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## The Current State of Election Law in the United States

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# The Current State of Election Law in the United States

Mark Rush\*

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## I. Introduction

Assessing the “state” of election law is a precarious venture.<sup>1</sup> Election law has been in a state of flux for more than a half century as the Voting Rights Act and Supreme Court decisions have been employed in an apparently never-ending tumult of litigation that is driven as much by partisan interests as it is to secure a particular vision of what constitutes a free and fair electoral system.<sup>2</sup> In part, the ongoing litigation is a result of courts gaining

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1. See Joshua A. Douglas, *Is The Right To Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 146 (2008) (“[T]he [Supreme] Court’s current ad hoc jurisprudence for election law cases creates confusion regarding what it means to enjoy the fundamental right to vote.”).

2. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 178 (2007) (“As with other legislation, disagreements about the [Voting Rights Act]’s meaning were passed on to the courts, and various legislators attempted to manipulate legislative history for

new and better information about the electoral process as litigants return to re-argue cases or present new cases with nuanced differences from prior ones.<sup>3</sup> As well, the process of litigation has demonstrated that notions of democracy are undergoing change.<sup>4</sup> Accordingly, the assumptions on which early decisions were based are challenged as new decisions bring new information.

A good example of this is, perhaps, the shift over time from the Supreme Court's decision in *Gomillion v. Lightfoot*<sup>5</sup> to the one-person, one vote decisions in *Baker v. Carr*<sup>6</sup> and *Reynolds v. Sims*<sup>7</sup> to the cases concerning the creation of majority-minority districts under the auspices of section two of the VRA and constrained by the Equal Protection clause of the Fourteenth Amendment (*Thornburg v. Gingles*,<sup>8</sup> *Shaw v. Reno*,<sup>9</sup> *Miller v. Johnson*,<sup>10</sup> *Easley*

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partisan ends.”).

3. See Samuel Issacharoff, *Does Section 5 of the Voting Rights Act Still Work?*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 107, 112 (David L. Epstein et al. eds., 2006) (“The striking feature about [Georgia v.] Ashcroft was the willingness of the entire Court to abandon the formal Beer standard for retrogression in favor of a more nuanced assessment of the on-the-ground political realities of a jurisdiction.”).

4. See John Powell, *Campaign Finance Reform Is a Voting Rights Issue: The Campaign Finance System as the Latest Incarnation of the Politics of Exclusion*, 5 *AFR. -AM. L. & POL'Y REP.* 1, 8 (2002) (hypothesizing that the practical response to vote dilution claims may place this country's most basic notions of democracy at stake.”).

5. See *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (holding when state power is used as an instrument for circumventing a federally protected right, it is not insulated from federal judicial review).

6. See *Baker v. Carr*, 369 U.S. 186, 237, 242 (1962) (reversing the dismissal of plaintiff's complaint because redistricting issues present a justiciable question since one person's vote cannot weigh more heavily than another's vote).

7. See *Reynolds v. Sims*, 374 U.S. 533, 586–87 (1963) (affirming the district court's decision to invalidate existing and proposed plans for the apportionment of Alabama's bicameral legislature because the plans violated “one person one vote.”).

8. See *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (finding that, except in one district, the redistricting plan violated § 2 of the Voting Rights Act of 1965 by impairing the opportunity of black voters to participate in the political process and to elect representatives of their choice).

9. See *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (deciding that appellants stated a claim under the Equal Protection Clause by alleging the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race).

10. See *Miller v. Johnson*, 515 U.S. 900, 920, 924 (1995) (explaining that the

v. *Cromartie*<sup>11</sup>). I discuss these in greater detail below. But, for the purposes of introduction, I note here that this transition entailed the Supreme Court's rejection of the "uncouth" gerrymander that was designed to cut black voters out of Tuskegee, AL,<sup>12</sup> to ongoing, protracted litigation to establish rules for drawing boundaries of voting districts for the sole purpose of ensuring minority representational opportunity while simultaneously providing enough evidence to suggest that race did not "predominate" in the process of line-drawing.<sup>13</sup> The result has been the creation of districts much more "uncouth" than the boundary of Tuskegee was in *Gomillion*.

A similar example would be the shift from an environment animated by a powerful VRA that could be used to prevent or stop a plethora of electoral practices designed either explicitly or *sub rosa* to prevent voter participation (literacy tests, poll taxes, etc.) to one in which a VRA weakened by the Supreme Court's decision in *Shelby v. Holder* is unable to prevent the erection of new barriers to electoral participation masquerading in the form of voter identification laws designed to prevent fraud.<sup>14</sup>

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redistricting was so bizarre on its face that it was unexplainable on grounds other than race and therefore it could not be upheld unless it was narrowly tailored to achieve a compelling state interest, but compliance with antidiscrimination laws alone was not a compelling state interest).

11. See *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (determining that the district court's findings were clearly erroneous because appellees failed to show that the legislature could have achieved its legitimate political objectives in alternative, racially balanced ways).

12. See Jeffrey G. Hamilton, *Deeper into The Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1525–26 (1994) (noting that the Supreme Court in *Gomillion* rejected the argument that a law altering the city limits from a square to "an uncouth twenty-eight-sided figure" presented a non-justiciable political question).

13. See *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. 2013) (finding that the district court erred by considering Alabama's goal of obtaining a 1% population deviation among districts as a relevant factor to determine whether race was a predominate factor in redrawing the electoral districts); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015) (holding voters failed to meet their burden of proof to show that race was the predominate factor motivating 11 out of 12 voting districts and the 1 voting district motivated by race was to comply with federal antidiscrimination law).

14. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding that the coverage formula in Section 4(b) of the VRA, which was used to determine the states and political subdivisions subject to Section 5 preclearance, was

In this Article, I discuss the current state of election law with regard to these two themes of redistricting and access to the polls. These issues reflect two of the three “generations” of voting rights litigation that Lani Guinier set forth in *Tyranny of the Majority*, written in 1994, and several law review articles from the same period.<sup>15</sup> The ongoing litigation demonstrates that the issues of fair representation and effective participation that Guinier and many others grappled with are truly complex and do not lend themselves to easy or quick judicial or legislative resolution.<sup>16</sup> This is due, in large part, to the complexity and diversity of the different strains of democratic theory.<sup>17</sup> I bring the article to a close with a discussion of the current controversy surrounding the Electoral College and how it, too, manifests the tensions that haunt democratic theory and the course of election law in the United States.<sup>18</sup>

## II. The Current Context: Redistricting

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unconstitutional). *Compare* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 209 (2008) (upholding Indiana’s universally applicable voter-identification law because the burden of acquiring, possessing, and showing a free photo identification is not severe), *with* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241–42 (4th Cir. 2016) (holding the North Carolina law requiring photo ID, reducing the days of early voting, and eliminating same-day registration, out-of-precinct voting, and preregistration were enacted with racially discriminatory intent in violation of the Voting Rights Act).

15. See generally LANI GUINIER, TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 85 MICH. L. REV. 1077 (1991); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991).

16. See, e.g., Luis Fuentes-Rohwer, *Doing our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 545 (2003) (noting that questions of democratic theory, including fair representation are both complex and often intractable).

17. See Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 908 (2008) (stating legislation surrounding the VRA cannot account for every democratic theory so there must always be trade-offs).

18. See Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 B.Y.U.L. REV. 1523, 1579 (2012) (noting critics of the electoral college believe it is contrary to the democratic theory because aggregating popular votes into electoral votes may produce a President who received fewer popular votes than another candidate).

As of this writing, the most recent redistricting case to reach the Supreme Court came from Virginia and concerns the drafting of state legislative district lines.<sup>19</sup> The case addresses the constitutionality of twelve state legislative districts that were drawn to comply with Section 2 of the VRA.<sup>20</sup> They were created to ensure that they were majority-minority districts and, therefore, provided the minority population with an opportunity to elect candidates of their choice.<sup>21</sup> The plaintiffs appealed the lower court ruling that upheld the districting plan in the face of an Equal Protection challenge that alleged that the districts comprised unconstitutional racial gerrymanders.<sup>22</sup>

The key issue in the case was the extent to which it could be argued that racial considerations “predominated” in the process of drawing the district lines.<sup>23</sup> While Section 2 of the VRA essentially required that race must be a factor in drawing district lines,<sup>24</sup> the Court has also ruled that the Fourteenth Amendment forbids the predominance of race in the construction of those districts.<sup>25</sup> As the

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19. *See* *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 553–54 (E.D. Va. 2015) (deciding that voters failed to meet their burden of proof to show that race was the predominate factor motivating 11/12 voting districts and the one voting district motivated by race was to comply with federal antidiscrimination law).

20. *See id.* at 510 (“This case challenges the constitutionality of twelve Virginia House of Delegates districts . . . as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.”).

21. *See id.* at 520 (addressing Delegate Jones’ argument that the majority-minority districts in the proposed legislation had a black voting-age population (BVAP) of 55% or higher).

22. *See id.* at 512 (noting the plaintiffs appealed the lower court’s ruling).

23. *See id.* at 510 (determining that Plaintiffs have the burden of proof to prove by a preponderance of the evidence that race was the predominate factor).

24. *See id.* at 515 (citing Section 2 of the VRA); *see also* 52 U.S.C. § 10301 (2016) (prohibiting any voting practice that abridges or denies any US citizen the right to vote based on race).

25. *See* U.S. CONST. amend. XIV (stating no state shall deny to any person within its jurisdiction “the equal protection of the laws.”); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (deciding that the district court erred in dismissing plaintiff’s case for failure to state a claim because “the central purpose of the equal protection clause of the Fourteenth Amendment is to prevent the states from purposefully discriminating between individuals on the basis of race.”); *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (finding that the redistricting plan violated the Fourteenth Amendment because “the redistricting was so bizarre on its face that it was unexplainable on grounds other than race.”).

District Court for the Eastern District of Virginia stated, legislatures are forced to navigate between these two constraints:

Therein lies the rub. To comply with federal statutory command (the VRA), the State must consider and account for race in drawing legislative districts in order to craft a compliant plan. However, to avoid violating the federal constitution, the State must not subordinate traditional, neutral principles to racial considerations in drawing district boundaries.<sup>26</sup>

The debates in the oral argument were strained because members of the Court believed they had resolved this issue in their most recent redistricting decision.<sup>27</sup> Justice Breyer stated in the *Bethune-Hill* oral argument that he had hoped that the *Alabama Black Legislative Caucus* decision “would end these cases in this Court.”<sup>28</sup> In *Bethune-Hill*, Virginia had used a 55% minority population threshold for the creation of the 12 majority-minority districts.<sup>29</sup> *Bethune-Hill* challenged this threshold as the equivalent of an admissions quota that the Supreme Court has declared unconstitutional in *Bakke v. Regents of the University of California* and *Grutter v. Bollinger*.<sup>30</sup>

Virginia had set forth several criteria for drawing legislative districts.<sup>31</sup> These included:

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26. *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 517 (E.D. Va. 2015).

27. See Transcript of Oral Argument at 9, *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015) (No. 15-680) (arguing that the Alabama Legislative Black Caucus should have ended the majority-minority line of cases).

28. See *id.* (“I mean, look, which I’m sure you’ve read, in--in the Alabama Legislative Black Caucus, which I had hoped [sic] would end these cases in this Court, which it certainly doesn’t seem to have done--all right?”).

29. See *Bethune-Hill*, 141 F. Supp. 3d at 519 (“[T]he 55% BVAP figure was used in structuring the districts and in assessing whether the redistricting plan satisfied constitutional standards and the VRA.”).

30. See *id.* at 530–31 (rejecting the comparison to an admissions quota); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 271–72 (1978) (striking down a higher education admissions program that reserved a specific number of seats for minority applicants).

31. See *Bethune-Hill*, 141 F. Supp. 3d at 518 (setting forth several criteria for drawing legislative districts).

1. Population Equality. Populations in House of Delegates districts could deviate by no more than one percent of the average population);
2. Voting Rights Act. Districts had to be drawn in a manner that complied with “protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength.”;
3. Contiguity and Compactness;
4. All districts had to be single member districts;
5. Communities of Interest. The districts would be drawn based on “legislative consideration of the varied factors that can create or contribute to communities of interest.” (Such as economic, cultural, geographic factors, etc.);
6. Priority. Maintaining equal district populations, abiding by state and federal constitutional requirements and complying with the VRA were given priority among the factors noted above.<sup>32</sup>

Plaintiffs contended that Virginia’s use of the 55% minority population standard demonstrated that racial considerations predominated over the other traditional, neutral redistricting principles.<sup>33</sup> Plaintiffs cited the Supreme Court’s earlier decision in *Alabama Black Legislative Caucus* where it rejected Alabama’s use of a similar population threshold:

We have said that the plaintiff’s burden in a racial gerrymandering case is “to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State. And neither the use of statewide evidence nor the effort to show widespread effect can transform a racial gerrymandering claim about a set of individual districts

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32. *Id.* at 518.

33. *See id.* at 566 (“The Plaintiffs simply point to the threshold’s attainment of the 55% BVAP floor, evidence of racial correlation, and a low compactness score to prove that race predominated.”).



into a separate, general claim that the legislature racially gerrymandered the State “as” an undifferentiated “whole.”<sup>34</sup>

Alabama contended that since its population threshold was one of several criteria for drawing district lines, race could not be regarded as a predominant factor.<sup>35</sup>

But, in order to abide by its interpretation of the VRA’s nonretrogression standard, the state sought to maintain the level of minority populations that had been effected in its 35 majority-minority districts in the prior round of redistricting.<sup>36</sup> To do this, the state had to move many minority voters into the majority-minority districts because many of those districts had lost population since the last redistricting.<sup>37</sup> The Court ruled, however, that maintaining equal district populations

is not one factor among others to be weighed against the use of race to determine whether race “predominates.” Rather it is a part of the redistricting background, taken as a given, when determining whether race, or other factors predominate in a legislator’s determination as to *how* equal population objectives will be met.<sup>38</sup>

Having rejected the state’s use of equal population as a counterbalance to the use of race, the Court determined that Alabama’s focus on maintaining the previous levels of minority population in the majority-minority districts comprised a predominant use of race in the districting process.<sup>39</sup> As well, the Court stated that this interpretation of the VRA’s nonretrogression standard was erroneous because “section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, § 5 is satisfied if

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34. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1267 (2015).

35. *See id.* at 1263 (noting Alabama’s various goals in redistricting).

36. *See id.* (“Alabama believed that, to avoid retrogression under § 5 [of the Voting Rights Act of 1965], it was required to maintain roughly the same black population percentage in existing majority-minority districts.”).

37. *See id.* (explaining that population required Alabama to add individuals to the districts in order to meet the State’s no-more-than-1% population-deviation objective).

38. *Id.* at 1270.

39. *See id.* at 1267 (“That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.”).

minority voters retain the ability to elect their preferred candidates.”<sup>40</sup> Accordingly, Alabama was obliged to revisit the districting process to assess how large a population of black voters was necessary to create the opportunity for them to elect their preferred candidate.<sup>41</sup> It might, for example, have been possible to create such an opportunity in a “crossover” or “influence” district (in which even a district with a minority-black population could create an opportunity for the black voters to elect a candidate of their choice with the assistance of white or other voters who shared their preferences.<sup>42</sup>

The Court acknowledged that the state of election law with regard to redistricting remains precarious:

The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome. The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few.<sup>43</sup>

So, while states need not establish the precise level of minority population necessary to avoid a retrogression claim, they did need to have a “strong basis in evidence” to justify the minority population levels they choose.<sup>44</sup> In Alabama’s case, the decision to maintain previous minority population levels was too blunt an instrument.<sup>45</sup>

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40. *Id.* at 1273.

41. *See id.* at 1274 (“[The district court and the legislature] should have asked: ‘To what extent must we preserve existing minority percentages in order to maintain the minority’s present ability to elect the candidate of its choice?’”).

42. *See Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (explaining that it is not necessarily retrogressive for a State to replace safe majority-minority districts with crossover or influence districts).

43. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273–74 (2015).

44. *See id.* at 1274 (“[A] court’s analysis of the narrow tailoring requirement insists only that the legislature have a ‘strong basis in evidence’ in support of the (race-based) choice that it has made.”).

45. *See id.* at 1261 (“Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority’s ability to elect a preferred candidate of choice.”).

The Virginia redistricting plan was effected before the Supreme Court ruled in *Alabama*. In *Bethune-Hill*, the challenges to the state legislative districts were based on essentially the same situation that had existed in Alabama.<sup>46</sup> The principal difference was that Virginia had used a 55% minority population threshold for all majority-minority districts (instead of using the prior district's population levels as *Alabama* had done).<sup>47</sup> Nonetheless, the District Court for the Eastern District of Virginia sustained the legislative redistricting plan.<sup>48</sup>

The court reasoned that Virginia's districting plan was constitutional because there was sufficient evidence to indicate that the 55% threshold did not demonstrate that race had predominated in the districting process.<sup>49</sup> Virginia's use of the several districting criteria noted above and its additional desire to ensure partisan balance in the state legislature demonstrated that the 55% threshold was not a "filter" through which all other criteria had passed.<sup>50</sup>

In the oral argument before the Supreme Court, the Justices and attorneys reviewed the definition of "predominance."<sup>51</sup> The predominance "standard" was first set forth in *Miller v. Johnson* where the Court stated that, in an equal protection challenge to a redistricting plan,

The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles including, but not limited to compactness,

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46. See *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 517–19 (E.D. Va. 2015) (explaining the redistricting plan).

47. Compare *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. 2013), with *Bethune-Hill*, 141 F. Supp. 3d.

48. See *Bethune-Hill*, 141 F. Supp. 3d at 571 (upholding all 12 challenged districts).

49. See *id.* (finding that the 55% threshold did not predominate).

50. See *id.* at 528 (rejecting the dissent's "racial filter" argument).

51. See Transcript of Oral Argument at 4–8, *Bethune-Hill*, 141 F. Supp. 3d 505 (discussing the meaning of "predominance.").

contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.<sup>52</sup>

In *Bethune-Hill*, the Supreme Court sustained the lower court's reasoning and upheld the legislature's conclusion that it was necessary to retain a 55% BVAP to ensure that black voters in the 75th district had "a functional working majority."<sup>53</sup> The Court reaffirmed "the basic racial predominance analysis explained in *Miller* and *Shaw II* and the basic narrow tailoring analysis explained in *Alabama*."<sup>54</sup> Thus, the question endures regarding how much thoughtful use of race—as mandated by the VRA—becomes tantamount to "predominance" within the context of other traditional districting principles that a state takes into account when drawing lines.<sup>55</sup> But, the Court has begun to offer broad guidance in *Miller*, *Alabama* and *Bethune*. Accordingly, the Court remanded *Bethune* so that the district court could review the other 11 districts that were challenged.

#### A. Escaping the "Trap"?

*Bethune-Hill* manifests the results of the tortuous course that the Supreme Court's redistricting case law has taken. On the one hand, states must avoid the "trap" that the case law sets if states are unable to navigate between the Scylla of Section 2 of the VRA and the Charybdis of the Equal Protection clause of the Fourteenth Amendment.<sup>56</sup> On the other hand, the oral argument in *Bethune-Hill* demonstrates an appreciation for the fact that states require some leeway in setting population targets in majority-minority

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

53. *See generally* *Bethune-Hill v. Va. State Bd. of Elections*, 137 S.Ct. 788 (2017).

54. *Id.* at 802.

55. *See Miller*, 515 U.S. at 916 (outlining predominant standard); *see also* *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 517 (E.D. Va. 2015) (stating the need to use the predominant standard).

56. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273–74 (2015) (explaining the "trap" condemning a redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under § 5 should the legislature place a few too few).

districts if they are to avoid besieging the courts with unending litigation.<sup>57</sup>

The trap that awaits states was created by the development of the Court's case law from the early one-person, one vote decisions of the 1960s,<sup>58</sup> through the 1980s decisions regarding how to apply Section 2 of the VRA to redistricting plans,<sup>59</sup> to the equal protection challenges to those redistricting plans in the 1990's,<sup>60</sup> to the cases in the 2000s where the Court embraced the use of influence and crossover districts,<sup>61</sup> to its acknowledgment that what appears to be a racial gerrymander may, in fact be driven by constitutionally permissible partisan concerns.<sup>62</sup> This history demonstrates that the several democratic values and visions that inform voting rights and election law are not always complementary.<sup>63</sup>

The one-person, one vote standard, for example, appeared to establish a clear-cut means for resolving redistricting conflicts before the passage of the VRA.<sup>64</sup> By establishing this standard, the Court created a clear, prophylactic legal standard that would simplify the redistricting process and litigation.<sup>65</sup> But, even as Chief Justice Warren penned his opinion in *Reynolds*, it was

57. Transcript of Oral Argument at 26, *Bethune-Hill*, 141 F. Supp. 3d at 505.

58. See *Baker v. Carr*, 369 U.S. 186, 237, 242 (1962) (establishing that one person's vote cannot weigh more heavily than another person's vote); *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (concluding political equality must mean that one person equals one vote).

59. See *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (explaining how to apply § 2 of the VRA to redistricting plans).

60. See *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (upholding a redistricting claim under the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (finding a viable redistricting claim under the Equal Protection Clause).

61. See *Georgia v. Ashcroft*, 539 U.S. 461, 493 (2003) (embracing the use of influence and crossover districts).

62. See *Easley v. Cromartie*, 532 U.S. 234, 253 (2001) (noting a need for racial and partisan balance).

63. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 294 (2014) (“[T]he Court does not base its theory of election law on any substantive value that the democratic process is meant to realize.”).

64. See *Reynolds v. Sims*, 377 U.S. 533, 557–61 (1964) (providing pre-VRA method to resolving redistricting disputes).

65. See Michelle H. Browdy, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379, 1381 (1990) (“*Reynolds v. Sims* and its progeny clarified the ‘one person, one vote’ standard for political redistricting . . .”).

evident that the notion of individual voting equality did not necessarily ensure fair representational opportunity.<sup>66</sup> In *Reynolds*, he wrote:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.

Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that

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66. See *Reynolds*, 377 U.S. at 567–68 (explaining the notion that individual voting equality did not necessarily ensure fair representational opportunity).

the Constitution forbids “sophisticated as well as simple-minded modes of discrimination.”<sup>67</sup>

In this passage, Warren made the clear case for individual voting equality and requiring voting districts to have equal populations.<sup>68</sup> There was no rational basis (let alone a compelling interest) for discriminating among individual voters’ voting power on the basis of where they lived.<sup>69</sup> Warren went on to discuss the nature of representation.<sup>70</sup> In doing so, he created an unresolvable tension within the opinion<sup>71</sup>:

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious

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67. *Id.* at 562–63.

68. *See id.* at 577 (stating that districts should be as nearly of equal population as possible).

69. *See id.* at 565 (“With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live.”).

70. *See id.* (discussing the nature of representation).

71. *Id.*

discriminations based upon factors such as race, or economic status. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.<sup>72</sup>

This passage dictates two principles that are not necessarily consistent.<sup>73</sup> Equality of individual voting power does not ensure fair and effective representational opportunity because the latter is, by definition, a group right.<sup>74</sup> To provide for equal individual voting power would require nothing more than randomly dividing a state into voting districts of equal population.<sup>75</sup> But ensuring fair and effective representational opportunity requires someone to draw voting districts with an eye towards ensuring that groups of voters have the opportunity to coalesce and elect representatives.<sup>76</sup>

As the Court explained in *Miller*, those groups of voters may take on any number of characteristics.<sup>77</sup> But, the VRA mandated that minority groups receive privileged treatment in the redistricting process.<sup>78</sup> In *Thornburg v. Gingles*,<sup>79</sup> the Court set forth the standard for determining whether a group of minority voters could demand that a state draw a district that would enable it to have the opportunity to elect a candidate of its choice.<sup>80</sup> Writing for the Court, Justice Brennan stated:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a

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72. *Id.* at 565–66.

73. *Id.*

74. *Id.*

75. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 773–76 (9th Cir. 1990) (finding that redistricting based on equal apportionment of total population was proper).

76. *Id.*

77. *See Miller v. Johnson*, 515 U.S. 900, 947 (1995) (detailing variations of voter groups).

78. *See Voting Rights Act of 1965* § 201, Pub. L. No. 94-73, 89 Stat. 400, 401 (1975).

79. 478 U.S. 30 (1986) (holding that plaintiffs challenging a redistricting plan under § 2 of the VRA could point to racially polarized voting to establish a prima facie case of vote dilution without having to prove causation or intent).

80. *See id.* at 50–51 (outlining elements that require redistricting to accommodate minority choice).



majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.

Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority's preferred candidate.<sup>81</sup>

*Gingles* dealt with a challenge to multimember districts in the North Carolina legislature.<sup>82</sup> But, the “test” set forth by Justice Brennan established the conditions under which a group of minority voters could claim that a districting scheme diluted its opportunity to elect candidates of its choice.<sup>83</sup> Brennan's test was grounded upon the Court's reading of Section 2 of the VRA:

(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 in contravention of the guarantees set forth in section 4(f)(2), 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

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81. *Id.*

82. *See id.* at 35 (noting that appellees were challenging one single-member and six multimember districts).

83. *See id.* at 50–51 (“These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice.”).

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.<sup>84</sup>

Accordingly, minority groups were entitled to an opportunity to elect candidates of their choice, but they were not guaranteed proportional representation.<sup>85</sup> But, the confluence of the one-person, one-vote rule and the *Gingles* test quickly led to the creation of bizarrely-shaped voting districts designed to connect enough pockets of minority voters to ensure that they could comprise a majority of a district's population.<sup>86</sup>

In *Shaw v. Reno*, the Court held that this process could be taken too far.<sup>87</sup> Voters challenged North Carolina's redistricting scheme because the outline of the voting districts indicated that they had been drawn exclusively to ensure the election of minority candidates.<sup>88</sup> Writing for the Court, Justice O'Connor stated:

[R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.<sup>89</sup>

Thus, to challenge a districting scheme for being dominated by racial considerations, a plaintiff had to demonstrate “that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.”<sup>90</sup>

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84. 52 U.S.C. § 10301 (2012).

85. *Id.*

86. *See Vera v. Richards*, 861 F. Supp. 1304, 1331 (5th Cir. 1994) (analyzing an odd-shaped district for signs of racial gerrymandering).

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

88. *Id.* at 633–34.

89. *Id.* at 647.

90. *Id.* at 649.

Whereas the *Gingles* standard invited the creation of majority-minority districts with reckless abandon, the *Shaw* response relied too much on the appearance of a district.<sup>91</sup> It overlooked the possibility that an aesthetically pleasing map of legislative districts could still be driven by racial considerations.<sup>92</sup> Accordingly, in *Miller*, the Court qualified the *Shaw* standard to require a demonstration that racial considerations had predominated the process of drawing district lines.<sup>93</sup>

The predominance “trap” described by the Court in *Alabama* remains.<sup>94</sup> In attempting to clarify how much racial consideration comprises “predominance,” the Court and litigants continue to struggle with the fact that Section 2 of the VRA essentially mandates the consideration of race in the redistricting process.<sup>95</sup> So, as the case law continues to develop, the Court continues to seek what some have referred to as a “Goldilocks” standard of taking race into account: not too much, not too little.<sup>96</sup> The Court acknowledged in *Alabama* and in the *Bethune-Hill* oral argument

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91. Compare *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (establishing a rule that led to the creation of misshapen districts in order to give minorities more voting power), with *Shaw*, 509 U.S. at 667 (considering the appearance of a district in determining its racial balance).

92. See *Shaw*, 509 U.S. at 667–68 (finding that failing to consider racial considerations and aesthetic appearance of districts were not mutually exclusive).

93. See *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995) (narrowing the *Shaw* standard).

94. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273–74 (2015) (highlighting the “trap’s” existence and related problems).

95. See generally *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp.3d 505 (E.D. Va. 2015).

96. In an interview with POLITICO, Rick Hasen, election law professor at University of California-Irvine and author of Election Law Blog, described *Bethune-Hill* as an opportunity for the Supreme Court to clarify the standard for racial gerrymandering cases: “It’s kind of a Goldilocks problem. You must take race into account somewhat to comply with the Voting Rights Act, but if you take into account too much the racial considerations you can get in trouble as well. The question is how do you know when you’ve gotten it just right.” See Josh Gerstein, *Supreme Court Takes Case Claiming Racial Gerrymandering in Virginia*, POLITICO (June 6, 2016), <http://www.politico.com/blogs/under-the-radar/2016/06/virginia-redistricting-supreme-court-223946> (last visited Apr. 19, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Pamela Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 246 (1993) (referring to the “ongoing struggle between the Supreme Court and the political branches over how to address the enduring problems of race in America.”).

that compliance with the VRA is a compelling state interest.<sup>97</sup> But, insofar as the Court's case law has yet to become clearer than the "Goldilocks" standard, states remain threatened by what one attorney in the *Bethune-Hill* oral argument described as "junior-varsity dilution claims."<sup>98</sup>

*B. Escaping the Trap: Vote Dilution, Black Electoral Success and the Road not Taken*

States—indeed, the entire USA—could escape the trap that haunts current voting rights litigation by jettisoning the commitment to single-member districts in favor of multimember districts.<sup>99</sup> Much has been written in favor of such a change for the United States.<sup>100</sup> Advocates of political and electoral reform such as FairVote continue to lobby for a conversion to virtually any alternative to the single-member district system.<sup>101</sup> Currently, FairVote advocates a conversion to ranked-choice voting where voters are able to select from a field of candidates and vote for them in order of preference.<sup>102</sup>

There are numerous alternative forms of voting that would diminish, if not resolve the problems that lead states into the trap set by current election law. First, by converting five, single-member districts into one, five-member district a state would diminish the need to litigate over the borders of four districts. Second, insofar as districts would be geographically larger and have larger populations, it would be less necessary for

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97. See *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273–74 (noting “that the interest in preventing § 5 retrogression” is a compelling state interest); Transcript of Oral Argument at 25–27, *Bethune-Hill*, 141 F. Supp. 3d.

98. See Transcript of Oral Argument at 43, *Bethune-Hill*, 141 F. Supp. 3d.

99. See Douglas Amy, *When Every Vote Counts: A Look at Proportional Voting*, FAIRVOTE, (Apr. 1993), <http://archive.fairvote.org/?page=646> (last visited Apr. 19, 2017) (arguing for multimember districts) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

100. *Id.*

101. See *generally Advocacy*, FAIRVOTE, <http://www.fairvote.org/advocacy> (last visited Feb. 12, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

102. See *generally Ranked Choice Voting/Instant Runoff*, FAIRVOTE, <http://www.fairvote.org/rcv#rcvbenefits> (last visited Apr. 19, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

cartographers to snake district lines across the state to pick up pockets of minority voters or Issacharoff's "filler people" to meet the demands of the VRA. Third, with more candidates to choose from, voters would be much less likely to find themselves casting a vote in an election where an incumbent is either unchallenged or is challenged by a candidate who has no chance of winning.

There is, of course, ample criticism of alternative electoral systems. They tend to increase the number of small parties who can contest elections. They produce correspondingly fragmented legislatures because the proliferation of small parties makes it more difficult for one party to win a majority of the seats. As a result, they tend to produce coalition governments that are not as stable as those produced by two party systems. So, there is a tradeoff between more legislative diversity and more voter choice and government stability.<sup>103</sup>

Insofar as alternative electoral systems improve the quality of voter choice, one would think they would be part and parcel of VRA litigation. But, insofar as the Court said in *Gingles* that there is no right to proportional representation, there is no constitutional basis to seek to convert to an alternative form of voting.<sup>104</sup> Nonetheless, there is no question that an alternative electoral system as simple as a conversion to multimember districts would resolve much of the complexity in voting rights case law.<sup>105</sup> Justice Thomas suggested as much in *Holder v. Hall*.<sup>106</sup>

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103. See generally MARK E. RUSH & RICHARD L. ENGSTROM, FAIR AND EFFECTIVE REPRESENTATION? DEBATING ELECTORAL REFORM AND MINORITY RIGHTS (2001) (offering a comprehensive discussion of electoral reform); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL CRISIS (2005) (explaining how single-member districts, particularly in nascent democracies, avoids the proliferation of political parties and the potential problems of governability that it presents).

104. See *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (noting that the Senate Report on the VRA provided that "the lack of proportional representation alone does not establish a violation" of § 2 of the VRA).

105. See *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring) ("In short, there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy that could be drawn upon to answer the questions posed in *Allen*.").

106. See *id.* (articulating that a court must find a reasonable alternative practice to use as a benchmark to compare with the existing voting practice in a vote dilution case under § 2 of the VRA).

*Holder* entailed a suit by minority voters to challenge Bleckley County, Georgia's decision not to convert from a single commissioner system of government to a five-district commission of government.<sup>107</sup> The state legislature had authorized counties to convert to multimember systems.<sup>108</sup> However, voters in a referendum rejected the conversion in Bleckley County.<sup>109</sup> Plaintiffs challenged the result of the referendum because maintaining the single commissioner system essentially prevented African American voters from gaining representation (since they comprised a minority of the voting-age population).<sup>110</sup> Speaking for the Majority, Justice Kennedy said that there was no basis on which to challenge a decision not to change an electoral system. Even if there were a constitutional case, there was no standard for determining in *Holder* the size of the new government: "As the facts of this case well illustrate, the search for a benchmark is quite problematic when a § 2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as the benchmark for comparison."<sup>111</sup>

In his concurrence, Justice Thomas challenged the Court to confront the doctrinal decisions and assumptions it had made as it had developed its VRA case law. The Court had established a preference for single-member voting districts without considering other choices of electoral systems. Thomas explained:

Perhaps the most prominent feature of the philosophy that has emerged in vote dilution decisions...has been the Court's preference for single member districting schemes, both as a benchmark for measuring undiluted minority voting strength and as a remedial mechanism for guaranteeing minorities

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107. *See id.* at 877 (describing the basis for the claim).

108. *See id.* (explaining that the Georgia state legislature authorized Bleckley County to adopt a multimember commission in 1985 and noting that all but about ten counties in Georgia had converted to multimember districts).

109. *See id.* (stating that local voters rejected the adoption of a multimember commission in a 1986 referendum, despite having approved a multimember district plan for the county school board only four years earlier).

110. *See id.* at 878 (noting the respondents' assertion that "Bleckley County must have a county commission of sufficient size that, with single-member election districts, the county's black citizens would constitute a majority in one of the single-member districts.").

111. *Id.* at 881.

undiluted voting power. Indeed, commentators surveying the history of voting rights litigation have concluded that it has been the objective of voting rights plaintiffs to use the Act to attack multimember districting schemes and to replace them with single member districting systems drawn with majority minority districts to ensure minority control of seats.

It should be apparent, however, that there is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single member districts the "proper" mechanism for electing representatives to governmental bodies or for giving "undiluted" effect to the votes of a numerical minority. On the contrary, from the earliest days of the Republic, multimember districts were a common feature of our political systems . . . . Today, although they have come under increasing attack under the Voting Rights Act, multimember district systems continue to be a feature on the American political landscape, especially in municipal governments.

The obvious advantage the Court has perceived in single member districts, of course, is their tendency to enhance the ability of any numerical minority in the electorate to gain control of seats in a representative body. But in choosing single member districting as a benchmark electoral plan on that basis the Court has made a political decision and, indeed, a decision that itself depends on a prior political choice . . . . In other words, in an effort to develop standards for assessing claims of dilution, the Court has adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body.<sup>112</sup>

This decision to prefer single-member districts conditioned the Court's reasoning going forward and, as we see above, led to the trap that the Court described in *Alabama*.<sup>113</sup>

There is a more pernicious aspect of this decision that Lani Guinier pointed out in 1991.<sup>114</sup> Anticipating Thomas's criticism in *Holder*, Guinier argued that the Court and voting rights litigation

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112. *Id.* at 897–99 (Thomas, J., concurring).

113. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273–74 (2015) (highlighting the "trap's" existence and related problems).

114. *See* Guinier, *The Triumph of Tokenism*, *supra* note 15, at 1081 (explaining that "black electoral success theory evolved from the civil rights movement's empowerment vision," in response to "pressure for judicial supervision of the movement's political agenda.").

had developed a theory and vision of “black electoral success” that actually did not comport with the original vision of the VRA.<sup>115</sup> Guinier argued that while the focus on creating single-member majority-minority districts “may result in the election of more black officials, it ignores the movement's concern with broadening the base of participation and fundamentally reforming the substance of political decisions.”<sup>116</sup> Thus, she contended, majority-minority districts may ensure more representatives, but they “may not necessarily result in more responsive government.”<sup>117</sup> If a polity were racially polarized the election of a few minority legislators would do little to advance the interests of their constituents.<sup>118</sup>

Furthermore—and perhaps even more pernicious—Guinier suggested that the black electoral success theory's focus on majority minority districts “ignores critical connections between broad-based, sustained voter participation and accountable representation.”<sup>119</sup> That is, ensuring the success of minority elected officials will not necessarily enhance the fortunes of their constituents.<sup>120</sup>

The impact of electoral success theory (for all legislators, not just minority representatives) is evident throughout the redistricting process. Incumbents and redistricters work together to move voters back and forth to create just the right balance to meet the mandates of the VRA and the desires of incumbents to make their districts more secure. In the oral argument for *Bethune-Hill* and the Court's discussion in *Alabama*, judges and attorneys focused on the numbers of voters and their races shuttled in and out of districts.

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115. *Id.*

116. *Id.* at 1080.

117. *Id.*

118. *See id.* at 1116 (“Because the individual black elected official may not be able to overcome polarization to ‘infiltrate the decision making process’ at the legislative level, the election of black representatives does not, by itself, translate into intergroup cooperation.”).

119. *Id.* at 1080.

120. *See id.* at 1134 (explaining that one of black electoral success theory's failings ensured that “legislative responsiveness would not be secured merely by the election day ratification of black representatives. Rather, legislative responsiveness would depend on citizen participation, legislative presence, and legislative success in meeting the needs of a disadvantaged group.”).



What is clear is that the goal of creating districts to ensure particular outcomes (the election of a minority legislator, the return of an incumbent) drives the redistricting process. What is not clear is whether or how the interests of constituents are regarded beyond their roles as filler people in legislative districts. As noted in the oral argument in *Bethune-Hill*:

The lines weren't there because, oh, we have this 55% BVAP target and everything had to go out the window. [Delegate Jones] said, well, you know, down there in Southampton Roads, we have three incumbents that are all close together because this part of the state lost a lot of population. So, I drew some zigs and zags here to keep the three incumbents separate . . . <sup>121</sup>

The role and impact of incumbency is, perhaps, the most important point raised in *Bethune-Hill*. As the following excerpt from the oral argument demonstrates, the Court addressed the fact that strong incumbents can change the voting profile of a district. In this case, it was acknowledged that an incumbent's retirement could actually undermine the purpose of creating the majority-minority district in the first place.<sup>122</sup> In this exchange, Marc Elias (plaintiff's attorney) veered from the discussion of the definition of "predominate" to consider the impact of incumbency on district voting patterns:

JUSTICE ALITO: Wasn't there a primary in 2005 in that district where Representative Tyler won over a white candidate by less than 300 votes?

MR. ELIAS: Yes, Your Honor. And I'm glad you raise that, because that's the third one, and that is the most important one. Let us take a step back, because it's—it's interesting that he—that he—he won by more—she won by more than—by—by only 300 votes. The districts were drawn in two thousand—in—in two—following 2000. In 2001, there was an incumbent who had been there 30-some-odd years who was a candidate of choice of the African-American community who won. That candidate won again in a landslide in 2003. That candidate then retired, and it was then an open primary. And in that open primary, Delegate Tyler won by five percentage points.

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121. Transcript of Oral Argument at 47, *Bethune-Hill v. Va. State Bd. of Elections*, 141 F.Supp.3d 505 (E.D. Va. 2015).

122. *Id.* at 22–24.

Now, what's interesting is that 300 votes is five percentage points. This was a 6,000-vote primary. Five-way. So to say she won by 300 votes and that proves predominance, well, she won in a landslide. She won five—by five percentage points as a non-incumbent in a multiple-primary field.

JUSTICE KAGAN: I thought she won by only, like, 1 1/2 percentage points in the general.

MR. ELIAS: In the general. So what happened next is that the incumbent, who had retired, whose son had run against her in the primary, who she had beaten, he then endorses the Republican opponent. So you have this long-time incumbent who endorses the Republican opponent, and she wins by 1.3 percent of the vote in the general.

JUSTICE ALITO: But these—these districts are going to last for a decade, are they not?

MR. ELIAS: Correct.

JUSTICE ALITO: And—and there's no guarantee that these same candidates are going to be running throughout that decade.

MR. ELIAS: I agree.

JUSTICE ALITO: So you think they have to take into account this very complicated analysis: Well, it was the—the person is an incumbent, and therefore is going to have the incumbent's advantage, and --

MR. ELIAS: No, Your Honor, I'm saying the complete opposite. I'm saying that in 2001, 2003, 2007, 2009, this was—this performed without a close election. In 2005 the primary was not close; it was a five-point election. So that leaves us one election, which was the 2005 general where she won by 1.3 percent of the vote.

JUSTICE KAGAN: Which you're saying, essentially, is idiosyncratic.

MR. ELIAS: It's—it's an idiosyncratic one election. But also, this Court has never said that it is a guarantee that they will win. It—in fact, in *Gingles* itself, there was a statement that it is not a guarantee—that no one election controls.

JUSTICE ALITO: Well, I mean, that gets to an interesting point. What—to what—what degree of confidence that it will

remain a— a majority-minority district is necessary to have a strong basis in evidence?<sup>123</sup>

This is a vitally important development.<sup>124</sup> To the extent that the Court and attorneys acknowledge that a district's voting profile is tied to the choices presented to voters on Election Day, it demonstrates that voter behavior is dependent on district-based conditions.<sup>125</sup> In the context of majority-minority districts, Justice Alito's comment in the exchange in *Bethune* uses an unfortunate choice of words.<sup>126</sup> A district would still be majority-minority because of its racial composition.<sup>127</sup> But, that majority might not coalesce around and elect one candidate even though the district is constructed to give minority voters the opportunity to do so.<sup>128</sup>

Of course, electing minority representatives is vital to ensuring that a legislature hears the voices of a diversity of constituents.<sup>129</sup> But, the manner in which those voices are heard does not necessarily depend on creating single-member districts that ensure the election of particular candidates.<sup>130</sup> The exchange above demonstrates that voters will behave differently when presented with different choices.<sup>131</sup> Accordingly, drawing majority-minority districts that minimize voter choice clearly benefits incumbent legislators more than voters.<sup>132</sup> An alternative,

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123. *Id.*

124. *See id.* (shifting focus from predominance to the effect of incumbency on district voting).

125. *See id.* (recognizing that incumbency is an issue).

126. *See id.* (confusing how a district would be classified based on racial composition).

127. *See Note, The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2208 (2003) (discussing majority-minority districts and race).

128. *See id.* at 2209 (explaining that a minority could still win in a district where the majority is white).

129. *See id.* at 2211–12 (stating that, without diversity, minorities will not have an equal opportunity to be heard).

130. *See id.* at 2209–10 (stating that a coalitional district will allow minorities' voices to be heard).

131. *See* Transcript of Oral Argument at 22–24, *Bethune-Hill v. Va. State Bd. of Elections*, 141 F.Supp.3d 505 (E.D. Va. 2015) (delineating the different outcomes in different elections).

132. *See* Grant Hayden, *Majority-Minority Voting Districts and Their Role in Politics: Their Advantages, Their Drawbacks, and the Current Law*, FINDLAW (Oct. 7, 2004), <http://supreme.findlaw.com/legal-commentary/majority-minority->

multimember districting plan would give voters more choices, minimize gerrymandering driven by electoral success and perhaps get states out of the trap set by the current state of voting rights law.<sup>133</sup> But, until the Court entertains a challenge to single-member districts, the trap will remain in place and the theory of black electoral success will prevail.<sup>134</sup>

### *III. Access to the Vote: Voter Identification Requirements in the Wake of Shelby v. Holder*

In what will certainly be regarded as one of the more unfortunate sequences of decisions, the Supreme Court upheld Indiana's voter identification law in *Crawford v. Marion County*<sup>135</sup> and then struck down Section 4 of the VRA in *Shelby County v. Holder*.<sup>136</sup> <sup>137</sup> In so doing, the Court unleashed state legislatures to restrict access to polling stations on Election Day.<sup>138</sup> In addition, by striking down Section 4 of the VRA (which set forth the criteria by which states or other political subdivisions were subject to the preclearance provisions of Section 5), the Court enabled states that had been subject to preclearance to erect hurdles to voter

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voting-districts-and-their-role-in-politics.html (last visited Apr. 19, 2017) (illustrating that drawing a majority-minority district involves pulling minority voters from other districts, which dilutes minority voting power) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

133. See ACE ELECTORAL KNOWLEDGE NETWORK, THE ACE ENCYCLOPEDIA: BOUNDARY DELIMITATION 22–23 (2013), [http://aceproject.org/ace-en/pdf/bd/at\\_download/file](http://aceproject.org/ace-en/pdf/bd/at_download/file) (detailing the advantages of multimember districts).

134. See *id.* (stating that single-member districts have the disadvantage of unequal representation).

135. 553 U.S. 181 (2008).

136. 133 S. Ct. 2612 (2013).

137. See Tomas Lopez, *'Shelby County': One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later> (last visited Apr. 19, 2017) (discussing effects of the Shelby holding) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *Crawford v. Marion County Election Board*, BRENNAN CTR. FOR JUST. (Apr. 28, 2008), <https://www.brennancenter.org/legal-work/crawford-v-marion-county-election-board> (last visited Apr. 19, 2017) (outlining harms of upholding Indiana's voter ID law) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

138. See Lopez, *supra* note 137 (stating how these laws may restrict access to voting).

registration and voting that would have required review by the federal government.<sup>139</sup>

Indiana law required voters to present a valid photo ID at polling places in order to vote.<sup>140</sup> If voters objected to being photographed or were unable to present an ID at the polls (even if they possessed one), they could cast provisional ballots.<sup>141</sup> The Indiana Democratic Party challenged the law as an infringement on the right to vote in violation of the Fourteenth Amendment.<sup>142</sup>

Indiana argued that the ID requirement was grounded in a compelling interest to prevent voter fraud and maintain voter confidence in the electoral process.<sup>143</sup> In sustaining the constitutionality of the ID requirement, the Court stated:

There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.<sup>144</sup>

The Court distinguished the voter ID requirement from other practices that it had struck down or supported.<sup>145</sup> On the one hand, the Court had struck down the poll tax in *Harper v. Virginia Board of Elections*<sup>146</sup> as an unconstitutionally discriminatory barrier to voting.<sup>147</sup> On the other, it had upheld restrictions on write-in

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139. See Jamie Fuller, *How Has Voting Changed Since Shelby County v. Holder?*, WASH. POST (July 7, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/?utm\\_term=.c53c1f305cb9](https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder/?utm_term=.c53c1f305cb9) (last visited Apr. 19, 2017) (giving examples of how the loss of Section 4 has created issues in different states) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

140. See generally Pub. L. 109-2005, 2005 Indiana Acts 2005; see also *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185–86 (2008) (describing the key provisions of Indiana's voter identification law).

141. *Id.*

142. *Id.* at 186–87.

143. *Id.* at 191–93.

144. *Id.* at 196.

145. See, e.g., *id.* at 198 (distinguishing Indiana's voter ID law from the poll tax struck down in *Harper v. Virginia* because Indiana did not require voters to pay a tax or fee to acquire a new photo ID, but provided them for free).

146. 383 U.S. 663 (1966).

147. *Id.* at 670.

ballots (*Burdick v. Takushi*<sup>148</sup>) and other “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” as not invidious.<sup>149</sup>

The Court acknowledged that the voter ID requirement “imposes some burdens on voters that other methods of identification do not share.”<sup>150</sup> Specifically, the Court noted,

a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out-of-state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed.<sup>151</sup>

But, the Court said, the severity of this burden was mitigated by the fact that voters without ID could cast a provisional ballot.<sup>152</sup> Since the evidence presented by the petitioners did not demonstrate that the voter ID provision had an impact on any discrete class of voters, the Court saw no reason to strike the law down.<sup>153</sup>

The petitioners also insisted that the law was clearly designed to harm Democratic voters because the law had been passed unanimously by the Republican majorities in the state legislature and opposed with equal unanimity by the Democratic minorities.<sup>154</sup> But, the Court said, “if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”<sup>155</sup>

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148. 504 U.S. 28 (1992).

149. *Crawford v. Marion Cty, Election Bd.*, 553 U.S. 181, 190 (2008).

150. *Id.* at 197.

151. *Id.* at 199.

152. *Id.* at 195.

153. *See id.* at 202–04 (stating that the law is amply justified by voter interest).

154. *See id.* at 188 (describing how a law that made it more difficult for minorities to vote could adversely affect the Democratic party).

155. *Id.* at 204.

*Crawford* upheld district and appeals court decisions that had reached the same conclusion.<sup>156</sup> Justice Richard Posner, who wrote the appeals court decision, subsequently expressed regrets about doing so.<sup>157</sup> In his book, *Reflections on Judging*, Posner stated: “I plead guilty to having written the majority opinion (affirmed by the Supreme Court) upholding Indiana’s requirement that prospective voters prove their identity with a photo ID—a type of law now widely regarded as a means of voter suppression rather than fraud prevention.”<sup>158</sup>

Writing in *The New Republic* in 2013, Posner insisted that this was not a recantation of his opinion.<sup>159</sup> Instead, he maintained, it was an acknowledgment that he—like any other judge—may be insufficiently knowledgeable about the technical aspects of a subject to which the law applies that a legal decision made in the abstract confines of a courtroom might fail to take into account the decision’s consequences.<sup>160</sup> Accordingly, Posner said essentially that he made the wrong decision for the right reasons: “We judges weren’t given, in *Crawford*, the data we would have needed to balance the good and bad effects of the Indiana law.”<sup>161</sup> Insofar as the evidence against the law was, at the time, “totally unreliable,” Posner asserted that there were no grounds on which to strike it down.<sup>162</sup> To have done so, he argued “would have plunged the federal courts deeply into the management of the electoral process.”<sup>163</sup>

Posner cited Richard Trotter’s “Vote of Confidence: *Crawford* v. *Marion County Election Board*, Voter Identification Laws and the Suppression of a Structural Right”<sup>164</sup> to demonstrate the

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156. *Id.* at 188–89.

157. *See generally* RICHARD POSNER, *REFLECTIONS ON JUDGING* 84–85 (2013).

158. *Id.*

159. *See* Richard Posner, *I Did Not ‘Recant’ on Voter ID Laws*, *NEW REPUBLIC* (Oct. 27, 2013), <https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id> (last visited Apr. 19, 2017) (explaining that the controversial sentence in *Reflections on Judging* had been taken out of context) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See generally* Richard Trotter, *Vote of Confidence: Crawford v. Marion County Election Board, Voter Identification Laws, and the Suppression of a*

dilemmas judges find themselves in when dealing with highly technical or discrete applications of the law.<sup>165</sup> According to Trotter, *Crawford* is ripe to be overturned because “[t]he evidentiary gaps that proved decisive in *Crawford* were a product of the relative novelty of voter identification laws and the lack of mainstream scholarly and journalistic attention dedicated to its potential effects.”<sup>166</sup> Between the *Crawford* decision and 2012, when Trotter was writing, 34 states had introduced voter ID laws and 7 had signed them into law.<sup>167</sup>

Fortunately, the wave of legislation attempting to restrict access to voting seems to be receding.<sup>168</sup> In several recent cases, lower courts have struck down restrictive voter registration and identification requirements in North Carolina, Texas and Wisconsin.<sup>169</sup> In North Carolina, the United States Fourth Circuit Court of Appeals overturned a district court ruling that had sustained the constitutionality of several voter registration restrictions passed under the auspices of a fifty-seven-page omnibus bill.<sup>170</sup> After spending about fifty-five pages documenting actions by the state legislature that were clearly designed to restrict access to the polls in manners that disproportionately discriminated against African Americans, the court stated:

The totality of the circumstances—North Carolina’s history of voting discrimination; the surge in African American voting; the legislature’s knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so—cumulatively and unmistakably reveal that the [Republican majority in the]

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*Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 515 (2013).

165. See Posner, *supra* note 159 (recalling the dearth of research available on voter identification when *Crawford* was decided).

166. Trotter, *supra* note 164, at 538.

167. *Id.*

168. See *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 243–44 (4th Cir. 2016) (striking down restrictive voter registration and identification laws).

169. See *generally id.*; *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. Tex. 2016); *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014).

170. See *McCrory*, 831 F.3d at 216 (explaining that, after the Supreme Court’s decision in *Shelby County* essentially lifted the preclearance regime, the North Carolina legislature “swiftly expanded an essentially single-issue bill into omnibus legislation.”).



General Assembly used SL 2013-381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party.<sup>171</sup>

The court distinguished its reasoning from that employed by the Supreme Court in *Crawford*.<sup>172</sup> In *McCrorry*, there was no reason to defer to legislative considerations about voter fraud.<sup>173</sup>

That deference does not apply here because the evidence in this case establishes that, at least in part, race motivated the North Carolina legislature. Thus, we do not ask whether the State has an interest in preventing voter fraud—it does—or whether a photo ID requirement constitutes one way to serve that interest—it may—but whether the legislature would have enacted SL 2013-381's photo ID requirement if it had no disproportionate impact on African American voters. The record establishes that it would not have.<sup>174</sup>

One would hope that legislators are no longer motivated by racially discriminatory intentions.<sup>175</sup> But, the North Carolina story demonstrates that this is a quixotic hope at least for the time being.<sup>176</sup> *McCrorry* therefore highlights the impact of the Supreme Court's decision to declare Section 4(b) of the VRA unconstitutional in *Shelby*.<sup>177</sup> The Court struck down Section 4(b), which provided the coverage formula used to identify the jurisdictions covered by Section 5's preclearance regime, because the Court found that the criteria used were terribly outdated:

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy

171. *Id.* at 233.

172. *See id.* at 235 (noting that, in *Crawford*, the Supreme Court gave deference to the Indiana legislature's decision to implement a voter ID law as the best way to serve its legitimate interest in combatting voter fraud and promoting public confidence in the state's electoral system).

173. *Id.*

174. *Id.*

175. HANS VON SPAKOVSKY, ELIZABETH SLATTERY & ROGER CLEGG, WHAT CONGRESS CAN DO TO STOP RACIAL DISCRIMINATION, HERITAGE FOUND. (Apr. 7, 2014), <http://www.heritage.org/civil-rights/report/what-congress-can-do-stop-racial-discrimination>.

176. *See id.* (showing how a legislator recently was motivated by racial discrimination).

177. *See id.* (demonstrating how a legislator was able to make a law that was discriminatory).

tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. (internal citations omitted).<sup>178</sup>

While the *Shelby* decision made sense in theory, it provides another Posnerian example of judges being insufficiently aware of the consequences of their decisions.<sup>179</sup> Absent the *Shelby* decision, North Carolina's legislature would have been required by Section 5 of the VRA to submit such widespread voting legislation to the Department of Justice for preclearance, where it is likely the DOJ would have raised objections to the same voting restrictions later struck down by the Fourth Circuit.<sup>180</sup> In *McCrorry*, the Fourth Circuit extensively documented how the *Shelby* decision precipitated the expansion and passage of "the most restrictive voting legislation seen in North Carolina since the passage of the Voting Rights Act of 1965."<sup>181</sup> While the Supreme Court would hope that the VRA has achieved its goals, the events in North Carolina demonstrate that this is not the case.<sup>182</sup>

If any good news is emanating from the area of voting rights despite the impact of *Shelby*, it is the fact that the forces of enhancing voter access seem to be advancing. According to the Brennan Center, in the first three months of 2016, "422 bills to enhance voting access were introduced or carried over

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178. *Id.* at 2027–28.

179. Compare Guinier, *The Triumph of Tokenism*, *supra* note 15 with *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

180. See *N.C. State Conf. of the NAACP v. McCrorry*, 831 F.3d 204, 227 (4th Cir. 2016) ("The record shows that, immediately after *Shelby County*, the General Assembly vastly expanded an earlier photo ID bill and rushed [it] through the legislative process . . .").

181. *Id.*

182. Compare *id.* with *Holder*, 133 S. Ct. at 2633 (stating the VRA's goals).

in 41 states plus the District of Columbia. Meanwhile, at least 77 bills to restrict access to registration and voting have been introduced or carried over from the prior session in 28 states.”<sup>183</sup> Legislation to promote or establish automatic voter registration was advancing in twenty-eight states and the District of Columbia.<sup>184</sup> Unfortunately, twenty states have enacted new restrictions on voting since 2010.<sup>185</sup> Without the potent weapon of preclearance, which deterred states from enacting broad voting restrictions, the federal government cannot take action against discriminatory state election laws until they have gone into effect and, even at that point, a plaintiff seeking to challenge a voting restriction must be able to prove that the law was motivated by discriminatory intent or has had a clear discriminatory impact.<sup>186</sup>

#### IV. *The Electoral College*

The Electoral College came under fire in 2016 because Donald Trump was elected with a majority of the Electoral College vote despite receiving more than 2 million fewer votes than Hillary Clinton.<sup>187</sup> This precipitated renewed calls for reform and a change to some form of a national popular vote mechanism to elect the president.<sup>188</sup>

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183. *Voting Laws Roundup 2016*, BRENNAN CTR. FOR JUSTICE (Apr. 18, 2016), <http://www.brennancenter.org/analysis/voting-laws-roundup-2016> (last visited Apr. 19, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

184. *Id.*

185. *Id.*

186. *See* Lopez, *supra* note 137 (critiquing the method by which to challenge restrictive voting laws).

187. *See* Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/> (last visited Apr. 19, 2017) (stating that Clinton outpaced Trump by almost 2.9 million votes in the 2016 Presidential election) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

188. *See* Igor Bobic, *Democrats Push For Electoral College Reform After Hillary Clinton's Popular Vote Victory*, HUFFINGTON POST (Dec. 6, 2016), [http://www.huffingtonpost.com/entry/electoral-college-popular-vote-reform\\_us\\_58471c4be4b0ebac58070c85](http://www.huffingtonpost.com/entry/electoral-college-popular-vote-reform_us_58471c4be4b0ebac58070c85) (last visited Apr. 19, 2017) (noting that a group of House Democrats gathered shortly after the election result to discuss reforms to the way the country elects its president) (on file with the Washington

The Electoral College reminds us that there can be many forms of democracy and elections.<sup>189</sup> Not all are simple, majoritarian systems.<sup>190</sup> In the United States, the reasoning for the Electoral College (and the governmental structure on which it is based) is grounded in the reasoning that informed the establishment of the Constitution.<sup>191</sup>

In *Federalist* 10, James Madison set forth a vision of politics that was intended to constrain the will of the majority.<sup>192</sup> The large republic that the country would be in the late 18th century would proliferate interest groups (Madison's "factions") and therefore make it extraordinarily difficult for a majority to form.<sup>193</sup> If one did form around a particular issue, Madison expected that it would quickly dissolve because other issues would divide it.<sup>194</sup>

The separation of powers among the three branches of the federal government and the division of powers between the states and the federal government were also designed to make governing difficult.<sup>195</sup> Specifically, the bicameral Congress was designed to give states equal representation in the Senate regardless of their size.<sup>196</sup>

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and Lee Journal of Civil Rights and Social Justice).

189. See *Electoral College*, HISTORY.COM, <http://www.history.com/topics/electoral-college> (last visited Apr. 19, 2017) (describing different methods of election the United States used to implement prior to enactment of Twelfth Amendment) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

190. See Charles King, *Electoral Systems*, GEORGETOWN UNIV. (2000), [http://faculty.georgetown.edu/kingch/Electoral\\_Systems.htm](http://faculty.georgetown.edu/kingch/Electoral_Systems.htm) (last visited Apr. 19, 2017) (detailing three different types of electoral systems) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

191. See U.S. CONST. amend. XII (replacing the original method of electing the President and Vice President with separate ballots for President and Vice President, with electors casting a single vote for each office).

192. See THE FEDERALIST NO. 10 (James Madison) (fearing that the classes without property would use their majority power to implement a variety of measures that redistributed wealth).

193. See *id.* (addressing the destructive role of a faction in breaking apart the republic).

194. See *id.* (expecting that small democracy means that undesirable passions can very easily spread to a majority of the people).

195. See THE FEDERALIST NO. 51 (James Madison) (writing to inform the reader of the safeguards created by the convention to maintain the separate branches of government).

196. See THE FEDERALIST NO. 62 (James Madison) (stating that if "every

There is no question that this constitutional structure, however democratic, does not treat voters equally in all circumstances; instead, it tends to under-represent the voting power of large states while over-representing the voting power of smaller ones<sup>197</sup> For instance, Wyoming has the same number of senators to represent its 586,107 residents that California has to represent 39,144,818 residents.<sup>198</sup> The same type of disparity can be seen in the electoral college system for United States presidential elections, where each state is apportioned the number of electors equal to the size of its Congressional delegation.<sup>199</sup> Wyoming receives one electoral vote for every 195,369 residents, while Californian receives one electoral vote for every 678,945 residents.<sup>200</sup>

Were a presidential election result to produce no Electoral College winner, the Constitution dictates that the top three candidates (in terms of Electoral Votes) would then contest the election in the House of Representatives.<sup>201</sup> Were this to occur,

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district ought to have a proportional share in the government” and the States “however unequal in size, ought to have an equal share in the common councils,” then “the government ought to be founded on a mixture of the principles of proportional and equal representation.”).

197. See Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 11, 2013), [http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?\\_r=0##smallstate](http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?_r=0##smallstate) (last visited Apr. 19, 2017) (“Vermont’s 625,000 residents have two United States senators, and so do New York’s 19 million. That means that a Vermonter has 30 times the voting power in the Senate of a New Yorker”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

198. See *id.* (noting that Wyoming and California have the largest representational inequality gap in the Senate).

199. See *id.* (“The advantage small states enjoy in the Senate is echoed in the Electoral College, where each state is allocated votes not only for its House members (reflecting the state’s population) but also for its senators (a two-vote bonus).”).

200. See Katy Collin, *The Electoral College Badly Distorts the Vote. And It’s About to Get Worse*, WASH. POST (Nov. 17, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/the-electoral-college-badly-distorts-the-vote-and-its-going-to-get-worse/?utm\\_term=.73a341b08644](https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/the-electoral-college-badly-distorts-the-vote-and-its-going-to-get-worse/?utm_term=.73a341b08644) (last visited Apr. 19, 2017) (describing the apportionment of electoral votes for Wyoming and California) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

201. See U.S. CONST. amend. XII (“[A]nd if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of

each state delegation to the House would cast one vote.<sup>202</sup> Accordingly, lone representatives of states like Wyoming, the Dakotas and Delaware would cast their votes while California's 55 representatives would have to caucus and vote to decide which candidate would receive their one, lone vote.<sup>203</sup>

The House itself is hardly a bastion of equality.<sup>204</sup> Montana, with 994,416 residents has one representative.<sup>205</sup> Meanwhile, Rhode Island with 1,055,247 residents sends two representatives to the House.<sup>206</sup>

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those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.”).

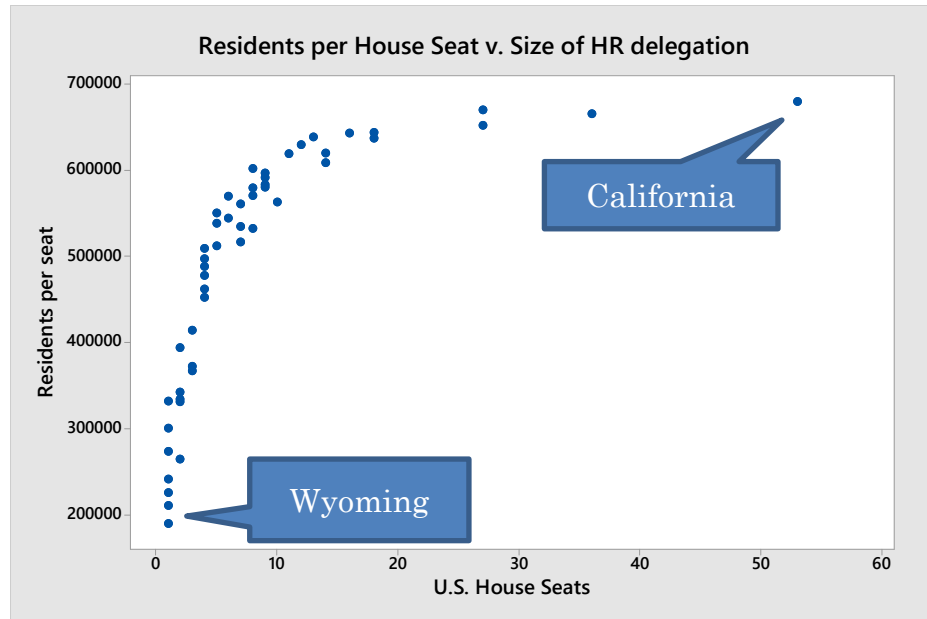
202. See U.S. CONST. amend. XII (“But in choosing the President, the votes shall be taken by states, the representation from each state having one vote.”).

203. See *Electoral College Information*, CAL. SEC’Y OF STATE, <http://www.sos.ca.gov/elections/electoral-college/> (detailing how the state of California’s 55 representatives elect the President) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

204. See *infra* notes 205–06 (showing that although both Montana and Rhode Island have comparable population size, their allotted number of Representatives in the House differ).

205. See *Montana*, GOVTRACK, <https://www.govtrack.us/congress/members/MT> (last visited Apr. 19, 2017) (stating that there is one United States House Representative in Montana) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

206. See *Rhode Island*, GOVTRACK, <https://www.govtrack.us/congress/members/RI> (last visited Apr. 19, 2017) (stating that there are two United States House Representatives in Rhode Island) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).



In isolation, the United States would appear to be a terribly undemocratic, gerrymandered legislative and electoral system that favors Republican and rural voters.<sup>207</sup> But, if we broaden our scope of inquiry, we see that the deviations from pure, democratic equality are common in many federal nations.

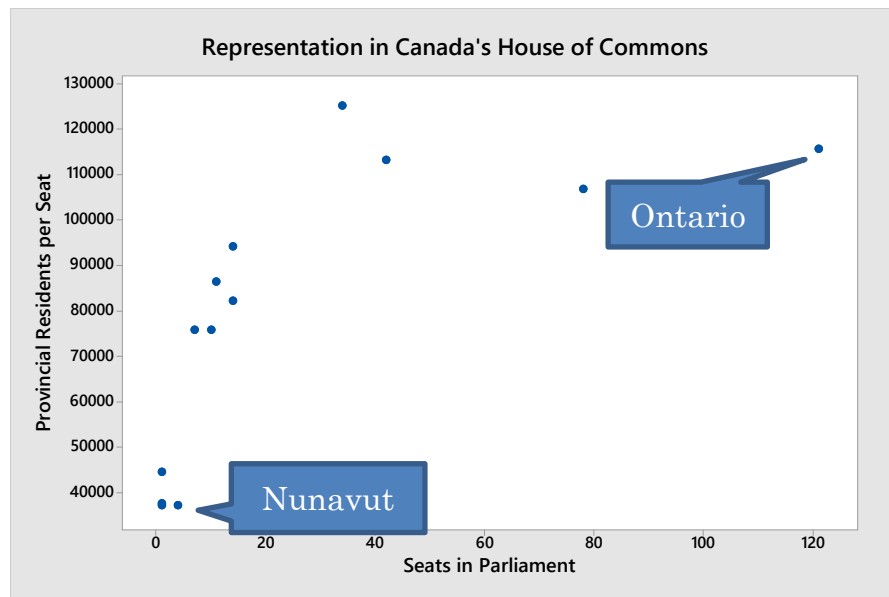
Canada suffers similar disparities of representation in the House of Commons.<sup>208</sup> Ontario, with 13,983,000 residents, has 121 seats in the Commons for a ratio of 115,562 residents per seat.<sup>209</sup> Meanwhile, Nunavut's 37,100 residents have one member in the

207. See Dylan Matthews, *The Senate Is Undemocratic and It Matters*, VOX (Jan. 6, 2015), <http://www.vox.com/2015/1/6/7500935/trende-senate-vote-share> (last visited Apr. 19, 2017) (suggesting that because small states do not have a lot of heavily populated cities, when they 'district by state,' they effectively district in a way that favors rural, conservative-leaning areas) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

208. See LIBRARY OF PARLIAMENT, GUIDE TO THE CANADIAN HOUSE OF COMMONS 3–4 (2016), [http://www.lop.parl.gc.ca/About/Parliament/GuideToHoC/pdf/guide\\_canadian\\_house\\_of\\_commons-e.pdf](http://www.lop.parl.gc.ca/About/Parliament/GuideToHoC/pdf/guide_canadian_house_of_commons-e.pdf) (describing Canada's bicameral legislative structure, comprised of the Senate and House of Commons, which are generally analogous to the United States Senate and House).

209. See *id.* (noting the allocation of seats in the House of Commons per province, including Ontario's 121 allocated seats).

House of Commons and roughly three times the voting power of the average Ontarian.<sup>210</sup>



Finally, the European Parliament manifests similar representational disparities.<sup>211</sup> Tiny Malta, with a population of 429,344 has six seats in the parliament for a ratio of 71,557 residents per seat.<sup>212</sup> On the other hand, 81,197,537 Germans have ninety-six seats in the Parliament.<sup>213</sup> With a ratio of 845,808

210. See *id.* (indicating that Nunavut is allocated only one seat in the Commons).

211. See MEPs, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/meps/en/map.html> (last visited Apr. 19, 2017) (explaining that the European Parliament is comprised of 751 Members elected by the 28 Member-States of the European Union and that seats are allocated based on Member-State population) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

212. See *Living in the EU*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/figures/living\\_en#tab-1-3](https://europa.eu/european-union/about-eu/figures/living_en#tab-1-3) (last visited Mar. 4, 2017) (indicating that Malta's population is 429,344) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *MEPs by Member State and Political Group: 8th Parliamentary Term*, EUROPEAN PARLIAMENT, <http://www.europarl.europa.eu/meps/en/crosstable.html> (last visited Apr. 19, 2017) (indicating that Malta is allocated six seats in the European Parliament).

213. See *Living in the EU*, *supra* note 212 (indicating that Germany's population is 81,197,537); *MEPs by Member State and Political Group*, *supra* note 212 (noting that Germany is allocated 96 seats in the European Parliament).



residents per seat, Germans have less than one-eleventh of the voting power of the Maltese.<sup>214</sup>

Such population disparities exist in systems that are designed to ensure meaningful representation of constituent interests (states, provinces or countries) in addition to individual voter equality. In all three legislatures, the smaller constituencies have far greater voting power than the larger ones.<sup>215</sup> Ironically, this sort of representation manifests the values that Lani Guinier advocated in “The Triumph of Tokenism.”<sup>216</sup> There, she called for “proportionate interest representation,” a scheme of representation that, essentially, over-represents minorities in order to give them a more effective presence in legislatures.<sup>217</sup>

Guinier wrote with regard to the plight of racial minorities in electorates that are polarized along racial lines.<sup>218</sup> In rejecting the black electoral success theory’s reliance on or satisfaction with merely electing a number of minority legislators (roughly proportional to the minority percentage of the population, Guinier called for the adjustment of voting rules in the legislature to enhance the influence of minority representatives:

Where majority representatives refuse to bargain with representatives of the minority, simple majority vote rules would be replaced. “A minority veto” for legislation of vital importance to minority interests would respond to evidence of gross “deliberative gerrymanders.” Alternatively, depending on the proof of disproportionate majority power, plaintiffs might seek minority assent through other supermajority

214. *Id.*

215. *See supra* notes 203197–07 (United States), 208208–10 (Canada), 211211–13 (European Union) and accompanying text.

216. *See generally* Guinier, *The Triumph of Tokenism*, *supra* note 15.

217. *See id.* at 1136 (“Proportionate interest representation disavows the pluralist conception of fairness, which falsely assumes equal bargaining power simply based on access, or numerically proportionate electoral success for all groups.”).

218. *See id.* at 1125 (“Given residential segregation, the assumption supports district election structures to reconfigure a heterogeneous, polarized electorate into a homogeneous one. The assumption correctly perceives that district elections favor black electoral success “because black candidates seeking district seats can steer clear of direct competition with white candidates.”).

arrangements, concurrent legislative majorities, consociational arrangements, or rotation in office.<sup>219</sup>

To the extent that the Electoral College constrains majorities and over-represents the power and influence of small states, it embraces at least some of Guinier's approach to representative fairness.<sup>220</sup> It compels majorities in the House of Representatives and the Senate to work with minorities (small states), it provides incentives for presidential candidates to campaign in small states and, occasionally, elects a president with a majority of the Electoral College but not the popular vote.<sup>221</sup>

### V. Conclusion

My review of these three aspects of contemporary election law is not meant to suggest that other aspects are not important. But, these three issues embody talismanic concerns about democratic integrity. VRA litigation has only enhanced and normalized brazen gerrymandering practices that serve the interests of legislators, but not necessarily the voters who elect them. The Supreme Court's decision to strike down section 4 of the VRA (and thereby render Section 5 meaningless) unleashed a wave of legislative attempts to restrict access to the polls that were clearly designed to discriminate on the basis of race and partisanship. While the Electoral College has come under fire due to the way it functioned in the 2016 presidential election, it is ironic to realize that its promotion of the power of smaller states manifests the same vision of minority representation rights that informs Lani Guinier's criticism of American voting rights litigation.

Democratic theory is complex and rife with competing values that do not necessarily complement one another.<sup>222</sup> The Electoral

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219. *Id.* at 1140.

220. *See id.* at 1090 ("For the integrationist, litigation to achieve black electoral success incorporated the preeminent process theory of empowerment: measuring political equality by the fairness of the process through which representatives were elected.").

221. *See, e.g.*, Gregory Krieg, *supra* note 187 (stating that, in the 2016 United States presidential election, Hillary Clinton, the Democratic candidate, won almost 2.9 million more votes than Donald Trump, the Republican candidate, but lost the electoral college, 232 to 306, thereby losing the presidential election).

222. *See* Norman Daniels, *Democratic Equality: Rawls's Complex*

College manifests that complexity. The current state of redistricting law demonstrates how legislation such as the Voting Rights Act can be hijacked at the expense of voters. The attempts to restrict access to the polls in the wake of *Shelby* remind us of James Madison's observation about human nature:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal constraints on government would be necessary.<sup>223</sup>

Despite the existence of the internal constraints on government that Madison and the Framers designed, the current state of election law demonstrates that angels do not govern the rules of the American electoral process.

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*Egalitarianism*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH, [https://www.hsph.harvard.edu/benchmark/ndaniels/pdf/democratic\\_equality.pdf](https://www.hsph.harvard.edu/benchmark/ndaniels/pdf/democratic_equality.pdf) (writing that democratic theory is complex because it is “motivated by several distinct egalitarian ideas” and rests on “three principles of justice that interact with and limit each other.”).

223. THE FEDERALIST NO. 10 (James Madison).