. at 2567. Of particular importance to this Article, a citizenship question has appeared on the census for the majority of the twenty-three decennial censuses. *See id.* at 2561 ("Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth."). The Trump administration sought to revive the citizenship question, but that attempt was abandoned after the Court determined that the Secretary of Commerce's purported explanation was pretextual. *See id.* at 2576; Michael Wines, *2020 Census Won't Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html [https://perma.cc/UQ9C-QY6A].

48 *See* Karlan, *Fire*, *supra* note 35, at 733–34 (listing substantive constraints).

49 *See* Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 259 (2015); Miller v. Johnson, 515 U.S. 900, 916 (1995).

interchangeably.[50] At the federal level, reapportionment refers to the distribution of seats *among* the States in the U.S. House of Representatives.[51] Reapportionment concerns whether, for example, Alabama is entitled to six or seven representatives following the 2020 Census.[52] The reapportionment process is governed by the Constitution and federal law.

The Constitution requires that "each State shall have at Least one Representative"[53] and that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State."[54] The Constitution does not set the size of the

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50 *See, e.g.*, James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 884 & n.1 (2006) (describing why these terms are used interchangeably).

51 Karlan, *Nonapportionment*, *supra* note 11, at 1922–23.

52 *See* Alabama v. U.S. Dep't of Commerce, 396 F. Supp. 3d 1044, 1050 (N.D. Ala. 2019). Some of the most heated redistricting battles occur when States gain or lose congressional seats following the reapportionment. PETER SKERRY, COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS 137 (2000).

53 U.S. CONST. art. I, § 2.

54 *Id.* amend. XIV, § 2. At the Founding, the Constitution infamously counted slaves as three-fifths of a person for purposes of reapportionment. *See id.* art. I, § 2 (basing apportionment on "the whole Number of free Persons" and "three fifths of all other persons"). As Professor Pam Karlan has explained: the Three-Fifths Clause "deserve[s] condemnation for denying the full humanity of Black people," but it "was designed to *reduce* the political power of the slave states relative to the free states, by discounting their slave population." Karlan, *Nonapportionment*, *supra* note 11, at 1926.

After the abolition of slavery, the Three-Fifths Clause was no longer operative and freedpersons were counted as full persons. The perverse consequence was that "the conquered South's representation in the House would *increase* by at least fifteen seats even if, as expected, southern states would deny the franchise to African-Americans." Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 405 (2014) [hereinafter Tolson, *Structure*] (emphasis added). The Reconstruction Congress quickly recognized that this development threatened the Union's victory in the Civil War. *See* Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 153 (2015).

In response, the Reconstruction Framers drafted Section Two of the Fourteenth Amendment, which clearly repudiated the Three-Fifths Clause by apportioning "Representatives . . . among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2. Known as the Apportionment Clause, Section Two also strips States of their seats in the House if they "den[y]" or "abridge[ ]" the "right to vote" of their adult "male" "citizens." *Id.* Notwithstanding several attempts, Section Two's penalty has never been enforced. *See* Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 795–97 (2018) (discussing litigation brought by the NAACP to enforce Section Two in the 1960s); Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 324–27 (2015) (noting non-enforcement and discussing congressional attempt to enforce Section Two in 1871); Franita Tolson, *What is Abridgment?: A*

House in stone,[55] and the number of representatives has increased in fits and starts over our nation's history.[56] To govern the reapportionment process, Congress adopted "the method of equal proportions," a formula developed by the National Academy of Sciences to allocate seats by total population while ensuring that each State has at least one representative.[57] Congressional reapportionment also impacts the allocation of electors in the Electoral College[58] and the distribution of federal funds.[59]

Following the one-person, one-vote revolution in the 1960s, there is no state-level equivalent of the congressional apportionment process.[60] That is because state legislative bodies must be equally apportioned without regard to factors like political subdivisions.[61] In other words, a State cannot mandate that its capital city receives a fixed ratio of seats in the state legislature in perpetuity[62] nor can it allocate at least one legislative seat to every county regardless of its population.[63]

By contrast, the *redistricting* process involves drawing the boundaries of districts of a representative body, such as a state

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Critique of Two Section Twos, 67 ALA. L. REV. 433, 474–77 (2015) (discussing congressional attempt to invoke Section Two in 1901).

55 The Constitution, however, does establish a maximum. *See* U.S. CONST. art. I, § 2 ("The Number of Representatives shall not exceed one for every thirty Thousand."). Given our nation's current population of 330 million people, the House could potentially have upwards of 11,000 members.

56 For a helpful graphical depiction of this trend, see Editorial Board, *America Needs a Bigger House*, N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html [https://perma.cc/STS5-KCGB]. The current number of 435 seats has been in place since 1929. *See* Magliocca, *supra* note 54, at 778–79 (discussing the Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018))). The House was briefly enlarged to 437 members following the admission of Alaska and Hawaii as States, but it was reduced to 435 seats after the 1960 reapportionment. *See id.* at 779 n.21.

57 *See* Magliocca, *supra* note 54, at 781–82.

58 *See* U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 3.

59 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2561 (2019).

60 *See* Gardner, *supra* note 50, at 884 n.1 (explaining that post-*Reynolds* the "process of apportioning legislators among state legislative districts necessarily occurs simultaneously with redrawing district boundaries to comply with the one person, one vote standard"); *infra* subpart I.B (discussing the one-person, one-vote revolution).

61 *See* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 734–35 (1964) (holding that a voter-approved plan to apportion Colorado's lower house based on population and its state senate based on population and other factors such as political subdivisions violated the Equal Protection Clause).

62 *See id.* at 728–29, 739.

63 *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

legislature, a city council, or congressional districts within a State.[64] Redistricting can take many forms: districts may be single-member, multi-member, or at-large.[65] Congressional districts have been single member since the 1840s,[66] but States and localities frequently use multi-member or at-large districts.[67] Put simply, when the average person on the street complains about gerrymandering, they are criticizing the redistricting process.[68]

Unlike in every other advanced industrialized democracy, the redistricting process in the United States is largely controlled by politicians.[69] The Constitution dictates that congressional districts be drawn by state "Legislature[s]."[70] The Court has interpreted that requirement to include a State's general lawmaking processes, thereby encompassing referenda, gubernatorial vetoes, and independent redistricting commissions.[71]

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64 Karlan, *Nonapportionment*, *supra* note 11, at 1922–23. Although redistricting normally involves a legislature, some jurisdictions have adopted judicial districts. *See* Chisom v. Roemer, 501 U.S. 380, 384 (1991).

65 *See* Growe v. Emison, 507 U.S. 25, 40–41 (1993) (single-member districts); Thornburg v. Gingles, 478 U.S. 30, 34 (1986) (multi-member districts); Rogers v. Lodge, 458 U.S. 613, 613 (1982) (at-large districts).

66 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019) (discussing the Apportionment Act of 1842, 5 Stat. 491). There have been brief periods when this requirement was not in force and when Congress accepted representatives from at-large districts. *See* Levitt & McDonald, *supra* note 37, at 1251 & n.18.

67 *See* Holder v. Hall, 512 U.S. 874, 897–98 (1994) (Thomas, J., concurring in the judgment) (canvassing the history of multi-member and at-large districts); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 48 (1995) (discussing how litigation under the VRA dismantled many of these districts).

68 *Cf.* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005) ("[V]oters should choose their representatives, not the other way around.").

69 *See, e.g.*, Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 78 (2004) ("The United States is the only country that places the power to draw election districts . . . in the hands of self-interested political actors.").

70 U.S. CONST. art. I, § 4, cl. 1.

71 *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793 (2015) (commissions); Smiley v. Holm, 285 U.S. 355, 365–66 (1932) (gubernatorial vetoes); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (referenda). Notwithstanding the Court's recent endorsement of independent redistricting commissions, several Justices have embraced the so-called independent state legislature doctrine, which calls that precedent into question. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 29–30 (2020) (Gorsuch, J., concurring); *id.* at 34 n.1 (Kavanaugh, J., concurring); *see also* Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring) (criticizing the Florida Supreme Court for not deferring to "the legislature's role under Article II in choosing the manner of appointing electors"); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 9 (2020) ("Because [the Elections Clause and the Presidential Electors Clause] confer power over federal elections specifically upon state legislatures,

The federal Constitution is silent as to who draws state legislative districts,[72] and state constitutions have filled the gap.[73] Notwithstanding the promise of independent redistricting commissions, the majority of state legislatures control the process for both congressional and state-legislative redistricting.[74]

This Article primarily focuses on redistricting—not reapportionment. Accordingly, this Article does not dwell on any disputes that might arise concerning the reapportionment process or a State's claim to an additional House seat.[75] Moreover, as this Article's primary goals are to describe, critique, and predict the substantive legal requirements for redistricting, it does not address the analytically distinct question of *who* should draw the lines as a constitutional or normative matter.[76]

B. One-Person, One-Vote

The reapportionment revolution fundamentally transformed American democracy, particularly at the state and local levels. For much of our nation's history, political subdivisions like towns or counties were the unit of representation in many state legislatures.[77] But after decades of rapid urbanization

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state constitutions cannot restrict the scope of that authority."). Moreover, independent redistricting commissions have been challenged on other constitutional grounds, such as the First Amendment. *See, e.g.*, Daunt v. Benson, 956 F.3d 396, 401 (6th Cir. 2020) (denying preliminary injunction in First Amendment challenge to a commission).

72 *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 847 (Roberts, C.J., dissenting) (noting that there is "no dispute that Arizona may continue to use its Commission to draw lines for state legislative elections").

73 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 873–74 (2021).

74 *See id.* at 913–14. States also exert substantial control over the electoral and redistricting processes at the local level. *See* Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1386–87 (2020).

75 The reapportionment process is no stranger to litigation. *See* Trump v. New York, 141 S. Ct. 530, 535 (2020); Utah v. Evans, 536 U.S. 452, 457 (2002); Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 320 (1999); Wisconsin v. City of New York, 517 U.S. 1, 4 (1996); Franklin v. Massachusetts, 505 U.S. 788, 790 (1992); U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 444–45 (1992).

76 *Compare, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 594 (2002) (advancing a "proposal to remove the power to redistrict from insider political operatives to promote a more competitive political process"), *with* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (disagreeing "fundamentally . . . with almost every aspect of Issacharoff's argument").

77 *See* Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1406–08 (2012).

and state legislatures' refusal to redraw districts, a system of rotten boroughs had developed.[78] Although it initially resisted entering the "political thicket,"[79] the Court ultimately determined that malapportionment claims are justiciable.[80] And in a pair of landmark 1964 decisions, the Court held that Article I and the Equal Protection Clause require that congressional and state legislative districts, respectively, must be apportioned on a population basis.[81]

Following these rulings, States must "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[82] To be clear, "mathematical perfection" is not required, and "the Constitution permits deviation when it is justified by 'legitimate considerations incident to the effectuation of a rational state policy.'"[83] In other words, a State can deviate from population equality to achieve traditional redistricting principles.[84] So how is this standard implemented in practice?

As the Court recently explained, "the one-person, one-vote rule is relatively easy to administer as a matter of math."[85] "Maximum population deviation is the sum of the percentage deviations from perfect population equality of the most- and least-populated districts. . . . For example, if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%."[86]

Mapmakers have greater leeway in crafting state legislative districts than congressional districts. State legislative districts

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78 *See* Guy Uriel Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 488–92 (2015) (cataloguing this history); Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 IND. L.J. 1033, 1041 (2018) ("Throughout the country, urban voters, who were disproportionately members of minority groups, had their votes numerically diluted.").

79 Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

80 *See* Baker v. Carr, 369 U.S. 186, 237 (1962).

81 *See* Reynolds v. Sims, 377 U.S. 533, 583 (1964) (state legislative districts); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (congressional districts).

82 *Reynolds*, 377 U.S. at 577.

83 Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1306 (2016) (quoting *Reynolds*, 377 U.S. at 579).

84 Conversely, the one-person, one-vote rule is "part of the redistricting background, taken as a given" for purposes of determining whether race "predominate[s]" in the redistricting process. Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 272 (2015).

85 Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019).

86 Evenwel v. Abbott, 578 U.S. 54, 60 n.2 (2016).

can vary upwards of 10%.[87] Plans that fall within the 10% window are presumptively valid whereas those outside it are assumed invalid.[88] By contrast, congressional districts must be drawn "with populations as close to perfect equality as possible."[89] Indeed, the Court once struck down a congressional redistricting plan for having a population deviation of 0.6984%.[90] In a *per curiam* opinion from 2012, however, the Court loosened the equi–population requirement for congressional districts, though the salience of this decision remains unclear.[91]

The one-person, one-vote revolution was neither a total revolution nor a panacea. Single-member districts survive even today, despite their tendency to promote local interests and their rarity in other advanced democracies.[92] And "the equipopulation requirement does little to curb partisan gerrymandering."[93] This revolution also begged the foundational question: equalization of whom?

Redistricting needs a *denominator*—that is, the relevant population that constitutes the demos for purposes of representation. This Article coins the phrase "redistricting denominator" to describe this concept. This term avoids conflating redistricting with reapportionment, particularly after the one-person, one-vote revolution.[94] In a constitutional system that

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87 *See id.* at 60. To provide a simple but unrealistic example: if a state's ideal district had 100 people, the districts could range in size from 95 to 105 people or from 93 to 103 people.

88 *See id.* Presumptively valid does not necessarily mean valid. In *Cox v. Larios*, 542 U.S. 947 (2004), the Court summarily affirmed a three-judge district court's decision invalidating a state-legislative plan on one-person, one-vote grounds. As Justice Stevens explained in a concurring opinion, the district court hinged its decision on the systematic under-population of Republican-leaning districts and the intentional pairing of Republican incumbents against one another. *See id.* at 947–48 (Stevens, J., concurring).

89 *Evenwel*, 578 U.S. at 60.

90 *See* Karcher v. Daggett, 462 U.S. 725, 727–28 (1983). This deviation amounted to 3,724 people from an ideal of 526,059. *Id.* at 728.

91 *See* Tennant v. Jefferson Cnty. Comm'n, 567 U.S. 758, 761 (2012) (permitting a population deviation of 0.79% to avoid splitting a county); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 227–28 (5th ed. 2016) (observing that *Tennant* opens the door to taking political subdivisions into account when justifying deviations from the equipopulation principle in congressional redistricting).

92 *See* Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1900–01 (2012).

93 Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 558 (2011).

94 *See* Gardner, *supra* note 50, at 884 & n.1 (discussing how these terms are often conflated). The term redistricting denominator also avoids the term "popu-

allocates political power based on geography,[95] *who* counts for purposes of the one-person, one-vote principle matters a great deal to how territorial districts are drawn.[96]

For congressional districts, the Court addressed the redistricting-denominator question in *Wesberry v. Sanders*.[97] Drawing on debates from the Founding era,[98] the Court concluded that total population was the redistricting denominator because Article I, Section Two dictates that "Representatives shall be chosen 'by the People of the several States.'"[99] Curi-

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lation base," which is sometimes used for the same concept, but its inclusion of the word "population" risks confusion as well.

95 *See, e.g.*, David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247, 1252–53 (2017); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1602–04 (1993).

96 The Census takes a snapshot of where people reside on April 1 of a year ending in zero. *See* 13 U.S.C. § 141(a). It does not consider transients as residing in a jurisdiction. As such, a thru-hiker on the Appalachian Trail is not a Virginian merely because they happened to be in Virginia on the legally relevant day. *See* Franklin v. Massachusetts, 505 U.S. 788, 804–06 (1992) (discussing the concept of "usual residence" in relation to the census).

97 376 U.S. 1, 7–8 (1964).

98 *See id.* at 13 ("[W]hen the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants."); *id.* at 18 (stating that there "is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives").

99 *Id.* at 17 (quoting U.S. CONST. art. I, § 2); *see also id.* at 18 (praising "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 232 (2003) ("[T]he Court seems to have settled on total population as the relevant statistic for congressional redistricting . . . .").

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court entertained a malapportionment challenge to Missouri's congressional districts that had been redrawn after *Wesberry*. *See id.* at 528. Acting in 1967, the Missouri state legislature did not rely merely on the 1960 Census data but also on "inaccurate data," *id.* at 532, to account for the presence of "large numbers of military personnel . . . and [college] students." *Id.* at 534. Missouri, however, made changes only to one congressional district and made "no attempt . . . to account for the presence of universities in other districts." *Id.* at 535. The Court invalidated the plan on one-person, one-vote grounds because "[f]indings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." *Id.* In so doing, the Court declined to resolve Missouri's argument that it was relying on eligible voter population and "assum[ed] without deciding that apportionment may be based on eligible voter population rather than total population." *Id.* at 534.

On the one hand, *Kirkpatrick* could be viewed as signaling that *Wesberry* did not definitely resolve the redistricting-denominator question for congressional districts. On the other hand, *Kirkpatrick* does not go as far as *Burns*, an earlier case that *upheld* a plan using registered voters as the redistricting denominator for state-legislative districts. *See infra* notes 103–108. Moreover, the *Evenwel* Court viewed *Wesberry* as adopting a total-population redistricting denominator

ously, the *Wesberry* Court spent little time analyzing Section Two of the Fourteenth Amendment,[100] which abrogated the Three-Fifth Clause and ensured that freedpersons would be treated as full persons for purposes of congressional reapportionment.[101]

By contrast, the Warren Court was more circumspect regarding the redistricting-denominator question for state legislative districts. The leading precedents toggle between using voters and persons.[102] Indeed, the most on-point precedent suggests that total population is *not* the constitutionally mandated redistricting denominator for state-legislative seats.

In *Burns v. Richardson*,[103] the Court rejected an equal protection challenge to Hawaii's use of registered voters as the redistricting denominator for the state legislature, with the caveat that its decision was based on a record showing that the "distribution of legislators [was] *not substantially different* from that which would have resulted from the use" of a total population baseline.[104] Two aspects of Justice Brennan's majority opinion in *Burns* are worth highlighting.

First, the Court's conception of "substantially different"[105] was quite broad. Given the large presence of non-resident servicemembers and their families living on or around Pearl Harbor, the island of Oahu would have been entitled to forty out of fifty-one representatives on a total population basis but only thirty-seven representatives on a registered voter basis.[106] As-

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for congressional districts. *See* Evenwel v. Abbott, 578 U.S. 54, 68 (2016) ("[A]s the Court recognized in *Wesberry*, this theory underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within States.").

100 *See Wesberry*, 376 U.S. at 10–18 (summarizing the Founders' debates).

101 *See supra* note 54. Although the Court recently ducked the question, Section Two of the Fourteenth Amendment makes clear that total population is the *apportionment* denominator for Congress, provided that each State gets at least one representative. *See* U.S. CONST. amend. XIV, § 2 (apportioning representatives by "counting the whole number of persons in each State, excluding Indians not taxed"); *see also* Trump v. New York, 141 S. Ct. 530, 542 (2020) (Breyer, J., dissenting) (arguing that undocumented immigrants must be counted for congressional apportionment pursuant to 2 U.S.C. § 2a(a)).

102 *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("Legislators represent *people*, not trees or acres. Legislators are elected by *voters*, not farms or cities or economic interests." (emphases added)).

103 384 U.S. 73 (1966).

104 *Id.* at 93 (emphasis added). The Court left the door open to future challenges and identified options that could make Hawaii's redistricting denominator a more reliable metric. *See id.* at 97–98.

105 *Id.* at 93.

106 *See id.* at 90. Looking at the statistics another way: two districts near Pearl Harbor "contained 28% of Oahu's population but only 17% of its registered voters"

suming that *Burns* establishes an outer limit, plaintiffs challenging a new redistricting denominator would have to show substantial reallocation of seats.

Second, the *Burns* Court acknowledged that *Reynolds* "carefully left open the question what population was being referred to" and "ma[de] no distinction between the acceptability of a [CVAP or VAP] test and a test based on total population."[107] The Court further remarked that nothing in its precedents required "States . . . to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base."[108]

Through the end of the 2010 cycle, "all States use[d] total-population numbers from the census when designing congressional and state-legislative districts."[109] A handful of States make minor adjustments to exclude certain populations—such as non-resident members of the military or prisoners who were domiciled out-of-state prior to their incarceration.[110] But as the Court's recent decision in *Evenwel* demonstrates,[111] there is a growing movement to adopt CVAP or VAP as the redistricting denominator.[112] Indeed, supporters of a Missouri constitutional amendment passed in November 2020 insist that it mandates CVAP-based redistricting,[113] though it remains to be

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whereas two neighboring districts "with only 21% of island population contained 29% of island registered voters." *Id.* at 91 n.18.

107 *Id.* at 91–92; *see also id.* at 91 ("We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.").

108 *Id.* at 92. During the 1980 redistricting cycle, a three-judge district court struck down Hawaii's use of registered voters as the redistricting denominator. *See* Travis v. King, 552 F. Supp. 554, 556 (D. Haw. 1982). Relying on *Burns*, the district court determined that registered voters no longer "accurately reflect[ed] the intended, permissible population base." *Id.* at 568.

109 Evenwel v. Abbott, 578 U.S. 54, 60 (2016). Technically speaking, Maine's and Nebraska's Constitutions exclude non—citizen immigrants from the redistricting process, but "neither provision is 'operational as written.'" *Id.* at 60 n.3.

110 *See id.*

111 *See id.* at 59; *infra* subpart II.C.

112 One leader of this movement is Ed Blum, who orchestrated not only *Evenwel v. Abbott* but also *Shelby County v. Holder*, *Fisher v. University of Texas Austin*, and *Bush v. Vera*. *See* Stephanie Mencimer, *Meet the Brains Behind the Effort to get the Supreme Court to Rethink Civil Rights*, MOTHER JONES (Mar. 2016), https://www.motherjones.com/politics/2016/04/edward-blum-supreme-court-affirmative-action-civil-rights/ [https://perma.cc/3YGD-GZYU].

113 *See* YURIJ RUDENSKY & GABRIELLA LIMÓN, BRENNAN CTR. FOR JUSTICE, GERRYMANDERING AWAY MISSOURI'S FUTURE 2 (2020), https://www.brennancenter.org/sites/default/files/2020-09/Gerrymandering%20Away%20Missouri%27s%20Future_0.pdf [https://perma.cc/NL32-AN39].

seen whether Missouri will actually use CVAP-based districts in the 2020 redistricting cycle.[114] And in light of *Burns*, any challenge to CVAP-based redistricting will face an uphill climb on one-person, one-vote grounds.

C. Racial Vote Dilution

The Constitution and Section 2 of the VRA prohibit racial vote dilution—that is, the packing or cracking of minority voters.[115] In *White v. Regester*,[116] the Court held that racial vote dilution violates the Equal Protection Clause when "the political processes leading to nomination and election [a]re not equally open to participation by the group in question—that its members ha[ve] less opportunity . . . to participate in the political processes and to elect legislators of their choice."[117] In applying this standard, the Court adopted a totality of the circumstances approach which considers several factors, including the jurisdiction's history of racial discrimination in voting, racial inequities in various socioeconomic indicators, racial campaign tactics, and racially polarized voting.[118] The Court has made clear that discriminatory intent is a necessary ingredient of a constitutional vote-dilution claim[119] and disclaimed any right to proportional representation for racial minorities.[120]

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114 The amendment's supporters believe that its use of the phrase "one person, one vote" is an endorsement of CVAP-based redistricting. For an argument about why that is not the best reading of the amendment, see Travis Crum, *The Fatal Flaw that Should Undo Amendment 3*, ST. LOUIS POST-DISPATCH (Oct. 21, 2020), https://www.stltoday.com/opinion/columnists/travis-crum-the-fatal-flaw-that-should-undo-amendment-3/article_267d9e35-ac61-554d-ab09-85a9588436de.html [https://perma.cc/C2UN-3J4M] [hereinafter Crum, *Amendment 3*].

115 For a comprehensive account of the development of constitutional and statutory racial vote-dilution doctrine, see Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 275–84 (2020). The Constitution and Section 2 also encompass vote-denial claims. The Court's recent decision in *Brnovich v. DNC*, 141 S. Ct. 2321 (2021), implicates those claims. As *Brnovich* does not implicate vote-dilution precedent, it is discussed at length below. *See infra* Section IV.D.3.

116 412 U.S. 755 (1973).

117 *Id.* at 766.

118 *See id.* at 766–69.

119 *See* Rogers v. Lodge, 458 U.S. 613, 617 (1982).

120 *See White*, 412 U.S. at 765–66 ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

Notwithstanding this constitutional imprimatur,[121] most vote-dilution claims are brought under Section 2 of the VRA,[122] a "permanent, nationwide ban on racial discrimination in voting."[123] When Congress revised Section 2 in 1982, it eliminated the discriminatory intent requirement and permitted a finding of liability based on discriminatory effect.[124] In so doing, Congress relied on its Reconstruction Amendment enforcement authority to enact prophylactic legislation.[125] Nonetheless, Section 2 mirrors the constitutional standard by embracing *White*'s totality of the circumstances approach and opportunity-to-elect language.[126]

In *Thornburg v. Gingles*,[127] the Supreme Court structured this inquiry into a more manageable standard,[128] articulating three "necessary preconditions" for bringing a vote-dilution claim under Section 2.[129]

To satisfy the first *Gingles* factor, plaintiffs must demonstrate that a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member

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121 The Court has repeatedly dodged whether the Fifteenth Amendment encompasses vote-dilution claims. *See* Voinovich v. Quilter, 507 U.S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims."); Crum, *Superfluous*, *supra* note 32, at 1558–61 (discussing how the Court treats racial vote dilution under the Fourteenth and Fifteenth Amendments).

122 *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 201–02 (2007) [hereinafter Persily, *Promise*].

123 Shelby County v. Holder, 570 U.S. 529, 557 (2013).

124 *See* Chisom v. Roemer, 501 U.S. 380, 383–84 (1991); *see also* 52 U.S.C. § 10301(a) (2018) (prohibiting any "standard, practice, or procedure" that "results in a denial or abridgement of the right . . . to vote on account of race").

125 *See* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2072 (2018); *see also* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 401 n.117 (2012) ("Section 2 may need the Fourteenth Amendment as its anchor insofar as it reaches injuries beyond simple vote denial, as it remains disputed whether the Fifteenth Amendment goes any further.").

126 *See* 52 U.S.C. § 10301(b) (2018) (imposing liability "if, based on the totality of circumstances, it is shown that . . . [racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"); *see also* Crum, *Reconstructing*, *supra* note 115, at 278 (comparing Section 2 and *White*).

127 478 U.S. 30 (1986).

128 *See, e.g.*, Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 589 (2016) ("The test keeps vote dilution law *manageable* by limiting the number of cases in which courts make politically delicate totality-of-the-circumstances judgment calls about racial fairness in the distribution of political opportunity.").

129 *Gingles*, 478 U.S. at 50.

district."[130] This means that Section 2 can be invoked to require the creation of majority-minority districts but not crossover or influence districts.[131] Regarding the first *Gingles* prong, the Supreme Court has never "explicitly answered the question 'majority *of what*?'"[132] In other words, the Court has never squarely addressed whether the denominator for the first *Gingles* factor is total population, VAP, or CVAP.[133]

Under the second and third *Gingles* factors, plaintiffs must establish that the minority group is "politically cohesive" and that majority bloc voting "usually . . . defeat[s] the minority's preferred candidate."[134] Although technically distinct, the second and third factors are generally treated as "one inquiry."[135] Thus, the *Gingles* factors look to whether a minority group is residentially segregated and voting is racially polarized.[136]

The *Gingles* factors loom large in Section 2 litigation,[137] but they are not sufficient conditions.[138] Once the *Gingles* factors are satisfied, courts still engage in a totality of the circum-

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130 *Id.*; *see also* Bartlett v. Strickland, 556 U.S. 1, 26 (2009) (plurality opinion) (concluding that the first *Gingles* factor is satisfied "[o]nly when a geographically compact group of minority voters could form a majority in a single-member district").

131 A crossover district is one in which "white voters joi[n] forces with minority voters to elect their preferred candidate." *Bartlett*, 556 U.S. at 25. By contrast, an influence district is one "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Id.* at 13; *see also* Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1572 (2019) (noting legal uncertainty over whether Section 2 protects so-called coalition districts composed of two or more minority groups).

132 Persily, *Census*, *supra* note 9, at 778 (emphasis added).

133 *See id.* In many ways, this question dovetails with the redistricting denominator issue. *See supra* notes 94–113.

134 *Gingles*, 478 U.S. at 51. There are no strict quantitative cutoffs for racial bloc voting, and the legally sufficient ratio "will vary according to a variety of factual circumstances." *Id.* at 57–58; *see also* Elmendorf et al., *supra* note 128, at 680 (advocating against "the establishment of numeric vote-share cutoffs for legally significant minority cohesion and white bloc voting").

135 Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 664 (2006) [hereinafter Katz, Aisenbrey, Baldwin, Cheuse & Weisbrodt, *Documenting Discrimination*].

136 *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1327 (2016) [hereinafter Stephanopoulos, *Race*].

137 *See* Cooper v. Harris, 137 S. Ct. 1455, 1470 (2017) ("If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district."); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992) ("*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act.").

138 *See* Johnson v. De Grandy, 512 U.S. 997, 1011 (1994).

stances inquiry that looks to the factors articulated in *White* and expounded upon in the Senate Report to the 1982 VRA amendments.[139] And notwithstanding Section 2's textual disavowal of a right to proportionality,[140] the Court has emphasized whether the number of majority-minority districts is "*roughly* proportional to the minority voters' respective shares in the voting-age population."[141] Although rough proportionality is not a "safe harbor,"[142] the Court has given it priority within the totality of the circumstances inquiry.[143]

During the 2010 redistricting cycle, the Supreme Court issued only one decision on the merits of a vote-dilution claim brought under Section 2.[144] Unlike its other redistricting decisions of the past decade, *Abbott v. Perez*[145] was not a seismic change in the law.[146] In reversing the lower court's finding that

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139 *See id.* at 1011–12. The so-called Senate Factors include the jurisdiction's history of racial discrimination in voting; the extent of racially polarized voting; the use of tactics like at-large election districts or majority-vote requirements; the exclusion of minority candidates from the slating process; the ongoing effects of past discrimination in areas like education, employment, and healthcare; racial appeals in campaigns; the prevalence of minority officeholders; the responsiveness of elected officials to the particularized needs of the minority group; and whether the policy underlying the challenged practice is tenuous. *See id.* at 1010 n.9 (citing *Gingles*, 478 U.S. at 44–45) (listing Senate Factors).

140 *See* 52 U.S.C. § 10301(b) (2018) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). On the other hand, Section 2 also provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." *Id.*

141 *De Grandy*, 512 U.S. at 1000 (emphasis added).

142 *Id.* at 1018.

143 *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1676 (2001) [hereinafter Gerken, *Undiluted Vote*] (observing that *De Grandy* made proportionality "the preeminent measure of fairness in redistricting").

144 This singular case is surprising given that challenges to statewide redistricting plans are heard by a three-judge district court with a direct appeal to the Supreme Court. *See* Shapiro v. McManus, 577 U.S. 39, 40–41 (2015). To be clear, the Court addressed or interpreted Section 2 in other cases, most notably in its racial gerrymandering decisions. *See* Cooper v. Harris, 137 S. Ct. 1455, 1469–72 (2017) (discussing a Section 2 defense to a racial gerrymandering claim); *see also* Shelby County v. Holder, 570 U.S. 529, 557 (2013) ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

145 138 S. Ct. 2305 (2018).

146 *See* Daniel P. Tokaji, Abbott v. Perez*: Bad Reading Invites Discriminatory Redistricting*, TAKE CARE BLOG (July 6, 2018), https://takecareblog.com/blog/abbott-v-perez-bad-reading-invites-discriminatory-redistricting [https://perma.cc/2RWE-PX5N] ("The *Abbott* majority indulges in some sloppy reading, but the opinion's damage to existing legal doctrine is modest."). *But see* Richard L. Hasen, *Suppression of Minority Voting Rights is About to Get Way Worse*, SLATE (June 25, 2018), https://slate.com/news-and-politics/2018/06/the-abbott-v-perez-case-echoes-shelby-county-v-holder-as-a-further-death-blow-for-the-vot-

Texas violated Section 2 in drawing its congressional and state house districts,[147] the Court largely applied settled principles. To be sure, the *Abbott* Court made it more difficult to prove discriminatory intent in redistricting cases, but as this doctrinal development is not limited to Section 2 and overlaps with issues raised in the bail-in cases, I discuss it below.[148]

A novel jurisdictional holding in *Abbott* is worth flagging here, however. The *Abbott* Court made it easier for States to bring interlocutory appeals in statewide redistricting suits, which are initially heard by three-judge district courts.[149] Following years of litigation,[150] the three-judge district court is-

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ing-rights-act.html?wpsrc=sh_all_dt_tw_ru [https://perma.cc/5KPJ-TUW9] (predicting that *Abbott* will make it "well near impossible for plaintiffs to prove that states have engaged in *intentional* racial discrimination so as to put those states back under federal supervision for voting under Section 3").

147 *See Abbott*, 138 S. Ct. at 2330. Specifically, the Court determined that Congressional District 27 did not violate Section 2 because the district court performed the racial bloc voting analysis in only one county rather than the district as a whole and because another congressional district sufficed as a Hispanic-opportunity district. *See id.* at 2331–32. The Court also rejected Section 2 challenges to two Texas House districts on the grounds that the district court hinged its analysis on its overturned intentional-discrimination finding and because the district court's finding did not refer to present local conditions. *See id.* at 2333. In sum, the Court's decisions were quite fact-bound.

On a different note, the Court affirmed the finding of a *Shaw* violation. *See id.* at 2330; *see infra* note 260.

148 *See infra* section II.A.3. It should also be noted that Justice Gorsuch joined Justice Thomas's concurring opinion arguing that Section 2's text does not encompass vote-dilution claims. *See Abbott*, 138 S. Ct. at 2335 (Thomas, J., concurring); *see also* Holder v. Hall, 512 U.S. 874, 923 (1994) (Thomas, J., concurring in the judgment) (making this argument for the first time). Given that Gorsuch replaced Justice Scalia, who also agreed with Thomas on this point, *see Abbott*, 138 S. Ct. at 2335 (Thomas, J., concurring), this development reflects the status quo ante.

In addition, Judge Ho of the Fifth Circuit has interpreted *Abbott* to impose a "new" "performance requirement" that must be satisfied "before reaching the totality of the circumstances test." Harding v. County of Dallas, 948 F.3d 302, 316 (5th Cir. 2020) (Ho., J., concurring in part). According to Ho, "Plaintiffs must now affirmatively prove that the minority group will have a 'real' opportunity to elect representatives of its choice." *Id.* Notwithstanding Ho's eagerness to fashion a fourth necessary condition for a Section 2 vote-dilution claim, an examination of a proposed district's performance is nothing new and has been rejected by the Fifth Circuit. *See* Elmendorf & Spencer, *Administering*, *supra* note 29, at 2181 ("Historically the courts have assessed the likely 'performance' of electoral districts with detailed inquiries into local political conditions."); Fusilier v. Landry, 963 F.3d 447, 457–62 (5th Cir. 2020) (discussing *Abbott* and framing performance as part of the totality of the circumstances inquiry).

149 *See* 28 U.S.C. § 2284(a) (2018); *Shapiro*, 577 U.S. at 40–41. Under 28 U.S.C. § 1253, "any party may appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action" heard by a three-judge district court. 28 U.S.C. § 1253 (2018).

150 For a concise overview of this litigation, see Travis Crum, *The Prospect of Bailing—in Texas: The Statutory Argument for Bail-in*, ELECTION L. BLOG (Sept. 15,

sued orders finding that the redistricting plans "'violate[d Section] 2 and the Fourteenth Amendment' and that these violations 'must be remedied.'"[151] The orders also gave the Texas Attorney General three days to inform the district court whether the state legislature "would remedy the violations" and further stated "that if the Legislature did not intend to adopt new plans, the court would hold remedial hearings."[152] After the Texas Governor declined to convene the legislature for a special session, the district court ordered remedial hearings.[153] Based on this fact pattern, the *Abbott* Court found interlocutory jurisdiction because the orders had the "practical effect" of entering an injunction against the use of the redistricting plans.[154]

In her dissenting opinion, Justice Sotomayor criticized the Court for "incentiviz[ing] appeals" and "open[ing the] courthouse doors to . . . time-consuming and needless manipulation of its docket."[155] Justice Sotomayor's dire prediction may very well come to pass. *Abbott* may encourage States that have received an adverse ruling to immediately appeal before a replacement plan can be put in place, especially if the State believes that it will fare better at the increasingly conservative Roberts Court. Indeed, the *Abbott* Court expressly foresaw the possibility that "if a plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time."[156]

This development is particularly troublesome after *Shelby County* given that the preclearance regime kept new redistricting plans from coming into force until federal authorities had determined that the maps had neither a discriminatory purpose nor a retrogressive effect.[157] However, three-judge district courts are now on notice of *Abbott*'s new rule and can calibrate

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2018) [hereinafter Crum, *Statutory Argument*], https://electionlawblog.org/?p=101139 [https://perma.cc/RYC5-HYEL].

151 *Abbott*, 138 S. Ct. at 2321 (quoting Perez v. Abbott, 274 F. Supp. 3d 624, 686 (W.D. Tex. 2017)).

152 *Id.* at 2322.

153 *See id.*

154 *Id.* at 2323.

155 *See id.* at 2343 (Sotomayor, J., dissenting).

156 *Id.* at 2324 (majority opinion). Under the *Purcell* principle, the Court has grown increasingly wary of last-minute changes to election laws. *See* Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006). For the canonical account of the *Purcell* principle in the pre-coronavirus era, see Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427 (2016).

157 *See infra* section II.A.1.

their decisions accordingly.[158] For instance, district courts can combine the liability and remedy phases or issue decisions far in advance of an election to avoid an interlocutory appeal.[159]

II
THE 2010 REDISTRICTING REVOLUTION

The extent to which the law of gerrymandering has changed in the past decade cannot be overstated. This Part surveys in chronological order four lines of cases that will impact the substantive law of the upcoming redistricting cycle.

First, this Part address the consequences of the *Shelby County* Court's invalidation of the VRA's coverage formula, which effectively nullified the preclearance regime. Second, it canvasses the transformation of *Shaw*'s racial gerrymandering cause of action. Third, it discusses the *Evenwel* Court's handling of the redistricting-denominator question. This Part concludes by analyzing the *Rucho* Court's holding that partisan gerrymandering claims are non-justiciable political questions.

A. Things Have Changed in the South

This Section charts the rise and fall of the VRA's coverage formula and its preclearance regime. It begins by explaining the preclearance process in place from the mid-1960s through the 2010 redistricting cycle. It then provides a doctrinal analysis of the Supreme Court's decision in *Shelby County*. It concludes with a discussion of the post-*Shelby County* bail-in suits, which sought to re-impose preclearance through litigation.

1. *The Ancien Preclearance Regime*

Section 5 of the VRA required covered jurisdictions—primarily States and counties in the South and Southwest—to preclear all voting changes with either the Attorney General or a three-judge court in the U.S. District Court for the District of Columbia.[160] Section 4(b) contained the VRA's coverage

158 *Cf.* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106–07 (2009) (discussing how district judges manage their dockets). For an overview of options available to district courts in redistricting litigation, see generally G. Michael Parsons, *Justice Denied: Equity, Elections, and Remedial Redistricting Rules*, 19 J.L. SOC'Y 229 (2019).

159 *See Abbott*, 138 S. Ct. at 2324 ("If a plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed.").

160 *See* Shelby County v. Holder, 570 U.S. 529, 537–39 (2013). Section 5 applied to the States of Alabama, Alaska, Arizona, Georgia, Louisiana, Missis-

formula, which was triggered if, during the 1964, 1968, or 1972 presidential election, a State or political subdivision had voter turnout below fifty percent[161] and maintained an illegal "test or device,"[162] such as a literacy test. Preclearance was granted only if the covered jurisdiction could establish by a preponderance of the evidence that the voting change "neither ha[d] the purpose nor w[ould] have the effect of denying or abridging the right to vote on account of race or color, or [language minority status]."[163] In practice, this meant that covered jurisdictions could not adopt changes that were intentionally discriminatory or "would lead to a retrogression in the position of racial minorities."[164]

By requiring federal approval of any voting changes and placing the burden on the jurisdiction to defend that change, Section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims."[165] And because "a new electoral map c[ould not] be used to conduct an election until it ha[d] been precleared,"[166] the preclearance process took priority over Section 2 litigation.[167] The retrogression standard also

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sippi, South Carolina, Texas, and Virginia, counties in California, Florida, New York, North Carolina, and South Dakota, and townships in Michigan and New Hampshire. *See id.*; *see also* 28 C.F.R. pt. 51 app. (2011) (listing dates of coverage). A few dozen counties and municipalities—mostly in Virginia—availed themselves of the VRA's "bailout" provision to escape Section 5's ambit. *See* Brief for the Federal Respondent at *4a–11a, *Shelby County*, 570 U.S. at 529 (No. 12-96), 2013 WL 315242. Prior to *Shelby County*, a handful of jurisdictions had been "bailed-in" to the preclearance process through Section 3(c). *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2010–15 (2010) [hereinafter Crum, *Pocket Trigger*] (describing the bail-ins of Arkansas, New Mexico, and several counties).

161 *See* 52 U.S.C. § 10303(b).

162 *See* 52 U.S.C. § 10303(c).

163 52 U.S.C. § 10304(a). For most of Section 5's existence, the purpose prong meant any discriminatory purpose. But in *Reno v. Bossier Parish School Board* (*Bossier Parish II*) the Supreme Court held that Section 5's purpose prong required *retrogressive* purpose—that is, an intent to make minorities worse off than before. *See* Reno v, Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 335 (2000). When it reauthorized the VRA in 2006, Congress overturned *Bossier Parish II* and made clear that Section 5 applied to "any discriminatory purpose." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 580–81 (codified at 52 U.S.C. § 10304(c)); *see also* Persily, *Promise*, *supra* note 122, at 199–200 (discussing *Bossier Parish II* and the 2006 reauthorization).

164 Beer v. United States, 425 U.S. 130, 141 (1976).

165 South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

166 Perry v. Perez, 565 U.S. 388, 391 (2012).

167 *See id.*

locked-in past electoral gains and prevented backsliding.[168] Section 5, therefore, played a profound role in structuring litigation over the redistricting process.

Section 5 stopped numerous discriminatory election law changes from coming into force. Between 1982 and 2006, the Attorney General objected to over 700 voting changes—and the majority of those objections were based on findings of discriminatory intent.[169] The preclearance process was especially salient for stopping repeat offenders in the redistricting process. For example, between the 1970 and 2000 redistricting cycles, "not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted."[170] Moreover, as Professor Pam Karlan aptly put it, Section 5 provided minority legislators and voters with an "invaluable bargaining chip" in the redistricting process.[171] The threat of a denial of preclearance and subsequent litigation served as a deterrent to discriminatory conduct.[172]

Section 5 had a tremendous impact on minority voter registration and turnout, as well as the share of minority legislators.[173] It was appropriately and widely viewed as the crown jewel of the civil rights movement, and its "historic accomplishments . . . are undeniable."[174]

2. Shelby County's *Equal Sovereignty Principle*

Following a series of decisions in the 1990s, commentators began to question whether the Court would invalidate Section 5. Threats emerged on multiple fronts. The *Shaw* cause of action injected considerable tension between the Equal Protection Clause and the VRA's requirement that mapmakers consider race in the redistricting process.[175] In a related vein, the Court cut back on the VRA's substantive scope in numerous

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168 *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 733 (1998) [hereinafter Karlan, *Two Section Twos*].

169 *See Shelby County*, 570 U.S. at 571 (2013) (Ginsburg, J., dissenting).

170 Northwest Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 251 (D.D.C. 2008), *rev'd on statutory grounds by* Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 211 (2009).

171 Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 36 (2004).

172 *See Shelby County*, 570 U.S. at 571 (Ginsburg, J., dissenting) ("Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982.").

173 *See id.* at 547–48 (majority opinion).

174 *Northwest Austin*, 557 U.S. at 201.

175 *See* Gerken, *Undiluted Vote*, *supra* note 143, at 1696–98; *infra* subpart II.B.

decisions, fueling concerns about the Act's constitutionality.[176] Finally, the Court raised the bar on Congress's Fourteenth Amendment enforcement authority in *City of Boerne v. Flores*[177] by adopting the congruence and proportionality test.[178] Notwithstanding these warning signs, Congress reauthorized the VRA in 2006 for twenty-five years without making any changes to the coverage formula.[179]

The 2006 VRA reauthorization was quickly challenged in *Northwest Austin Municipal Utility District Number One v. Holder*.[180] The Court resolved that case on constitutional avoidance grounds.[181] Four years later, the Court in *Shelby County v. Holder* invalidated the VRA's coverage formula. But despite years of foreshadowing, it was neither *Shaw* nor *Boerne* that felled the VRA's coverage formula. Rather, it was the so-called equal sovereignty principle.[182]

Invoking dicta from *Northwest Austin*, the *Shelby County* Court fashioned a new constitutional standard: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[183] In other words, a coverage formula's "current burdens" need to be justified by "current needs."[184] Because the VRA's coverage formula imposed "substantial federalism costs"[185] and was based on "decades-old" proxies for unconstitutional conduct,[186] the Court struck it down.[187] The Court, however, stopped short of invalidating preclearance itself and invited Congress to pass a new coverage formula.[188]

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176 *See, e.g.*, Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 503–08 (1992) (holding that rules altering the allocation of power within an elected body were not subject to preclearance); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 COLUM. L. REV. 708, 745 (2006) (discussing the Court's concern that the "voting rights protections will entrench rather than undermine racial divisions").

177 521 U.S. 507 (1997).

178 *See id.* at 520; *see also* Crum, *Superfluous*, *supra* note 32, at 1569–75 (charting the Court's shift away from *Katzenbach*'s rationality standard to *Boerne*'s congruence and proportionality test); *infra* section III.C.1.

179 *See* Persily, *Promise*, *supra* note 122, at 207–11 (detailing the legislative process).

180 557 U.S. 193 (2009).

181 *See id.* at 197.

182 For critiques of the equal sovereignty principle, see Litman, *supra* note 32, at 1229–52.

183 Shelby County v. Holder, 570 U.S. 529, 553 (2013).

184 *Id.* at 542.

185 *Id.* at 549.

186 *Id.* at 551.

187 *See id.* at 557.

188 *See id.*

The doctrinal nuances and the future relevance of the equal sovereignty principle will be unpacked more below.[189] For now, I turn my attention to *Shelby County*'s aftermath.

3. *Post*-Shelby County *Bail-in Litigation*

Notwithstanding the Court's belief that "things have changed in the South,"[190] *Shelby County* launched a wave of voter-suppression laws.[191] Civil rights groups and the Obama administration responded by filing Section 2 suits and seeking relief under Section 3(c).[192] Known as the bail-in mechanism and the pocket trigger, Section 3(c) authorizes courts to place States and political subdivisions under preclearance for a violation of the Fourteenth or Fifteenth Amendments.[193] The most prominent suits were filed against North Carolina and Texas, but neither State was bailed-in notwithstanding findings of discriminatory intent.[194] Because *Shelby County* was decided in 2013, bail-in litigation of the 2010s was directed more at vote-denial laws than redistricting plans. Nevertheless, several lessons emerged from these cases that will prove useful for the 2020 redistricting cycle.

First, these decisions demonstrate a growing interest in bringing constitutional claims that require a showing of discriminatory intent. Before *Shelby County*, discriminatory intent claims were viewed as not worth the time and resources given that Section 2's effects test was far easier to satisfy.[195] But with Section 3(c) on the table, the calculus for bringing an

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189 *See infra* sections III.C.1 & IV.D.1.

190 *Shelby County*, 570 U.S. at 540 (alteration and internal quotation marks omitted) (quoting Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

191 *See generally* THURGOOD MARSHALL INST., *supra* note 31 (cataloging racially discriminatory election laws passed after *Shelby County*).

192 *See, e.g.*, Veasey v. Abbott, 888 F.3d 792, 804 (5th Cir. 2018) (declining bail-in relief due to recent revisions to Texas's voter ID); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241–42 (4th Cir. 2016) (declining to bail-in North Carolina notwithstanding finding of intentional discrimination); Perez v. Abbott, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019) (finding intentional discrimination in enactment of redistricting plan but declining request for Section 3(c) relief); Patino v. City of Pasadena, 230 F. Supp. 3d 667, 729–30 (S.D. Tex. 2017) (ordering bail-in of city in Texas); Allen v. City of Evergreen, No. 13-0107-CG-M, 2014 WL 12607819, at *2 (S.D. Ala. Jan. 13, 2014) (granting consent decree bailing-in city in Alabama).

193 *See* 52 U.S.C. § 10302(c); Crum, *Pocket Trigger*, *supra* note 160, at 2006–07.

194 *See McCrory*, 831 F.3d at 241–42 (North Carolina voter-suppression law); *Perez*, 390 F. Supp. 3d at 807 (Texas redistricting); *Veasey*, 888 F.3d at 804 (Texas voter ID).

195 *See* Karlan, *Two Section Twos*, *supra* note 168, at 735–36.

intent claim changed because bail-in relief provided a means of re-imposing preclearance through litigation—even absent any congressional action in response to *Shelby County*.[196] In a potential harbinger of more suits to come, the Biden administration recently filed a bail-in suit against Georgia, alleging that its 2021 omnibus elections bill was motivated by discriminatory intent.[197]

Second, the sole district court to address the issue ruled that *Shaw* claims cannot be used as triggers for bail-in relief. Even though *Shaw* claims are doctrinally classified as Fourteenth Amendment violations,[198] the court observed that *Shaw* violations do not require intentional discrimination and therefore do not fall within the category of constitutional claims that Section 3(c) was intended to capture.[199] The court also observed that *Shaw* claims were recognized decades after Congress passed the VRA and likely were not the types of constitutional violations that it envisioned would authorize preclearance.[200]

Third, courts have been reluctant to grant bail-in relief even after a finding of intentional discrimination. In striking down North Carolina's post-*Shelby County* voter-suppression law on intentional discrimination grounds,[201] the Fourth Circuit determined that "intentionally targeting a particular race's

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196 *See* Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 69–73 (2013) [hereinafter Stephanopoulos, *South*] (discussing the costs of Section 2 litigation and the upshots of Section 3(c) relief); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance after* Shelby County, 102 CALIF. L. REV. 1123, 1176–80 (2014) [hereinafter Elmendorf & Spencer, *Racial Stereotyping*] (discussing bail-in suits); *see also* Crum, *Pocket Trigger*, *supra* note 160, at 1997–98 (advocating use of bail-in suits prior to *Shelby County*); ISSACHAROFF, KARLAN, PILDES & PERSILY, *supra* note 91, at 644 (observing that plaintiffs rarely pressed constitutional claims after the 1982 amendments but predicting that such claims will increase post-*Shelby County* because of Section 3(c)).

197 *See* Alex Ebert & Kimberly Strawbridge Robinson, *Biden Challenge to New State Voting Laws Hinge on GOP 'Intent'*, BLOOMBERG LAW (June 26, 2021), https://news.bloomberglaw.com/us-law-week/biden-challenge-to-new-state-voting-laws-hinges-on-gop-intent [https://perma.cc/9QAF-WX2B].

198 *See* Shaw v. Reno, 509 U.S. 630, 649 (1993).

199 *See Perez*, 390 F. Supp. 3d at 813–14; *see also* Travis Crum, *A Lone Star Bail-in?*, ELECTION L. BLOG (Feb. 14, 2019) [hereinafter Crum, *Lone Star*], https://electionlawblog.org/?p=103606 [https://perma.cc/CZ5P-UGYQ] ("Preclearance and *Shaw*, moreover, employ diametrically opposed methods of inquiry. Preclearance injects race into the decision-making process whereas *Shaw* seeks to root it out."); Blackmoon v. Charles Mix Cnty., 505 F. Supp. 2d 585, 592 (D.S.D. 2007) (declining bail-in relief for malapportionment violation).

200 *See Perez*, 390 F. Supp. 3d at 814 n.8.

201 *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016).

access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose . . . . even absent any evidence of race-based hatred and despite the obvious political dynamics."[202] Nevertheless, the Fourth Circuit resolved the bail-in question with a cursory paragraph, concluding that "[s]uch remedies '[are] rarely used' and are not necessary here in light of our injunction."[203] The Fourth Circuit could have been acting strategically: it took the high-stakes bail-in question off the table and resolved the case on a fact-bound record of intentional discrimination rather than on the novel legal question of Section 2's application to vote-denial claims.[204]

Moreover, the Fifth Circuit engaged in "animus laundering"[205] when reviewing a finding of discriminatory intent concerning a Texas voter ID law passed in 2011. With the prospect of bail-in hanging in the balance, the Fifth Circuit determined that revisions passed in 2017 to the voter ID law meant that "there [wa]s no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c)."[206] In short, the Fifth Circuit was unwilling to continue holding Texas accountable because it had slightly loosened its voter ID law in response to litigation.

The Texas redistricting litigation followed a similar pattern. Here, some procedural background is helpful. In a series of decisions, a three-judge district court found that redistricting plans passed in *both* 2011 and 2013 were enacted with discriminatory intent.[207] In reaching its conclusion as to the 2013 maps, the district court relied heavily on its prior finding of

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202 *Id.* at 222–23.

203 *Id.* at 241.

204 *See* Travis Crum, *The Prospect of Bailing-in Texas: Recent Bail-in Litigation*, ELECTION L. BLOG (Sept. 14, 2018) [hereinafter Crum, *Recent Bail-in Litigation*], https://electionlawblog.org/?p=101137 [perma.cc/8K8Q-9DN5].

205 Prominent civil rights attorney Joshua Matz coined the term "animus laundering" to describe cases where courts ultimately upheld Trump administration policies after numerous revisions and notwithstanding strong evidence of discriminatory intent in the original action. *See* Joshua Matz, *Thoughts on the Chief's Strategy in the Census Case*, TAKE CARE BLOG (July 1, 2019), https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case [https://perma.cc/CTS7-K8H7] ("[T]he [Trump] administration launders its animus through minor modifications to the policy and a round of administrative process in which the original policy is decorated with new, nondiscriminatory rationales.").

206 Veasey v. Abbott, 888 F.3d 792, 804 (5th Cir. 2018).

207 *See* Abbott v. Perez, 138 S. Ct. 2305, 2315–19 (2018) (summarizing procedural history); Crum, *Statutory Argument*, *supra* note 150 (similar).

discriminatory intent and determined that the discriminatory taint had not been purged.[208]

In *Abbott v. Perez*, the Supreme Court held that Texas's redistricting plans enacted in 2013 were not motivated by discriminatory intent.[209] Justice Alito's majority opinion criticized the district court for "disregard[ing] the presumption of legislative good faith" when it concluded that the 2013 maps were tainted by the 2011 plans.[210] Put simply, the Court engaged in animus laundering.[211]

However, the Court's ruling as to the 2013 plans did not disturb the prior factual finding that the 2011 plans were racially discriminatory.[212] After the case was remanded, the three-judge district court declined to grant bail-in based on the 2011 redistricting plans[213] and explicitly pointed to the perceived hostility of the Roberts Court to preclearance.[214]

Ultimately, these decisions have set a high—but not insurmountable—bar for bail-in cases brought after the 2020 redistricting cycle. It is important to keep in mind that these decisions have all been highly fact-specific and have not created significantly damaging precedent. Indeed, courts have recognized that the bail-in inquiry is inherently equitable.[215]

B. *Shaw*'s Metamorphosis

During the 1990 redistricting cycle, the U.S. Department of Justice adopted an interpretation of Section 5 that required covered jurisdictions to draw the maximum possible number of majority-minority districts, which oftentimes forced the creation of non-compact districts linking geographically distant

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208 *See Abbott*, 138 S. Ct. at 2318.

209 *See id.* at 2313.

210 *Id.* at 2326–27.

211 Other scholars have also noted that the Texas redistricting litigation fits Matz's description of animus laundering. *See* Hasen, *Pro-Partisanship*, *supra* note 41, at 65–66 (noting this similarity and arguing that *Abbott* makes it harder to prove discriminatory intent); *cf.* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 562–64 (2018) (discussing *Abbott* in the context of purging discriminatory taint).

212 *See* Perez v. Abbott, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019).

213 *See id.*

214 *See id.* at 819 ("In the wake of *Shelby County*, courts have been hesitant to grant § 3(c) relief.").

215 *See id.* at 818 (discussing equitable factors first listed in Jeffers v. Clinton, 740 F. Supp. 585, 601 (E.D. Ark. 1990)); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) (commenting on bail-in's equitable nature); Elmendorf & Spencer, *Racial Stereotyping*, *supra* note 196, at 1177–78 (describing how *Shelby County* impacts *Jeffers*'s equitable analysis).

communities.[216] The Supreme Court quickly pushed back against this policy.

In *Shaw v. Reno*,[217] the Court created an "analytically distinct" racial gerrymandering cause of action.[218] Premised on the Fourteenth Amendment's Equal Protection Clause, [219] *Shaw*'s "racial gerrymandering claim does not ask for a fair share of political power and influence . . . [but] asks instead for the elimination of a racial classification."[220] Borrowing from other areas of equal protection,[221] *Shaw* mandated that race-based districts survive strict scrutiny.[222]

According to the *Shaw* Court, the purposeful creation of majority-minority districts composed of voters "who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to *political apartheid*."[223] Rather than moving our nation toward "a political system in which race no longer matters,"[224] the Court viewed race-based redistricting as "balkaniz[ing] us into competing racial factions."[225] Justice O'Connor's majority opinion in *Shaw* focused on the "bizarre"[226] and "highly irregular"[227] shape of the challenged majority-minority district, opining that "reapportionment is one area in which appearances do matter."[228]

The Court, however, quickly abandoned its aesthetic focus and shifted to a motive-based inquiry.[229] The Court acknowledged that "[r]edistricting legislatures will . . . almost always be

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216 *See* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2378–79 (2003) [hereinafter Katz, *Reinforcing*].

217 509 U.S. 630 (1993).

218 *Id.* at 652.

219 *See id.* at 649.

220 Rucho v. Common Cause, 139 S. Ct. 2484, 2502 (2019).

221 *See* Crum, *Superfluous*, *supra* note 32, at 1559–60. Grounding *Shaw*'s racial gerrymandering claim in the Equal Protection Clause is particularly strange for purportedly originalist Justices given that Section One of the Fourteenth Amendment was understood during Reconstruction to exclude protections for voting rights. *See id.* at 1583–87.

222 *See Shaw*, 509 U.S. at 653.

223 *Id.* at 647 (emphasis added).

224 *Id.* at 657.

225 *Id.*

226 *Id.* at 644.

227 *Id.* at 646.

228 *Id.* at 647.

229 *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 371; *see also* Gerken, *Undiluted Vote*, *supra* note 143, at 1692–93 (explaining that only Justice O'Connor appeared to ever endorse an "expressive harm" theory).

aware of racial demographics."[230] After all, anyone even remotely familiar with our nation's history of residential segregation understands that zip codes can strongly correlate with race,[231] and mapmakers are often politicians who are intimately knowledgeable of the geography and demography of their communities. To avoid applying strict scrutiny to every redistricting plan, the Court adopted the "predominant factor" test.[232]

Under that test, if the mapmaker "subordinated traditional race-neutral districting principles . . . to racial considerations,"[233] the district must be "narrowly tailored to achieve a compelling interest."[234] In applying strict scrutiny, the Court frequently assumed that compliance with the VRA was a compelling interest.[235] The Court, moreover, allowed mapmakers to show that they had "a strong basis in evidence" for believing that the VRA mandated the creation of a majority-minority district.[236]

Given its application of strict scrutiny to race-based redistricting, *Shaw* was viewed from the beginning as a grave threat to vote-dilution doctrine and the constitutionality of the VRA.[237] And yet, by the end of the 1990s redistricting cycle, *Shaw* claims petered out.[238] That is because the Court created an "exit strategy": it permitted mapmakers to argue that when race and party are strongly correlated, it was party—not race—that was the predominant motive in the creation of a majority-minority district.[239] In other words, the presence of racially

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230 Miller v. Johnson, 515 U.S. 900, 916 (1995).

231 *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 528–30 (2015).

232 *Miller*, 515 U.S. at 916. The Court also justified this heightened approach by referencing "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments." *Id.*

233 *Id.* To be clear, a "district's shape" is part of the predominance inquiry. *Id.*

234 *Id.* at 920.

235 *See, e.g.*, Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 915 (1996) ("We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 [of the VRA] could be a compelling interest.").

236 *Miller*, 515 U.S. at 922.

237 *See Shaw*, 509 U.S. at 680–81 (Souter, J., dissenting). In the academy, *Shaw* was generally critiqued as doctrinally incoherent and in significant tension with vote-dilution precedent. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 977 (1998); Gerken, *Undiluted Vote*, *supra* note 143, at 1691; Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 795–98 (1998).

238 *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 371–72.

239 Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. REV. 667, 687

polarized voting makes it difficult to determine whether race predominated over other factors, and the Court sided with party as the explanation in such circumstances.[240]

In *Easley v. Cromartie*, the Court was confronted for the *fourth* time with North Carolina's Congressional District 12, the same district at issue in *Shaw*.[241] And like any movie series with too many sequels, the Court desperately wanted a way out. The *Easley* Court dismissed strong circumstantial evidence that race predominated in the redistricting process on the grounds that "racial identification is highly correlated with political affiliation in North Carolina."[242] Perhaps most telling, the Court even rejected direct evidence of racial motivation. Roy Cooper, then a state Senator and the present-day Governor, stated that the new redistricting plan "provide[d] for a fair, geographic, *racial* and partisan balance throughout the State of North Carolina."[243] Notwithstanding this express "consideration" of race, the Court construed Cooper's statement "along with [his reference to] other partisan and geographic considerations" as "say[ing] little or nothing about whether race played a *predominant* role comparatively speaking."[244] *Easley* thus raised the threshold for triggering strict scrutiny in *Shaw* cases.[245]

Fast forward to the 2010s and *Shaw* changed dramatically.[246] Here, it is important to keep in mind that the 2010

(2002) [hereinafter Karlan, *Exit Strategies*]. Another explanation for the reduction in *Shaw* litigation in the 2000s is the U.S. Department of Justice's abandonment of its 1990s position that Section 5 mandated the creation of the maximum number of majority-minority districts. *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 372.

240 *See* Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1840–42 (2018) [hereinafter Hasen, *Race or Party*] (outlining three solutions to the "race or party" problem).

241 *See* 532 U.S. 234, 238–39 (2001).

242 *Id.* at 243. In finding that race predominated, the district court relied on the "district's shape, its splitting of towns and counties, and its high African-American voting population." *Id.*

243 *Id.* at 253 (emphasis added). The district court interpreted Cooper's comment to refer to the 10-2 White-Black composition of the congressional delegation. *See id.*

244 *Id.*

245 *See* Karlan, *Exit Strategies*, *supra* note 239, at 689.

246 The only *Shaw* claim to reach the Court in the 2000s cycle was in the Texas mid-decade redistricting litigation. However, as it invalidated Congressional District 23 on statutory grounds and the map needed to be re-drawn, the Court declined to address the *Shaw* claim against Congressional District 25. *See* League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 442–43 (2006). As Professor Rick Hasen has explained, the *LULAC* Court's decision "appeared to merge aspects of racial gerrymandering claims into the section 2 analy-

redistricting cycle occurred *before* the *Shelby County* Court invalidated the VRA's coverage formula in 2013. And just as in the first wave of *Shaw* cases, the genesis of the second wave of *Shaw* cases was an implausible interpretation of the VRA.[247] Many Republican-controlled jurisdictions in the South redistricted on the purported belief that the VRA required them to "maintain supermajority quotas of minority voting-age or citizen voting-age population ostensibly to avoid retrogression, or to peg districts at a 50% minority-voter threshold ostensibly to satisfy section 2."[248] In Alabama, for example, the state legislature believed that not only must a new plan have the same number of majority-minority districts to avoid retrogression but also that each *district* must maintain the same percentage of minority voters.[249]

In *Alabama Legislative Black Caucus v. Alabama*, the Court considered its first *Shaw* claim brought by Black plaintiffs[250] and concluded that Alabama's policy triggered strict scrutiny because race predominated during the redistricting process.[251] In so doing, the Court rejected "Alabama's mechanical interpretation of § 5" and strongly suggested that the challenged districts were unconstitutional.[252]

And thus began the second wave of *Shaw* cases, which confounded the traditional 5-4 divisions. These cases witnessed the Court's liberals—joined intermittently by conservative Justices—use a doctrine developed to dismantle majority-minority districts to, as a practical matter, enhance minority political power.[253] Following *Alabama Legislative Black Caucus*, the Court considered several other racial gerrymandering challenges raising similar claims.[254] Most importantly in these

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sis." Hasen, *Racial Gerrymandering*, *supra* note 5, at 373; *see also LULAC*, 548 U.S. at 429–37 (discussing *Shaw* in relation to Section 2).

247 *See* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 591 (2016) [hereinafter Levitt, *Quick and Dirty*].

248 *Id.* Critically, these jurisdictions made these assumptions "without the searching local electoral analysis required to determine if those targets were statutorily necessary or sufficient." *Id.*

249 *See id.* at 592.

250 *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 365–66.

251 *See* Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 275 (2015).

252 *Id.* at 277.

253 *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 366.

254 *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019) (dismissing appeal because single house of state legislature lacked standing to appeal); Cooper v. Harris, 137 S. Ct. 1455, 1481–82 (2017) (invalidating two North Carolina congressional districts); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 802 (2017) (upholding one state legislative district against a *Shaw* challenge but remanding for the district court to apply strict scrutiny as to several

subsequent cases, the Court "relaxed the evidentiary burden in mixed motive cases" by eliminating the requirement that plaintiffs produce an alternative map.[255]

Although all of these decisions are, as a matter of black-letter law, classified under *Shaw*, there are, in fact, two waves of *Shaw* cases. The first wave crested in the 1990s. These suits were brought by White plaintiffs and targeted majority-minority districts. The Court initially emphasized the bizarre shapes of racial gerrymanders but ultimately determined that the predominance standard would govern. The *Shaw* Court's incendiary rhetoric was very much part of the 1990s zeitgeist, with its references to "political apartheid"[256] and racial "balkaniz[ation]."[257] By contrast, the second wave of *Shaw* cases struck a very different tone. There were no bombastic comparisons of race-based redistricting to Jim Crow-era segregation of schools.[258] Rather, the second wave cases were written with an almost clinical detachment,[259] unsurprising given that many of them were authored by the Court's liberal Justices. Whether either of these waves—or a new variant of *Shaw*—reappears in the 2020 redistricting cycle remains to be seen.[260]

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others); Wittman v. Personhuballah, 136 S. Ct. 1732, 1734 (2016) (dismissing appeal for lack of standing).

A handful of second wave *Shaw* claims were filed against county maps, but those cases did not reach the Supreme Court. *See* Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 352 (4th Cir. 2016) (affirming district court's finding that race was not the predominant factor); Atkins v. Sarasota Cnty., 457 F. Supp. 3d 1226, 1235 (M.D. Fla. 2020) (rejecting *Shaw* claim on predominance grounds).

255 Charles & Fuentes-Rohwer, *Race and Representation*, *supra* note 29, at 1592 (discussing *Cooper*, 137 S. Ct. at 1481).

256 Shaw v. Reno, 509 U.S. 630, 647 (1993).

257 *Id.* at 657.

258 *See* Miller v. Johnson, 515 U.S. 900, 911 (1995).

259 *Cf.* Charles & Fuentes-Rohwer, *Race and Representation*, *supra* note 29, at 1586 (describing Justice Kagan's majority opinion in *Cooper* as applying *Shaw*'s framework "matter-of-factly").

260 One *Shaw* decision from the 2010s that is difficult to classify is *Abbott v. Perez*, 138 S. Ct. 2305 (2018). Although that case primarily involved Section 2 and interlocutory appeals, *see supra* notes 145–156, the Court affirmed the district court's finding of a *Shaw* violation. *See Abbott*, 138 S. Ct. at 2330. The district at issue was created after one of the *Abbott* plaintiffs, the Mexican American Legislative Caucus (MALC), requested that "the Legislature move[ ] Latinos into the district to bring the Latino population back above 50%." *Id.* at 2334. Texas did not dispute that race was a predominant factor, arguing instead that the district was mandated by Section 2. *See id.* The Court rejected Texas's reliance on MALC's views and further criticized Texas for conducting "no actual legislative inquiry that would establish the need for its manipulation of the racial makeup of the district." *Id.* at 2335 (internal quotation marks omitted). Thus, *Abbott* resembles the second wave cases in that the plaintiffs were Hispanic-

C. *Evenwel* as Harbinger

Recall that one-person, one-vote requires that congressional and state-legislative districts be equally apportioned.[261] But once the decision has been made to move away from representation based on political entities toward a population basis, the question arises: what population should be equalized? The *Wesberry* Court answered that total population is the redistricting denominator for congressional districts.[262] Meanwhile, the *Burns* Court strongly suggested that States have discretion in choosing a redistricting denominator for state legislative seats.[263]

This brings us, then, to the near present. In *Evenwel v. Abbott*,[264] the plaintiffs brought a one-person, one-vote challenge against the use of total population as the redistricting denominator for Texas's state senate districts.[265] According to the plaintiffs, the Equal Protection Clause mandates the use of CVAP as the redistricting denominator.[266] In many ways, Texas was an ideal defendant given that its population is disproportionality foreign and young. Under the challenged redistricting plan, the "maximum total-population deviation [wa]s 8.04%, safely within the presumptively permissible 10% range. But measured by a voter-population baseline—eligible voters or registered voters—the map's maximum population deviation exceed[ed] 40%."[267]

Relying on "history, precedent, and practice," Justice Ginsburg, writing for six Justices, rejected the claim that there is "a voter-equality mandate in the Equal Protection Clause."[268] Drawing on *Wesberry* and debates during the Founding and Reconstruction, the *Evenwel* Court observed that it would be perverse if "the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis."[269] And after canvassing the one-person, one-vote cases, the Court determined that

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aligned interest groups but differs significantly in that the challenged district was drawn at the *behest* of Hispanic legislators. *See* Crum, *Lone Star*, *supra* note 199 (arguing that this fact pattern made a bail-in vulnerable on appeal).

261 *See supra* subpart I.B.

262 *See* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964); *supra* notes 97–101.

263 *See* Burns v. Richardson, 384 U.S. 73, 90–91 (1966); *supra* notes 103–108.

264 578 U.S. 54 (2016).

265 *Id.* at 62.

266 *See id.*

267 *Id.*

268 *Id.* at 64. *Evenwel* was decided while the Court had eight Justices.

269 *Id.* at 68.

those decisions "always assumed the permissibility of drawing districts to equalize total population."[270] Finally, relying on a mixture of historical gloss and pragmatism, the Court cautioned that the mandatory use of CVAP-based redistricting "would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries."[271]

The *Evenwel* Court rejected mandatory CVAP-based redistricting, which would have had severely destabilizing effects. However, the *Evenwel* Court did not decide that CVAP-based redistricting is impermissible.[272] Moreover, in his concurring opinion, Justice Thomas argued that States could adopt CVAP-based redistricting because "[t]he Constitution does not prescribe any one basis for apportionment within States."[273] Justice Alito's concurrence similarly indicated an openness to CVAP-based redistricting,[274] though he also flagged that manageability concerns may weigh in favor of using total population as the redistricting denominator.[275]

While the plaintiffs in *Evenwel* tried to impose CVAP-based redistricting via judicial decree, conservative activists are seeking to achieve this result at the state and local level through legislation and ballot initiatives. The Trump administration's failed attempt to add a citizenship question to the census was designed to create sufficiently accurate data to conduct CVAP-based redistricting.[276] This Article addresses below how these efforts will play out in court if and when a jurisdiction adopts CVAP or VAP as the redistricting denominator.[277]

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270 *Id.* at 72.

271 *Id.* at 73.

272 *See id.* at 75 ("[W]e need not and do not resolve whether . . . States may draw districts to equalize voter-eligible population rather than total population.").

273 *Id.* at 76 (Thomas, J., concurring in the judgment).

274 *See id.* at 103 (Alito, J., concurring in the judgment) ("It is impossible to draw any clear constitutional command from this complex history.").

275 *See id.* at 92 ("The decennial census required by the Constitution tallies total population. These statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters." (internal citations omitted)).

276 *See supra* note 10.

277 *See infra* subpart IV.C.

D. Partisan Gerrymandering Unreviewed

After seven failed attempts to decide whether partisan gerrymandering claims are justiciable,[278] the Court finally shut the door in *Rucho v. Common Cause*.[279]

The Court's reasoning relied on history, manageability, and the separation of powers. At the outset, the Court noted that "[p]artisan gerrymandering is nothing new"[280] and that, even though "[t]he Framers were aware of electoral districting problems,"[281] they chose not to empower the federal courts to intervene. Given that history, the Court concluded that it could not banish partisan considerations from the redistricting process.[282]

Once that analytical move was made, the Court was able to portray "[p]artisan gerrymandering claims [as] invariably sound[ing] in a desire for proportional representation," a principle that has no basis in equal protection jurisprudence.[283] And even if proportional representation is not the goal of partisan gerrymandering claims, the Court found itself disabled from picking between "different visions of fairness," as "[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral."[284]

Although the *Rucho* Court's logic focused on the separation of powers, it also alluded to federalism concerns. After all, the Framers' solution to the foreseeable gerrymandering of congressional districts was to "assign[ ] the issue to the state legislatures, expressly checked and balanced by the Federal Congress."[285] The *Rucho* Court's federalism concerns were somewhat muted because both challenged plans involved con-

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278 *See* Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (per curiam); Gill v. Whitford, 138 S. Ct. 1916, 1933–34 (2018); League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 419 (2006); Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment); Davis v. Bandemer, 478 U.S. 109, 113 (1986) (plurality opinion); Karcher v. Daggett, 462 U.S. 725, 744–45 (1983) (Stevens, J., concurring); Gaffney v. Cummings, 412 U.S. 735, 752–53 (1973).

279 139 S. Ct. 2484, 2508 (2019).

280 *Id.* at 2494.

281 *Id.* at 2496.

282 *See id.* at 2497 ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities.").

283 *Id.* at 2499.

284 *Id.* at 2500; *see also id.* at 2499 (observing that "federal courts are not equipped to apportion political power as a matter of fairness").

285 *Id.* at 2496.

gressional districts,[286] but one could easily imagine the federalism theme emerging more clearly if the challenge had been brought against state-legislative districts.

So what does a world with unbridled partisan gerrymandering look like? As Professor Michael Kang has explained, "[m]odern voting is eminently more predictable based purely on partisanship, and it has allowed gerrymandering to become more aggressive, precise, and durable over time."[287] In addition to polarization along party lines, racial polarization has increased over the past generation, even though Democrats lost some support among minority voters in 2020.[288] Voters are also sorting themselves into residential bubbles of like-minded partisans.[289]

Even more worrisome, redistricting technology has evolved at breakneck speed in recent years. For those uninitiated in redistricting technology: imagine using a flip phone today instead of an iPhone and that will give you a sense of how much things have changed in the past decade. Or as Justice Kagan vividly described in her *Rucho* dissent: "While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage. . . ."[290]

New strategies of partisan gerrymandering redistricting may be tried in the 2020 cycle. Professors Adam Cox and Richard Holden have argued that the conventional "pack-and-crack" strategy is sub-optimal.[291] According to Cox and Holden, "the optimal strategy for a redistricter is to match

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286 *See id.* at 2491–93.

287 Kang, *supra* note 46, at 1385.

288 *See* Stephanopoulos, *Race*, *supra* note 136, at 1349 (discussing long-term trends in racial polarization); Eric Levitz, *David Shor on Why Trump was Good for the GOP and How Dems Can Win in 2022*, INTELLIGENCER (Mar. 3, 2021), https://nymag.com/intelligencer/2021/03/david-shor-2020-democrats-autopsy-hispanic-vote-midterms-trump-gop.html [https://perma.cc/3S84-B4RH] (discussing how Democrats in 2020 lost support of 1 to 2% among Black voters, 8 to 9% among Hispanic voters, and approximately 5% among Asian American voters).

289 *See, e.g.*, David Wasserman, *To Beat Trump, Democrats May Need to Break Out of the 'Whole Foods' Bubble*, N.Y. TIMES (Feb. 27, 2020), https://www.nytimes.com/interactive/2020/02/27/upshot/democrats-may-need-to-break-out-of-the-whole-foods-bubble.html [https://perma.cc/ATT4-882B] (presenting data that Democratic voters largely live in a few concentrated metropolitan areas).

290 *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

291 Cox & Holden, *supra* note 93, at 567. As in the vote-dilution context, the pack-and-crack strategy involves placing voters of the opposition party overwhelmingly in certain districts or spreading them out across several districts.

slices of voters from opposite tails of the [political] distribution."[292] Thus, Cox and Holden suggest "creat[ing] districts by combining a bloc of strong supporters with a slightly smaller group of strong opponents, and then continuing this matching into the middle of the distribution of voters."[293] A limitation of Cox and Holden's strategy is obtaining sufficient information about voters, but in a world of racially polarized voting and detailed census data about race, this strategy becomes more feasible. This is especially true in the post-*Shelby County* South, where States are free from the preclearance regime's protections and racially polarized voting is growing.[294]

Here, it is useful to step back and put *Rucho* in perspective, despite popular outrage over the decision and its consequences.[295] From a realpolitik viewpoint, the threat of the Court finding partisan gerrymandering claims justiciable was just that—a threat. Many mapmakers did not find it credible enough to alter their behavior. It did not stop Wisconsin Republicans from drawing a redistricting map that required Democrats to win "54% of the statewide vote to secure a majority in the legislature."[296] It did not deter Maryland Democrats from dismantling a heavily Republican congressional district in the western part of the State while simultaneously protecting all Democratic incumbents.[297] And it did not prevent North Carolina Republicans from drawing a congressional map with a 10-3 partisan makeup even though the statewide vote was closely divided.[298] In fact, the Republican co-chair of that redistricting committee was perfectly candid about the committee's partisan intent: "We are draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats."[299] And these examples are just from major cases litigated during the 2010 cycle. Thus,

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292 *Id.*

293 *Id.*

294 *See* Stephanopoulos, *South*, *supra* note 196, at 104–05.

295 *See, e.g.*, Paul Waldman & Greg Sargent, *The Supreme Court Just Body-Slammed Democracy. More is Coming.*, WASH. POST (June 27, 2019), https://www.washingtonpost.com/opinions/2019/06/27/supreme-court-just-body-slammed-democracy-this-is-only-beginning/ [https://perma.cc/ABU4-77A2] (referencing Justice Kagan's dissent and the Court's hostility to "pro-democracy reforms").

296 Gill v. Whitford, 138 S. Ct. 1916, 1925 (2018).

297 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2510–11 (2019) (Kagan, J., dissenting).

298 *See id.* at 2509–10.

299 *Id.* at 2510 (internal quotation marks omitted).

the backlash to *Rucho* is not because the Court upended the status quo—it is because the Court *endorsed* a dysfunctional status quo.

Finally, not all hope is lost—a point the *Rucho* Court made in repeatedly invoking state-level solutions to partisan gerrymandering. For example, in 2015, the Court affirmed the constitutionality of independent redistricting commissions under the Elections Clause in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[300] thereby preserving vital state-level institutions in the fight against partisan gerrymandering. In a similar vein, voters in several States have passed substantive redistricting reforms.[301] State courts have also started recognizing partisan gerrymandering claims under state constitutions.[302]

III
UNDERSTANDING THE 2010 CYCLE

The Court deployed a variety of constitutional arguments to extricate itself from the political process during the last redistricting cycle. In particular, the Court invoked federalism and separation of powers concerns rather than using the far heavier hammers of equal protection and restrictions on Congress's Reconstruction Amendment enforcement authority—doctrines that would have implications far beyond voting rights. In so doing, the Court engaged in judicial activism and judicial restraint, striking down some laws while letting others stand.[303]

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300 576 U.S. 787, 793 (2015). There is an irony in Chief Justice Roberts pointing to *Arizona Independent Redistricting Commission* to argue that there are non-judicial solutions to partisan gerrymandering, *see Rucho*, 139 S. Ct. at 2506–08, given that he authored a vociferous dissent in that case. Predictably, Justice Kagan made hay of this inconstancy in her *Rucho* dissent. *See id.* at 2524 (Kagan, J., dissenting) ("Some Members of the majority, of course, once thought such initiatives unconstitutional.").

301 *See Rucho*, 139 S. Ct. at 2507–08 (majority opinion). The National Conference of State Legislatures has identified several "emerging" redistricting criteria, such as competitiveness, proportionality, a prohibition on using partisan data, and a ban on favoring a political party or incumbent. *Redistricting Criteria*, NAT'L CONF. STATE LEGISLATURES (Apr. 23, 2019), https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx [https://perma.cc/3K83-ML9T].

302 *See* League of Women Voters v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 370 (Fla. 2015). Whether state courts can hear *federal* partisan gerrymandering claims notwithstanding *Rucho* has been hotly debated. *See* Will Baude, *Can Federal Partisan Gerrymandering Claims Be Brought in State Court?*, VOLOKH CONSPIRACY (June 28, 2019), https://reason.com/volokh/2019/06/28/can-federal-partisan-gerrymandering-claims-be-brought-in-state-court/ [https://perma.cc/DB5V-U72X].

303 *See supra* note 33 (defining judicial activism and judicial restraint).

This Part begins by showing how the Court's decisions have deregulated the redistricting process. It further discusses cases—primarily *Rucho* and *Evenwel*—that are examples of judicial restraint where the Court declined to enter the thicket. It then turns to the Court's activist decision in *Shelby County* and reframes it as a targeted strike that has limited collateral damage to other doctrines. This Part next addresses the major exception to the Court's recent retreat: the revival and transformation of *Shaw*. This Part concludes by demonstrating that the Court's redistricting decisions display an election law exceptionalism—that is, the underlying rationales are unlikely to apply beyond the realm of voting rights.

A. Deregulating the Redistricting Process

Redistricting law evolves incrementally but its impacts are felt episodically. Indeed, every redistricting cycle since 1970 has been governed by a new set of rules.[304] In the 1970 cycle, States confronted the one-person, one-vote revolution.[305] In the 1980 cycle, States encountered Section 5 of the VRA's retrogression standard[306] and racial vote-dilution doctrine under the Fourteenth Amendment.[307] In the 1990 cycle, States tackled the *Gingles* factors[308] and the threat that the Supreme Court would recognize partisan gerrymandering claims.[309] In the 2000 cycle, States were faced with the *Shaw* cause of action,[310] the application of Section 2 to single-member districts,[311] and the narrowing of Section 5's intent standard.[312] In the 2010 cycle, States had to adjust to comparatively minor changes to Sections 2 and 5.[313] Of course, mid-decade

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304 *See* Karlan, *Nonapportionment*, *supra* note 11, at 1922.

305 *See* Reynolds v. Sims, 377 U.S. 533, 583 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964); *see also supra* subpart I.B (discussing the development and application of the one-person, one-vote rule).

306 *See* Beer v. United States, 425 U.S. 130, 141 (1976) (adopting the retrogression standard); *id.* at 145 (Marshall, J., dissenting) ("[W]e are faced today for the first time with the question of § 5's substantive application to a redistricting plan.").

307 *See* White v. Regester, 412 U.S. 755, 765–67 (1973).

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

309 *See* Davis v. Bandemer, 478 U.S. 109, 138–39 (1986); Karcher v. Daggett, 462 U.S. 725, 744–45 (1983) (Stevens, J., concurring).

310 *See* Shaw v. Reno, 509 U.S. 630, 658 (1993).

311 *See* Growe v. Emison, 507 U.S. 25, 40–41 (1993).

312 *See* Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 341 (2000).

313 *See* League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 434–35 (2006) (adopting a cultural compactness standard in Section 2 cases); Bartlett v. Strickland, 556 U.S. 1, 26 (2009) (plurality opinion) (determining that the first *Gingles* factor is satisfied "[o]nly when a geographically compact group of

changes in the rules of the game have often sparked litigation that upends maps mid-cycle.[314] But since the Court began regulating the "political thicket,"[315] the Court or Congress—or both—have changed the rules of redistricting each decade.

Moreover, from the civil rights movement to *Shelby County*, each successive redistricting cycle involved *ever-greater* regulation of the redistricting process. At the start of each decade, mapmakers were faced with an expanding checklist of laws and doctrines that constrained their authority. The 2020 redistricting cycle abruptly reversed that trend.

Consider what mapmakers today need to comply with—and how they can do so easily or through sleight of hand. Frankly, there are only four boxes left to check. First, mapmakers must abide by Section 2, which requires analysis of residential segregation and racially polarized voting. This requirement presents the heaviest lift.[316] Second, mapmakers must avoid drawing racial gerrymanders. But other than for districts mandated by Section 2, mapmakers can invoke partisanship—not race—as the motive for their choices.[317] Third, mapmakers must draw equipopulous districts,[318] but that requirement is not a real impediment to gerrymandering.[319] Finally, mapmakers must comply with any traditional redistricting principles required by their State, which are mere paper tigers.[320]

The past decade of redistricting decisions has created a system with "minimal regulation[ ] of the political process and deference to state regulations."[321] The end result is less federal oversight of redistricting and fewer opportunities for judicial

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minority voters could form a majority in a single-member district"); Persily, *Promise*, *supra* note 122, at 207–08 (discussing how Congress overturned *Bossier Parrish II* and *Georgia v. Ashcroft* when it reauthorized the VRA in 2006).

314 For example, the Court's decision in *Alabama Legislative Black Caucus* sparked a new wave of *Shaw* litigation in the mid-2010s. *See supra* note 254.

315 Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

316 *See supra* subpart I.C.

317 *See infra* section IV.B.2 (discussing how courts will likely answer the race or party question).

318 *See supra* subpart I.B.

319 *See, e.g.*, Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1654 (1993) (observing that "the *Reynolds* rule could constrain but not eliminate the prospects for gerrymandering").

320 If these traditional redistricting principles are mandated by the State's constitution rather than by laws enacted by the State legislature, it is possible that even these restraints could be declared unconstitutional under the independent state legislature doctrine. *See supra* note 71.

321 Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Abbott v. Perez*, Race, and the Immodesty of the Roberts Court*, HARV. L. REV. BLOG (July 31, 2018), https://

entanglement in redistricting disputes. This devolution of authority has given mapmakers—that is, state legislators in most States—far greater power and discretion.

In some ways, this deregulatory trend predates the 2010 redistricting cycle. In 2009, Professor Ellen Katz examined several recent election law cases—all outside the redistricting context—and concluded that those "decisions suggest a systematic move by the Roberts Court to abandon active review of state electoral procedures and to curb federal regulation of such processes more generally."[322] That prediction proved prescient, and the Court's recent redistricting jurisprudence has brought it into sharp relief. It is to these cases that I now turn.

B. Side-Stepping the Thicket

In exercising judicial restraint in the 2010 redistricting cycle, the Court avoided regulating partisan gerrymandering and the redistricting denominator. These decisions, therefore, are easiest to explain if one believes that the Court is seeking to extricate itself from politics.

Recall that the *Rucho* Court relied on the non-justiciable political question doctrine, a limitation imposed by the separation of powers.[323] But in reaching this conclusion, the Court did more than simply interpret Article III's "Cases" and "Controversies" requirement.[324] The Court first concluded that the Equal Protection Clause does not command proportional representation of political parties.[325] In the absence of any neutral principle for fairness, partisan gerrymandering claims presented "political question[s] beyond the competence of the federal courts."[326] The Court thereby avoided the political thicket by taking a narrow view of the Equal Protection Clause.

Turning to *Evenwel*, the plaintiffs there asked the Court to jump headfirst into the political thicket by *mandating* CVAP-based redistricting,[327] a ruling that would have invalidated "districting [plans in] all 50 States and countless local jurisdic-

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blog.harvardlawreview.org/abbott-v-perez-race-and-the-immodesty-of-the-roberts-court/ [https://perma.cc/EZV4-K6DJ].

322 Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1642 (2009). Katz examined four decisions involving the nomination of judicial candidates, blanket primaries, voter ID laws, and whether a gubernatorial appointment to a county commission vacancy needed to be precleared under Section 5 of the VRA. *See id.* at 1615–16.

323 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019).

324 U.S. CONST. art. III, § 2.

325 *See Rucho*, 139 S. Ct. at 2499.

326 *Id.* at 2500.

327 *See* Evenwel v. Abbott, 578 U.S. 54, 64 (2016).

tions."[328] Once again, it is easy to understand why the Court would be reticent to accept such an invitation. But in declining to rule *out* CVAP-based redistricting plans,[329] the Court appeared agnostic about the meaning of the Equal Protection Clause and whether it gives States discretion to set a redistricting denominator.

The Court stayed out of the electoral fray in a handful of other election law cases. The Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*[330] is perhaps the most prominent example. There, the Court cited stability concerns in broadly interpreting the term "legislature" in the Elections Clause,[331] lest "doubt [be cast] on numerous . . . election laws adopted by the initiative method of legislating."[332] The Court also accepted Arizona's power to "'define[ ] itself as a sovereign'" and to "delineat[e] the State's legislative authority" as including "both the initiative power and the [commission]'s redistricting authority."[333] This approach respects federalism as it does not presume that each State's division of legislative authority matches Article I. Similar themes are found in *Chiafalo v. Washington*,[334] where the Court deferred to longstanding practice and endorsed state authority when it upheld faithless elector laws.[335] The Court's reasoning in these pro-reform decisions once again sounded in federalism and—paradoxically—promoted stability.[336]

A few themes emerge in these instances of judicial restraint. First, in both *Rucho* and *Evenwel*, the Court treated

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328 *Id.* at 73.

329 *See id.* at 75. Justice Thomas's clear endorsement of such plans, *see id.* at 75–76 (Thomas, J., concurring in the judgment), will only encourage efforts to modify the redistricting denominator.

330 576 U.S. 787 (2015).

331 U.S. CONST. art. I, § 4, cl. 1.

332 *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 822.

333 *Id.* at 817 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

334 140 S. Ct. 2316 (2020).

335 *See id.* at 2326–28.

336 Although not a pro-reform decision, the Court's dismissal on standing and ripeness grounds of challenges to Trump's attempt to exclude undocumented immigrants from congressional reapportionment is yet another example of the Court side-stepping the thicket. *See* Trump v. New York, 141 S. Ct. 530, 535 (2020). The Trump administration's incompetence and failure to follow through on its policy makes the ripeness rationale appear prescient in retrospect. *See supra* notes 20–22.

This pattern also held in an anti-reform decision, Brnovich v. DNC, 141 S. Ct. 2321 (2021). There, the Court issued its first ruling concerning Section 2's application to vote-denial claims. In creating a high bar for bringing such claims, the Court discouraged future suits and once again avoided embroiling itself in future politically charged disputes. *See infra* Section IV.D.3.

the Equal Protection Clause as a cipher with few clear dictates—an approach in stark contrast to the *Shaw* line of cases and the Court's more general equal protection jurisprudence.[337] Second, the Court endorsed historical gloss, which is a familiar method of interpretation, particularly in separation of powers cases.[338] Third, the Court was happy to hand over its decision-making role to the States. Finally, the Court invoked prudential considerations to avoid invalidating numerous state laws, rather than overturning, say, a landmark federal statute.[339]

C. Exiting the Thicket

Shelby County is the contemporary poster child for judicial activism in the redistricting arena. By invalidating the VRA's coverage formula, the Court obliterated the *ancien* preclearance regime, letting States and localities across the South and Southwest pass voting laws without federal approval for the first time in decades. Some jurisdictions quickly responded to this freedom by passing voter-suppression laws or redrawing districts mid-decade.[340] But the full import of *Shelby County* on the redistricting cycle will be felt in the next few years. The end of preclearance as we knew it has reallocated authority away from the U.S. Department of Justice and the federal courts and into the hands of state and local mapmakers.

In discussing *Shelby County*'s holding and future doctrinal impact, this Section makes two claims about how and why the Court exited the political thicket in such a dramatic fashion.

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337 *See infra* subpart III.E.

338 *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2567 (2019) (looking at historical practice in holding that the Enumeration Clause permits a citizenship question on the census); NLRB v. Noel Canning, 573 U.S. 513, 528–30 (2014) (relying on historical practice in interpreting the Recess Appointments Clause); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012) (canvassing "the role of historical practice in the separation of powers context"); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (resurrecting "James Madison's theory of postenactment historical practice, sometimes called 'liquidation'").

339 *Cf.* Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2227 (2014) ("Over the course of the Court's history, it has been far more active in striking down state laws than federal laws. . . . The Roberts Court has struck down state laws in fewer cases per year than any Court since the Civil War, by a significant margin.").

340 *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (voter-suppression law); Patino v. City of Pasadena, 230 F. Supp. 3d 667, 673 (S.D. Tex. 2017) (mid-decade redistricting); *see also supra* section II.A.3 (discussing the wave of bail-in litigation following *Shelby County*).

First, the *Shelby County* Court's adoption of the equal sovereignty principle is surprisingly narrow notwithstanding its profound real-world consequences. Second, the Court engaged in activist decision-making to, in part, extricate itself from the political thicket.

1. *The Equal Sovereignty Principle as Freestanding Federalism*

Before *Northwest Austin* was decided, Professor John Manning coined the term "freestanding federalism" to describe cases where the Court invalidates a statute on federalism grounds "without purporting to ground its decision[ ] in any particular provision of the constitutional text."[341] Several scholars—myself included—have argued that *Shelby County*'s equal sovereignty principle rests on "freestanding federalism" rather than an interpretation of the Reconstruction Amendments.[342]

But first, a quick detour through the caselaw on Congress's Reconstruction Amendment enforcement authority. In a pair of landmark decisions upholding the original VRA, the Warren Court held that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[343] *Katzenbach*'s rationality standard applied to statutes enacted under *both* the Fourteenth and Fifteenth Amendments. Then, in *City of Boerne v. Flores*,[344] the Rehnquist Court fashioned a stricter test for Congress's *Fourteenth* Amendment enforcement authority.[345] At the first step of *Boerne*'s congruence and proportionality test, the Court "identif[ies] with some precision the scope of the constitutional right at issue."[346] Next, the Court examines the legislative record to ascertain "whether Congress identified a history and pattern of unconstitutional [conduct]

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341 John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004–05 (2009).

342 *See* Colby, *supra* note 32, at 1168; Crum, *Superfluous*, *supra* note 32, at 1575–76; Litman, *supra* note 32, at 1259; *cf.* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1258–59 (2012) (criticizing *Northwest Austin* on similar grounds).

343 South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966); *see also* Katzenbach v. Morgan, 384 U.S. 641, 646–47 (1966) (upholding Section 4(e) of the VRA as appropriate enforcement legislation under Section Five of the Fourteenth Amendment).

344 521 U.S. 507 (1997).

345 *See id.* at 511; Katz, *Reinforcing*, *supra* note 216, at 2395–97 (discussing *Boerne* in relation to *Katzenbach*).

346 Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

by the States."[347] Finally, the Court decides whether "[t]here [is] a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[348] The Court has never squarely applied *Boerne* in a case involving the Fifteenth Amendment, racial discrimination, or the right to vote.[349]

In *Northwest Austin*, the parties teed up whether *Katzenbach* or *Boerne* supplied the governing standard of review for Congress's *Fifteenth* Amendment enforcement authority.[350] But in deciding the case on constitutional avoidance grounds, the Court concluded that it "need not resolve" that dispute.[351]

In *Shelby County*, the Court self-consciously borrowed language about equal sovereignty and current burdens from *Northwest Austin*.[352] And in a footnote, the Court observed that "[b]oth the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin*" and that decision "guides our review under both Amendments in this case."[353]

Notwithstanding this language, the Court's majority opinion in *Shelby County* does not even cite *Boerne*—not for the standard of review and not for its application. Nor does it cite to any of *Boerne*'s progeny. The words "congruent" and "proportional" do not appear either. Thus, *Shelby County* cannot be viewed as applying *Boerne*, much less *holding* that it applies to the Fifteenth Amendment.[354]

Instead, "*Shelby County* broadened the equal sovereignty principle beyond how it had been used in prior cases."[355] And if the equal sovereignty principle is properly viewed as an example of freestanding federalism, then it would apply to "[b]oth [Reconstruction] Amendments,"[356] just as it would apply to any other grant of congressional authority in the Constitution. The Court's reassurances that its opinion was limited "only [to] the

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347 *Id.* at 368.

348 *Boerne*, 521 U.S. at 520.

349 *See* Crum, *Superfluous*, *supra* note 32, at 1575.

350 *See* Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009).

351 *Id.*

352 *See* Shelby County v. Holder, 570 U.S. 529, 550–51, 556 (2013).

353 *Id.* at 542 n.1.

354 *See* Crum, *Superfluous*, *supra* note 32, at 1577; *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

355 Litman, *supra* note 32, at 1211.

356 *Shelby County*, 570 U.S. at 542 n.1.

coverage formula" and "in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2" or to "§ 5 itself" further underscore this point.[357]

This language makes clear that *Shelby County*'s equal sovereignty principle—as its name would suggest—applies only to statutes that "divide the States,"[358] and not to nationwide statutes. Indeed, in *Allen v. Cooper*, the sole post-*Shelby County* discussion of Congress's Fourteenth Amendment enforcement authority, the Court does not even cite *Shelby County* and fails to mention either the equal sovereignty principle or its current burdens standard.[359] Unsurprisingly, *Allen* involved a nationwide statute.[360] Perhaps even more telling, in its recent decision creating a high bar for vote-denial claims brought under Section 2, the Court omitted any discussion of the relevant constitutional standard of review notwithstanding the issue being briefed by the parties and amici.[361] As discussed more below, the Court stayed mum on the underlying constitutionality of Section 2's discriminatory-effects standard.[362]

2. *Judicial Activism as Judicial Retreat*

In an influential article on partisan gerrymandering, Professors Guy-Uriel Charles and Luis Fuentes-Rohwer called for courts to engage in judicial activism in order to avoid downstream entanglements.[363] According to Charles and Fuentes-Rohwer, "the Court ought to occasionally make strategic interventions in the domain of law and politics . . . where doing so is reasonably likely to avoid future problems that would lead to greater interventions."[364] By policing partisan gerrymanders, Charles and Fuentes-Rohwer's argument goes, the Court initially wades into the political thicket but, in so doing, corrects certain pathologies and creates a political system in which subsequent disputes are resolved democratically and without liti-

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357 *Id.* at 557.

358 *Id.* at 553.

359 *See* 140 S. Ct. 994, 1004–05 (2020).

360 *See id.* at 999.

361 *See* Brnovich v. DNC, 141 S. Ct. 2321 (2021); Travis Crum, *Avoiding Avoidance in* Brnovich, ELECTION L. BLOG (July 1, 2021), https://electionlawblog.org/?p=123078 [https://perma.cc/3776-2E3V].

362 *See infra* Section IV.D.3.

363 In many ways, Charles and Fuentes-Rohwer's argument builds on John Hart Ely's political process theory. *See* Charles & Fuentes-Rohwer, *Judicial Intervention*, *supra* note 34, at 257 & n.164 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 121 (1980)).

364 *See id.* at 240.

gation.[365] Although this argument was convincing to Justice Kagan in dissent,[366] it failed to persuade the majority in *Rucho*.

Shelby County is, in many ways, the conservative doppelganger of Charles and Fuentes-Rohwer's argument. Within the four corners of its opinion, the Court focused on the "federalism costs"[367] imposed by the preclearance regime and the sovereign indignities wrought by Congress's "divi[sion of] the States."[368] But if you look at the subtext of *Northwest Austin* and *Shelby County*, it becomes apparent that the Court assumed—wrongly in hindsight and, in my view, in foresight as well—that its invalidation of the coverage formula would entangle it *less* in politically laden disputes.

During the *Northwest Austin* oral argument, Justice Scalia expressed his "suspicion" over the 2006 VRA reauthorization's "overwhelming congressional vote in favor."[369] Scalia specifically invoked "the Israeli Supreme Court['s] . . . rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something wrong there."[370] Then, during the *Shelby County* oral argument, Scalia rehashed this point, but with a different spin:

> Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes. I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless—unless a court can say it does not comport with the Constitution.[371]

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365 *See id.* at 241 ("[J]udicial intervention in this context is an act of judicial restraint because it obviates the need for the Court to take sides later on substantive partisan disputes that would arguably arise as a result of unconstrained state actors' partisan manipulation of electoral rules."); *id.* at 268 (arguing that the Court "can set clear ground rules, which would likely result in fewer secondary disputes in the political process and therefore fewer cases flowing from the political process to the courts for adjudication").

366 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2523 n.5 (2019) (Kagan, J., dissenting) (citing Charles & Fuentes-Rohwer, *Judicial Intervention*, *supra* note 34, at 269).

367 Shelby County v. Holder, 570 U.S. 529, 549 (2013) (quoting Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000)).

368 *Id.* at 553.

369 Karlan, *Disdain*, *supra* note 41, at 2.

370 Transcript of Oral Argument at 51, Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (No. 08-322), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-322.pdf [https://perma.cc/W6JR-PKLW].

371 Transcript of Oral Argument at 47, Shelby County v. Holder, 570 U.S. 529 (2013) (No. 12-96), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-96_7648.pdf [https://perma.cc/SX5Y-VR3Y]. The

For his part, Justice Thomas opined in his *Northwest Austin* concurrence that Section 5 being "no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory."[372]

At least some of the conservative Justices, therefore, viewed the VRA as a "political lockup" that only a "self-conscious judiciary [c]ould destabilize . . . in order to protect the competitive vitality of the electoral process."[373] In other words, they believed the VRA was distorting politics—much like liberals believe partisan gerrymandering does. And given the political pitfalls in voting against the VRA, the Court viewed itself as the only institution that could solve the problem.

Furthermore, Charles and Fuentes-Rohwer are undoubtedly correct that some Justices—in particular Chief Justice Roberts—care deeply about the Court's institutional legitimacy.[374] That is why the Court has been "asking whether judicial engagement is bad for the Court" instead of "whether judicial engagement would be good for the political process."[375]

This institutional self-preservation lurks behind the Court's reasoning. It explains *Northwest Austin*'s questionable constitutional avoidance ruling,[376] which presumably bought Congress time to respond but ended up giving the Court cover to strike down the coverage formula four years later.[377] It also illuminates *Shelby County*'s dubious statement that Congress was free to "draft another formula based on current conditions."[378] In support of this gesture of goodwill, the Court de-

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notion that racial considerations lurk beneath the surface of a decision's text is not limited to election law cases. *See, e.g.*, Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1164 (2019) (arguing that "race played a significant role in the creation, maturation, and curtailment of the modern right to counsel").

372 *Northwest Austin*, 557 U.S. at 226 (Thomas, J., concurring in the judgment in part and dissenting in part).

373 Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649 (1998).

374 *See* Charles & Fuentes-Rowher, *Judicial Intervention*, *supra* note 34, at 259.

375 *Id.* at 258. The Court has asked the former question because of its longstanding "worr[y] that political elites will ignore judicial directives that are inimical to the[ir] interests." *Id.* at 269.

376 *Cf.* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1277 (2016) (critiquing *Northwest Austin*'s reasoning).

377 Congress did not even bother to hold a hearing following *Northwest Austin*. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2132 (2015).

378 Shelby County v. Holder, 570 U.S. 529, 557 (2013).

clined to invalidate *preclearance* itself,[379] a step that Justice Thomas would have taken.[380]

To be crystal clear, I am not endorsing this line of thinking by the *Shelby County* Court. I am not a *Shelby County* apologist. Rather, my point is that the Court is willing to engage in short-term judicial activism to achieve its long-term goal of judicial retreat from the political thicket. In so doing, the Court is operating within a conservative—rather than progressive—framework.

D. Staying in the Thicket

The major exception to the Court's general retreat from regulating the political process is its revival and transformation of *Shaw*'s racial gerrymandering claim.

The salience of the second wave of *Shaw* cases has been debated by academics and lawyers. Professor Rick Hasen is perhaps the most realpolitik given his conclusion that *Shaw*'s "racial gerrymandering cause of action has been repurposed for new partisan warfare in cases in which the vote-dilution claim under section 2 is not strong enough to stand on its own."[381] For their part, Professors Guy-Uriel Charles and Luis Fuentes-Rohwer believe that the new "[r]acial gerrymandering cases are . . . adjudicated exclusively through the anticlassification framework," which "may signal the end for Section 2 of the VRA."[382] Dale Ho, a prominent voting rights attorney at the ACLU and current judicial nominee, has argued that the two waves of *Shaw* cases are distinct doctrines notwithstanding their shared moniker. According to Ho, the 1990s *Shaw* cases "sought to turn the redistricting process away from race" whereas the 2010s *Shaw* cases sought "to root out intentional efforts to discriminate on the basis of race."[383]

As an initial matter, I concur with Hasen's framing as to the plaintiffs' motives and as a descriptive account of what happened to the *Shaw* cause of action. The Black and Democratic Party-backed plaintiffs in the second wave *Shaw* cases

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379 *See id.*

380 *See id.* at 557–58 (Thomas, J., concurring).

381 Hasen, *Race or Party*, *supra* note 240, at 1854.

382 Charles & Fuentes-Rohwer, *Race and Representation*, *supra* note 29, at 1593.

383 Dale E. Ho, *Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887, 1891–92 (2018).

saw an opportunity to flip a doctrine on its head and took it. [384] But the same partisan motives could be ascribed to the plaintiffs in the first wave of *Shaw* cases. The White plaintiffs in *Shaw* did not allege a vote-dilution claim, which would have failed on the merits.[385] The more relevant question, in my view, is how the Court views *Shaw*'s second wave.

In this debate, I disagree with Charles and Fuentes-Rohwer that the *second* wave *Shaw* cases signaled an adoption of the colorblind approach by the Court.[386] The first wave's application of strict scrutiny to race-based redistricting and the Court's rhetoric are quintessentially anti-classification and colorblind.[387] Of course, the liberal Justices in the second wave cases embraced *Shaw* for the first time.[388] This begs the question—why embrace *Shaw* now?

On this point, Ho's interpretation provides valuable insights, especially when it comes to *Alabama Legislative Black Caucus*. There, Alabama claimed that it sorted so many voters by race to achieve two redistricting criteria. First, Alabama pointed to its decision to tighten maximum population deviation from the constitutionally permissible ten percent deviation to merely two percent.[389] Second, Alabama argued that Section 5's retrogression principle required it to maintain the same percentage of Blacks within each district.[390] Alabama asserted that the former criteria was the predominant factor.[391]

The Court rejected this argument, framing the "equal population goal" as "part of the redistricting background."[392] In other words, the one-person, one-vote rule could not predominate because it was *not* discretionary, even though

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384 *Cf.* Charles & Fuentes-Rohwer, *Race and Representation*, *supra* note 29, at 1593–94 (discussing the identities of the plaintiffs in *Shaw*'s second wave).

385 *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483, 494 (1993). And to be clear, that claim would *not* have failed on the grounds that the plaintiffs were White. Section 2 protects White as well as minority voters. *See* Harding v. County of Dallas, 948 F.3d 302, 316 (5th Cir. 2020); United States v. Brown, 561 F.3d 420, 430 (5th Cir. 2009); *see also* Rice v. Cayetano, 528 U.S. 495, 499 (2000) (relying on the Fifteenth Amendment to invalidate provision that limited suffrage to "native Hawaiians").

386 *See* Charles & Fuentes-Rohwer, *Race and Representation*, *supra* note 29, at 1594–95.

387 *See* Ho, *supra* note 383, at 1891.

388 *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 366.

389 *See* Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254, 259 (2015) (discussing Brown v. Thomson, 462 U.S. 835, 842 (1983)).

390 *Id.* at 259–60.

391 *See id.* at 273–74.

392 *Id.* at 272.

States have great flexibility to deviate from perfect population equality.[393] Moreover, Alabama's pro-packing interpretation of Section 5 was legally dubious from the start—and ultimately rebuffed by the Court.[394] The Court did not use the word "pretext," but its rejection of Alabama's presumptively good-faith explanation for its choices certainly resembles such a finding.[395]

So, does this explain why the Court stayed in the thicket? After all, the second wave cases were initiated in *Alabama Legislative Black Caucus* by the liberal Justices joined by Kennedy.[396] The former lack the colorblind vision and the escapist impulses that have motivated majorities in the other redistricting cases.[397] Kennedy's endorsement of the *Shaw* cause of action was at least consistent with his past votes.[398] This explanation is persuasive but not the whole story.

Shaw's racial gerrymandering claim differs from the other major redistricting disputes of the past decade in that it deals solely with race *qua* race. That matters because race has a unique and privileged place within constitutional law.[399] In addition, there were fewer available escape hatches, like federalism and separation of powers rationales. When such opportunities presented themselves, the Court took them. The Court ducked some of the second wave cases on standing grounds,[400] and it squarely rejected expanding the doctrine to permit challenges to state-wide maps rather than individual districts.[401] Of course, the Court has used an escape hatch to avoid *Shaw*

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393 *See Brown*, 462 U.S. at 843.

394 *See Ala. Legislative Black Caucus*, 575 U.S. at 275–78; Levitt, *Quick and Dirty*, *supra* note 247, at 582–85.

395 *Cf.* Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1233 (2018) ("In many cases, this litmus test for constitutionality resulted in a close examination of the state's proffered justifications for a statute . . . to ascertain whether they were pretextual.").

396 See *Ala. Legislative Black Caucus*, 575 U.S. at 257.

397 *See* Hasen, *Racial Gerrymandering*, *supra* note 5, at 366.

398 *See* Miller v. Johnson, 515 U.S. 900, 903 (1995).

399 *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2234–35 (2019) (reversing capital murder conviction of a Black defendant due to discriminatory use of peremptory challenges by prosecutors against prospective Black jurors); Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (holding that where juror clearly states that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires trial court to consider evidence of the juror's statement and consequent denials of the jury trial guarantee); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that courts cannot enforce racially restrictive covenants).

400 *See* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1950 (2019); Wittman v. Personhuballah, 136 S. Ct. 1732, 1734 (2016).

401 *See Ala. Legislative Black Caucus*, 575 U.S. at 268.

before, namely the race or party question. And it may use it again in the 2020 cycle.[402]

E. Voting Rights Exceptionalism

The Supreme Court cannot simply ghost the political thicket. Its exit will be very noticeable, and its escape route will necessitate judicial activism. If the Court continues down this path, there will be a series of landmark decisions in the early 2020s. And, as I hope this Article makes clear, the worst-case scenarios will require a significant expansion of existing doctrine.

Here, my claim is that the Court's redistricting decisions of the past decade have been limited in their potential cross-application to other areas of law. Despite dealing with complex issues of race, congressional authority, federalism, and separation of powers, the Court's redistricting decisions can be cabined to the realm of election law. The divide between constitutional law and election law has become increasingly apparent.[403]

Consider first how the Court could have written its opinion in *Shelby County*, as that case had the greatest potential for collateral damage. Rather than rely on the equal sovereignty principle, the Court could have straightforwardly held that *Boerne*'s congruence and proportionality test applies to Congress's authority to remedy racial discrimination under the Fourteenth and Fifteenth Amendments. The Court could have then invalidated *both* the coverage formula and preclearance. Alternatively, the Court could have struck down the coverage formula for "inject[ing] racial considerations into every [election law] decision."[404] A ruling on either enforcement authority or equal protection grounds would have had far more wide-reaching effects than a doctrine that applies solely to coverage formulas.[405] The equal sovereignty principle—while unprincipled—was a surgical strike.

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402 *See* section IV.B.2.

403 For an account of how election law scholarship diverged from the constitutional law literature, see Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 7–9 (2010).

404 Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543 (2015).

405 Coverage formulas are an oddity in federal law. In the voting rights realm, Section 203 of the VRA uses a coverage formula based on recent demographic data to determine which jurisdiction must provide election materials in languages other than English. 52 U.S.C. § 10503. To be sure, both historically and contemporaneously, Congress has differentiated between the States with regards to appropriations and regulations. *See* Litman, *supra* note 32, at 1242–46 (collecting

The limited collateral damage is important for *other* areas of voting rights. If *Shelby County* were clearly based on an enforcement authority or equal protection rationale, then Section 2's constitutionality would be in grave danger.[406] Indeed, the constitutional challenge would have been filed already.

The fact that Section 2 and its discriminatory-effects standard remain on the books at the start of the 2020 redistricting cycle matters. Section 2 will guide the drawing of districts where elections will be held and where voters will elect representatives, who, in turn, will pass laws that make a difference in people's lives.

On this point, *Northwest Austin*'s aftermath is instructive. Because the Court punted in the first constitutional challenge to the 2006 VRA reauthorization, Section 5 played a key role in the 2010 redistricting cycle.[407] In Texas, for example, Section 5 delayed the implementation of redistricting maps that were found to be intentionally discriminatory[408] and temporarily blocked the nation's "most stringent" voter ID law.[409] Doctrinal choices can have real-world consequences.

To the extent that the Court has grounded—and continues to ground—its decisions in federalism, there remain pathways for reform. Professors Sam Issacharoff and Franita Tolson have each put forward persuasive arguments for ways Congress can and should invoke its Elections Clause authority to regulate federal elections generally and congressional redistricting in particular.[410] This argument only goes so far, however. The Elections Clause is a powerful tool over federal elections,[411] but it does not apply to state elections.[412]

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examples). And yet, these laws have not been successfully challenged. *See* NCAA v. Governor of New Jersey, 730 F.3d 208, 237–39 (3d Cir. 2013), *overturned on other grounds by* Murphy v. NCAA, 138 S. Ct. 1461 (2018).

406 *See infra* subpart IV.D.

407 *See* Levitt, *Quick and Dirty*, *supra* note 247, at 580.

408 *See* Texas v. United States, 887 F. Supp. 2d 133, 159 (D.D.C. 2012) (finding discriminatory intent), *vacated*, 570 U.S. 928 (2013); *id.* at 178 (denying preclearance).

409 Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013).

410 Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 108–09 (2013); Tolson, *Structure*, *supra* note 54, at 399; Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 367–68 (2019).

411 *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 13–15 (2013) (holding that there is no "presumption against pre-emption" under the Elections Clause).

412 *See* Stephanopoulos, *Anti-*Carolene, *supra* note 29, at 155.

Looking beyond the beltway for solutions, the Court's rationales leave room for state-level VRAs. California, Washington, Oregon, and Virginia have enacted state VRAs, and legislators have proposed one in New York.[413] State-level VRAs are not mirror images of their federal counterpart. For instance, the California Voting Rights Act (CVRA)[414] differs from Section 2 in "not requir[ing] that [a] plaintiff prove a 'compact majority-minority' district is possible for *liability* purposes."[415] As such, the CVRA dispenses with the first *Gingles* prong and focuses on the presence of racially polarized voting.[416] Once again, doctrine matters. Even if the Court one day invalidates Section 2 of the VRA because it exceeds Congress's Reconstruction Amendment enforcement authority, those same federalism burdens do not apply to a state VRA.

If the Court's decision in *Shelby County* had focused on the Equal Protection Clause, then the constitutionality of state-level VRAs and Section 2 of the VRA would be imperiled as well. Here, I am referring to what Professor Richard Primus has called "[d]isparate [i]mpact: [r]ound [t]hree," or the prospect that "equal protection could *prohibit* the passage of [disparate-impact] statutes because of their overt concern with race."[417] Such an approach would have also taken a wrecking ball to other domains of anti-discrimination law, endangering the dis-

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413 *See* RUTH GREENWOOD & ASEEM MULJI, CAMPAIGN LEGAL CTR., DESIGNING STATE VOTING RIGHTS ACTS: A GUIDE TO SECURING EQUAL VOTING RIGHTS FOR PEOPLE OF COLOR AND A MODEL BILL (2020), https://campaignlegal.org/sites/default/files/2020-07/DesigningStateVotingRights_Report%20FINAL.pdf [https://perma.cc/563U-EU7X]; Ben Pavior, *Virginia is Poised to Approve Its Own Voting Rights Act*, NPR (Feb. 26, 2021), https://www.npr.org/2021/02/26/971366621/virginia-is-poised-to-approve-its-own-voting-rights-act [https://perma.cc/53X7-C85M].

414 CAL. ELEC. CODE §§ 14025–14032 (West 2021).

415 Jauregui v. City of Palmdale, 226 Cal. App. 4th 781, 789 (Cal. Ct. App. 2014) (quoting Sanchez v. City of Modesto, 145 Cal. App. 4th 660, 669 (Cal. Ct. App. 2006)).

416 *See* Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 240 (2010). The California Supreme Court will soon hear a case on the elements of a CVRA claim. Pico Neighborhood Ass'n v. City of Santa Monica, 265 Cal. Rptr. 3d 530, 544 (Cal. Ct. App. 2020), *cert. granted* 474 P.3d 635 (Cal. 2020). Separately, the CVRA has been unsuccessfully challenged by conservative activists. *See* Higginson v. Becerra, 786 Fed. App'x. 705, 707 (9th Cir. 2019); Rick Hasen, *Breaking: Without Noted Dissent, Supreme Court Refuses to Hear Challenge to California Voting Rights Act*, ELECTION L. BLOG (May 26, 2020), https://electionlawblog.org/?p=111649 [https://perma.cc/X58G-PM24].

417 Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003); *see also* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (predicting that "the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?").

parate impact provisions of Title VII and the Fair Housing Act.[418]

Moving away from *Shelby County*, the Court's other recent cases treat voting rights differently. Recall that the *Rucho* Court reached its conclusion about the non-justiciability of partisan gerrymandering claims through an interpretation of the Equal Protection Clause rather than a re-working of Article III's Cases or Controversies requirement. The *Evenwel* Court similarly reasoned based on one-person, one-vote precedents and voting rights jurisprudence.[419] Put bluntly, neither *Rucho* nor *Evenwel* have any obvious application to other strands of equal protection doctrine.[420]

And although *Shaw* reflects a broader misapplication of Fourteenth Amendment principles to Fifteenth Amendment cases,[421] its predominant factor test has no direct counterpart in other areas of anti-discrimination law. As a general rule, the Equal Protection Clause and anti-discrimination statutes are triggered if race was merely a *motivating* factor.[422] *Shaw* dispenses with such a requirement for practical reasons and replaces it with a predominance requirement.[423] Once again, the Court put a wedge between voting rights and other areas of equal protection law.

Finally, from a longer time horizon, the Court's nascent voting rights exceptionalism stands out for how it has treated redistricting disputes as, well, redistricting disputes. Over the past several decades, the Court has failed to distinguish between voting rights and civil rights, treating election law cases no differently than other equal protection cases.[424] As I have

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418 *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545–46 (2015) (Fair Housing Act); Griggs v. Duke Power Co., 401 U.S. 424, 429–31 (1971) (Title VII).

419 *See* Evenwel v. Abbott, 578 U.S. 54, 71–73 (2016); *supra* subpart III.B.

420 This pattern continued with the Court's silence in Brnovich v. DNC, 141 S. Ct. 2321 (2021), concerning the underlying constitutionality of Section 2 of the VRA. *See infra* section IV.D.3.

421 *See* Amar & Brownstein, *supra* note 237, at 929; Crum, *Reconstructing*, *supra* note 115, at 314–18.

422 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); 42 U.S.C. § 2000e-2(m); Clarke, *supra* note 209, at 541–42.

423 *See* Miller v. Johnson, 515 U.S. 900, 916 (1995). To be sure, one prominent analogue to *Shaw*'s approach in equal protection jurisprudence is the Court's treatment of the University of Texas at Austin's top-ten percent plan, which is "facially neutral" but whose "basic purpose . . . is to boost minority enrollment." Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2213 (2016). That policy did not trigger strict scrutiny; rather, it was the University's affirmative-action program that did. *See id.* at 2208–09.

424 *See* Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1425 (2002) (arguing that "the Fifteenth Amendment

written elsewhere, this trend is perhaps most apparent in the Court's conflation of the Fourteenth and Fifteenth Amendments.[425]

To the extent that the Court is now treating redistricting disputes *sui generis*, this opens the door to novel arguments targeted at election law jurisprudence. If the Court continues distinguishing between voting rights and constitutional law, then it may be open to arguments that disentangle the Reconstruction Amendments and seek to uphold the VRA under the Fifteenth Amendment.[426]

IV
LOOKING AHEAD TO THE 2020 CYCLE

This Part canvasses four areas of law that are likely flashpoints during the 2020 redistricting cycle. First, it examines how the VRA will be enforced in a post-*Shelby County* world. Second, it addresses *Shaw*'s future, paying particular attention to whether there will be a third, distinctive wave of racial gerrymandering claims and how courts will confront the race or party question after *Rucho*. Third, this Part looks to the consequences of mapmakers switching the redistricting denominator to CVAP and what legal challenges can be brought in response. Finally, this Part asks whether Section 2's constitutionality is endangered by *Shelby County*, *Rucho*, or *Brnovich*.[427]

A. Enforcing the VRA

Given that the Court did not tinker much with Section 2's application to vote-dilution claims during the 2010 cycle,[428] the major changes for Section 2 relate to how it will operate in a

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should not be viewed as merely adding the right to vote to the list of other rights to be protected . . . through the Fourteenth Amendment"); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CALIF. L. REV. 1201, 1202 (1996) (criticizing "the Court's attempt to integrate voting rights law into its more general approach to affirmative action"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1023–25 (1995) (observing that the Reconstruction Framers' "categorization of rights plays no part in current interpretations of the Fourteenth Amendment").

425 *See* Crum, *Superfluous*, *supra* note 32, at 1566.

426 *See id.* at 1625–26 (arguing that *Boerne* should not be extended to the Fifteenth Amendment); Crum, *Reconstructing*, *supra* note 115, at 320–22 (reconceptualizing racial vote-dilution doctrine under the Fifteenth Amendment).

427 In this Part, I assume that Congress fails to pass the John R. Lewis Voting Rights Advancement Act, the Freedom to Vote Act, and the For the People Act. *See supra* note 41.

428 *See supra* subpart I.C.

world without Section 5—and one with a delayed census.[429] The new issues facing Section 2 litigation can be divided into three categories: procedure, liability, and remedies.[430]

Let's start with procedure. One consequence of the end of preclearance is that Section 2 litigation will proceed at a much faster pace. That is because Section 5 froze election laws until they were approved by federal authorities, and Section 2 litigation took a backseat to the preclearance process.[431] The fact that, unlike Section 5's preclearance process, Section 2 does not automatically stop jurisdictions from using their enacted maps means that elections may take place under plans that are later found to be illegal.[432] In sum, Section 2 litigation will proceed apace nationwide rather than on a two-track system in covered and non-covered jurisdictions.[433]

The delay in census data will act as an accelerant, as the time to challenge and implement new maps in time for the 2022 primary elections has been reduced by several months.[434] Further complicating matters is the *Abbott* Court's permissive approach to interlocutory appeals in redistricting cases,[435] which may result in the Roberts Court hearing these cases on an expedited schedule or even on the shadow

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429 This is not to say that there are no open questions about Section 2. There certainly are. *See, e.g.*, Elmendorf, Quinn & Abrajano, *supra* note 128, at 680 (discussing whether the Court will impose quantitative cutoffs for the second and third *Gingles* factors). This Section focuses on questions that have arisen due to events in the past decade. This Section also avoids *Shaw*'s interaction with Section 2, as that doctrine is covered next. *See infra* section IV.B.1.

430 Professor Michael Pitts has advocated transplanting Section 5's retrogression requirement to Section 2. *See* Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 750–51 (2016). Moreover, the John R. Lewis Voting Rights Advancement Act includes language that would do just that. *See* Travis Crum, *Revising Sections 2 and 5 in the John Lewis Voting Rights Advancement Act of 2021*, ELECTION L. BLOG (Aug. 17, 2021), https://electionlawblog.org/?p=124147 [https://perma.cc/7T5H-57JV]. But given that this provision has not been enacted into law and given that the Supreme Court shows no signs of adopting this suggestion, I do not dwell on its potential here. *See supra* note 41.

431 *See* Perry v. Perez, 565 U.S. 388, 391 (2012).

432 *See* Stephanopoulos, *South*, *supra* note 196, at 64.

433 Notwithstanding that Section 5 applied to only a quarter of the nation's population, more successful Section 2 suits have been filed in covered jurisdictions than in non-covered jurisdictions. *See* Katz, Aisenbrey, Baldwin, Cheuse & Weisbrodt, *Documenting Discrimination*, *supra* note 135, at 655–56. This suggests that discrimination is more rampant in the covered jurisdictions and that Section 2 will have even more work to do in the 2020 cycle.

434 *See supra* notes 12–16.

435 *See* Abbott v. Perez, 138 S. Ct. 2305, 2321–23 (2018); *supra* notes 145–-156.

docket.[436] The key takeaway here is that the next several months will bring fast-moving redistricting challenges.[437]

Turning to liability, the dearth of Section 2 cases during the last decade means that little has changed on this front, aside from *Abbott* slightly raising the bar for proving intentional discrimination by condoning animus laundering by mapmakers.[438] The Court's changed membership will likely have a bigger impact on findings of liability than the minor doctrinal shifts from the past decade. That said, it is worth flagging that, in the absence of Section 5's retrogression principle, there are a handful of *non-compact* districts that States could dismantle without violating Section 2.[439] The number of these districts across the country is estimated to be quite small, likely because *Shaw* claims deterred covered jurisdictions from drawing non-compact districts in the first place.[440]

Regarding remedies, litigants may continue to seek bail-in relief given the huge pay-off for a victory, as the recently filed bail-in suit against Georgia demonstrates.[441] However, the dif-

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436 *See generally* William Baude, *Forward: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1–2 (2015) (explaining what the shadow docket is and how the Supreme Court sometimes uses it to quickly and informally adjudicate cases).

437 In the waning years of the 2010s, a new procedural wrinkle emerged in voting rights litigation. In a recent set of dueling opinions, Judges Costa and Willett of the Fifth Circuit disagreed over whether Section 2284(a) requires a three-judge district court for *statutory* challenges to state-legislative districts. *See* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."). Costa believes that three-judge courts are required only for constitutional challenges to state-legislative plans, *see* Thomas v. Reeves, 961 F.3d 800, 801–02 (5th Cir. 2020) (en banc) (Costa, J., concurring), whereas Willett claims that such courts are required for both constitutional and statutory challenges, *see id.* at 810 (Willett, J., concurring in the judgment). But even Willett concedes this dispute is mostly academic, as "[i]n most reapportionment cases, statutory claims are asserted alongside constitutional claims, rendering moot the 3-judge vs. 1-judge question." *Id.* at 823.

Nevertheless, procedure can be substance here, as whether a case is heard by a three-judge district court determines whether it can be directly appealed to the Supreme Court, *see* Shapiro v. McManus, 557 U.S. 39, 40–41 (2015), and, potentially, whether circuit precedent is binding. *Compare* Douglas & Solimine, *supra* note 27, at 419 ("[C]ircuit precedent is not formally binding on three-judge district courts. . . ."), *with* Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 766 (2020) (arguing that "a three-judge district court should follow the precedent of its regional court of appeals").

438 *See supra* notes 148?156 (discussing *Abbott*).

439 *See* Stephanopoulos, *South*, *supra* note 196, at 77–78.

440 *See id.* at 59 (estimating 22 such districts). This list is tentative as Stephanopoulos compiled it before the second wave of *Shaw* cases and new census data may change those districts' demographics.

441 *See supra* section II.A.3.

ficulty in proving intentional discrimination and fear of incurring the increasingly conservative Roberts Court's wrath may deter plaintiffs from seeking—and lower courts from imposing—such relief.[442] And even if such relief were imposed, its impact would be felt in deterring mid-decade redistrictings and in the 2030 cycle.

B. *Shaw*'s Future

Predicting whether there will be significant *Shaw* litigation in the 2020s is fraught at this stage of the redistricting process. After all, *Shaw* is a motive-based inquiry. With that caveat, there are two potential developments on the horizon.

The first potential development is whether a *third* wave of *Shaw* cases will emerge. In other words, will new types of challenges be brought using *Shaw* as a cause of action? Here, I tentatively predict that Democratic-backed plaintiffs may invoke *Shaw* to challenge crossover districts drawn by Republican state legislatures in order to redistribute minority voters into influence districts.[443] Although these lawsuits may result in fewer minority officeholders, their goal would be to help the Democratic Party capture state legislatures.[444]

The second potential development is how the increasingly conservative Roberts Court answers the race or party question in the aftermath of *Rucho*. On this point, I predict that the Court will re-engineer its exit strategy from the 2000s and take a broad view of partisan discrimination when there is a dispute over whether race or party was the predominant factor.

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442 *See, e.g.*, Perez v. Abbott, 390 F. Supp. 3d 803, 819 (W.D. Tex. 2019) ("In the wake of *Shelby County*, courts have been hesitant to grant § 3(c) relief.").

443 A crossover district is one in which "white voters [join] forces with minority voters to elect their preferred candidate." Bartlett v. Strickland, 556 U.S. 1, 25 (2009) (plurality opinion). By contrast, an influence district is one "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Id.* at 3; *see also supra* note 131 (discussing these terms).

444 This trade-off between descriptive and substantive representation is familiar in election law. *See* Stephanopoulos, *Race*, *supra* note 136, at 1328 ("At the federal level, it is reasonably clear that a tradeoff exists between descriptive and substantive representation, at least for blacks. When more blacks are elected to Congress, fewer Democrats win seats, and the chamber's median moves in a conservative direction."). Descriptive representation looks to whether the "representatives of choice are more likely to mirror the race of the majority of voters in that district." Georgia v. Ashcroft, 539 U.S. 461, 481 (2003) (citing HANNA FENEICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–91 (1967)). By contrast, substantive representation looks to whether a group's interests are represented in the legislature by, for example, being in the majority. *See id.*

1. Shaw*'s Third Wave?*

In the 1990s, *Shaw*'s racial gerrymandering claim was first recognized in cases brought by White plaintiffs seeking to dismantle majority-minority districts.[445] In the 2010s, *Shaw* was invoked by Black and Democratic plaintiffs to dismantle majority-minority districts that unnecessarily *packed* minority voters.[446] In the 2020s, it is possible that Democratic plaintiffs may invoke *Shaw* to dismantle crossover districts.[447]

The absence of Section 5's preclearance regime—and the failure to bail-in North Carolina and Texas under Section 3(c) notwithstanding findings of discriminatory intent[448]—means that every State will be free to draw maps that retrogress minority voting strength. For the reasons noted above, this is a troubling development.[449] But this also means that Republican mapmakers cannot invoke Section 5 as a pretext to pack minority voters into districts like they did in the 2010s cycle.[450]

Section 2 is now the sole federal statute that compels the creation of majority-minority districts. And here, it is important to emphasize that *Gingles*'s first prong is satisfied *only* when a minority group is more than fifty percent of a compact geographic area.[451] Because Section 2 does not mandate the creation of crossover districts,[452] it cannot be invoked to defend such a district against a *Shaw* claim. This means that crossover districts have no viable defense once a court has determined that race predominated during the redistricting process. These districts would be struck down under strict scrutiny as there is no compelling governmental interest justifying their race-based creation. The upshot from the Democratic Party's perspective is that these suits would not risk the long-predicted collision between *Shaw* and Section 2,[453] as the latter is simply not implicated.

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445 *See* Ho, *supra* note 383, at 1893.

446 *See id.*

447 The intentional creation of coalition districts—where two different minority groups are combined to achieve a majority—might also be vulnerable to a *Shaw* claim. That is because the Court has not decided whether such districts qualify under *Gingles*'s first prong for protection. *See* Sellers, *supra* note 131, at 1572.

448 *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241–42 (4th Cir. 2016); Perez v. Abbott, 390 F. Supp. 3d 803, 807 (W.D. Tex. 2019).

449 *See supra* notes 160–189.

450 *See* Levitt, *Quick and Dirty*, *supra* note 247, at 591–94.

451 *See* Bartlett v. Strickland, 556 U.S. 1, 25–26 (2009) (plurality opinion).

452 *See id.*; *see also supra* note 131 (discussing crossover districts).

453 *See, e.g.*, Gerken, *Undiluted Vote*, *supra* note 143, at 1697–98 (discussing the tension between *Shaw* and Section 2).

If mapmakers employ racial quotas or targets to draw coalition districts, a court would likely find that race predominated in the redistricting process.[454] But mapmakers often adapt to clear doctrinal rules and are unlikely to make the same mistake as in the 2010 cycle. Rather, the race or party question will probably dictate whether a third *Shaw* wave—or any *Shaw* cases—get off the ground in the 2020 cycle.[455]

2. *The Race or Party Question after* Rucho

There will be clear instances when Section 2 will mandate the creation of a majority-minority district in the 2020 cycle. In such situations, that district is vulnerable to a *Shaw* claim. But these are not the archetypal race or party cases.

The race or party cases typically arise when mapmakers use race as a proxy for partisanship in jurisdictions with high levels of racially polarized voting.[456] The circuit courts have long grappled with this question, which also arises under Section 2. On one side of the split, the Fourth Circuit has determined that "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose . . . . even absent any evidence of race-based hatred and despite the obvious political dynamics."[457] By contrast, the Fifth Circuit has opined that "[Section] 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[458] The Supreme Court has not definitively resolved which answer to the race or party question it prefers.

As discussed above,[459] the Court remains—for now—in the political thicket when it comes to race *qua* race. If the Court wishes to further extricate itself, the clearest escape route is to follow the path set by *Easley* and take a broad view of what

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454 *See* Charles & Fuentes-Rohwer, *Race and Representation*, *supra* note 29, at 1588.

455 Internal divisions within the Democratic Party over descriptive and substantive representation may squash these lawsuits. Or, more cynically, incumbents may wish to keep running in relatively safe seats and advocate against bringing these suits.

456 *See* Patino v. City of Pasadena, 230 F. Supp. 3d 667, 703–04 (S.D. Tex. 2017) (discussing mapmakers' use of "'Hispanic' as a proxy for Democratic voters and 'Anglos' as a proxy for Republican voters").

457 N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 222–23 (4th Cir. 2016)

458 League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 854 (5th Cir. 1993).

459 *See supra* subpart III.D.

counts as partisan discrimination as opposed to racial discrimination.[460] Thus, the same exit strategy that worked in the 2000s is likely to reappear in the 2020s.

This strategy will have two new arrows in its quiver. First and foremost, *Rucho*'s blessing of partisan gerrymandering will make mapmakers even *more* comfortable with defending their plans based on partisan advantage. The conventional wisdom is that, in *Rucho*'s wake, the Court will defer to officials when they invoke party as an explanation.[461] Second, from a doctrinal perspective, the *Abbott* Court, in rejecting a finding of intentional discrimination, reiterated that state legislators should receive the presumption of good faith in race or party disputes.[462]

C. The Redistricting Denominator

Total population is the redistricting denominator for all congressional and state-legislative districts.[463] However, there is a concerted push in several States to change the redistricting denominator to either VAP or CVAP. The vanguard of this movement may be Missouri, where an anti-redistricting reform measure was narrowly approved by voters in November 2020.[464] Supporters of this measure claim that it mandates

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460 *See supra* subpart II.B.

461 *See, e.g.*, Kristen Clarke & Jon Greenbaum, *Gerrymandering Symposium: The Racial Implications of Yesterday's Partisan Gerrymandering Decision*, SCOTUSBLOG (June 28, 2019), https://www.scotusblog.com/2019/06/gerrymandering-symposium-the-racial-implications-of-todays-partisan-gerrymandering-decision/ [https://perma.cc/EUX4-Z4NQ] (predicting that the Court will accept partisan explanations in race or party cases).

462 *See* Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018) (citing Miller v. Johnson, 515 U.S. 900, 915 (1995)). A similar dynamic played out in *Brnovich v. DNC*, albeit with the Supreme Court relying on the clear error standard of review to side with the district court's factual finding that the state legislators were motivated by partisan considerations. *See* Brnovich v. DNC, 141 S. Ct. 2321, 2348–50 (2021); *infra* Section IV.D.3.

463 *See* Evenwel v. Abbott, 578 U.S. 54, 63 (2016).

464 *See* Jason Rosenbaum, *Missourians Scrap Clean Missouri Redistricting Plan, Pass Amendment 3*, ST. LOUIS PUBLIC RADIO (Nov. 4, 2020), https://news.stlpublicradio.org/government-politics-issues/2020-11-04/missourians-scrap-clean-missouri-redistricting-plan-pass-amendment-3 [https://perma.cc/AC3J-Q2XX].

Justice Kagan highlighted these events in her *Rucho* dissent and predicted that this anti-reform measure would be enacted: "Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. I'd put better odds on that bill's passage than on all the congressional proposals the majority cites." Rucho v. Common Cause, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting) (citations omitted).

CVAP-based redistricting, but this is disputed.[465] Republican officials in several other States initially signaled that they may follow Missouri's lead,[466] but those threats have so far not been followed through. It is widely believed that switching to CVAP-based redistricting will boost Republican gerrymandering efforts because urban Democratic constituencies tend to have lower rates of citizenship and are disproportionately younger.[467]

To better understand why this is the conventional wisdom, let's look at the demographic differences between CVAP and total population. Based on the most recent American Community Survey data, nationwide implementation of CVAP-based redistricting would exclude 51.1% of Hispanics and 44.6% of Asians. By contrast, only 28.1% of Blacks and 20.3% of Whites would be excluded.[468] One does not need quantitative training to understand that the racially disparate impact of this policy change jumps from the page.

Of course, for redistricting purposes, the relevant entities are States, which vary in the share of their populations that are non-citizens and, to a lesser extent, children. Ten States have CVAP percentages below the nationwide CVAP average of 70.9% of the total population.[469] A recent article by Professors

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465 *See, e.g.*, David Daley, *The Coming Redistricting Showdown in Missouri Will Be Huge*, THE HILL (Nov. 10, 2020), https://thehill.com/opinion/campaign/525007-the-coming-redistricting-showdown-in-missouri-will-be-huge [https://perma.cc/J4LR-6YRB] (discussing supporters' views); Crum, *Amendment 3*, *supra* note 114 (arguing that this new amendment does not mandate CVAP-based redistricting).

466 *See, e.g.*, Daley, *supra* note 465 (commenting that Republicans in "Texas, Georgia and even Florida" may back CVAP-based redistricting).

467 *See id.* In a posthumously released memo, Thomas Hofeller, the grandmaster of Republican gerrymandering, bluntly stated: "switch[ing] to . . . citizen voting age population as the redistricting population base for redistricting would be advantageous to Republicans and Non-Hispanic Whites." THOMAS HOFELLER, THE USE OF CITIZEN VOTING AGE POPULATION IN REDISTRICTING 9 (2015), https://www.commoncause.org/wp-content/uploads/2019/05/2015-Hofeller-Study.pdf [https://perma.cc/MDU4-4N24].

468 *See* U.S. CENSUS BUREAU, CVAP FROM THE 2015–2019 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (Feb. 19, 2021) (providing underlying data for these figures), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html [https://perma.cc/5CPX-DNPX].

For helpful color-coded maps and graphs illustrating the salience of CVAP, see Philip Bump, *What if Congressional Districts Were Drawn Based on Voters, Not Total Population?*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/05/27/heres-which-states-could-lose-and-gain-congressional-seats-from-the-new-supreme-court-case/ [https://perma.cc/YQ9Y-CUD2].

469 *See* Jowei Chen & Nicholas O. Stephanopoulos, *Democracy's Denominator*, 109 CALIF. L. REV. 1019, 1035 (2021).

Jowei Chen and Nick Stephanopoulos examines the empirical implications for adopting CVAP-based redistricting in nine of these States plus Florida.[470] Chen and Stephanopoulos find that CVAP-based redistricting has "a significant—though not overwhelming—decline in minority representation" and "a noticeable, but not enormous, Republican advantage."[471] The racially disparate impact is worst in Arizona, Florida, New York, and Texas, whereas the biggest Republican boon is found in Texas.[472] These findings hold regardless of whether the mapmaker is partisan or non-partisan.[473] Chen and Stephanopoulos's article is self-consciously "an empirical, not a normative, contribution" to the literature.[474] This Article, by contrast, provides normative and doctrinal responses to CVAP-based redistricting.

If a State were to switch to CVAP-based redistricting, what options are available to plaintiffs who wish to challenge such a policy? First, there are serious questions whether CVAP-based redistricting is feasible given current data.[475] Recall that the Trump administration's repeated efforts to add a citizenship question to the census failed, as did its last-ditch effort to publish detailed CVAP data.[476] Without this data, States will have to cobble together their own citizenship data—which is largely gathered by the federal government and is less reliable than census data[477]—and open themselves to lawsuits that the maps fail even under their own terms of equalizing CVAP.

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470 *See id.* The other States are Arizona, California, Georgia, Idaho, Illinois, Nevada, New York, Texas, and Utah. *See id.*

471 *Id.* at 1021–22.

472 *See id.*

473 *See id.* at 1022.

474 *Id.* at 1023.

475 *Cf.* Evenwel v. Abbott, 578 U.S. 54, 92 (2016) (Alito, J., concurring in the judgment) (observing that total population figures were "more reliable and less subject to manipulation").

476 *See supra* notes 10–47.

477 This point was made pellucid in the recent oral argument over Trump's attempt to exclude undocumented immigrants from congressional reapportionment when Acting Solicitor General Jeff Wall stated: "They're trying to get the categories of illegal aliens that you could identify based on the kinds of records we have . . . And the question is just, how feasible is it going to be to capture large numbers within those categories? And, unfortunately, we don't know at this point." Transcript of Oral Argument at 22, Trump v. New York, 141 S. Ct. 530 (2020) (No. 20-336), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-366_7lho.pdf [https://perma.cc/7UFR-3TXX].

Although American Community Survey (ACS) data is sometimes used to calculate CVAP and VAP data during the redistricting process, that survey is not as accurate as the census. *See, e.g.*, Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist., 894 F.3d 924, 932 (8th Cir. 2018) ("ACS had projected that the overall population of St. Louis would grow throughout the 2000s, only to be

Moreover, CVAP-based redistricting is normatively and logistically problematic because it presumes that all eligible voters are (1) citizens and (2) adults. But that presumption is incorrect. As Professor Josh Douglas has chronicled, "[c]ities and towns have lowered the voting age in local elections to sixteen, [and] granted the right to vote to noncitizens."[478] Conversely, not all adult citizens can actually vote: felon disenfranchisement laws prevent approximately 2.27% of the voting eligible population—that is, 5.17 million adult citizens—from casting a ballot.[479] Felon disenfranchisement laws have a well-documented disparate impact based on race and sex.[480] Given this legal and demographic landscape, the notion that CVAP approximates those persons who can *actually* vote is misguided.

Second, plaintiffs could challenge CVAP-based redistricting based on a one-person, one-vote theory, but that argument is likely to be a hard sell at the Roberts Court. For starters, precedent gives States discretion over the redistricting denominator.[481] Furthermore, a State willingly adopting CVAP-based redistricting would actually dove-tail with the Court's predisposition to reinforce federalism; this is not a situation like in *Evenwel* where plaintiffs are seeking to thrust a policy choice on a State that would upend maps across the country.[482] In addition, when Thomas authored his concurrence on *Evenwel*, he was the sole strict originalist on the Court, but now he is

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disproved when the actual data for the 2010 Census were collected."); McConchie v. Scholz, No. 21-cv-3091, 2021 WL 4866354, at *13–17 (N.D. Ill. Oct. 19, 2021) (invalidating Illinois state-legislative map drawn using ACS data on malapportionment grounds following the release of census data).

478 Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1052 (2017). As a historical matter, suffrage has not been limited to citizens. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993) (noting that White male aliens "exercised the right to vote in at least twenty-two states or territories during the nineteenth century"); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093 (1977) ("[H]istorical experience rebuts the argument that the terms 'citizen' and 'voter' are synonymous.").

479 THE SENTENCING PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020), https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf [https://perma.cc/9P63-YJQ3].

480 *See, e.g.*, *id.* (noting that African-American adults are disenfranchised at a rate 3.7 times higher than non-African-American adults and that men comprise eighty percent of the total disenfranchised population).

481 *See* Burns v. Richardson, 384 U.S. 73, 91–92 (1966); *supra* subpart I.B.

482 *See supra* subpart II.C.

joined by Gorsuch and Barrett, who will likely share his views on the original understanding of the Equal Protection Clause.

Third, plaintiffs could argue that CVAP-based redistricting violates the Equal Protection Clause on intentional discrimination grounds.[483] On this point, if Chen and Stephanopoulos's findings are correct that Republicans garner few, if any, additional seats from shifting to CVAP-based redistricting,[484] then a partisan rational for such a seismic shift in redistricting is unconvincing. Absent any partisan gains, the motives for adopting CVAP-based redistricting look more and more like animus.[485]

Finally, plaintiffs could bring a discriminatory-effects challenge under Section 2. Whether Section 2 provides any relief here is a complex question—and one whose complete resolution lies outside this Article's scope. At first blush, if a State's move to CVAP-based redistricting resulted in fewer minority-opportunity districts, then a Section 2 claim seems straightforward.

But recall that the Court has not resolved the "denominator" question for the first *Gingles* prong.[486] It is unsettled whether minorities must be a majority of the total population, the voting age population, or the citizen voting age population in a compact geographic area.[487] At the risk of going even deeper down the rabbit hole, this question is also complex.

On the one hand, courts often look at CVAP at the first *Gingles* prong because "CVAP is a superior measure of minority voting strength" compared to "total or voting-age population."[488] If CVAP were the proper denominator for the first *Gingles* prong, that would make a Section 2 claim *against* CVAP-based redistricting quite difficult, as Section 2 *itself* uses the metric.

But on the other hand, Section 2's text distinguishes between "citizens," "members of the electorate," and "population," and, tellingly, it uses the term "population" solely when refer-

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483 The Fifteenth Amendment is unlikely to be useful here, as its use of the word "citizen[ ]" implicitly endorses the notion that citizenship and suffrage are linked. U.S. CONST. amend. XV, § 1.

484 *See* Chen & Stephanopoulos, *supra* note 469, at 1021–22.

485 *Cf.* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

486 *See supra* notes 94–113, 132.

487 *See supra* notes 132–133.

488 Stephanopoulos, *South*, *supra* note 196, at 88.

encing proportional representation and the redistricting map as a whole.[489] Furthermore, Congress's use of different words carries meaning.[490] This is especially true when Congress legislates "[a]gainst th[e] background understanding in the legal and regulatory system"[491] that total population is the redistricting denominator.[492] Section 2's legislative history further illuminates this point.[493] And if the redistricting denominator for *Gingles* is total population, then it may prove too unwieldy to draw an entire map using CVAP, given the gravitational pull of the majority-minority districts mandated by Section 2.[494]

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489 To illustrate this point, I've used different forms of emphasis on Section 2's text:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any *citizen* of the United States to vote on account of race or color, or [language-minority status], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of *citizens* protected by subsection (a) in that its members have less opportunity than other MEMBERS OF THE ELECTORATE to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the *population*.

52 U.S.C. § 10301 (emphases added).

490 Courts generally assume that Congress selects multiple words "because it intended each term to have a particular, nonsuperfluous meaning." Bailey v. United States, 516 U.S. 137, 146 (1995).

491 Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015).

492 *See* Evenwel v. Abbott, 578 U.S. 54, 72 (2016) (discussing the longstanding use of total population as the redistricting denominator); *see also* Travis v. King, 552 F. Supp. 554, 556 (D. Haw. 1982) (invalidating Hawaii's use of registered voters as the redistricting denominator).

493 *See, e.g.*, S. REP. NO. 97-417, at 11 (1982) ("The new plan drastically reduced minority voting strength. Most of the black residents were put into two overpopulated (and therefore underrepresented) districts, while most of the whites were put into the other two districts."); *id.* ("In 1981, Petersburg, Virginia, drew a redistricting plan that virtually insured white control even though blacks make up 61 percent of the city."); *id.* at 23 ("Members of a minority group have no federal right to be represented in legislative bodies in proportion to their numbers in the general population."); H.R. REP. NO. 97-227, at 18 (1981) ("Blacks constituted 44 percent of the county population . . . yet no black had ever been elected to the county Commission.").

494 Even setting the *Gingles* denominator problem aside, the Court may treat such a Section 2 challenge as a so-called governance claim that is outside the statute's scope. *See* Holder v. Hall, 512 U.S. 874, 874 (1994) (plurality opinion) (concluding that the "size of a governing authority is not subject to a vote dilution

To be clear, this is a preliminary sketch of options available to plaintiffs. A full picture cannot emerge until a State actually changes its redistricting denominator to CVAP.

D. Constitutional Challenges to Section 2

During the past decade, three potential threats emerged to the constitutionality of Section 2 of the VRA.[495] First, the *Shelby County* Court's adoption of the equal sovereignty principle and its requirement that a statute's "current burdens" be justified by "current needs" raises the specter that the Court changed the standard of review for Congress's Fifteenth Amendment enforcement authority.[496] Second, the *Rucho* Court's disavowal of a proportionality principle in the Fourteenth Amendment[497] raises the stakes for any future challenge to Section 2 of the VRA, which looks to whether minorities have elected candidates of choice in rough proportion to their percentage of the population.[498] Finally, in *Brnovich v. DNC*, the Court addressed for the first time ever a vote-denial claim brought under Section 2 of the VRA and also heard a Fifteenth Amendment claim for the first time in two decades.[499] Although *Brnovich* has rightly been criticized for unduly raising the bar on bringing vote-denial claims,[500] the four-corners of the decision do not raise constitutional concerns about the VRA. This Section examines the implications of *Shelby County*, *Rucho*, and *Brnovich* for Section 2 and argues that none of these decisions should threaten this "nationwide ban on racial discrimination in voting."[501]

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challenge under § 2"); Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 503–08 (1992) (holding that rules altering the allocation of power within an elected body were not subject to preclearance); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1716–19 (1993) (discussing governance claims).

495 For a discussion of more longstanding threats to Section 2, see Crum, *Reconstructing*, *supra* note 115, at 287–88.

496 Shelby County v. Holder, 570 U.S. 529, 536, 544 (2013).

497 Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019).

498 52 U.S.C. § 10301.

499 *See* Brnovich v. DNC, 141 S. Ct. 2321, 2330 (2021).

500 *See, e.g.*, David Gans, *Selective Originalism and Selective Textualism: How the Roberts Court Decimated the Voting Rights Act*, SCOTUSBLOG (July 7, 2021), https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act [https://perma.cc/5ZSF-ZYK7] (criticizing *Brnovich* for "mak[ing] it harder to vote").

501 *Shelby County*, 570 U.S. at 557.

1. Shelby County *and Section 2*

As discussed above,[502] *Shelby County*'s equal sovereignty principle is a freestanding federalism doctrine rather than a specific limitation on Congress's Reconstruction Amendment enforcement authority. I will not re-litigate that point here. Rather, my goal is to show that *Shelby County*'s "current burdens" standard is linked to the equal sovereignty principle and thus inapplicable to a nationwide statute like Section 2.

To recap, the *Shelby County* Court criticized Congress for relying on "decades-old" turnout and registration rates in reauthorizing the VRA.[503] These "[s]tale fact[s]" doomed the coverage formula.[504] In applying the "current burdens" standard, the Court went *beyond* the record compiled by Congress for the VRA's 2006 reauthorization. Specifically, the Court referenced turnout rates in the 2012 election,[505] when President Obama's presence on the ballot likely increased turnout among Black voters.[506]

The "current burdens" requirement is linked to *Shelby County*'s equal sovereignty principle. Indeed, the Court's opinion is structured in a contingent fashion. It begins by examining the coverage formula and then proceeds to determine whether its burdens are justified in light of current conditions.[507] Furthermore, the Court's clearest statement of the governing standard ties the two together: "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."[508] As such, a statute violates the equal sovereignty principle when its current burdens are not justified by current needs.

The uniqueness of the current-burdens requirement can be seen by contrasting this approach to *Boerne*'s congruence and proportionality test. Under *Boerne*, courts look to the "legislative record" compiled by Congress for evidence of unconsti-

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502 *See supra* section III.C.1.

503 *Shelby County*, 570 U.S. at 551.

504 Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 60 (2015).

505 *See Shelby County*, 570 U.S. at 548 ("Census Bureau data from the most recent [2012 presidential] election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5 . . . .").

506 *See* Klarman, *supra* note 41, at 181 (noting Obama's effect on turnout).

507 *See Shelby County*, 570 U.S. at 550.

508 *Id.* at 553.

tutional state conduct.[509] This record-based inquiry survived *Shelby County*. In *Allen v. Cooper*,[510] the Court recently applied *Boerne* to strike down Congress's abrogation of state sovereign immunity in the Copyright Remedy Clarification Act of 1990.[511] In so doing, the Court confined its analysis to the legislative record compiled by Congress in 1990,[512] rather than examine extra-record evidence of copyright infringement from the past three decades. *Allen*, therefore, establishes that the current-burdens requirement is inapplicable to nationwide statutes like Section 2.

2. Rucho *and Section 2*

As a matter of blackletter law, *Rucho* concerns the nonjusticiable political question doctrine.[513] But in declining to police partisan gerrymandering, the Court disavowed the notion that the Equal Protection Clause mandates proportional representation of political parties.[514]

This aspect of *Rucho*'s reasoning raises red flags about the constitutionality of Section 2 of the VRA's application to vote-dilution claims.[515] After all, ever since *Johnson v. De Grandy*,[516] the Court has looked to "rough[] proportional[ity]" as the benchmark for fairness in Section 2 cases.[517] For their part, mapmakers have sought to comply with Section 2 by following the rough proportionality benchmark.[518] Thus, at a surface level, *Rucho*'s conception of the Equal Protection Clause is in tension with how Section 2 is administered by courts and mapmakers.

Rucho's troubling implications for Section 2 go even deeper. To see why, consider how the *Rucho* Court endorsed other voting rights doctrines developed under the Equal Protection Clause. The Court observed that *Reynolds*'s one-person,

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509 City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

510 140 S. Ct. 994 (2020).

511 *See id.* at 1007.

512 *See id.* at 1005–06.

513 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

514 *See id.* at 2499.

515 Here, it is important to differentiate between constitutional challenges to Section 2's application to vote-dilution claims and its discriminatory-effects standard. *Rucho* implicates the former, not the latter.

516 512 U.S. 997 (1994).

517 *Id.* at 1000; *see also* Elmendorf, *supra* note 125, at 392 (describing rough proportionality as a "central consideration in vote dilution cases"); *supra* notes 115–149.

518 *See* Levitt, *Quick and Dirty*, *supra* note 247, at 597–98 (discussing North Carolina's redistricting criteria at the dawn of the 2010 cycle).

one-vote rule is "relatively easy to administer as a matter of math."[519] As for *Shaw*, the Court remarked that racial gerrymandering claims seek the "elimination of a racial classification" and "do[ ] not ask for a fair share of political power and influence."[520]

By contrast, the *Rucho* Court cited the plurality opinion in *City of Mobile v. Bolden*,[521] a constitutional *racial* vote-dilution case, for its statement that "[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization."[522] This fleeting citation to *Bolden* was *Rucho*'s sole reference to a racial vote-dilution case notwithstanding the obvious parallels between the two doctrines. The Court also failed to cite any post-1982 Section 2 cases.[523] Put simply, the Court grandfathered in *Reynolds* and *Shaw*—indeed, with a rationale for *Shaw* that is at cross-purposes with Section 2—but only invoked a racial vote-dilution case to undercut a claim for proportional representation.

Building off *Bolden*'s characterization of the Equal Protection Clause, the *Rucho* Court turned to whether it was possible to fashion a judicially manageable standard for partisan gerrymandering claims. The Court opined that "it is not even clear what fairness looks like in this context."[524] The Court then identified numerous visions of "fair" representation, including the maximization of "competitive districts," drawing an "'appropriate' share of 'safe' seats" for each political party, and maps based on "'traditional' districting criteria."[525] Once again invoking separation of powers concerns, the Court explained that "[judges] are not equipped to apportion political power as a matter of fairness"[526] and that these "questions . . . are political, not legal."[527]

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519 *Rucho*, 139 S. Ct. at 2501.

520 *Id.* at 2502.

521 446 U.S. 55 (1980).

522 *See Rucho*, 139 S. Ct. at 2499 (quoting *Bolden*, 446 U.S. at 75–76 (plurality opinion)).

523 These points have not gone unnoticed. *See* Travis Crum, Rucho *and Section 2 of the Voting Rights Act*, TAKE CARE BLOG (June 27, 2019), https://takecareblog.com/blog/rucho-and-section-2-of-the-voting-rights-act [https://perma.cc/6CBZ-VTXY]; Nicholas Stephanopoulos, *The Erasure of Racial Vote Dilution Doctrine*, ELECTION L. BLOG (June 28, 2019), https://electionlawblog.org/?p=105855 [https://perma.cc/FP7B-NLNF].

524 *Rucho*, 139 S. Ct. at 2500.

525 *Id.*

526 *Id.* at 2499.

527 *Id.* at 2500.

This critique is nearly identical to Justice Thomas's long-standing condemnation of Section 2 for lacking a legitimate benchmark. In his highly influential concurrence in *Holder v. Hall*,[528] Justice Thomas argued that "vote dilution cases are questions of political philosophy, not questions of law" because "there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy."[529] According to Justice Thomas, vote-dilution claims "are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories."[530]

Moreover, the academic debate over race-based redistricting is remarkably similar to the one outlined in *Rucho*. On the one hand, Professors Sam Issacharoff and Rick Pildes have long advocated the drawing of competitive districts that eschew a fixation on race.[531] On the other hand, Professors Heather Gerken and Michael Kang are far more comfortable with race playing a prominent role in the redistricting process.[532] Scholars have also debated the requisite percentage of minority voters in a district needed to guarantee a minority-opportunity district given changes to turnout rates, demographics, and racial bloc voting.[533] And just as the quest for fairness in the partisan gerrymandering realm has proved elusive, so too has the search for a benchmark in the racial vote-dilution context.[534]

Furthermore, to the extent the *Rucho* Court sought to extricate the judiciary from apportioning political power, Section 2 forces judges to do just that. Given patterns of racially polarized voting, majority-minority districts are largely viewed as

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528 Holder v. Hall, 512 U.S. 874 (1994); *see also* ISSACHAROFF, KARLAN, PILDES & PERSILY, *supra* note 91, at 870 ("Justice Thomas's concurrence in *Holder* is in some ways the most extraordinary voting rights opinion of modern times.").

529 *Holder*, 512 U.S. at 901 (Thomas, J., concurring in the judgment).

530 *Id.* at 901–02.

531 *See* Issacharoff & Pildes, *supra* note 373, at 646; *see also* Issacharoff, *supra* note 402, at 108–09 (advocating that Congress rely on its Elections Clause authority to pass new voting rights legislation).

532 *See* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1118–21 (2005); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 736–38 (2008) [hereinafter Kang, *Democratic Contestation*].

533 *See* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1390–94 (2001) (surveying these debates).

534 *Cf.* Elmendorf, *supra* note 125, at 390 ("An antidiscrimination results test necessarily presupposes some benchmark conception of neutrality or fairness against which an allegedly discriminatory result may be measured.").

safe seats for Democrats.[535] When combined with the rough proportionality benchmark, Section 2 could be characterized by its critics as guaranteeing a significant number of "racially safe boroughs"[536] under the Democratic Party's control.

Nevertheless, *Rucho*'s disavowal of a judicially manageable standard for partisan gerrymandering is distinguishable from Section 2 of the VRA. For starters, the Court *itself* has held that intentional racial vote dilution violates the Equal Protection Clause.[537] Thus, unlike in the partisan gerrymandering context where the Court repeatedly failed to issue a clear holding,[538] racial vote-dilution claims have the Court's constitutional imprimatur. In other words, the Court has already concluded that such claims are appropriate for judicial resolution. To be sure, the Court has not found a *constitutional* vote-dilution claim since 1982,[539] but that is largely because plaintiffs generally bring statutory vote-dilution claims given that they are easier to prove.[540] The Court, moreover, commented in 2006 that a Texas redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation."[541] Although the Court today is quite different from the Court in 1982 or even 2006, any attempt to

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535 *See, e.g.*, Kang, *Democratic Contestation*, *supra* note 532, at 744–45 (describing the "close association between African American voters and Democrats means that representational guarantees for African Americans under the VRA inevitably produce safe districts for Democrats that are almost completely insulated from partisan competition").

Of course, this is not always true. For example, Cuban Americans in Florida are a Republican voting bloc. *See, e.g.*, Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 901–02 (1995) (discussing the role of Cuban American voters in *De Grandy*). Taking a long view of history, the Republican Party received the overwhelming support of Black men during Reconstruction. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 397–98 (2005). These examples, however, merely serve to prove today's general rule.

536 Holder v. Hall, 512 U.S. 874, 905 (Thomas, J., concurring in the judgment) (internal quotation marks omitted).

537 *See* Rogers v. Lodge, 458 U.S. 613, 627 (1982); White v. Regester, 412 U.S. 755, 765–67 (1973). The Court has expressly reserved whether the Fifteenth Amendment also prohibits intentional racial vote dilution. *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims.").

538 *See supra* notes 283–296.

539 *See* Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 46 (2006). And unlike under Section 2, the Court has never found constitutional racial vote-dilution involving a single-member redistricting plan, as opposed to at-large or multi-member districts. *Cf.* Growe v. Emison, 507 U.S. 25, 40–41 (1993) (applying Section 2 to single-member districts for the first time).

540 *See* Karlan, *Two Section Twos*, *supra* note 168, at 735.

541 League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 440 (2006).

reject racial vote-dilution claims based on *Rucho*'s logic will run headlong into precedent.

In addition, unlike in the partisan gerrymandering context where Congress has failed to provide any statutory guidance,[542] Congress exercised its Reconstruction Amendment enforcement authority in amending Section 2 in 1982.[543] And in so doing, Congress largely borrowed from the Court's racial vote-dilution jurisprudence, endorsing its totality of the circumstances approach and its opportunity-to-elect standard.[544] The Court further refined the vote-dilution inquiry when it adopted the *Gingles* factors, which have made Section 2 cases more predictable.[545] Thus, the Court has managed to apply Section 2 for several redistricting cycles without incident.

Last but certainly not least, rough proportionality is *not* synonymous with proportional representation. In crafting Section 2, Congress established a delicate balance between rough proportionality and proportional representation. Section 2 explicitly authorizes courts to examine whether minorities have been elected to office,[546] but it clearly *disavows* a right to proportional representation.[547] This balance reflects a line the Court drew in the constitutional racial vote-dilution cases.[548] And in practice, there is substantial daylight between rough proportionality and proportional representation: minority legislators have been under-represented in both state houses and in Congress.[549] Rough proportionality is therefore not a stalking horse for proportional representation.

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542 *Cf.* Stephanopoulos, *Anti*-Carolene, *supra* note 29, at 155–57 (discussing the constitutionality of Congress requiring States to use independent redistricting commissions for drawing congressional and state-legislative maps).

543 *See supra* note 125.

544 *See* Crum, *Reconstructing*, *supra* note 115, at 278.

545 *See, e.g.*, Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 186 (2011) (observing that *Gingles* established a "manageable, three-part test for proving vote dilution"); *see also supra* notes 127–137 (discussing the *Gingles* factors).

546 52 U.S.C. § 10301(b) (2018) ("The extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.").

547 *Id.* ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

548 *Compare* White v. Regester, 412 U.S. 755, 765–66 (1973) ("To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."), *with id.* at 766–67 (observing that only two Black politicians had been elected to office from those districts since Reconstruction).

549 *See* Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 834 (2013) (congressional districts); Stephanopoulos, *Race*, *supra* note 136, at 1370–71 (state-legislative districts).

To sum up, nothing in *Rucho* directly challenges Section 2's constitutionality. Rather, the concerns articulated in *Rucho* have already been rejected by the Court in its constitutional racial vote-dilution cases. Congress's additional guidance further distinguishes racial vote dilution from partisan gerrymandering claims. And although rough proportionality and proportional representation share a surface-level similarity, the two standards diverge in theory and practice. If the Roberts Court seeks to invalidate Section 2, it must go far behind existing precedent. Indeed, it would need to repudiate precedent.

3. Brnovich *and Section 2*

At the dawn of the 2020 redistricting cycle—and as this Article was already far along in the publication process—the Supreme Court issued its decision in *Brnovich v. DNC*, a case concerning vote-denial claims brought under Section 2 of the VRA and the Fifteenth Amendment.[550] Although it dealt a harsh blow to voting-rights plaintiffs and made it more difficult to challenge voter-suppression laws, *Brnovich* says nothing about redistricting and remarkably little about the underlying constitutional issues.

In fashioning out of whole cloth a new totality-of-the-circumstances test for vote-denial claims, [551] the Court made clear that it was taking a "fresh look at the statutory text" rather than relying on the *Gingles* preconditions or the Senate

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[550] *See* 141 S. Ct. 2321, 2330 (2021). The cert grant in *Brnovich* followed a wave of vote-denial litigation under Section 2. *See, e.g.*, Veasey v. Abbott, 888 F.3d 792, 804 (5th Cir. 2018) (upholding Texas's revised voter ID law); N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016) (invalidating North Carolina's post-*Shelby County* voter-suppression law). And concomitantly, there is a growing literature on Section 2's application to vote-denial claims. *See* Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763 (2016); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013); Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566 (2019); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006); *cf.* Lisa Marshall Manheim & Elizabeth G. Portner, *The Elephant in the Room: Intentional Voter Suppression*, 2019 SUP. CT. REV. 213 (2019) (discussing vote-denial claims under the National Voter Registration Act).

[551] Specifically, the Court highlighted five factors for adjudicating vote-denial claims: (1) the burden imposed by the voting rule; (2) whether similar voting rules were in widespread use in 1982; (3) the voting rule's racially disparate impact; (4) other opportunities to vote provided by the jurisdiction's overall electoral system; and (5) the jurisdiction's interest in preserving the challenged voting rule. *See Brnovich*, 141 S. Ct. at 2338–40.

Factors that are central to vote-dilution claims under Section 2.[552] Perhaps most importantly for present purposes, the Court's treatment of Section 2 reads as a matter of *pure* statutory interpretation. Indeed, Justice Kagan's dissent criticizes the Court for treating the VRA like "any old piece of legislation—say, the Lanham Act or ERISA."[553]

The Court's avoidance of constitutional avoidance stands out because it has routinely invoked the doctrine when discussing the VRA. Perhaps most (in)famously, the Court's decision in *Northwest Austin* relied on constitutional avoidance to creatively re-write the VRA's bailout mechanism.[554] One can find seeds of discontent about the VRA's constitutionality stretching back decades.[555] Furthermore, the briefs in *Brnovich* raised the issue of constitutional avoidance and teed up the appropriate standard for Congress's Fifteenth Amendment enforcement authority.[556] Neither the Court nor any of the conservative Justices opined on these points.[557]

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552 *Id.* at 2337; *see also id.* at 2333 (distinguishing vote-denial and vote-dilution claims).

553 *Id.* at 2372 (Kagan, J., dissenting).

554 *See* Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009); *see also* Fish, *supra* note 368, at 1277 (critiquing *Northwest Austin*'s reasoning).

555 *See* Georgia v. Ashcroft, 539 U.S. 461, 482–83 (2003) (allowing influence and coalition districts to count as majority-minority districts under Section 5's retrogression analysis); Holder v. Hall, 512 U.S. 874, 874 (1994) (plurality opinion) (concluding that "[t]he size of a governing authority is not subject to a vote dilution challenge under § 2"); *see also* Elmendorf & Spencer, *Administering*, *supra* note 29, at 2158 ("The Supreme Court has issued a string of decisions narrowing Section 2 on the basis of the constitutional avoidance canon.").

In a related vein, the Court has signaled its unease with the disparate-impact provisions of other anti-discrimination statutes. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543 (2015) ("Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."); Ricci v. DeStefano, 557 U.S. 557, 584 (2009) ("[W]e adopt the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII.").

556 *See* Brief for Private Petitioners at 16, *Brnovich*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258), 2020 WL 7121775 (arguing that "the Ninth Circuit's reading also renders § 2 unconstitutional"); *id.* at 39 (arguing that *Boerne* applies to the Fifteenth Amendment); Brief for Senator Ted Cruz et al. as Amici Curiae Supporting Petitioners at 31, *Brnovich*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258), 2020 WL 7263505 (claiming that *Shelby County*'s current burdens standard applies to Section 2); Brief for Professor Travis Crum as Amicus Curiae in Supporting Respondents at 14–17, *Brnovich*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258), 2021 WL 260088 (arguing that *Boerne* should not be extended to the Fifteenth Amendment).

557 In a one-page concurring opinion, Justice Gorsuch, joined by Justice Thomas, flagged that it remains an "open question" whether there is "an implied cause of action under § 2." *Brnovich*, 141 S. Ct. at 2350 (Gorsuch, J., concurring).

Turning to the Fifteenth Amendment claim, the *Brnovich* Court concluded that the challenged ballot-collection law was *not* motivated by discriminatory intent.[558] Here, the case's procedural history matters. The district court concluded that the law was motivated by partisan—rather than racial—motives. The Ninth Circuit reversed that factual finding, invoking a cat's paw theory of liability.[559] In siding with the district court, Justice Alito's majority opinion relied on the clear-error standard of review and held that the district court's interpretation was "permissible."[560] The Court also expressly rejected the cat's paw theory of liability,[561] yet further evidence that the Court will err on the side of partisanship in answering race-or-party questions.[562] Given the way it resolved the case, the Court did not reach out and decide open questions such as whether the Fifteenth Amendment has an intent element or is limited to vote-denial claims.[563]

In short, *Brnovich* was a clear loss for voting rights but the decision's collateral consequences for redistricting and the VRA's constitutionality could have been far worse.

CONCLUSION

Throughout the 2010 redistricting cycle, the Court sought to disentangle itself from the political thicket. Its tactics varied considerably. Freestanding federalism doomed the crown jewel of the civil rights movement whereas separation of powers concerns torpedoed any judicial solution to partisan gerrymandering. But the overall exit strategy remained the same.

The redistricting developments over the past decade call to mind Justice Breyer's lament from the Roberts Court's second Term: "[i]t is not often in the law that so few have so quickly changed so much."[564] A Court with a true center is now but a

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This short concurrence is likely to encourage defendants to raise this point in the 2020 redistricting cycle. Here, I will simply note that Section 3 of the VRA expressly authorizes remedies in suits brought by "aggrieved person[s] . . . under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(a)–(c).

558 *See Brnovich*, 141 S. Ct. at 2349–50.

559 *See id.* at 2335–36.

560 *Id.* at 2349.

561 *See id.* at 2350.

562 *See supra* notes 234–240 (discussing the race or party question).

563 *Cf.* Crum, *Superfluous*, *supra* note 32, at 1560–63 (discussing these open doctrinal questions).

564 Oral Dissent of Justice Breyer at 32:54–33:01, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (No. 05-908), https://www.oyez.org/cases/2006/05-908 [https://perma.cc/3N9J-KGY9].

memory—and more revolutionary changes may be just around the bend.