Washington and Lee Law Review

Volume 81 | Issue 3 Article 6

Summer 2024

Protecting Minority Representation in an Era of Political Polarization and the Hollowing Out of Voting Rights Protections

Henry L. Chambers Jr.
University of Richmond, hchamber@richmond.edu

Protecting Minority Representation in an Era of Political Polarization and the Hollowing Out of Voting Rights Protections

Henry L. Chambers, Jr.*

Abstract

The United States Supreme Court has hollowed out various voting rights protections, leaving all voters—minority and nonminority—less protected in a politically polarized America. Surprisingly, the Court has continued to protect representation for minority race voters who live in racially polarized areas. However, minority race voters risk losing that protection, typically provided through majority-minority districts authorized under the Voting Rights Act, if they build cross-racial coalitions with their neighbors. Under the Court's interpretation of the VRA, cross-racial voting coalitions may be less protected than local majorities comprised of a single race of voters. The loss of such protection could leave their representation subject to the mercies of politically polarized national and state legislatures that may wish to, and may be allowed to, silence their voices and those of their cross-racial political allies. If America wishes to guarantee the voices of minority voters are heard when those voices are part of cross-racial coalitions, courts may need to revisit how minority political voices can be protected. For example, they may do so broadly by reconsidering the reach of the Fifteenth Amendment's bar on race-based limitations on the right to vote or somewhat narrowly by rethinking the viability of

* Austin E. Owen Research Scholar and Professor of Law, University of Richmond School of Law.

voting structures—such as multimember districting—that were largely abandoned when used in the past to limit representation of minority voters but could be repurposed to help those voters have their voices heard today.

Table of Contents

INTRODUCTION

America is politically polarized,[1] though Americans may be less polarized than they believe.[2] Nonetheless, our politics are polarized,[3] with our representatives typically acting in a highly polarized manner.[4] The two major political parties do not work well with each other.[5] Their voters do not cross over consistently to vote for candidates of the other party.[6] Swing voters exist, and may influence elections, but may have little effect on the behavior of the officials they help elect.[7]

Polarization's effect on our political system is problematic. It may foster attempts to gain structural advantages over

---

1. *See* Stephen Menendian, *Race and Politics: The Problem of Entanglement in Gerrymandering Cases*, 96 S. CALIF. L. REV. 301, 327–28 (2022) (noting partisan and racial political polarization); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011) ("American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization."). As importantly, Americans from different parties may not like each other much. *See* Rachel Kleinfeld, *Polarization, Democracy, and Political Violence in the United States: What the Research Says*, 3 (Carnegie Endowment for Int'l Peace, Working Paper 2023), https://perma.cc/6RXB-ZUM6 (noting Americans are more affectively polarized—"they do not like members of the other party"—than politically polarized).

2. Kleinfeld, *supra* note 1, at 1 ("American voters are less ideologically polarized than they think they are . . . .").

3. *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 5, 6 (2022) ("Commentators regularly decry the polarization of American politics.").

4. *See* Kleinfeld, *supra* note 1, at 2 ("American politicians are highly ideologically polarized. In other words, they believe in and vote for different sets of policies, with little overlap. This trend has grown in a steady, unpunctuated manner for decades.").

5. *See id.*, at 40 ("Congress remains very ideologically polarized. Since the Tea Party Caucus entered in 2011, there has been almost no issue area overlap between members of Congress across the two parties . . . ."); *see also* McGinnis & Rappaport, *supra* note 3, at 14 ("In recent years, there is little overlap between the two political parties.").

6. *See* Pildes, *supra* note 1, at 278 ("[S]plit-ticket voting has declined sharply: more voters express consistent, partisan political preferences by voting for candidates from the same party across all races, whether for the House, the Senate, or the presidency.").

7. *See* David Leonhardt, *What Moves Swing Voters*, N.Y. TIMES (Nov. 9, 2021), https://perma.cc/4C9F-FMKK (noting that most swing voters vote for a Democratic or Republican candidate).

political opponents.[8] When opponents are considered political enemies with whom common ground is nearly impossible, rather than as fellow Americans with whom we simply disagree, some antidemocratic power moves—including partisan gerrymandering,[9] voter suppression, and even voter intimidation—may appear acceptable.[10] More broadly, the American electoral system may encourage political polarization though the prevalence of first-past-the-post and single-member districting.[11] Single-member districting can foster partisan gerrymandering by creating conditions that allow a party to

8. *See* McGinnis & Rappaport, *supra* note 3, at 12–13 (noting polarization can move "beyond substantive policy disagreements into identity politics or tribalism, in which an 'us versus them' mentality flourishes and each side views the other as an existential threat to be destroyed rather than engaged with"); *see also* Kleinfeld, *supra* note 1, at 10 ("[A]dvocacy that amplifies the belief that members of the other party are bent on destroying democracy itself is likely to deepen polarization and support for antidemocratic action on one's own side.").

9. Extreme partisan gerrymandering may be inconsistent with constitutional principles but is not unconstitutional. *See* Rucho v. Common Cause, 588 U.S. 684, 718 (2019) (discussing how partisan gerrymandering may lead to "unjust" results, but is not unconstitutional). There has been disagreement regarding the relationship between gerrymandering and polarization. *See* Nolan M. McCarty, *The Limits of Electoral and Legislative Reform in Addressing Polarization*, 99 CALIF. L. REV. 359, 359 (2011) ("Given that the forces that produce polarized politics are deeply embedded in the American political system, opening primaries, eliminating gerrymandering, reforming Congress, and regulating campaign finance are unlikely to provide much relief."); *see* Pildes, *supra* note 1, at 297–98

> I identify here the three specific institutional features that, it has been argued, have either contributed to the rise of polarized politics or could be adjusted to help reconstruct a center in American politics: primary elections, gerrymandered election districts, and centralization of House and Senate power in the hands of party leaders.

10. The outright denial of the right to vote may be rare, but concerns about voter intimidation persist. *See* Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. 289, 308–10 (2022) (discussing the interplay between voter intimidation and election surveillance); *see also* Michael Weingartner, *Remedying Intimidating Voter Disinformation through § 1985(3)'s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 89–92 (2021) (discussing nontraditional forms of voter intimidation).

11. For a discussion of first-past-the-post systems (in which a candidate who wins a mere plurality of votes can win an election) and single-member districting, see Henry L. Chambers, Jr., *Enhancing Rural Representation Through Electoral System Diversity*, 57 U. RICH. L. REV. 851, 859–62 (2023) [hereinafter *Enhancing Rural Representation*].

pack the opposition's voters into a few districts, create a small majority of their voters in the other districts, and draw more safe seats for the party than fairness would suggest.[12] A two-party dominant system using first-past-the-post primaries may lead to polarized general election candidates chosen by the party faithful.[13] The United States Supreme Court has ruled the United States Constitution provides no protection against partisan gerrymandering, leaving political minorities with little protection in politically polarized times.[14]

The confluence of factors results in lessened protections for minority voters.[15] A lack of protection against voter suppression harms individual minority voters.[16] A lack of protection for political minorities may lead to a lack of protection for any numerical minority, including racial minorities.[17] The Supreme Court has intentionally or unintentionally aided those who seek to suppress votes by hollowing out voter protections specifically under the Voting Rights Act ("VRA"),[18] and more generally under other laws, functionally harming minority voters.[19]

---

12. *See* McCarty, *supra* note 9, at 366 (noting attempts to do such in Texas and California).

13. *See* Kleinfeld, *supra* note 1, at 3 (noting the small proportion of party voters in primary elections for safe seats allows a small number of partisans to select polarizing candidates); *see also Rucho*, 588 U.S. at 750 (Kagan, J., dissenting) ("[Gerrymandered] districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process."). *But see* McCarty, *supra* note 9, at 366 ("[T]he way in which states structure their nominating primaries seems to have very little impact on the degree of polarization or candidate extremism.").

14. *See Rucho*, 588 U.S. at 718 (refusing to deem partisan gerrymandering unconstitutional).

15. *See infra* Parts I–II (describing how Voting Rights have been hollowed out).

16. *See infra* Parts I–II.

17. The interests of a racial minority group may be subsumed in the political minority (or majority), ignored, or harmed when not explicitly protected. Partisan gerrymandering may lead to a diminution of power for racial minorities when racial and partisan interests correlate. *See generally* Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221 (2024); Cooper v. Harris, 581 U.S. 285 (2017).

18. Voting Rights Act of 1965, 52 U.S.C. §§ 10101, 10301–14, 10501–08, 10701–02 (originally enacted as Pub. L. No. 89-110, 79 Stat. 437 (1965)).

19. *See infra* Parts I–II.

This Essay briefly considers the Supreme Court's willingness to hollow out voter protections in the context of a politically polarized America, what effects that may have, and two responses to those effects. Its structure is simple. First, it discusses how the United States Supreme Court has hollowed out voting protections generally. Second, it considers how the Court has hollowed out VRA doctrine while yet protecting racial gerrymandering doctrine favorable to minority representation. Finally, it suggests two interventions—reinvigorating the Fifteenth Amendment and revisiting multimember districting—that may help protect representation for minority voters.

I. HOLLOWING OUT VOTING RIGHTS PROTECTIONS GENERALLY

The right to vote is not affirmatively granted under the U.S. Constitution. Rather, it is provided by individual states. However, when granted, the right to vote is protected through various constitutional and statutory provisions.[20] In recent years, the Court has hollowed out some voting rights protections. It has not left voting rights unprotected but has narrowed protections in enough contexts to weaken the right to vote and any concomitant right to representation.

A. *Partisan Gerrymandering:* Rucho v. Common Cause

In *Rucho v. Common Cause*,[21] the Court considered two partisan gerrymanders of congressional seats, one a Democratic gerrymander in Maryland and the other a Republican gerrymander in North Carolina.[22] For decades, the Court had deemed partisan gerrymandering claims justiciable but not

20. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (protecting right to vote as fundamental under Fourteenth Amendment's Equal Protection Clause); *see also* Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1415–18 (2002) [hereinafter *Colorblindness, Race Neutrality, and Voting Rights*] (discussing protections the Fourteenth Amendment may provide for minority voting rights).

21. 588 U.S. 684 (2019).

22. *Id.* at 691 ("The districting plans at issue here are highly partisan, by any measure.").

subject to a clear remedy.[23] However, the *Rucho* Court determined partisan gerrymandering claims involve political questions the federal courts cannot resolve under the Constitution.[24] In deeming partisan gerrymandering not subject to adjudication, the Court eliminated the claim that groups of voters have a constitutional right to representation consistent with their numbers.[25]

The Constitution allows federal courts to decide legal issues and provide legal remedies but stops federal courts from resolving political questions.[26] Federal courts can resolve issues involving voting and politics; however, when a dispute lacks "judicially discoverable and manageable standards for resolving the case," the case involves a political question that must be

23. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 447 (2006) (rejecting a "statewide challenge to Texas' redistricting" but finding one district violated law and requiring redrawing without reaching the constitutional question); Davis v. Bandemer, 478 U.S. 109, 143 (1986) (finding political gerrymandering claims justiciable but not providing a remedy); Gaffney v. Cummings, 412 U.S. 735, 752–54 (1973) (ruling that the gerrymandered map did not violate the Fourteenth Amendment and thus not providing a remedy). In *Vieth v. Jubelirer*, five justices—the four dissenting justices plus Justice Kennedy—found political gerrymandering justiciable. 541 U.S. 267 (2004). However, Justice Kennedy concurred in the plurality's judgment that the Court should not intervene, arguing no manageable standards for relief had been identified. *See id.* at 317 (Kennedy, J., concurring in judgment) ("The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief. With these observations, I join the judgment of the Court.").

24. *See* Rucho v. Common Cause, 588 U.S. 684, 718 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

25. *Id*. at 704 ("Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence.").

26. *Id*. at 696

> The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere. (citation omitted).

resolved by the political branches.[27] Partisan gerrymandering claims arguably do not present justiciable claims because the Constitution tolerates some partisan gerrymandering.[28] Extreme partisan gerrymandering may be inconsistent with democratic principles, but determining how extreme partisan gerrymandering must be to be found unconstitutional is impossible.[29] Measures that quantify partisan gerrymandering exist, but those measures—according to the Court—do not demonstrate unconstitutionality because they cannot show deviations from a constitutional standard, as no such standard exists.[30] The *Rucho* Court suggests partisan gerrymandering claims depend on proportional representation and fairness; but the Constitution does not require proportional representation nor does fairness provide a legal standard.[31] Consequently, the Court leaves partisan gerrymandering remedies to Congress or states through legislation or constitutional amendment.[32]

By deeming the Constitution powerless to regulate partisan gerrymandering, the Court leaves groups of voters at the mercy

27. *Id.* at 700 (internal quotations omitted). The one person, one vote cases involved issues of voting and politics decided under the Equal Protection Clause or Article I and were not political questions. *See*, *e.g.*, Baker v. Carr, 369 U.S. 186, 237 (1962) (finding the challenge to political districting justiciable); Reynolds v. Sims, 377 U.S. 533, 559 (1964) (same); Wesberry v. Sanders, 376 U.S. 1, 6 (1964) (same).

28. *See* Hunt v. Cromartie, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . . .").

29. *See Rucho*, 588 U.S. at 717 (stating that "partisan gerrymandering infringes the right of 'the People' to select their representatives"); *see also id.* at 685 ("Partisan gerrymandering claims have proved far more difficult to adjudicate . . . .").

30. *See* Gill v. Whitford, 585 U.S. 48, 73 (2018) (requiring proof of "concrete and particularized injuries" to demonstrate a "burden on their individual votes"); *see also Rucho*, 588 U.S. at 687 ("[A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."). *But see* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (proposing a doctrine for the courts to implement).

31. *See Rucho*, 588 U.S. at 704 ("Partisan gerrymandering claims invariably sound in a desire for proportional representation."); *see also id.* at 707 ("Deciding among just these different visions of fairness . . . poses basic questions that are political, not legal.").

32. *See id.* at 721 ("[T]he avenue for reform established by the Framers, and used by Congress in the past, remains open").

of political processes or rival state voters.[33] Typically, political minorities are at the mercy of political majorities.[34] However, given that partisan gerrymandering can allow a motivated numerical minority to retain power and control political levers, a numerical majority's policy preferences may be at the mercy of a numerical minority.[35] *Rucho* is especially problematic in a politically polarized America. A motivated numerical minority can control redistricting and block access to the political power the *Rucho* Court suggests should be used to end political gerrymandering and structure fair representation.[36]

B. *Voter Identification:* Crawford v. Marion County Election Board

Crawford v. Marion County Election Board[37] involved an Indiana statute that required voters to present government-issued photo identification when voting in person.[38] Plaintiffs argued the statute violated the Fourteenth Amendment by substantially burdening the right to vote of those who did not have or could not easily obtain the required identification.[39] Indiana argued its interests in passing the law outweighed any burden on voters.[40] Ultimately, after using a balancing test embedded in precedent, the Court allowed the statute to stand.[41]

---

33. *See* McCarty, *supra* note 9, at 366 (describing how a partisan gerrymander allows a numerical minority to take control of political offices).

34. *See id.* ("Consider a *partisan gerrymander*, where the majority party attempts to control as many seats as possible by giving itself a small majority in many districts and packing the opposition party into a few districts . . . .").

35. *See* Kleinfeld, *supra* note 1, at 3 ("Average voters are not able to assert their . . . policy preferences because they do not have an effective way to vote out representatives who do not accurately represent their constituents' views . . . .").

36. *See* Rucho v. Common Cause, 588 U.S. 684, 721 (2019) (emphasizing that Congress and state political bodies could reform partisan gerrymandering).

37. 553 U.S. 181 (2008) (plurality opinion).

38. *Id.* at 185 (plurality opinion).

39. *Id.* at 187 (plurality opinion).

40. *Id.* at 191 (plurality opinion).

41. *Id.* at 204 (plurality opinion). The balancing test comes from both *Burdick v. Takushi* and *Anderson v. Celebreeze*, a framework discussed in the

The three-justice plurality's application of the balancing test did not ignore the right to vote, but the Justices arguably overvalued the state's interests and undervalued the statute's burdens.[42] The Court deemed the state to be "protecting the integrity and reliability of the electoral process."[43] The state's interests included concerns about voter fraud, the need to safeguard voter confidence, and the need to aid election modernization.[44] The plurality recognized no evidence of significant voter fraud had been presented , suggested no other reason Indiana voters should lack confidence in their elections, and noted the state's own deficiencies created the need to modernize elections.[45] Indiana did not appear to argue its limitations on the right to vote would solve any actual problem regarding the casting of in-person ballots.[46] Though the plurality recognized the law might place a significant burden on the right of some Indiana citizens to vote, it deemed the burden on the right to vote to be light.[47] The Court determined the burden would not justify the statute's invalidation.[48] The

---

opinion. *Id.* at 189–91 (citing Burdick v. Takushi, 504 U.S. 428 (1992); Anderson v. Celebrezze, 460 U.S. 780 (1983)).

42. *See Crawford*, 553 U.S. at 190 (plurality opinion) ("[A] court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule . . . .").

43. *Id.* at 191 (plurality opinion).

44. *Id.* (plurality opinion).

45. *See id.* at 194 (plurality opinion) ("There is no evidence of extensive fraud in U. S. [sic] elections or of multiple voting, but both occur, and it could affect the outcome of a close election." (internal quotations omitted)); *see also id.* at 191 (plurality opinion) ("[The State] has a particular interest in preventing voter fraud in response to a problem that is in part the product of its own maladministration . . . .").

46. The Court noted a problem with absentee ballots, which the law in place could not affect. *See id.* at 195–96 (plurality opinion) (noting that absentee ballot fraud occurred in the 2003 East Chicago Mayor primary but recognizing that was not in-person voting fraud).

47. *See id.* at 198 (plurality opinion) ("[T]he inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote . . . ."). *But see id.* at 199 (plurality opinion) ("[A] somewhat heavier burden may be placed on a limited number of persons").

48. *See id.* at 199–200 (plurality opinion) ("[E]ven assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.").

concurrence—necessary to make the plurality the opinion of the Court—asserted the burden of obtaining a photo identification was "minimal and justified" and, without analyzing whether the "usual burdens of voting" are too burdensome for some voters, found photo identification consistent with the "usual burdens of voting."[49]

The Court's decision is the essence of hollowing out a voting protection. The right to vote was not ignored.[50] However, it was not treated with the respect that should be expected when a court evaluates a core constitutional right. The Court may have applied the proper balancing test, but the Court improperly minimized the value of the right to vote and failed to interrogate whether the state's potential interests were weighty present concerns. The Court balanced the right to vote against weak governmental justifications and concluded weak justifications would prevail.[51]

C. *Removing Voters from Voter Rolls:* Husted v. A. Philip Randolph Institute

At issue in *Husted v. A. Philip Randolph Institute*[52] was whether Ohio's law allowing the state to remove voters from its voter rolls was consistent with the National Voter Registration Act ("NVRA").[53] The NVRA seeks accurate voter rolls and provides an approved process for removing voters who have

49. *Id.* at 204 (Scalia, J., concurring); *id.* at 209 (Scalia, J., concurring). For a discussion of *Crawford* and whether the burdens under the instant law should be considered light or significant, see Henry L. Chambers, Jr., *Technological Change, Voting Rights, and Strict Scrutiny*, 79 MD. L. REV. 191, 199–201 (2019).

50. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. at 189–90 (plurality opinion) (noting how even "rational restrictions" on voting rights can be "invidious").

51. *See id.* at 237 (Souter, J., dissenting) ("The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old.").

52. 584 U.S. 756 (2018).

53. *Id.* at 766; National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–11.

changed residences from those rolls.[54] The core contention in *Husted* is whether Ohio violated the NVRA by using a voter's failure to vote to initiate the process of determining whether a voter should be removed from the voter rolls.[55] If Ohio did not need an additional reason to begin the removal process, its law was consistent with the NVRA; if Ohio needed an additional reason to begin the removal process, its law violated the NVRA.[56]

Ohio's process tracked the NVRA's process for removing voters from voter rolls, which requires a state to send a voter notice or receive written confirmation of a voter's move before removing the voter from the rolls.[57] The required notice is a return postcard.[58] If the voter does not respond to the postcard or indicate she has not moved, and fails to vote in the next two federal election cycles, the voter is removed from the voter rolls.[59] Ohio sent the required return postcard to all voters who did not engage in voting activity—which included casting a ballot, signing a petition, or filling out a voter registration form—for two years.[60] The two-year dormancy period was Ohio's proxy for a voter's possible change in residence.[61]

Two issues arose. First, the NVRA does not indicate what evidence is sufficient to trigger the mailing of the return postcard.[62] Second, the NVRA bars states from removing voters from the voter rolls for a failure to vote, and the Help America Vote Act ("HAVA")[63] bars removing voters from the voter rolls

54. *See Husted*, 584 U.S. at 761–62 (stating that one of the NVRA objectives is "removing ineligible persons from the States' voter registration rolls").

55. *Id.* at 767–68 (noting respondents' argument that removing voters from voter rolls because they failed to vote violates the NVRA).

56. *Id.*

57. *Id.* at 767 (suggesting Ohio followed the NVRA's process exactly as the NVRA directs).

58. 52 U.S.C. § 20507(d)(1)(A)–(B).

59. *Husted*, 584 U.S. at 760.

60. *Id.*

61. *Id.* at 760 ("Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address.").

62. Husted v. A. Philip Randolph Inst., 584 U.S. 756, 762 (2018).

63. 52 U.S.C. § 21082.

solely for a failure to vote.[64] The Court deemed Ohio's process compliant with the NVRA/HAVA structure.[65] The NVRA/HAVA process does not indicate when a jurisdiction may send the postcard, arguably making any trigger a state uses sufficient even if it does not suggest a change of residence.[66] In *Husted*, the bar on removing voters solely for failing to vote was avoided because the failure to return the postcard plus the failure to vote were necessary for the voter's removal.[67]

The dissenters argued the NVRA's process was meant to confirm that a voter had moved from her residence.[68] They suggest additional evidence that the voter may have moved is required to trigger sending the return postcard.[69] The failure to engage in voting activity for two years is not sufficient.[70] They argue using nonvoting to trigger the process violates the statute's bar on using nonvoting to remove a voter from the voting rolls.[71] The dissenters would appear to require a state to have good reason to believe a voter has moved before beginning the process to confirm a voter has moved from her residence.[72]

The *Husted* Court hollowed out one of the NVRA/HAVA voting protections.[73] The majority opinion allows states to

64. *See Husted*, 584 U.S. at 767–68.

65. *Id.* at 779.

66. *See id.* at 776–77 ("So long as the trigger for sending such notices is 'uniform, nondiscriminatory, and in compliance with the Voting Rights Act,' . . . States can use whatever plan they think is best." (quoting National Voter Registration Act of 1993, 52 U.S.C. § 20507(b)(1))).

67. *Id.* at 774.

68. *See id.* at 786 (Breyer, J., dissenting) (describing the confirmation procedure by which the legislation intended for states to confirm a voter's move).

69. *Id.* at 789 (Breyer, J., dissenting).

70. *See id.* at 782–83 (Breyer, J., dissenting) (arguing that the voter roll removal process cannot be initiated by nonvoting).

71. *See id.* at 795 (Breyer, J., dissenting) (arguing that Ohio's legislation did not make a reasonable effort to include an evidentiary factor beyond the failure to vote).

72. *See id.* at 792 (Breyer, J., dissenting) ("[T]he State, as an initial matter, must use a reasonable method to identify a person who has likely moved and then must send that person a confirmatory notice . . . .").

73. Ohio's program appeared to have an outsized effect on minority voters. *See id.* at 808–10 (Sotomayor, J., dissenting) (stating that the Supplemental Process had disproportionately affected minority, low-income, disabled, and veteran voters).

remove a voter from the voting rolls when the voter has done nothing to suggest she has moved other than fail to engage in voting activity for six years and return a postcard.[74] Few may sympathize with a disengaged voter. However, that voter—who has lived in the same residence for the prior eight years—will be removed from the voting rolls though there was no evidence she had moved. Unless that voter learns she has been removed from the rolls and reregisters to vote at the same residence from which she never moved, she may be unable to vote in the next election.

D. *Absentee Voting and COVID-19:* Republican National Committee v. Democratic National Committee

In *Republican National Committee v. Democratic National Committee*,[75] the Supreme Court reviewed whether and how a federal court could adjust state election law deadlines to account for ballot delivery delays accompanying an election occurring near the beginning of the COVID-19 pandemic.[76] Wisconsin was scheduled to hold a statewide election on April 7, 2020, but Wisconsin's governor had issued a stay-at-home order that extended past election day.[77] As a result of the pandemic, Wisconsin voters requested an overwhelming number of absentee ballots.[78] Though a substantial number of absentee ballots had been processed and sent to voters, thousands of absentee ballots—all requested before the request deadline—would not be delivered to voters until after election day.[79] Wisconsin law required absentee ballots be postmarked by

74. *See id.* at 766 ("Failure to vote for two years triggers the sending of a return card, and if the card is not returned, failure to vote for four more years results in removal."); *see also id.* at 779 (holding that the Ohio policy for removing voters does not violate federal law).

75. 589 U.S. 423 (2020) (per curiam).

76. *Id.* at 423–24 (per curiam).

77. *See id.* at 424 (noting Wisconsin's plans to hold an election Tuesday, April 7). But see *id.* at 427 (Ginsburg, J., dissenting) ("[T]he Governor ordered Wisconsinites to stay at home until April 24 to slow the spread of the disease.").

78. *See id.* at 429–30 (Ginsburg, J., dissenting) ("About one million more voters have requested absentee ballots in this election than in 2016.").

79. *See id.* at 429 (Ginsburg, J., dissenting) (discussing the "severe backlog" of ballots requested).

election day to be counted.[80] The federal district court granted a preliminary injunction requiring any absentee ballot received by April 13 be counted, whether or not it was postmarked by election day, April 7.[81] The court also enjoined the public release of any election results until April 13.[82]

The Supreme Court's per curiam opinion and the dissent disagreed about how the absentee ballot issue should be framed. The per curiam opinion framed the issue solely as "whether absentee ballots now must be mailed and postmarked by election day, Tuesday, April 7, as state law would necessarily require, or instead may be mailed and postmarked after election day, so long as they are received by Monday, April 13."[83] With that framing, the Court argued the district court's original extension of the deadline for voters to mail absentee ballots—from a few days before the election to election day—adequately protected voters' rights.[84] The Court terminated the portion of the district court's injunction requiring absentee ballots postmarked after election day but received by April 13 be counted.[85] The dissent disagreed with the majority's framing, arguing the inability to deliver absentee ballots to voters on or before election day meant thousands of voters would be forced to forgo their right to cast a timely requested ballot or put their health at risk to vote in person during a pandemic.[86] They likened voters waiting for an absentee ballot's delivery to voters still waiting in line at their polling station when the polls closed;[87] those voters would be allowed to vote.[88]

Even in extenuating circumstances like the COVID-19 pandemic, the Court decided to leave voters' right to cast a ballot less protected.

---

80. *Id.* at 424.

81. *Id.*

82. *Id.*

83. *Id.* at 424.

84. *See id.* at 426 ("The extension was designed to ensure that the voters of Wisconsin can cast their ballots and have their votes count.").

85. *Id.* at 426.

86. *See id.* at 432 (Ginsburg, J., dissenting) (arguing that limiting absentee ballots would leave voters "quite literally without a vote").

87. *Id.* at 431 (Ginsburg, J., dissenting).

88. *Id.* (Ginsburg, J., dissenting).

E. *Implications*

The Court could have been and should have been more protective of voters in the cases noted above. Though the Court was not clearly wrong in those cases, it could have provided more protection for the right to vote. In a politically polarized America, the right to vote and the right to representation should be protected as broadly as the law allows. The failure to ensure such protection invites more attempts to limit the voting rights and voting power of political opponents and the continued degrading of the Fourteenth Amendment's protection of the right to vote.

II. HOLLOWING OUT THE VOTING RIGHTS ACT

The Fifteenth Amendment bars race-based voting discrimination.[89] The VRA operationalizes the Fifteenth Amendment.[90] Section 2 of the VRA is a nationwide ban on laws and procedures that discriminate or have the effect of discriminating in the provision of voting rights on the basis of race.[91] Section 5—the preclearance provision—applies to specific jurisdictions that must get voting changes approved before they can be used.[92] The Court has hollowed out substantial portions of Section 2 and effectively gutted Section 5. Its willingness to do so is not surprising, as various justices have indicated their belief that the VRA should be

89. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

90. *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 655 (2021) ("Congress enacted the landmark Voting Rights Act of 1965 . . . in an effort to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier: an end to the denial of the right to vote based on race."); *see also* Allen v. Milligan, 599 U.S. 1, 10 (2023) (discussing the history of the Voting Rights Act).

91. *See* 52 U.S.C. § 10301(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 . . . .").

92. *See id.* § 10304 (providing approval process for voting changes that must be precleared before becoming effective).

interpreted more narrowly.[93] However, the Court has retained and reaffirmed Section 2 doctrine on redistricting.[94] This Part briefly discusses these developments, noting that even the redistricting protections may ultimately harm the voting rights of racial minorities.

A. *Preclearance:* Shelby County v. Holder

In *Shelby County v. Holder*,[95] the Court opined on the constitutionality of Sections 4 and 5 of the VRA.[96] Section 4 defines which jurisdictions are covered ("covered jurisdictions") by the preclearance provisions of Section 5.[97] Section 5 explains the process by which covered jurisdictions must have their voting changes, including their redistricting plans, reviewed or precleared by the Department of Justice or the United States District Court for the District of Columbia before the voting changes become effective.[98] Preclearance guarantees the voting changes do not discriminate on the basis of race.[99] The Court decided Section 4's coverage formula was unconstitutional but left Section 5 untouched.[100]

Though the *Shelby County* Court described the preclearance process as extraordinary, deeming it inconsistent

93. Chief Justice John Roberts was an opponent of Section 2's effects test when the VRA was amended in 1982. *See* Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1170 (2007) ("[Chief Justice Roberts] opposed amending Section 2 to create a results-based test for discrimination in voting."); Leah M. Litman, *"Hey Stephen"*, 120 MICH. L. REV. 1109, 1128 (2022) ("[Chief Justice Roberts] argued that Voting Rights Act violations 'should not be made too easy to prove.'" (citations omitted)). Justice Thomas has consistently argued for a narrow interpretation of VRA for three decades. *See* Holder v. Hall, 512 U.S. 874, 893 (1994) (Thomas, J., concurring) (arguing Section 2 should be limited to "state enactments that limit citizens' access to the ballot").

94. *See infra* Part II.C.

95. 570 U.S. 529 (2013).

96. *Id.* at 556–57.

97. *See id.* at 537 (discussing the VRA's coverage standards).

98. *Id.*

99. *Id.* ("A jurisdiction could obtain such 'preclearance' only by proving that the change had neither 'the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.'" (alteration in original) (citation omitted)).

100. *Id.* at 557.

with equal sovereignty and state autonomy principles embedded in the Constitution,[101] the Court also found the process was justified in 1965.[102] The covered jurisdictions formula focused on a jurisdiction's use of discriminatory tests and disparities in voter registration and turnout, and the preclearance requirement was designed to be temporary and set to expire in five years—1970.[103] Nonetheless, the preclearance process was reauthorized on multiple occasions.[104] However, as the preclearance process continued to be renewed, it needed to be continually justified based on current conditions.[105]

The Court found that the 2006 VRA reauthorization, which included a reauthorization of the preclearance formula, was "based on decades-old data and eradicated practices."[106] It suggested the multiple bases for preclearance in 1965 were no longer true in 2013: covered and noncovered jurisdictions had similar voting and registration rates and the discriminatory tests had been banned for forty years.[107] Finding no current justification for the extraordinary process, the Court invalidated Section 4.[108] Section 5 remains operative but applies to very few jurisdictions.[109]

---

101. *See id.* at 534 ("The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem."); *see id.* at 544 (stating that the VRA "sharply departs" from the basic principles of equal sovereignty).

102. *See id.* at 535 ("As we explained in upholding [the VRA of 1965], exceptional conditions can justify legislative measures not otherwise appropriate." (internal quotation omitted)).

103. *See also id.* at 537 (explaining the original formula for determining a covered jurisdiction); s*ee also id.* at 538 ("Sections 4 and 5 were intended to be temporary; they were set to expire after five years.").

104. *Id.* at 538–39 (noting the various congressional reauthorizations up until 2006).

105. *See id.* at 536 ("The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements."); *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("[T]he Act imposes current burdens and must be justified by current needs.").

106. *Id.* at 551.

107. *Id.* at 547.

108. *See id.* at 557 (holding that the formula in Section 4 can no longer be used as a basis for subjecting jurisdictions to preclearance).

109. *Id.* at 557. Jurisdictions may alternatively become covered jurisdictions under Section 3 of the VRA. *See* L. PAIGE WHITAKER, CONG. RSCH.

The *Shelby County* decision had immediate effects. Formerly covered jurisdictions quickly enacted voting changes that would have previously needed to be precleared.[110] Previously covered jurisdictions appear to be backsliding into unlawful practices.[111] Those jurisdictions are purging voters at higher rates than other jurisdictions.[112] In addition, the racial voter turnout gap is increasing faster in formerly covered jurisdictions than in other jurisdictions.[113] *Shelby County* may not have caused the backsliding but functionally eliminating preclearance provided a situation in which backsliding could occur. With preclearance all but dead, Section 2 is the remaining key bulwark against racially discriminatory voting laws and practices. However, Section 2 is being hollowed out like other voting protections.

SERV., LSB10771, VOTING RIGHTS ACT: SECTION 3(C) "BAIL-IN" PROVISION (2022), https://perma.cc/PSS5-DERY (PDF) (noting the criteria necessary for Section 3 mandatory preclearance to apply); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After* Shelby County, 102 CALIF. L. REV. 1123, 1176 (2014) (discussing bail-in under Section 3 of the VRA in which a jurisdiction may become a covered jurisdiction in the wake of voting rights violations).

110. *See* Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 698–99 (2021) (Kagan, J., dissenting) ("On the very day Shelby County issued, Texas announced that it would implement a strict voter-identification requirement that had failed to clear Section 5.").

111. *See* KEVIN MORRIS & CORYN GRANGE, BRENNAN CTR. FOR JUST., GROWING RACIAL DISPARITIES IN VOTER TURNOUT, 2008–2022, at 4 (2024), https://perma.cc/PG4T-4LRA (PDF) ("[W]ith the federal government unable to protect the political rights of people of color using the full power of the Voting Rights Act, the laws and practices that would have been subject to preclearance continue to accumulate.").

112. *See id.* at 3 ("[F]ollowing the Shelby County decision, jurisdictions that previously had been required to preclear any changes to voting with the federal government dramatically increased the rate at which they removed voters, even if state laws governing list maintenance did not change.").

113. *See id.* at 4

> [T]he turnout gap—especially the white-Black turnout gap—is growing more quickly in counties that were formerly subject to Section 5 than in other, comparable parts of the country. A variety of statistical approaches support the conclusion that this more rapid growth in the turnout gap is attributable to the Supreme Court's decision in *Shelby County*.

B. *Time, Place, and Manner Restrictions Under Section 2:* Brnovich v. Democratic National Committee

In *Brnovich v. Democratic National Committee*,[114] the Supreme Court addressed the standard for determining the legality of time, place, and manner ("TPM") restrictions under Section 2 of the VRA for the first time.[115] In that case, two Arizona provisions were at issue.[116] One provision required that votes be cast in the correct precinct to be counted.[117] The other provision criminalized the knowing collection of an early ballot by anyone other than a postal worker, an election official, or a voter's caregiver, family member, or household member.[118] The Democratic National Committee challenged the provisions, claiming they adversely affected minority citizens in Arizona in violation of Section 2.[119] The Court found neither provision violated Section 2.[120]

Rather than provide doctrinal rules to govern future cases, the Court provided principles to help focus future Section 2 TPM inquiries.[121] The five principles concern: the size of a regulation's burdens; how far a provision deviates from laws or regulations in effect in 1982 when Section 2 was substantially revised to include its effects test; the size of the provision's effect on minority voters; the general ease of voting in the jurisdiction; and the strength of the state's interests in enacting the provision.[122] The principles ostensibly flow from the suggestion that Section 2 is violated only when voting or voting processes

114. 594 U.S. 647 (2021).

115. *See id.* at 660 ("[U]ntil today, we have not considered how [Section 2] applies to generally applicable time, place, or manner voting rules. In recent years, however, such claims have proliferated in the lower courts.").

116. *Id.* at 654–55.

117. *Id.* at 654.

118. *Id.* at 654–55.

119. *See id.* at 662 ("[P]laintiffs claimed that both the State's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens, in violation of [Section 2] of the VRA." (internal quotation omitted)).

120. *Id.* at 678.

121. *Id.* at 666.

122. *Id.* at 668–73.

are not "equally open" to those of all races.[123] That occurs when people of different races are not given the equal opportunity to vote and have those votes counted.[124] Section 2 TPM violations are ultimately based on the totality of the circumstances regarding whether a voter has been denied the right to vote and have their vote counted.[125] The Court noted that neither a disparate impact analysis nor the totality-of-the-circumstances factors—which apply in vote dilution cases—are directly relevant in analyzing TPM provisions.[126]

In applying the principles to the provisions in *Brnovich*, the majority suggested voting is easy in Arizona because voters may vote early, cast ballots at voting centers, or vote at the polls on election day.[127] The Court found Arizona's provisions not especially onerous given the various ballot-casting options voters have.[128] It deemed casting a ballot from the correct polling place to be a usual burden of voting and noted that very few out-of-precinct ballots were cast in Arizona.[129] In addition, the ballot collection provision still allows voters to mail or drop off their own ballots or have those ballots collected by various authorized people.[130] The Court found no evidence that limiting ballot collection measures to those listed in the statute triggered a heavy burden or a significant disparate impact on minority voters.[131] Finally, the Court argued Arizona had interests in preventing election fraud—even though very little to no

123. *See id.* at 668 ("Putting these terms together, it appears that the core of [Section] 2(b) is the requirement that voting be 'equally open.'").

124. *Id.* 667–68.

125. *Id.* at 668–70.

126. *See id.* at 672–73 (explaining that factors considered in vote dilution cases are less directly relevant to TPM cases but should not be disregarded).

127. *Id.* at 661.

128. *See id.* at 679 ("The burdens of identifying and traveling to one's assigned precinct are also modest when considering Arizona's 'political processes' as a whole.").

129. *See id.* at 678 (describing the out-of-precinct rule as an "unremarkable burden[]"); *see also id.* at 680 ("[O]ut-of-precinct votes on election day make up such a small . . . portion of overall ballots cast—0.47% of all ballots in the 2012 general election and just 0.15% in 2016.").

130. *Id.* at 683.

131. *See id.* at 680 ("[T]he racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms.").

evidence exists of election fraud in Arizona—and in bolstering Election Day efficiency in collecting ballots.[132]

The dissent argued the VRA was passed to stop states from enacting statutes that would impede racial minorities from voting equally with white Americans and to ensure racial equality in voting.[133] The dissenters suggested the majority provided a narrow reading of Section 2 and limited its effectiveness.[134] Section 2's purpose is to stop all voting rules that unduly abridge the right to vote based on race.[135] The totality-of-the-circumstances analysis was intended to put neutral voting rules in context to determine if they had a discriminatory effect.[136] Instead, the dissent argues, the majority uses the totality analysis to justify laws that have discriminatory effects.[137] Given the purpose of Section 2, whether minority voters can typically vote easily in a jurisdiction is too narrow a focus according to the dissent.[138]

The dissent argues both provisions at issue are discriminatory.[139] The burden of the out-of-precinct rule falls more heavily on minority voters; Arizona tends to change its polling places and to place minority voters in polling places that

---

132. *Id.* at 681–82.

133. *See id.* at 690 (Kagan, J., dissenting)

> If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out. Section 2, the provision at issue here, guarantees that members of every racial group will have equal voting opportunities.

134. *Id.* at 692 (Kagan, J., dissenting).

135. *See id.* at 701 (Kagan, J., dissenting) ("Section 2's text requires courts to eradicate voting practices that make it harder for members of some races than of others to cast a vote, unless such a practice is necessary to support a strong state interest.").

136. *Id.* at 703–04 (Kagan, J., dissenting).

137. *Id.* at 710–11 (Kagan, J., dissenting).

138. *See id.* at 710 (Kagan, J., dissenting) ("[The majority] hints that as long as a voting system is sufficiently 'open,' it need not be equally so. In sum, the majority skates over the strong words Congress drafted to accomplish its equally strong purpose: ensuring that minority citizens can access the electoral system as easily as whites.").

139. *See id.* at 718 (Kagan, J., dissenting) (stating that the out-of-precinct policy and the ballot collection ban "disproportionately affect minority citizens' opportunity to vote").

may not be closest to their home.[140] That confusion can lead to out-of-precinct voting.[141] The ballot collection ban is problematic for Native Americans because home mail delivery in many Native American communities is almost nonexistent.[142] In the wake of the ballot collection provision, many such citizens now must rely on ballot collection by the limited number of authorized persons, drive long distances to mail their ballots, or go to a polling place.[143] That violates Section 2 because those voters are harmed due to their race and less restrictive means exist that would allow them to have their ballots collected.[144]

The *Brnovich* opinion lessens protections for voters of color.[145] Rather than ensure that no voting rules diminish the effective voting opportunity for voters of color, the Court suggests the VRA exists only to ensure that a jurisdiction's broad system of voting is not unduly discriminatory, allowing some rules or laws that produce a disparate impact against the jurisdiction's voters of color.[146] This leaves people of color with an impoverished set of voting protections.[147]

C. *Redistricting Under the VRA and Fourteenth Amendment:* Thornburg v. Gingles *and* Allen v. Milligan

Though the Court has hollowed out various forms of voter protections, in *Allen v. Milligan*,[148] the Court recently noted its continued support for the doctrine underlying *Thornburg v.*

140. *See id.* at 722–23 (Kagan, J., dissenting).

141. *Id.* at 723 (Kagan, J., dissenting).

142. *Id.* at 724 (Kagan, J., dissenting).

143. *See id.* at 724–25 (Kagan, J., dissenting) (discussing the distance that Native Americans must travel to reach a mailbox).

144. *Id.* 718–19 (Kagan, J., dissenting).

145. *See id.* at 718 (Kagan, J., dissenting) ("By declaring some racially discriminatory burdens inconsequential, and by refusing to subject asserted state interests to serious means-end scrutiny, the majority enables voting discrimination.").

146. *See id.* at 674 (suggesting the dissent wants Section 2 TPM cases to be decided purely on disparate impact grounds).

147. *See id.* at 697 (Kagan, J., dissenting) ("Weaken the Voting Rights Act, and predictable consequences follow: yet a further generation of voter suppression laws.").

148. 599 U.S. 1 (2023).

Gingles.[149] *Gingles* protects substantive representation for voters of color under certain circumstances.[150] The support is a bit surprising given the Court could have abandoned the *Gingles* doctrine as easily as it abandoned or remade other doctrines noted above. However, the Court's embrace of *Gingles* may be less helpful than it seems. If the Court applies *Gingles* narrowly in the future, the Court may functionally hollow out representation protections by discouraging cross-racial coalitions.

1. *Gingles* Preconditions

In *Gingles*, the Court defined the circumstances under which multimember districts must be divided into single-member districts to avoid a violation of Section 2.[151] African American voters argued the maintenance of multimember districting in their area of North Carolina limited their ability to elect a candidate of their choice in violation of Section 2.[152] In a multimember system where a voter can cast votes equal to the number of representatives to be elected, a bare majority of voters can elect all representatives.[153] In a districted system, the number of representatives a group can elect depends on how the group is distributed throughout the jurisdiction. A numerical minority that is concentrated in specific areas of a jurisdiction might be able to elect their candidates of choice in a number of single-member districts.[154]

---

149. 478 U.S. 30 (1986).

150. *See* Allen v. Milligan, 599 U.S. 1, 41 (2023) (noting the Court has used *Gingles*' test and "authorized race-based redistricting as a remedy for state districting maps that violate [Section] 2").

151. 478 U.S. at 48–51.

152. *See id.* at 35 (explaining that plaintiffs alleged the redistricting scheme violated Section 2).

153. For a discussion of the mathematics of multimember districting, see *infra* Part III.B. *See also Gingles*, 478 U.S. at 46–47 ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population." (alteration in original) (internal quotations omitted)).

154. *See* George Bundy Smith, *The Multimember District: A Study of the Multimember District and the Voting Rights Acts of 1965*, 66 ALB. L. REV. 11, 21 (2002) (illustrating the difference between single-member and multimember districts).

Rather than deem multimember districting per se unlawful under Section 2, the Court created three preconditions that must be met before a multimember district must be dismantled.[155] If any precondition is not met, the minority group loses elections because it is a numerical minority rather than a racial minority.[156] First, the minority group must be able to be a majority in a reasonably drawn single-member district.[157] If such a district cannot be drawn, the minority group loses elections because it is geographically dispersed and not because it is in a multimember district or is a racial minority.[158] "Second, the minority group must . . . be . . . politically cohesive."[159] If the minority group is not politically cohesive, it loses elections not because it is a racial minority but because it does not have enough people voting for the same person or with the same interests.[160] Third, non-minority voters must vote in a bloc that usually allows them to defeat the minority group's representative of choice.[161] The third precondition may exist when the majority white bloc can defeat the minority voters plus crossover white votes.[162] If there has been insufficient bloc voting to defeat the minority group's candidate of choice, the minority loses elections because it could not attract enough support for its candidate of choice—not because majority race voters generally will not vote for the candidate the minority

155. *Gingles*, 478 U.S. at 49–51.

156. *Id.* Vote dilution focuses on whether a group's electoral power has been lessened by a rule or mechanism; it does not guarantee minorities the ability to win when they otherwise would not have won. *See id.* at 46 (noting the confluence of a potentially dilutive system and less than proportional representation alone does not prove dilution).

157. *See id.* at 50 ("First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.").

158. *See id.* (explaining that if the minority group would not constitute a majority in a single-member district, then "the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates").

159. *Id.* at 51.

160. *Id.*

161. *Id.*

162. *See id.* at 56 ("And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting.").

group supports.[163] If the preconditions are proven, a remedy is necessary if the court finds the political processes in the jurisdiction are not equally open to the racial minority group at issue.[164] The typical remedy for a *Gingles* violation is the creation of a majority-minority district in which a minority race group could elect their candidate of choice without additional help from nonminority members.[165] Though the *Gingles* preconditions were developed to determine when multimember districting needed to become single-member districting, the doctrine was quickly adapted for use in determining how single-member districts should be drawn during redistricting.[166]

2. *Allen v. Milligan*

In *Allen v. Milligan*, while analyzing Alabama's congressional redistricting after the 2020 Census, the Court reiterated the *Gingles* doctrine governs Section 2 redistricting cases.[167] Alabama retained the same number of U.S. congressional seats after the 2020 Census as before, but its population shifts required redrawing district lines.[168] Given

163. *See id.* at 51 (clarifying that the minority group must "demonstrate[] that submergence in a white multimember district impedes its ability to elect its chosen representatives").

164. *See id.* at 79 (ruling that trial courts considering a Section 2 claim must determine "whether the political process is equally open to minority voters"); *see also* Bartlett v. Strickland, 556 U.S. 1, 11, 14–15 (2009) (plurality opinion) (same).

165. *See* Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's "Redemption" Revisited 1870–1905 and 2011–2013*, 33 L. & INEQ. 53, 96–98 (2015) (discussing majority minority districts as remedies for *Gingles* violations); Paul A. Riley, Jr., *'Unpacking' the Problem: The Need to Broaden the Scope of Vote Dilution Claims Under Section 2 of the VRA*, 55 COLUM. J.L. & SOC. PROBS. 279, 282 (2002) (identifying the creation of majority-minority districts as the remedy for Section 2 violations); Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1384 (2016) (noting the assumption that majority-minority districts are the proper remedy for a *Gingles* violation).

166. *See*, *e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1007–10 (1994) (applying *Gingles* to a redistricting plan involving single-member districts).

167. Allen v. Milligan, 599 U.S. 1, 17–18 (2023).

168. *Id.* at 15.

Alabama's seven congressional seats,[169] its 27 percent African American population,[170] and its racially and politically polarized politics, drawing two majority-minority districts might be appropriate if the population dispersion of the state's African American population would allow two majority-minority districts to be drawn.[171] Alabama drew one majority-minority district, triggering Section 2 and Fourteenth Amendment equal protection claims.[172]

Alabama attempted to sidestep *Gingles* and remake Section 2 doctrine.[173] Alabama suggested Section 2 merely demands race-neutral redistricting.[174] Consequently, it proposed the Court consider computer-generated maps that did not consider race as the race-neutral benchmark maps for Section 2.[175] Under Alabama's proposed doctrine, plaintiffs would be required to prove Alabama deviated from those "race-neutral" maps to demonstrate a Section 2 violation.[176] The showing would need to prove "that any deviation between the State's plan and a race-neutral plan is explainable 'only' by race—not, for example, by 'the State's naturally occurring geography and demography.'"[177]

The Court rejected Alabama's attempted doctrinal revision, using the *Gingles* preconditions to review Alabama's map for a Section 2 violation.[178] It found the *Gingles* preconditions and

169. Press Release, The Office of Alabama Governor, 2020 Census Shows Alabama's Population at 5.03 Million; State to Keep Current U.S. House Seats (Apr. 26, 2021), https://perma.cc/D2V6-PKDK.

170. America Counts Staff, *Alabama Population Grew 5.1% Since 2010, Surpassing 5 Million,* U.S. CENSUS BUREAU (Aug. 25, 2021), https://perma.cc/8HZV-6UEJ.

171. The Supreme Court has recognized the difficulty of proving totality of the circumstances when minority voters have roughly proportional representation. *See De Grandy*, 512 U.S. at 1024. However, proportional representation for minority voters does not necessarily disprove totality of circumstances. *See id.* at 1026 (O'Connor, J., concurring) ("The Court also makes clear that proportionality is never dispositive.").

172. *Milligan*, 599 U.S 1, 16.

173. *See id.* at 23 ("The heart of these cases is not about the law as it exists. It is about Alabama's attempt to remake our [Section 2] jurisprudence anew.").

174. *Id.* at 23–24.

175. *Id.* at 24.

176. *Id.* at 23–24.

177. *Id.* at 24 (citation omitted).

178. *Id.* at 19.

totality of the circumstances were met, and therefore held Section 2 was violated.[179] At trial, the first precondition—which requires a reasonably drawn single-member district—was especially important.[180] Plaintiffs presented several maps (which included a second majority Black district) that were just as compact and cohesive—with the same or fewer split counties—as the districts in Alabama's proposed map.[181] In light of the amply satisfied *Gingles* preconditions test, the plaintiffs also appeared likely to prove that the totality of the circumstances demonstrated the political process in Alabama is not equally open to minority voters.[182]

Though one could argue the Court's application of *Gingles* reflects a preference for proportional representation, the Court disagreed.[183] It clarified that *Gingles* is not a proportionality test; it is an effects test informed by the number of representatives a group can elect under the relevant map.[184] Given that, drawing a second majority-minority district was sensible.[185] In 2024, Alabama will use a congressional map that includes two congressional districts likely to elect a representative of the African American community's choice.[186]

---

179. *Id.* at 19–23.

180. *See id.* at 20–21 (reviewing the arguments made at trial regarding the first *Gingles* precondition).

181. *Id.* at 20.

182. *See id.* at 19 ("As noted, the District Court concluded that plaintiffs' [Section 2] claim was likely to succeed under *Gingles*." (citation omitted)).

183. *See id.* at 28 ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing [Section] 2.").

184. *See id.* at 26 ("Alabama also argues . . . our existing [Section 2] jurisprudence inevitably demands racial proportionality in districting . . . . But properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as our decisions have frequently demonstrated."); *see also id.* at 27–28 (noting circumstances where proportionality was not dispositive).

185. *See id.* at 26–29 (describing why Alabama's argument against the proportionality test fails).

186. For order regarding Alabama's congressional maps, see Singleton v. Allen, No. 2:21-CV-1291-AMM, 2023 WL 6567895, at *3 (N.D. Ala. Oct. 5, 2023) (ordering "either an additional majority-Black [congressional] district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice").

3. Implications

In the short run, the *Allen* Court's affirmation of *Gingles* as the doctrinal standard for protecting minority representation under Section 2 is positive. However, in a politically polarized context, the protection may not be as helpful as it seems. If the *Gingles* preconditions are read narrowly, significant racial polarization is required to trigger a remedy[187] even though the VRA's underpinnings may welcome a decline in racial polarization and an increase in cross-racial coalitions.[188] In addition, as the protection *Gingles* provides fades, the Fourteenth Amendment may be used to narrow the circumstances in which race can be used to foster minority representation.[189]

A few words on nomenclature regarding districts is worthwhile before continuing. A majority-minority district contains a single racial minority that can elect its representative of choice without help from voters of a different race.[190] A crossover district contains a single minority group that needs majority group voters to join them—a cross-racial majority—to elect the minority group's representative of choice.[191] A coalition

187. *See* Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter"*, 30 U.S.F. L. REV. 1, 28–29 ("The second and third Gingles factors (minority voting cohesion and contrary white bloc voting) are, in essence, the test of racial polarization." (citation omitted)).

188. *See* Bartlett v. Strickland, 556 U.S. 1, 25 (2009) (plurality opinion) (noting the VRA was passed to foster cross-racial coalitions). Some suggest the rise of majority-minority districts greatly diminished cross-racial voting in the South. *See* Pildes, *supra* note 1, at 291–92 ("Safe minority districts concentrated Southern black voters into the majority in certain districts and reduced their presence dramatically in most others. The effect was the elimination of districts in which white-black coalitions controlled outcomes . . . .").

189. *See* U.S CONST. amend. XIV, § 1 (prohibiting states from denying equal protection of the laws); *see also* Bush v. Vera, 517 U.S. 952, 1071–72 (1996) (Souter, J., dissenting)

> The first is the irony that the price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect, precisely the problem that necessitated our recognition of vote dilution as a constitutional violation in the first place.

190. *Bartlett*, 556 U.S. at 13 (plurality opinion).

191. *Id.* (plurality opinion); Thornburg v. Gingles, 478 U.S. 30, 56 (1986).

district contains voters from multiple minority groups joining together—a cross-racial majority—to elect the minority groups' representative of choice.[192] An influence district contains a group of minority voters who can influence the election of a candidate who is not their candidate of choice.[193]

A narrow interpretation of the *Gingles* preconditions may limit protection for minority representation under Section 2 of the VRA to majority-minority districts that do not require cross-racial majorities. The first precondition requires the ability to draw a reasonably constructed district that contains a majority of minority race voters.[194] The third precondition requires bloc voting that tends to lead to the defeat of the minority group's candidate of choice.[195] Read narrowly, those preconditions might appear to suggest a majority-minority district in which the majority could win on its own is the prototypical and possibly only remedy a court may order for a *Gingles*-based Section 2 violation.[196] Though *Gingles* indicates crossover voting would not necessarily defeat a *Gingles* claim, the Court may decide crossover voting is inconsistent with the third precondition.[197] If so, courts may be limited to creating

192. *Bartlett*, 556 U.S. at 13 (plurality opinion).

193. *Id.* (plurality opinion)*; see also* Georgia v. Ashcroft, 539 U.S. 461, 482 (2003), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 580 (current version at 52 U.S.C. § 10304) (suggesting influence districts should be considered when determining if a state has met its Section 5 burden to not discriminate in districting).

194. *Bartlett*, 556 U.S. at 26 (plurality opinion).

195. *Id.* at 16 (plurality opinion).

196. That may not have always been the case. *See* Katz, *supra* note 93, at 1165 ("And yet, neither Congress nor the Supreme Court ever meant for the majority-minority district to be the exclusive or even the preferred remedy for racial vote dilution under Section 2."). Indeed, the map Alabama will use post-*Allen* creates a second Black opportunity district rather than a second majority-minority district. *See* Maegan Vazquez & Amy B. Wang, *Court Picks Alabama Congressional Map Likely to Mean Democratic Gain*, WASH. POST (Oct. 5, 2023), https://perma.cc/8XQQ-YJ75 (noting the second Black opportunity district "has a Black voting-age population of 48.7 percent"). However, that district may function as a majority-minority district though it technically is not one.

197. *See Gingles*, 478 U.S. at 56 (noting the third precondition could be met when a white bloc defeats a minority bloc plus crossover voters); *but see Bartlett*, 556 U.S. at 16 (plurality opinion) ("It is difficult to see how the

majority-minority districts in highly racially polarized areas, effectively discouraging cross-racial alliances.

The VRA's principles may welcome crossover districts, but the VRA may not require they be drawn.[198] Indeed, the VRA may not protect crossover districts—unless a jurisdiction dismantles one for discriminatory reasons.[199] A jurisdiction may draw a crossover district to avoid a *Gingles*-based Section 2 violation[200] by carving a crossover district out of a broader area in which bloc voting exists.[201] Barring other legal limitations, jurisdictions may voluntarily draw crossover districts in the absence of a *Gingles* claim.[202]

The Fourteenth Amendment may limit intentionally drawn crossover districts. Redistricters may be conscious of race when drawing districts, but typically cannot use race as a predominant factor in redistricting.[203] When traditional redistricting criteria are subordinate to race, racial predominance occurs and triggers strict scrutiny.[204] Surviving strict scrutiny requires that race be used for a compelling interest and that the use of race be narrowly tailored to serve

---

majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate.").

198. *See* Bartlett v. Strickland, 556 U.S. 1, 16 (2009) (plurality opinion) (noting crossover district claims would be inconsistent with the existence of the third *Gingles* precondition).

199. *See id.* at 24 (plurality opinion) ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.").

200. *See id.* at 23 (plurality opinion) ("[Section] 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.").

201. That may have occurred in *Abbott v. Perez*. *See* 585 U.S. 579, 616 (2018) (noting a lack of bloc voting in parts of a district did not negate the existence of bloc voting in other areas of the district or statewide).

202. *Bartlett*, 556 U.S. at 24 (plurality opinion) ("States that wish to draw crossover districts are free to do so where no other prohibition exists.").

203. Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. 178, 191–93 (2017) (observing racial consciousness is typical and allowed, but race predominance is not).

204. Cooper v. Harris, 581 U.S. 285, 291–92 (2017) (noting the subordination standard and that "if racial considerations predominated over others, the design of the district must withstand strict scrutiny"); *Bethune-Hill*, 580 U.S. at 187 (noting racial subordination analysis).

the compelling interest.[205] The use of race to remedy a Section 2 or Section 5 violation appears to serve a compelling interest.[206] The narrow tailoring prong is met when a redistricter has a reasonable or strong basis to believe race must be used to draw districts to avoid a VRA violation.[207] Unless used to remedy a *Gingles* violation or to meet preclearance, race predominance in districting almost certainly will not survive strict scrutiny. If the race predominance test narrows—which some argue race consciousness should trigger strict scrutiny—the Fourteenth Amendment may limit attempts to intentionally build crossover or coalition districts where they do not occur organically.[208] However, the Fourteenth Amendment may protect organically-formed crossover districts by limiting attempts to pack such districts with additional minority voters to create majority-minority districts.[209]

The political landscape is fraught regarding minority representation. The *Gingles*-based protections for minority

205. *Cooper*, 581 U.S. at 292.

206. *See id.* at 292 ("This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965 . . . ."); *see also* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 279 (2015) (noting compliance with Section 5 is assumed to be compelling interest).

207. *Cooper*, 581 U.S. at 292–93; *Ala. Legis. Black Caucus*, 575 U.S. at 278.

208. *See* Allen v. Milligan, 599 U.S. 1, 33 (2023) ("The contention that mapmakers must be entirely 'blind' to race has no footing in our [Section 2] case law.").

209. In *Bethune-Hill v. Virginia State Board of Elections*, the Court considered Virginia's post-2010 Census redistricting in which it required minority opportunity districts to have a minimum 55 percent Black Voting Age Population ("BVAP"). *See* 580 U.S. at 181. In that case, the Court recognized that some districts might require a 55 percent BVAP to perform as an opportunity district, suggesting other districts may not need such a high BVAP to perform as an opportunity district. *Id.* at 194–95; *see* also Bethune-Hill v. Va. State Bd. of Elections, 326 F. Supp. 3d 128, 180 (E.D. Va. 2018) (noting improper use of 55 percent minimum BVAP in districts where Black voters could have elected their candidate of choice with a much lower BVAP). Indeed, some of the remedial districts formed as a result of the equal protection violations in similar cases were crossover districts. *See* Bethune-Hill v. Va. State Bd. of Elections, 368 F. Supp. 3d 872, 888–99 (E.D. Va. 2019) (adopting remedial plan containing crossover districts); Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 565 (E.D. Va. 2016) (adopting remedial districts with BVAPs of 45.3 percent and 40.9 percent). The Court limits attempts to pack Black voters into majority-minority districts. *See Ala. Legis. Black Caucus*, 575 U.S. at 279 (limiting the packing of additional Black voters in majority-minority districts).

representation may be of little help in a politically polarized America where partisan gerrymandering and racial gerrymandering can be intertwined.[210] Political actors appear to have the latitude to engage in partisan gerrymandering that incidentally but consciously harms minority representation.[211] Political polarization coupled with partisan gerrymandering may yield redistricting maps with as few majority-minority or crossover districts and as little functional minority representation as possible. Congress and the states can address partisan gerrymandering with constitutional and statutory fixes or redistricting commissions.[212] Laws can do much to limit partisan gerrymandering and encourage protection for minority representation.[213] Whether redistricting commissions are enough to support minority representation is unclear.[214] In addition, in states where political polarization is likely to trigger harm to minority representation, the adoption of laws to stem the effects of that polarization would appear unlikely. In a politically polarized landscape, the predominant protection for minority voting rights might be serendipity.

---

210. *See* Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1233 (2024) (noting race and partisan preference can be highly correlated and affect redistricting).

211. *See* Menendian, *supra* note 1, at 304 ("In much of the country, race and partisanship are entangled, such that redistricting efforts on one basis are largely indistinguishable from the other. As a consequence, unregulated partisan gerrymanders have a dangerous potential to subvert the constitutional rule against racial gerrymandering.").

212. *See* Rucho v. Common Cause, 588 U.S. 684, 718–21 (2019) (describing instances in which Congress and the states limit partisan gerrymandering though constitutions, statutes, and redistricting commissions).

213. *See, e.g.*, VA. CODE ANN. § 24.2-304.04.8 (2024) ("A map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party."); *see also id.* § 24.2-304.04.4 ("Districts shall be drawn to give racial and language minorities an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of choice either alone or in coalition with others.").

214. *See, e.g.*, Agee v. Benson, No. 1:22-cv-272, 2023 WL 8826692, at *53 (W.D. Mich. Dec. 21, 2023) (finding Michigan's redistricting commission redistricted to the detriment of Black voters). The court approved the commission's revised map. *See* Agee v. Benson, No. 1:22-cv-272, 2024 WL 1298018, at *1 (W.D. Mich. Mar. 27, 2024).

III. RESPONSES TO HOLLOWING OUT VOTER PROTECTIONS

Political polarization may lead to attempts to narrow voter protections and limit representation for political opponents. The Supreme Court appears willing to allow the narrowing of voter protections and the proliferation of partisan gerrymandering. That is problematic for minority representation. Minority voters may be less able to cast votes in future elections and less likely to have their votes translated into representation.[215] If minority representation is to be protected, Americans should contemplate what protections the Fifteenth Amendment should provide and consider structural reforms in our voting systems. Reforms such as the judicious use of multimember districting could foster political representation for racial minorities consistent with their percentage in the population.

A. *Fifteenth Amendment and the Voting Rights Act*

The Fifteenth Amendment could be invigorated to guarantee substantive representation for voters of color. That would not be inconsistent with its original purpose.[216] A reconsidered Fifteenth Amendment could support a stronger VRA and a substantive right to representation.[217] A Court that is currently hollowing out voting rights protections is unlikely to expand the Fifteenth Amendment and find voting rights protections for racial minorities within. However, a future Supreme Court could do so.

---

215. *See* MORRIS & GRANGE, *supra* note 111, at 3 ("Recent scholarship finds that restrictive voting laws generally limit the turnout of voters of color the most.").

216. *See* Chambers, *Colorblindness, Race Neutrality, and Voting Rights*, *supra* note 20, at 1421 ("The Fifteenth Amendment's passage rested on the lofty belief that freedmen should have political equality and on the more practical desire of the Republican Party for freedmen's votes to have an impact on elections."); *see also id.* at 1420–23 (reviewing the history of the Fifteenth Amendment's passage).

217. *See*, *e.g.*, Voting Rights Advancement Act of 2024, S. 4, 118th Cong. (2024) (proposing amendments to strengthen the VRA by reestablishing federal oversight of voting law changes in jurisdictions with a history of discrimination and enhancing protections against voter suppression).

Reinvigorating the Fifteenth Amendment would first involve dismantling unnecessarily cramped doctrine.[218] Limiting Fifteenth Amendment violations to intentional discrimination should be scuttled.[219] In addition, concerns regarding proportional representation should vanish as its function is clarified. Using proportional representation to determine when rules have caused harm to minority representation is sensible, especially if intentional discrimination is no longer required to violate the Fifteenth Amendment.[220]

The Amendment could support a substantive right to representation.[221] The right to vote has evolved to support a right to cast a ballot and to have that ballot counted.[222] That evolution does not necessarily require a right to representation.[223] However, the Fifteenth Amendment's history implicitly recognizes the denial of the right to vote to racial minorities.[224] Thus, the right to have votes counted might trigger the right to representation or the right not to be hampered in securing representation—or *even* the right to force

---

218. For an intriguing discussion of the Fifteenth Amendment's role in voting rights doctrine, see Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1627–30 (2020).

219. *See* City of Mobile v. Bolden, 446 U.S. 55, 79–80 (1980) (plurality opinion), *superseded by statute*, Voting Rights Act Amendments of 1982, sec. 2, § 3, Pub. L. No. 97-205, 96 Stat. 131, 134 (current version at 52 U.S.C. § 10301) (requiring intentional discrimination for violation of the Fifteenth Amendment).

220. The *Allen* Court noted proportional representation can be used as a baseline to measure harm, even though proportional representation is not required under the VRA or the Constitution. *See* Allen v. Milligan, 599 U.S. 1, 26–29 (2023). Ironically, under the VRA, proportional representation has been used as a de facto ceiling on minority representation. *See, e.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144, 165–66 (1977) (deeming proportionality relevant to whether constitutional rights had been violated by voting plan).

221. *See* Chambers, *Colorblindness, Race Neutrality, and Voting Rights*, *supra* note 20, at 1462–66 (explaining how the Fifteenth Amendment could support a substantive right to representation).

222. *Id.* at 1429–38 (explaining the evolution of the right to vote).

223. However, the right to minority representation flows implicitly from the right to have one's vote counted. *See id.* at 1439 ("[A]n implicit right to representation for minority groups based on their numbers springs directly from the Fifteenth Amendment's purpose to have freedmen and their progeny affect elections with their votes.").

224. *See supra* note 223 and accompanying text.

states to abandon their electoral structures that limit the opportunity for minority race voters to have a voice or representation.[225] For example, the Fifteenth Amendment could trigger scrutiny when jurisdictions that have sufficient voters of color to elect their own representatives choose to use single-member districts and other structures which may eliminate minority voting power. The jurisdiction could be required to justify its use of single-member districts, its districting plans, or both. The level of justification is less important than the principle that some justification should be required for electoral structures that, in effect, limit substantive representation for minority voters.

Reinterpreting the Fifteenth Amendment is not meant to resolve specific issues. The confirmation that minorities must be provided representation would encourage jurisdictions to meet their historical obligations to voters of color. The recognition that jurisdictions have an obligation to affirmatively consider whether their electoral structures foster representation for minority voters might be enough to spur jurisdictions to ensure minority voters have a voice in those jurisdictions. That could trigger the development of constitutional principles that challenge partisan gerrymandering. Requiring states to contemplate how to protect the representation of racial minorities could expand thinking regarding how to protect the representation of political minorities.

B. *Multimember Districting*

Multimember districting may seem an odd response to concerns about minority representation. Traditionally, multimember districting was used to submerge the power of minority voters into a sea of majority voters.[226] Indeed, *Gingles* focused on whether a multimember districting scheme did exactly that.[227] However, limited-voting multimember districting can ensure minority representation rather than

225. *Gingles* is the manifestation of that line of argument in the VRA context. *See supra* Part II.

226. *See*, *e.g.*, Thornburg v. Gingles, 478 U.S. 30, 48 (1986) (providing a traditional example of multimember districts being used to submerge the power of minority voters).

227. *See id.* at 48 (noting multimember districts are not per se unlawful).

harm it by dispensing with the requirement that minority voters be concentrated in a geographic area to elect a candidate of choice.[228]

A limited-voting multimember system in which each voter casts a single vote can alleviate the submersion problem.[229] In a typical multimember system, each voter is given the same number of votes as there are representatives to be elected and each person may use only one vote per candidate.[230] In that system, 50.1 percent of the population controls 100 percent of the seats if the 50.1 percent vote for the same candidates.[231] Consider a race with a thousand voters and five candidates to be elected with each voter casting five votes. If each candidate preferred by the 50.1 percent receives 501 votes, no other candidate can receive more than 501 votes from the 499 remaining voters. Minority voters (up to 49.9 percent of the population) win no representation. Conversely, if each voter is given one vote instead of five, the number of votes necessary to guarantee the election of one candidate is: *Votes necessary to win a seat = (total votes/(representatives to be elected+1))+1*.

In a race with a thousand voters each casting a single vote and five representatives to be elected, 167 votes guarantee a seat. If divided perfectly, 334 voters can guarantee they win two seats. If minority voters comprise 35 percent of the electorate, they can win two seats without help when they might win none in a traditional multimember districting system. Those voters might be able to win two seats in a single-member districting structure (or three in an idiosyncratically districted jurisdiction), as 101 well-placed voters could elect a representative in a single-member districting system with a thousand votes and five districts of 200 voters.

---

228. *See* Chambers, *Colorblindness, Race Neutrality, and Voting Rights*, *supra* note 20, at 1465–66 (explaining why eliminating the geographic requirement could be beneficial).

229. Limited voting is not new. *See id.* at 1465 n.294 (noting authorities on and examples of limited voting); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 339–41 (1998) (discussing limited voting). Providing each voter a single vote is sensible given that each voter would have a single vote in a single-member districting scheme. *Id.*

230. Mulroy, *supra* note 229, at 339–41.

231. Chambers, *Enhancing Rural Representation*, *supra* note 11, at 879–84.

Using limited-voting multimember districting can have multiple benefits. Redistricters need to draw fewer lines, providing less opportunity for gerrymandering. Limited-voting multimember districting could help minority voters use their political voice how they want: through representatives who explicitly seek to represent the voice of minority voters, through representatives who represent cross-racial or multiracial coalitions, or through a combination of the two.[232] Voters can join cross-racial coalitions without losing the opportunity to elect candidates of choice, as they might under a *Gingles*-based single-member districting system. Finally, multimember districting allows more people to vote for a candidate who may win. In theory, a large percentage of voters can vote for a winning candidate in a limited voting, multimember district system.[233] In a tightly-contested, first-past-the-post election with two candidates, nearly 50 percent of voters may vote for a losing candidate.[234] In a three-candidate race, the percentage may be higher. The likelihood of voting for a losing candidate may drive low turnout. Voter turnout could increase if there was a possibility for a much higher percentage of voters to vote for a winning candidate existed.

Using multimember districts can have drawbacks. Large multimember districts can be problematic for some minority populations.[235] The larger the multimember district, the more it will approximate representation based on eligible voters rather than based on equal population as required by the one person, one vote doctrine.[236] A multimember district that choses five representatives will be the size of five single-member districts. Winning a seat in the multimember district requires winning

232. *See* Chambers, *Colorblindness, Race Neutrality, and Voting Rights*, *supra* note 20, at 1443–44 ("How a voting system is structured can determine how easily a member of a jurisdiction-wide minority can be a part of an electing majority and elect her candidate of choice.").

233. *See supra* Part III.B.

234. *See supra* Part III.B.

235. *See Gingles*, 478 U.S. at 48 ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (alteration in original) (citations omitted)).

236. The Court rejected a suit by voters claiming the one person, one vote doctrine requires districts with equal numbers of voters rather than districts with equal population. *See* Evenwel v. Abbott, 578 U.S. 54, 57–58 (2016).

enough votes to finish with one of the five highest vote totals. The focus is on the number of votes a candidate receives compared to other candidates. If the multimember district were divided into five districts with equal population, winning a seat would require winning the most votes in a district, regardless of how many votes any other candidate received in their district. Unfortunately, some racial groups have a lower percentage of eligible voters in their population because of young, immigrant, and formerly incarcerated members.[237] When those communities are combined with populations with higher percentages of eligible voters in a multimember district, the result may be the systematic underrepresentation of those communities of color.[238] This is a problem, especially if that community would have been a majority in a single-member district. However, the alternative in a post-*Gingles* context may not be that the group lives in a majority-minority, crossover, or coalition district. Rather, it may be that the group is spread out in multiple single-member influence districts with virtually no representation or in in a set of closely divided, but unwinnable, districts in which their power is submerged.

Limited-voting multimember districting is an option, not a cure-all. It will not be effective in some locations and for some elections. The number of representatives to be chosen, the electorate's size and its demographics, and the geography of the multimember district can determine how successful the

237. *See* Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), https://perma.cc/9YZP-GH9U (producing data showing disparities in percentages of eligible voters); *see also* Hansi Lo Wang, *Why There's a Long-Standing Voter Registration Gap for Latinos and Asian Americans*, NPR (Apr. 2, 2024), https://perma.cc/VBZ8-9B2F (identifying immigration and other reasons why there may be a eligible voter gap); John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), https://perma.cc/TG2H-FC88 ("In 2017, blacks represented 12% of the U.S. adult population but 33% of the sentenced prison population. Whites accounted for 64% of adults but 30% of prisoners. And while Hispanics represented 16% of the adult population, they accounted for 23% of inmates."); Mike Schneider, *America Aged Rapidly in the Last Decade as Baby Boomers Grew Older and Births Dropped*, ASSOCIATED PRESS (May 25, 2023), https://perma.cc/DB54-7PTP ("Non-Hispanic whites were the oldest cohort, with a median age of 44.5.").

238. *See* Thornburg v. Gingles, 478 U.S. 30, 48 (1986) (describing how multimember districts have been used to diminish the voting power of minorities).

districting option might be in protecting minority representation.[239] Jurisdictions may want to use single-member districting, multimember districting, or a combination of the two to protect minority representation.[240] Any of these forms could be sufficient if the jurisdiction is required to find some method of districting to protect minority representation.

CONCLUSION

Political polarization may degrade voting rights protections through attempts to harm political opponents using partisan gerrymandering and other methods. That degradation may unintentionally or intentionally diminish the representation of racial minority voters.[241] The United States Supreme Court is allowing this to occur. The Fifteenth Amendment should protect against much of that degradation but has not been interpreted to do so. Revisiting the doctrine underlying the Amendment would help protect the right to vote and the ability to gain representation for racial minorities. In addition, revisiting electoral systems such as multimember districting could help protect minority voters' ability to be represented when their numbers support such protection. A side benefit of altering political structures to help protect minority voters might be to protect political minorities more generally, fostering a stronger democracy for all, even in a politically polarized America.[242]

---

239. *Id.*

240. Redistricting plans have included combinations of single-member districts and multimember districts. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 114 (1986); Mahan v. Howell, 410 U.S. 315, 318–19 (1973).

241. *See* Menendian, *supra* note 1 at 354

> [Partisan gerrymandering] is a problem in its own right because it undermines the values and foundation of the republic, and because it causes and results in the racial segregation of voters in clear violation of the Constitution without necessarily running afoul of the standards established by the Supreme Court to secure those protections.

242. *See* Kleinfeld, *supra* note 1, at 46 ("Altering U.S. political structures in order to change the political incentives that are exacerbating affective polarization is almost certainly part of the solution to ensuring a more cohesive citizenry that supports a stronger democracy in the United States.").