

Blurred Lines: Conjoined Polarization and Voting Rights

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Considerable evolution in American political party coalitions threatens to undermine the gains that minorities have made in political representation and participation. Since the migration of Southern white conservatives to the Republican Party, party identification has become more consolidated and consistent. As the parties have become more distinct from each other, they have also become more internally ideologically consistent. This assortative political sorting has been accompanied by the strengthening of racial partisan identification, leading to a conjoined polarization of party, ideology, and race. Conjoined polarization complicates and undermines the efforts of an earlier time to protect minority voting rights, most notably through the passage of the Voting Rights Act. This Article evaluates the effect of conjoined polarization on two main kinds of litigation under the Voting Rights Act: redistricting and election administration. Conjoined polarization aligns political contestation along racial lines. All attempts to manipulate the political process—through drawing gerrymandered district lines or erecting barriers to vote—will have decidedly racial consequences; yet, existing doctrine is either ill-equipped, or ill-defined to address them. Section 2 of the Voting Rights Act and the Supreme Court’s racial gerrymandering jurisprudence will struggle to reign in partisan gerrymandering in the 2020 redistricting cycle. And the protection of minority voting rights in election administration will depend on the ability of courts to translate section 2’s protections developed in vote dilution cases to vote denial cases.

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I. INTRODUCTION

Congress passed the Voting Rights Act of 1965 and amended it five times throughout a period of critical transformation in American politics.¹ From the start of the Nixon Administration to the end of Reagan's, social conservatives migrated geographically and politically towards the Republican Party while African-American and Latino voters increasingly coalesced with liberal white

¹*History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, U.S. DEP'T JUST., <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/YTZ4-DVXZ>] (last updated Aug. 8, 2015). The Voting Rights Act was amended in 1970, 1975, 1982, 1992, and 2006. *Id.* Examples of amendments to the Act include: Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; 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; and Act of July 1, 2008, Pub. L. 110-258, 122 Stat. 2428. The Voting Rights Act is codified at 52 U.S.C. §§ 10101–10702 (Supp. II 2014).

Democrats.² This changing composition of electoral coalitions is known as party sorting.³

Party coalitions can become more assortative (members of a party being more homogenous) or disassortative (more heterogeneous).⁴ The American party duopoly has accommodated both types of coalitions at various times in its history. From the end of World War II to the 1960s, the Democratic and Republican Party coalitions were comparatively heterogeneous due to the presence of Northern liberals and moderates among Republicans and Southern conservatives among Democrats.⁵ But since 1965, party sorting has been assortative rather than disassortative.⁶ The two major party coalitions have become much more ideologically consistent, creating higher levels of partisan polarization and more frequent legislative stalemates at both the state and federal levels.⁷ The ideological sorting has been accompanied by racial sorting as well, pitting a predominantly white Republican party against a racially diverse Democratic one.⁸ President Barack Obama's 2008 election might have raised hopes that the United States had finally overcome racialized politics, but there are few, if any, who would claim that today.

The more consistent alignment of race, party, and ideology since 1965—i.e. *conjoined polarization*—has complicated and undermined efforts under the Voting Rights Act to protect the voting rights of historically underrepresented racial and ethnic minorities. The passage and maintenance of the Voting Rights Act was possible as a result of relative heterogeneity in the Democratic and Republican parties.⁹ Conjoined polarization threatens the bipartisan

² See *infra* Part II.A.

³ Political scientists debate how the phenomenon ought to be described. It is also referred to as “polarization.” We find the term “party sorting” more apt, since it better captures the movement between the adherents of the two parties that account for the political phenomenon. For further discussion on the two terms, see generally Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People*, in 1 RED AND BLUE NATION? 49 (Pietro S. Nivola & David W. Brady eds., 2006).

⁴ See *id.* at 53–54.

⁵ See Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 17 (Nathaniel Persily ed., 2015).

⁶ See *id.*

⁷ *Id.* at 15.

⁸ See *infra* note 9.

⁹ For a deeper discussion of how the two parties diverged in their treatment of race, see EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS*, 27–58 (1989). While the Republican Party as a whole slowly ceased advocating for civil rights, it nonetheless contained enough legislators who were supportive of civil rights legislation in the '50s and '60s to help aid in the passage of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. Heterogeneity in the Democratic Party was also present during this period. In response to electoral competition from the Republican Party, Southern Democrats generally liberalized their positions and moved closer to Northern Democrats, although there was, into the 1980s, “considerable variation”

consensus that heterogeneous parties allowed. Democrats, previously divided over voting rights legislation, now support it firmly.¹⁰ The Republicans, having supported the Voting Rights Act in the past, now refuse to consider any efforts to revive section 5 or broaden the law to prohibit new forms of voter restrictions.¹¹

Conjoined polarization is responsible for the parties' changing tactics in redistricting. Redistricting under the Voting Rights Act has historically been focused on African-American underrepresentation and primarily threatened Southern white Democrats.¹² The initial section 2 and section 5 redistricting remedies often removed African-American voters from districts represented by white Democratic incumbents in order to fashion new majority-minority districts.¹³ In essence, they cracked the Democratic vote and opened up previously safe Democratic seats to competition from Republicans.

But demographics threaten to change the political logic behind minority rights redistricting. With the Latino population spreading out into rural and suburban Republican areas around the country,¹⁴ the partisan tactical

in their tendencies to support liberal policies. Richard Fleisher, *Explaining the Change in Roll-Call Voting Behavior of Southern Democrats*, 55 J. POL. 327, 338–39 (1993).

¹⁰Certainly, after President Johnson, the Democratic Party has come to be identified as the party advocating for racial liberalism. See CARMINES & STIMSON, *supra* note 9, at 51–52. But that transformation took time.

¹¹The Voting Rights Act was first co-sponsored by Senate Minority Leader Everett Dirksen, a Republican from Illinois, in 1965 as S. 1564. *Voting Rights Act*, ASS'N CTRS. FOR STUDY CONGRESS, <http://acsc.lib.udel.edu/exhibits/show/legislation/vra> [<https://perma.cc/FT3Q-DB7S>]. After the bill was introduced, it was co-sponsored by an additional twenty Republicans. *Id.* Today, such bipartisan support for the Voting Rights Act is unimaginable. After *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Republicans have stalled efforts to pass a restored Voting Rights Act. In control of both the House and the Senate, Republicans have refused to conduct hearings over new voting rights legislation. See *The Voting Rights Act Is 51 and Voter Discrimination Is Flourishing Again*, VRA FOR TODAY (Aug. 5, 2016), <http://vrafortoday.org> [<https://perma.cc/SLM5-RMS9>].

¹²See CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 36–37*, 170 (1995); Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION IN THE SOUTH* 21, 26–27 (Chandler Davidson & Bernard Grofman eds., 1994); Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 112, 125 (1991); J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING* 135, 144–45 (Bernard Grofman & Chandler Davidson eds., 1992).

¹³These are districts in which minorities constitute the majority of the population. In these districts, minorities have the ability to elect their representatives of choice. For a history on the creation of such districts, see generally Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 12, at 7–51.

¹⁴Daniel T. Lichter & Kenneth M. Johnson, *Emerging Rural Settlement Patterns and the Geographic Redistribution of America's New Immigrants*, 71 RURAL SOC. 109, 110–11 (2006); Daniel T. Lichter, *Immigration and the New Racial Diversity in Rural America*, 77 RURAL SOC. 3, 4, 7–51 (2012).

advantage in redistricting under the Voting Rights Act is no longer so clear. The growing Hispanic population demands its own ability-to-elect districts.¹⁵ These districts can be created by removing low voting Hispanic populations from Republican seats and replacing them with either one of two options, both to the detriment of Republicans. First, the Hispanic population may be replaced with higher voting white Democrats, drawing them away from previously safe Republican districts and therefore rendering those seats more competitive. The alternative is to replace the Hispanic population with more Republican voters, packing Republican voters inefficiently into districts where Republican control is likely. Demographic change was turning the Voting Rights Act into an equal opportunity weapon that Republicans were susceptible to as well.

The slow change in politics and demographics was accompanied by a drastic legal change in 2013. The Supreme Court in *Shelby County v. Holder* struck down the coverage formula in section 4 of the Voting Rights Act,¹⁶ hence neutralizing the preclearance regime set out under section 5.¹⁷ Post *Shelby County*, the political prospects of a bipartisan effort to revive section 5 by fixing its section 4 coverage formula are currently dim. In addition to removing section 5 protections for the next round of redistricting, this decision eliminated a crucial tool for scrutinizing and precluding the implementation of possible second-generation barriers to voting, such as new voter ID requirements and other laws that can make voting more difficult for disadvantaged populations.¹⁸ Predictably, racial, partisan, and administrative motives have blurred. Many Republicans believe that looser voter qualification laws favor the Democrats and encourage voter impersonation fraud.¹⁹

¹⁵ *A Look at Remaining Map Disputes: Treatment of Hispanics in North Texas*, TEX. REDISTRICTING & ELECTION L. (Apr. 17, 2013), <http://txredistricting.org/post/48186394247/a-look-at-remaining-map-disputes-treatment-of> [https://perma.cc/52HM-PYCD] (discussing the creation of more Hispanic ability-to-elect districts in Texas).

¹⁶ *Shelby Cty.*, 133 S. Ct. at 2627, 2631–32.

¹⁷ Under section 5 preclearance, states covered under section 4 seeking to enact or administer “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,” must first have those changes precleared by the Department of Justice (or obtain an declaratory judgment from the United States District Court for the District of Columbia) before they can be implemented. 52 U.S.C. § 10304(a) (Supp. II 2014).

¹⁸ Voting qualifications like photo ID laws, or removal of early voting opportunities, would have been covered under section 5 if not for *Shelby County*. *See id.* This is not to say that states would have been uniformly precluded from implementing such qualifications, but certainly, the preclearance regime would have closely scrutinized the motives behind their implementation and evaluated their effects.

¹⁹ *See* Shelley de Alth, *ID at the Polls: Assessing the Impact of the Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 185–88 (2009). Voter ID laws have been almost universally passed by Republicans, and opposed by Democrats. *Id.* For further discussion of the partisan nature of election administrative reforms, see *infra* Part III.B.1.

Democrats believe otherwise and suggest that the administrative justifications are pretexts for racially motivated vote suppression.²⁰

As they battle for control of Congress and state legislatures, the parties fight for every tactical advantage, raising the stakes for electoral rule disputes. Even seemingly mundane decisions about ballot types, early voting, precinct consolidations, or voter identification laws have potentially important political and racial consequences. Expand the electorate to include more Latinos, and Democrats seemingly gain. Add more voting qualifications, and Republicans think that they might exclude Democratic voters and win a few more seats. Disentangling partisan aims from racial motives and pretext from legitimate considerations about ballot security, cost, and the like is harder than ever.

In the Parts of this Article that follow, we will first review the concept and evidence of conjoined polarization. Then, we will discuss how it has complicated the application of the Voting Rights Act to redistricting and election administration. The conflation of party and race under conjoined polarization prevents existing redistricting doctrines from protecting minority voting rights. It has also ignited heated disputes over election administration that the post-*Shelby County* Voting Rights Act is ill-equipped to handle or adjudicate. The system might correct itself if the party coalitions become more ideologically and racially diverse in the future. But failing that, we argue that the courts should closely scrutinize the evidence of fraud and the burdens associated with new voter requirements and administrative changes that reduce opportunities to vote. With respect to redistricting, the courts need help from the political process in order to limit egregious bias. The burden falls on state and local jurisdictions to define what they mean by impermissible political unfairness. Emerging evidence-based standards put forth by social scientists will aid in that endeavor.

II. CONJOINED POLARIZATION

A. *Description of Conjoined Polarization*

American politics has become decidedly more polarized in the last two decades.²¹ By political polarization, we mean the persistent and growing ideological gap between adherents of the two major political parties.²² Another

²⁰ See RICHARD L. HASEN, *THE VOTING WARS* 41–73 (2012).

²¹ Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563, 574, 577, 584 (2008). The precise way to characterize what has happened is up for some debate: some refer to the phenomenon as polarization, while others use the term party sorting. We refer to the observed outcome of the parties drifting apart as polarization, and use the term party sorting to explain the demographic shifts in party identification that accounts for the observed outcome of polarization. See discussion *supra* note 3.

²² For a discussion of polarization in Congress, see generally NOLAN MCCARTY ET AL., *POLARIZED AMERICA* (2006). For a dissenting view on the polarization in the electorate

way to think of polarization is that there is increasingly less overlap in what the two parties stand for. Polarization is the centrifugal force that draws the two parties farther away from each other, and also from the center.²³

Democrats and Republicans today can reliably be expected to hold certain policy and ideological positions. Two decades ago, partisan labels were much less predictive of the views that an individual held.²⁴ In more colorful terms, polarization has made the country more red and blue, and less purple.

Polarization along partisan lines also has a racial dimension. The campaign, election, and reelection of President Obama spawned significant academic research on the parallel growth of racial and partisan polarization.²⁵ Such racial polarization is evident in President Obama's election returns: in the 2008 election, he lost the white vote by 20%, but won with a nonwhite margin of 62%.²⁶

The roots of racial polarization run much deeper. The civil rights movement divided the population on racial issues and caused party attachments to form along racial lines.²⁷ Such racial polarization has not only

see ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 1–5 (2010).

²³ Polarization is commonly understood as the “division into two opposites” or the “concentration about opposing extremes of groups or interests formerly ranged on a continuum.” *Polarization*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/polarization> [<https://perma.cc/829N-KLN2>].

²⁴ Political scientists describe this phenomenon in the language of “constraints.” See John L. Sullivan et al., *Ideological Constraint in the Mass Public: A Methodological Critique and Some New Findings*, 22 AM. J. POL. SCI. 233, 233–35 (1978). Theoretically, one's ideological position on abortion and climate change need not be connected, but often, they are bundled. See *id.* at 233–35, 247–48. Another way to understand polarization is that those constraints have strengthened over time. See *id.* at 233. Believing in the virtues of small government has come to be paired with climate change skepticism and gun right enthusiasm. In a polarized polity, knowing one's political views on a single issue can strongly predict one's views on a whole host of other issues.

²⁵ By the end of President Obama's first year in office, African-Americans and white Americans were separated by fifty percentage points in their presidential approval ratings—a distance already significantly larger than the racial polarization at any time during Ronald Reagan's and George H.W. Bush's presidencies. Michael Tesler & David O. Sears, *President Obama and the Growing Polarization of Partisan Attachments by Racial Attitudes and Race 2* (Aug. 31, 2010) (unpublished paper), <https://ssrn.com/abstract=1642934> [<https://perma.cc/D464-XBSV>].

²⁶ Alan Abramowitz, *The Emerging Democratic Presidential Majority: Lessons of Obama's Victory* 10 (2013) (unpublished paper), http://themonkeycage.org/wp-content/uploads/2013/01/abramowitz_emerging_majority.pdf [<https://perma.cc/KN3V-WE88>] (according to nationwide exit poll).

²⁷ CARMINES & STIMSON, *supra* note 9, at 47. Although there is evidence that the racial attachment had waned by the Clinton years, if not for President Obama, we may have seen a continued decline in the association between the Democratic party and African-Americans. Cf. Abramowitz, *supra* note 26, at 2 (“Obama's 2012 victory reflected the impact of demographic and cultural trends that are transforming the American electorate and the American party system.”).

caused African-Americans and other minorities to more closely associate with the Democratic Party, it has also had an effect on whites. Political scientists have found a notable increase in the effects of racial resentment²⁸ on white partisanship from 1988 to 2000.²⁹

B. *The Explanation for Conjoined Polarization*

What caused party sorting, and how did it come to correlate with race and ideology? In retrospect, many moving pieces coincided to produce this trend. In the immediate post-World War II period, the South, due to the legacy of the Civil War and Reconstruction, was still a Democratic stronghold, with racial conservatives in an uneasy coalition with Northern liberals.³⁰ Congressional committee chairs in this period wielded a great deal of power over whether bills and amendments made it onto the floor, and many of them were from the South.³¹

A common refrain in political science during this period was that electoral or party trends would generally hold, “except in the South.”³² Looking back, we can see that ideological heterogeneity in both parties served as an internal check on centrifugal drift. For the Democrats, the modulating effect of ideological diversity waned as the tenuous alliance between Southern conservatives and Northern liberals eroded during the 1960s due to the Vietnam War, the sexual revolution, and the civil rights movement.³³ While the story of President Johnson declaring that signing the Civil Rights Act of 1964 would cause the Democratic Party to lose the South forever is likely

²⁸ Racial resentment is measured through a proxy by asking whether people agree with the statement, “We should make every possible effort to improve the position of blacks and other minorities, even if it means giving them preferential treatment.” *American Values Survey: Question Database*, PEW RES. CTR., <http://www.people-press.org/values-questions/q401/make-every-effort-to-improve-the-position-of-minorities-including-preferential-treatment/#total> [<https://perma.cc/GV7J-WXQJ>]. While imperfect, political scientists have found that views on affirmative action are closely tied to racial conservatism. See, e.g., David O. Sears et al., *Is it Really Racism? The Origins of White Americans’ Opposition to Race-Targeted Policies*, 61 PUB. OPINION Q. 16, 17, 30 tbl.3, 31 (1997); Tesler & Sears, *supra* note 25, at 18.

²⁹ Tesler & Sears, *supra* note 25, at 12. See *id.* for evidence that “the impact of racial resentment on white party identification reached its apex in 2008, growing by 75 percent of its 2004 size. With that enhanced effect, a change from least to most racially resentful now independently increased Republican partisanship by 20 percent of the party identification scale’s range.” Tesler and Sears argue that “Obama’s presidency has, in fact, opened the door for old fashioned racism to influence white partisanship.” *Id.* at 18.

³⁰ See EARL BLACK & MERLE BLACK, *POLITICS AND SOCIETY IN THE SOUTH* 235 (1987); Nicholas A. Masters, *Committee Assignments in the House of Representatives*, 55 AM. POL. SCI. REV. 345, 355–56 (1961).

³¹ See Masters, *supra* note 30, at 348, 353 tbl.3.

³² See generally BYRON E. SHAFER & RICHARD JOHNSTON, *THE END OF SOUTHERN EXCEPTIONALISM: CLASS, RACE, AND PARTISAN CHANGE IN THE POSTWAR SOUTH* (2006).

³³ See *id.* at 53–54.

apocryphal,³⁴ the prophecy's fame derives in part from its truth. As the Democratic Party became more heavily identified with liberal causes and Presidential candidates, Southern and socially conservative Democrats began to defect to Republican candidates, with many eventually switching their party identification.³⁵

On the Republican side, social issues such as abortion and women's rights created a coalitional divide, one that deepened as the party's base moved to the South.³⁶ The ranks of fiscally conservative and socially moderate Republicans gradually thinned, and the overlap between the most conservative Democratic and liberal Republican representatives got progressively smaller, as evident in various measures and interest group ratings of Congress.³⁷

Hence, the driving force behind party sorting was the movement of socially conservative white voters from the Democratic Party to the Republican Party.³⁸ The two major parties and their candidates made fateful political and electoral choices regarding civil rights and social issues that caused some supporters and officials to convert from one party to the other. Physical, geographic sorting in the form of internal migration accelerated party sorting. Liberal and conservative whites sorted not only according to ideology but also with regard to where they lived and worked. Liberal whites moved to creative urban hubs like the Bay Area, Boulder, Seattle, Austin, etc., and conservative whites migrated to the South, exurbs, and rural communities.³⁹ The younger conservatives who eventually replaced the Reagan and Blue Dog Democrats no longer identified or registered with the Democratic Party.⁴⁰

Meanwhile, nonwhite voters increased in numbers and were attracted in the opposite direction by the more liberal positions of the Democratic Party. Where domestic migration accounted for white social sorting, documented and undocumented immigration accounted for much of the nonwhite social

³⁴ Steven J. Allen, "We Have Lost the South for a Generation": *What Lyndon Johnson Said, or Would Have Said if Only He Had Said It*, CAP. RES. CTR. (Oct. 7, 2014), <https://capitalresearch.org/2014/10/we-have-lost-the-south-for-a-generation-what-lyndon-johnson-said-or-would-have-said-if-only-he-had-said-it/> [<https://perma.cc/L7NS-L85E1>].

³⁵ Kevin A. Hill & Nicol C. Rae, *What Happened to the Democrats in the South? US House Elections, 1992–1996*, 6 PARTY POL. 5, 6 (2000).

³⁶ See Richard Fleisher & John R. Bond, *The Shrinking Middle in the US Congress*, 34 BRITISH J. POL. SCI. 429, 433 (2004).

³⁷ KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 166–74 (2000).

³⁸ Michael Lind, *This Is What the Future of American Politics Looks Like*, POLITICO MAG. (May 22, 2016), <http://www.politico.com/magazine/story/2016/05/2016-election-realignment-partisan-political-party-policy-democrats-republicans-politics-213909> [<https://perma.cc/ED5Z-CVM6>].

³⁹ See, e.g., Wendy K. Tam Cho et al., *Voter Migration and the Geographic Sorting of the American Electorate*, 103 ANNALS ASS'N AM. GEOGRAPHERS 856, 857–60 (2012); Tony Robinson & Stephen Noriega, *Voter Migration as a Source of Electoral Change in the Rocky Mountain West*, 29 POL. GEOGRAPHY 28, 28, 37 (2010).

⁴⁰ See Hill & Rae, *supra* note 35, at 18–19.

sorting.⁴¹ As Latinos—and to a lesser extent, Asians—entered the country, many ended up residing in cities, following jobs and available low income housing stock.⁴² Together with white liberals, urban dwellers became loyally Democratic and more liberal.⁴³ When the Voting Rights Act ended districting practices that had previously fractured minority areas, it enabled these communities to elect their representatives of choice.⁴⁴ The Democrats became more ideologically consistent both by addition (of minority voters) and subtraction (through the defection of socially conservative whites).

Racial sorting and party sorting trends have been closely intertwined. Civil rights policies gave socially conservative white Democrats reason to defect to the Republican Party.⁴⁵ Immigration policies also enabled the nonwhite and non-European population to grow and eventually enter a coalition with liberal whites. At the same time, both parties became more ideologically consistent, with more within-party conformity in social and economic policy.⁴⁶ This undercut the ideological heterogeneity that in the immediate post World War II era had limited the polarization of activists, donors, and representatives in both parties. The Democratic and Republican parties became more ideologically consistent and racially distinctive.⁴⁷

C. *Some Implications of Conjoined Polarization*

Before examining how the coincidence of racial and partisan polarization affected redistricting and election administration specifically, we note some larger political implications. First, racial and partisan identities are both fraught with strong emotions. And given that there is also a gender divide in the mix,⁴⁸ political emotions have upped the political intensity potential. A key element of any pluralist design is promoting flexible and crosscutting

⁴¹ See Kathleen Ronayne & Emily Swanson, *Young Voters from Newer Immigrant Families Lean More Liberal, Poll Shows*, PBS NEWSHOUR (Sept. 8, 2016), <http://www.pbs.org/newshour/rundown/immigrant-young-voters-liberal/> [<https://perma.cc/S48A-KLLJ>].

⁴² WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 179 (2d ed. 2012).

⁴³ See *infra* note 106 and accompanying text.

⁴⁴ Davidson, *supra* note 12, at 21.

⁴⁵ See Fleisher & Bond, *supra* note 36, at 432.

⁴⁶ *Id.* at 431.

⁴⁷ Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Feb. 8, 2013), <http://www.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white.aspx> [<https://perma.cc/PQ4H-KW89>].

⁴⁸ Hillary Clinton's historic candidacy puts gender front and center as an issue that divides the parties. See Danielle Kurtzleben, *The Trump-Clinton Gender Gap Could Be the Largest in More than 60 Years*, NPR (May 26, 2016), <http://www.npr.org/2016/05/26/479319725/the-trump-clinton-gender-gap-could-be-the-largest-in-more-than-60-years> [<https://perma.cc/Q86M-HSQW>]. But certainly, even before her candidacy, gender issues divided strongly on partisan lines. See Fiorina & Abrams, *supra* note 21, at 568–69, 577–78.

alliances, limiting to some extent possible hardened cleavages.⁴⁹ Hardened factions make the essential job of negotiating, bargaining, and compromise more difficult. The layering of partisan and racial identity is a particularly bad sociology given America's peculiar and fractionalized political system, as little gets done in a decentralized power structure without a willingness to deal with the other side.⁵⁰ In other words, the fractured nature of American institutions magnifies the ills of conjoined polarization and renders political dysfunction more intractable.

Second, heightened contestation under conjoined polarization is not limited to voting rights, although voting rights are especially vulnerable under conjoined polarization because the electoral process directly affects the parties' access to power in the first place. Conjoined polarization has turned immigration policy into a proxy battle over political power. Immigration has always been a hotly contested issue in the United States,⁵¹ with clear implications for U.S. culture and the economy. But given the racial composition of contemporary partisan alignments, a more open and inclusive policy embracing undocumented immigrants and refugees threatens the long-term viability of the Republican Party unless the Party either adapts its positions to attract more nonwhite voters (as recommended by the Party establishment's post-mortem after its 2012 presidential defeat)⁵² or finds ways to restrict the volume of potentially unfavorable immigration (as vocalized by Donald Trump).⁵³

Immigration is also clearly linked to voting rights: anxiety about the one is tied to the other. As Latino voters develop a stronger Democratic partisan

⁴⁹The classic articulation of pluralist design was from ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* 325 (2d ed. 2005), and of the non-dominance principle, from MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 17, 20 (1983). With respect to political reform, see generally BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* (2015). The concern over hardened factions in politics goes back to the founding era. THE FEDERALIST NO. 11 (Alexander Hamilton) was centrally occupied with this problem. In it, Hamilton argued that if factions and their alliances shifted from issue to issue, factionalism would do less injury to the governance of the nation. *See generally id.*

⁵⁰Barber & McCarty, *supra* note 5, at 15.

⁵¹Bipartisan efforts to reform immigration has failed over and over again; it has become a part of our recurring political history. *See* Rachel Weiner, *How Immigration Reform Failed, Over and Over*, WASH. POST (Jan. 30, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/01/30/how-immigration-reform-failed-over-and-over/> [<https://perma.cc/E3XU-RR5L>]. Part of the Obama administration's efforts to reform immigration through executive action can be traced to its frustration with the legislative process's ability to arrive at any compromise. *Id.*

⁵²Danny Vinik, *Can the GOP Appeal to Minority Voters?*, POLITICO (Aug. 25, 2015), <http://www.politico.com/agenda/story/2015/08/can-the-gop-appeal-to-minority-voters-000209> [<https://perma.cc/FE7F-LNM3>].

⁵³Stephen Collinson & Jeremy Diamond, *Trump on Immigration: No Amnesty, No Pivot*, CNN (Sept. 1, 2016), <http://www.cnn.com/2016/08/31/politics/donald-trump-immigration-speech/> [<https://perma.cc/U7UR-4YQ4>].

identity, immigration reforms pose more of an existential threat to Republicans. The inability to control U.S. borders strengthens the partisan motivation to reduce the naturalization rate and to strengthen ballot security even if the evidence of fraudulent voting is extremely thin and isolated.⁵⁴

The intersection of these two issues occurred in a near miss during the Supreme Court's 2016 term in *Evenwel v. Abbott*.⁵⁵ The case was about how states can calculate total population for the purposes of state and local legislative redistricting.⁵⁶ First, some background: states have to draw their legislative districts under the one person, one vote principle established by the Supreme Court in *Wesberry v. Sanders*.⁵⁷ Districts must contain equal numbers of people.⁵⁸ This is also known as the equipopulous rule.⁵⁹ *Wesberry* was decided against the backdrop of severe malapportionment. States often had districts containing disparate numbers of people, which meant that the votes of those in smaller districts had more chance of swaying an election, proportionally speaking, when compared to votes of those in a larger district.⁶⁰ After *Wesberry*, states apportioned districts of equal total population, using the decennial census.⁶¹ Some population deviation between the districts was permitted, but generally no more than 10% was allowed.⁶²

⁵⁴ Justin Levitt, the current Deputy Assistant Attorney General in the Civil Rights Division, found only thirty-one credible instances of voter fraud out of one billion votes cast. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [https://perma.cc/6H5X-44H8]. The article was published when he was a professor at Loyola Law School. For further discussion of the rarity of fraudulent voting, see LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 5–7 (2010), and David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 494–501 (2008). Voter fraud is also highly unusual in in-person voting. *Id.* The vote fraud that occurs is primarily through vote-by-mail. *Id.*

⁵⁵ *Evenwel v. Abbott*, 136 S. Ct. 1120, 1126–27 (2016) (holding that states and localities can use total population in drawing its legislative districts).

⁵⁶ *Id.*

⁵⁷ *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

⁵⁸ *Id.*

⁵⁹ See, e.g., Roderick M. Hills, Jr., Response, *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2005).

⁶⁰ See STEPHEN ANSOLABEHRE & JAMES M. SNYDER JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 30–31 (2008).

⁶¹ See *Evenwel*, 136 S. Ct. at 1124 (“But, in the overwhelming majority of cases, jurisdictions have equalized total population, as measured by the decennial census. Today, all States use total-population numbers from the census when designing congressional and state-legislative districts, and only seven States adjust those census numbers in any meaningful way.”).

⁶² *Id.* (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)).

The plaintiffs' challenge in *Evenwel* was in part a response to the sweeping demographic change caused by immigration.⁶³ Due to high numbers of noncitizens, Texas districts' total populations often do not match their total number of eligible voters (also known as the CVAP population, which stands for Citizen Voting Age Population).⁶⁴ While containing equal numbers of *people*, Senate districts contained differing numbers of *eligible voters*.⁶⁵ Urban districts that absorbed more immigrants contained fewer eligible voters than rural districts.⁶⁶ The plaintiffs in *Evenwel*, who lived in one of the rural districts with more eligible voters, argued that their votes had been diluted.⁶⁷ Their theory was that under *Wesberry*, their votes counted for less than that of a similar vote in another district with fewer eligible voters.⁶⁸

The *Evenwel* plaintiffs' challenge cannot be understood purely in terms of geography. Politics permeates the case: the challenge also reflects the political geography that conjoined polarization has created. The plaintiffs in *Evenwel* would not have brought the case if they were politically aligned with the voters of urban districts.⁶⁹ Put simply, they were Republicans, and they only brought the case because the districts that contained fewer eligible voters (and more immigrants) were expected to vote for Democrats. *Evenwel* demonstrates aptly how the politics of voting, immigration, and geography are inextricably bound up together. By enlarging the numerator of how many persons must be

⁶³ See *id.* at 1124–25.

⁶⁴ See Ryan Murphy, *Updated Map: Not All Voting-Age Populations Are Equal*, TEX. TRIB. (Mar. 20, 2013), <https://www.texastribune.org/library/data/texas-legislative-cvap-map/> [<https://perma.cc/UL2J-N8B2>]. Suffrage in the United States is limited to citizens. For a discussion of alien suffrage, see generally Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

⁶⁵ See *Evenwel*, 136 S. Ct. at 1125. Race data from Texas Senate Districts sheds some light on this phenomenon. Plaintiffs reside in Senate Districts 1 and 4, with Hispanic percentages of 10.5 and 16.5 respectively. *District Population Analysis with County Subtotals: Senate District 1 – PlanS172*, TEX. LEGIS. COUNCIL, <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/senate/dist1/r4.pdf> [<https://perma.cc/J8M8-X8K6>] (last modified Jan. 13, 2015); *District Population Analysis with County Subtotals: Senate District 4 – PlanS172*, TEX. LEGIS. COUNCIL, <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/senate/dist4/r4.pdf> [<https://perma.cc/MA3A-JDRB>] (last modified Jan. 13, 2015). District 6, containing the county that Houston is in, is 73.8% Hispanic. *District Population Analysis with County Subtotals: Senate District 6 – PlanS172*, TEX. LEGIS. COUNCIL, <http://www.fyi.legis.state.tx.us/fyiwebdocs/PDF/senate/dist6/r4.pdf> [<https://perma.cc/EQ8N-8DRR>] (last modified Jan. 13, 2015).

⁶⁶ Senate Districts 1 and 4 are comparatively rural. *State Senate Districts: 84th Legislature 2015-2016*, TEX. LEGIS. COUNCIL (Nov. 12, 2014), <http://www.tlc.state.tx.us/redist/pdf/senate/map.pdf> [<https://perma.cc/US45-9UK3>] (locations of Districts 1 and 4); U.S. Census Bureau, *Census 2000: Texas Profile*, REDCROSS.ORG, http://maps.redcross.org/website/Maps/Images/Texas/TX_Census2K_Profile.pdf [<https://perma.cc/BZB6-GVY8>] (population density of the two districts).

⁶⁷ *Evenwel*, 136 S. Ct. at 1125.

⁶⁸ *Id.*

⁶⁹ See *id.* at 1123, 1125.

in a district, immigration poses an attenuated, but nevertheless causal threat to Republican control of populous states like Texas. Conjoined polarization renders the political consequences of demographic changes highly predictable. How many immigrants come and where they end up settling become not only policy questions that the parties must grapple with but also alter the political calculus that the parties make in their battles for power.

One final associated general trend is the decreasing influence of traditional media and the rising prominence of social media.⁷⁰ While the long-term effects of this trend will only fully reveal themselves in time, it seems pretty clear at this point that it has removed a filter on public dialogue, and under the cover of semi-anonymous internet identities, unleashed and provided a wide platform to uncivil discourse, and in some cases, hateful and violent speech.⁷¹ Social media may also contribute to a phenomenon that social scientists have termed affective polarization.⁷² Social media platforms like Facebook or Twitter, which allow users to choose whom to receive news and entertainment from, may cause users to become cloistered within a particular ideological community.⁷³ It may also create greater pressures to conform to prevailing views in the online communities.⁷⁴ The Internet seems also to give rapid national and international exposure to what might have been in an earlier era a localized partisan and racial issue like minority voting rights. The segregated and segmented media environment threatens to calcify conjoined polarization.

III. CONJOINED POLARIZATION AND VOTING RIGHTS

How has conjoined polarization affected voting rights? In 1965, voting rights advocacy had a geographic and racial focus in the South and on African-Americans.⁷⁵ Dealmaking on civil rights legislation, difficult to be sure, was at

⁷⁰ Amy Mitchell & Jesse Holcomb, *State of the News Media 2016*, PEW RES. CTR. (June 15, 2016), <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/> [<https://perma.cc/FKN2-38GP>].

⁷¹ See, e.g., Katherine Long & Coral Garnick, *WWU Cancels Classes Tuesday After Racial Threats on Social Media*, SEATTLE TIMES, <http://www.seattletimes.com/seattle-news/education/western-washington-university-cancels-classes-as-hate-speech-is-investigated/> [<https://perma.cc/L97P-WVT8>] (last updated Dec. 7, 2015) (discussing hate speech facilitated by social media).

⁷² See, e.g., Yphtach Lelkes et al., *The Hostile Audience: The Effect of Access to Broadband Internet on Partisan Affect*, AM. J. POL. SCI. 13 (2015), <https://pcl.stanford.edu/research/2016/lelkes-ajps-hostile-audience.pdf> [<https://perma.cc/6X8B-PG93>].

⁷³ See Cass R. Sunstein, *How Facebook Makes Us Dumber*, BLOOMBERGVIEW (Jan. 8, 2016), <https://www.bloomberg.com/view/articles/2016-01-08/how-facebook-makes-us-dumber> [<https://perma.cc/QEX8-4NPX>] (discussing confirmation bias on social media).

⁷⁴ See Lelkes et al., *supra* note 72, at 13.

⁷⁵ The coverage formula under section 4 had a decidedly Southern focus. See Davidson, *supra* note 12, at 30–31. Gains in African-American voter registration were made primarily in the South. See *id.* at 29–30, 36. Certainly the Voting Rights Act's

least more viable than it is today because it centered on a specific region and was widely regarded as exceptional. With current voting rights controversies spread across the country, deals between the two parties are harder to reach.

Before delving into the details of how redistricting and election administration are affected by conjoined polarization, we note that the transformation of voting rights from a circumscribed, regional problem into a contentious, national one renders the challenges we describe more insurmountable. As a rule of thumb in politics, the wider the scope of potentially affected interests, the larger the opposition coalition and the more difficult it will be to achieve a broad consensus.⁷⁶ Contemporary voting rights issues cover a wider spectrum of minority groups and have potential consequences for partisan power across the country. Whether or not today's members of Congress and politicians generally are as able as those in the past, they are operating in a more complex environment.

A. Redistricting

1. *The Protections for Minority Voting Rights Under the Voting Rights Act*

The Voting Rights Act helped minorities achieve an unprecedented level of representation in a relatively short period of time.⁷⁷ These achievements were possible thanks to two crucial components of the Act: section 2 and section 5. Section 2 provided the affirmative litigation tool to create new majority-minority districts,⁷⁸ and section 5 provided the preclearance backstop to secure those districts.⁷⁹

Section 2 provided the doctrinal handle for challenging voting practices and arrangements that prevented minorities from electing their representatives of choice. Most cases involved challenges to at-large election schemes that often made it impossible for minorities, mostly African-Americans, to elect their representatives of choice.⁸⁰ It became, over time, a powerful instrument for affirmatively advancing minority representation. But this was not always the case. Before 1982, courts interpreted section 2 to impose an intent requirement for discriminating against minorities before redistricting plans

protections were not limited to African-Americans, but the history of the Voting Rights Act and the advocacy for African-American voting rights are intertwined. *See id.* at 30.

⁷⁶ The formalization of this insight is the size principle. *See* WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 126–27 (1962).

⁷⁷ Davidson, *supra* note 12, at 26–27.

⁷⁸ *See* 52 U.S.C. § 10304 (Supp. II 2014) (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437).

⁷⁹ *See id.* § 10302 (originally enacted as § 5, 79 Stat. at 439).

⁸⁰ The basis for such litigation is discussed in Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 984 (1981).

could be struck down.⁸¹ The 1982 amendment eliminated the intent requirement and explicitly implemented an effects standard.⁸² The Court in *Thornburg v. Gingles* then laid out a simplified three-part test for determining when a political jurisdiction had to remedy a situation of minority underrepresentation.⁸³

Section 5, while no less significant, played a more defensive role. The preclearance regime was, by definition, put into place in order to prevent backsliding in minority representation.⁸⁴ In places with a long history of racial discrimination and exclusion, section 5 played a major role in preventing reversion to entrenched discriminatory methods and practices.⁸⁵ Section 2 and section 5 worked in tandem: section 2 allowed minorities to secure gains in representation,⁸⁶ and section 5 allowed them to hold on to those gains through the non-retrogression standard.⁸⁷

Yet as minority gains grew, the scope of both section 2 and section 5 became increasingly limited. Section 2's ability to create new minority ability-to-elect districts was hamstrung by the Court's decision in *Shaw v. Reno*⁸⁸ and its progeny.⁸⁹ In the *Shaw* line of cases, the Court held that while race may be taken into account in drawing districts, and indeed must be taken into consideration under the Voting Rights Act, excessive consideration of race in

⁸¹ See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). For more background on section 2, see *Thornburg v. Gingles*, 478 U.S. 30, 43–46 (1986).

⁸² Section 2 now protects against:

Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of *or will have the effect of* diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote

52 U.S.C. § 10304(b) (emphasis added) (as amended by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134).

⁸³ *Gingles*, 478 U.S. at 50–51. Under the *Gingles* test, the minority must prove that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) it is politically cohesive, and (3) racial-bloc voting usually defeats the minority's preferred candidate. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 618 (3d ed. 2007).

⁸⁴ *About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> [<https://perma.cc/AKR7-HR7Z>] (last updated Aug. 8, 2015) [hereinafter *About Section 5*].

⁸⁵ See, e.g., *infra* notes 139 and 164.

⁸⁶ See U.S.C. § 10304.

⁸⁷ See *id.* § 10302; see also *About Section 5*, *supra* note 84.

⁸⁸ *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

⁸⁹ *Hunt v. Cromartie*, 526 U.S. 541, 553–54 (1999); *Shaw v. Hunt*, 517 U.S. 899, 916–17 (1996); *Miller v. Johnson*, 515 U.S. 900, 927 (1995); *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994). For a modern case along this line of cases, but with a different outcome, see *Alabama Legislative Black Caucus v. Alabama (ALBC)*, 135 S. Ct. 1257, 1287–88 (2015), and also *id.* at 1287–88 (Thomas, J., dissenting).

redistricting triggered strict scrutiny.⁹⁰ Other traditional redistricting criteria, such as compactness and communities of interest, must also be taken into account.⁹¹ And section 5's role was strictly limited to a retrogression standard, and could not be used, like section 2, to affirmatively create majority-minority seats.⁹²

The new legal restraints plus the earlier achievements in African-American representation meant that by the 2001 round of redistricting, most of the new minority ability-to-elect opportunities were situated in areas that had experienced high rates of immigration, naturalization, and fertility—i.e. primarily Latino, and to a lesser extent Asian-American neighborhoods.⁹³ Immigrant demography had some indirect benefits for African-American representation.⁹⁴ Even though the African-American population share was declining nationally over this period, African-American incumbents in cities like Los Angeles were able to hold onto their seats longer than might be expected because the remaining African-American populations in their districts had a higher proportion of voters than the Latino communities in their districts did.⁹⁵ Moreover, African-Americans and Latinos shared an allegiance to the Democratic Party.⁹⁶

The Court's decision in *Shelby County v. Holder*⁹⁷ could have serious consequences for the 2020 redistricting cycle. By striking down section 4 of the Voting Rights Act, which established a coverage formula for parts of the country that would be subject to the preclearance process, it essentially neutered section 5.⁹⁸ The 2021 round of redistricting will be the first in recent history without section 5 preclearance protection. Section 5 was a strong regulatory tool for two reasons. First, the retrogression standard clearly put the burden on the line drawers to draw and justify no fewer than the existing

⁹⁰ See, e.g., *Shaw*, 509 U.S. at 657.

⁹¹ *Id.* at 646. The traditional redistricting principles are compactness, contiguity, and respect for political subdivisions. *Id.* at 647.

⁹² The Supreme Court also eroded some of section 5's enforcement power. For instance, in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 341 (2000), the Court held that the Voting Rights Act did not prohibit preclearing a redistricting plan that was enacted with a discriminatory purpose, but with non-retrogressive effects.

⁹³ See WILSON, *supra* note 42, at 179 (discussing the “new immigrant” migration of Asian- and Latin-American immigrants and their gravitation toward urban centers).

⁹⁴ See Karen M. Kaufmann, *Black and Latino Voters in Denver: Responses to Each Other's Political Leadership*, 118 POL. SCI. Q. 107, 119–20 (2003) (discussing the voting habits of Latino and African-American voters in Denver and other major cities throughout the 1990s).

⁹⁵ *Id.* at 120.

⁹⁶ This was evident in the large differential in the Hispanic vote share between President Obama and John McCain. See MARK HUGO LOPEZ & SUSAN MINUSHKIN, PEW HISPANIC CTR., 2008 NATIONAL SURVEY OF LATINOS: HISPANIC VOTER ATTITUDES ii (July 2008), <http://www.pewhispanic.org/files/reports/90.pdf> [<https://perma.cc/7HMM-GQXB>].

⁹⁷ *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

⁹⁸ See *id.* at 2627, 2631; see also *id.* at 2632 (Thomas, J., concurring).

number of minority ability-to-elect districts.⁹⁹ This meant that unless the minority population dropped drastically, it would not lose seats over time.

But secondly, and perhaps more powerfully, the Department of Justice's functional analysis brought a number of additional factors to bear on the task beyond sheer population statistics—i.e. extensive voting statistics, historical background, events leading up to the redistricting, departures from normal procedures, and legislative and administrative history.¹⁰⁰ This created enormous uncertainty and risk aversion about whether the Department of Justice or the D.C. Circuit Court¹⁰¹ would approve of any given plan. If not, a covered jurisdiction would be forced to produce a timely replacement plan or to use a court-ordered plan.

2. Remaining Doctrinal Tools for Protecting Minority Voting Rights Against Partisan Gerrymandering

The invalidation of section 5's enforcement power puts more of the burden for protecting minority representation from an adverse redistricting plan on section 2 and the relevant constitutional amendments. The uncertainty over their effectiveness will affect both the incentives of legislatures when drawing maps and the remedial tools available to litigants who seek to challenge them.

The thinning legal protection of voting rights coincides with increasing political polarization, which raises the stakes for more partisan gerrymandering where the local political conditions permit (i.e., unified control of the redistricting process).¹⁰² Partisan gerrymandering will not be new to the 2020 redistricting cycle. Prior to the 2011 redistricting cycle, Republicans rode a national wave of support in 2010 to gain control of the redistricting process in twenty states.¹⁰³ They were therefore able to make gains in the state legislatures and Congress through redistricting that had been

⁹⁹ See About Section 5, *supra* note 84.

¹⁰⁰ See *generally* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470 (Feb. 9, 2011) (summarizing the Attorney General's delegation of authority for determinations under section 5 in light of recent legislation and judicial decisions, and providing guidance concerning the review of redistricting plans submitted to the Attorney General).

¹⁰¹ Instead of going through preclearance by the Department of Justice, jurisdictions had the option of obtaining a declaratory judgment from a three-judge panel of the District of Columbia District Court. *Id.* at 7470.

¹⁰² See *supra* note 21 and accompanying text.

¹⁰³ Based on the way that the NCSL calculates state control, nine state governments were controlled by Republicans before the 2010 election. NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 STATE AND LEGISLATIVE PARTISAN COMPOSITION PRIOR TO THE ELECTION (Nov. 2010), http://www.ncsl.org/documents/statevote/2010_Legis_and_State_pre.pdf [https://perma.cc/9H5B-4P7L]. After the election in 2010, the number rose to twenty. NAT'L CONFERENCE OF STATE LEGISLATURES, 2011 STATE AND LEGISLATIVE PARTISAN COMPOSITION (Jan. 2011), http://www.ncsl.org/documents/statevote/2010_Legis_and_State_post.pdf [https://perma.cc/GYP5-WBZC].

denied to them in earlier decades when the Democrats controlled more state legislatures and governorships.¹⁰⁴ A plan with Republican bias can increase the Party's seat share by efficiently clustering Republican voters just enough to win but not so much as to waste Republican votes. At the same time, the strategy would aim to either concentrate or fracture Democratic voters.¹⁰⁵ The tactic of packing minority voters is facilitated by the inherent residential clustering of minorities in ghettos, barrios, and minority neighborhoods.¹⁰⁶

In some of these instances of partisan gerrymandering, the Voting Rights Act was employed as an excuse to pack minority voters. There may be no need for a majority-minority district if liberal whites or other minority groups demonstrate a willingness to vote for a minority candidate of choice. In some states, packing minorities into existing majority-minority districts diverted them away from competitive districts, as was the case in *Alabama Legislative Black Caucus v. Alabama (ALBC)*.¹⁰⁷ In that case, the Republican legislature had packed African-American voters into existing majority-minority districts, and cited two legitimate rationales to justify its 2012 plan: first, to limit district population deviations as mandated by the Supreme Court's decision in *Reynolds v. Sims*,¹⁰⁸ and second, to avoid retrogression under section 5 of the Voting Rights Act.¹⁰⁹ But packing African-Americans to prevent retrogression was clearly unnecessary. Prior to the 2012 redistricting plan, many of the majority-minority Alabama districts were already heavily concentrated—for instance, 72.75% of District 26's population was African-American.¹¹⁰

The use of the non-retrogression standard as a pretext to pack minority voters also occurred in Virginia in *Wittman v. Personhuballah*.¹¹¹ The Virginia Legislature packed minority voters in the already heavily majority-minority District 3, represented by Bobby Scott.¹¹² It claimed that the reason it did so

¹⁰⁴ Carl Klarner, *Forecasting Control of State Governments and Redistricting Authority After the 2010 Elections*, 8 FORUM, Oct. 2010, at 20–21. The Republican plan was known as “Operation REDMAP.” Republican State Leadership Comm., *2012 REDMAP Summary Report*, REDISTRICTING MAJORITY PROJECT (Jan. 4, 2013), <http://www.redistrictingmajorityproject.com/?p=646> [https://perma.cc/J6JK-SPNS1].

¹⁰⁵ For a description of how a partisan plan works, see Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 331 (1985).

¹⁰⁶ Bruce E. Cain et al., *Sorting or Self-Sorting: Competition and Redistricting in California?*, in THE NEW POLITICAL GEOGRAPHY OF CALIFORNIA 245, 245 (Frédéric Douzet et al. eds., 2008); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241 (2013).

¹⁰⁷ *Ala. Legislative Black Caucus v. Alabama (ALBC)*, 135 S. Ct. 1257, 1282 (2015) (Thomas, J., dissenting).

¹⁰⁸ *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964) (holding that state legislative districts had to be equipopulous).

¹⁰⁹ *ALBC*, 135 S. Ct. at 1263.

¹¹⁰ *Id.*

¹¹¹ *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016), *dismissing appeal from Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029 (E.D. Va. June 5, 2015). The appeal to the Supreme Court was dismissed for lack of standing. *Id.* at 1734.

¹¹² *Page*, 2015 WL 3604029, at *17.

was to ensure compliance with the non-retrogression standard of the Voting Rights Act even though there was no evidence Representative Scott was ever in danger of losing his seat given his support among the liberal white community as well.¹¹³

a. *Shaw and Progeny*

Redistricting plans that aim for partisan advantage by dividing the population based on race may be challengeable under the *Shaw* line of cases. Indeed, that is what the Court used to strike down the redistricting plans in both Alabama and Virginia: it found that the plans focused too much on the race of the inhabitants when drawing districts.¹¹⁴ Yet conjoined polarization will reduce the effectiveness of racial gerrymandering doctrine.

The Court has expressed deep reluctance to hear partisan gerrymandering claims.¹¹⁵ In attempting to prevent the courts from entering the political thicket, the Court has implanted a partisan exception under the *Shaw* line of cases. In *Easley v. Cromartie*,¹¹⁶ the Court held that courts must be satisfied that race, *rather than* party, was the dominant explanation for district lines before the redistricting plan can be struck down as a racial gerrymander.¹¹⁷ This requirement likely encompasses so few redistricting scenarios as to almost entirely neutralize any effect that the racial gerrymandering doctrine might have.

Such a distinction between race and party is meaningless in the context of conjoined polarization. Nearly every decision to discriminate against racial minorities in voting has an electoral purpose. Considered in that light, all manipulations of the electoral process are at heart partisan. But since direct evidence of motive is almost never available in redistricting, courts have to rely on line drawers' conduct in inferring their motivation. The gerrymanders in *ALBC* and *Wittman* were easy to strike down because they were unsophisticated and ham-handed: the legislatures simply looked at the race of the inhabitant and decided which district the inhabitant should be in.¹¹⁸ Presuming one's politics based on one's race is *prima facie* racial stereotyping precluded by the Constitution.¹¹⁹

¹¹³ *Id.*

¹¹⁴ *ALBC*, 135 S. Ct. at 1270–72 (finding that race could have predominated in the drawing of district lines); *see also Page*, 2015 WL 3604029, at *13–15.

¹¹⁵ The Court opened the door to hearing partisan gerrymandering claims in *Davis v. Bandemer*, 478 U.S. 109, 127 (1986), but in *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004), it failed to coalesce around a workable standard to measure unconstitutional partisan gerrymanders.

¹¹⁶ *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

¹¹⁷ *Id.*

¹¹⁸ *See ALBC*, 135 S. Ct. at 1270–72; *Page*, 2015 WL 3604029, at *19.

¹¹⁹ *Bush v. Vera*, 517 U.S. 952, 968 (1996).

Future racial gerrymanders may not be as easily challenged as in *ALBC* and in *Wittman* for several reasons. First, racial gerrymandering doctrine is inherently uncertain, with ill-defined upper and lower constraints. There is a danger in doing either too much or too little for minority representation. When the Voting Rights Act was intact, line drawers were authorized, and indeed in some situations required, to take race into consideration in drawing district lines. Now that section 4 has been voided, it is uncertain how much line drawers will be allowed to take race into account.¹²⁰ And it is unclear whether anything short of using race data, and race data alone, will run afoul of the Court's test for racial gerrymanders.

Second, the emphasis that the *Shaw* line of cases puts on the appearance of a gerrymandered district may also hamper the doctrine's ability to adjudicate future racial gerrymanders produced in the context of conjoined polarization. In striking down the racially gerrymandered districts in *Shaw*, the Court discussed their uncouth shapes: one resembling a "Rorschach ink-blot test," and the other winding like a snake.¹²¹ And it held, explicitly, that the appearance and shape of a district are relevant factors to consider in racial gerrymandering cases.¹²² The emphasis on the appearance of racial gerrymanders may make sense in states where minorities are spread out spatially across the state. In those circumstances, legislatures *have* to draw contorted district lines in order to capture minorities in a single district.¹²³

But a racial gerrymander certainly can be accomplished without drawing hideous or misshapen districts. Especially in places where minorities are residentially clustered,¹²⁴ racial gerrymanders may be accomplished by creating compact and contiguous districts. The shape of the district is therefore a red herring in these cases. As in other areas of life, appearances may blind observers to other forces at play. While the irregular shape of a district may give judges reason for suspicion of a redistricting plan, it must not be a necessary element of a racial gerrymander claim.

Third, conjoined polarization makes it easy for line drawers to avoid using race data in the future. Conjoined polarization allowed Republicans in Alabama and Virginia to redistrict based on race and achieve a partisan outcome.¹²⁵ Legislators may in the future achieve the same racial ends simply

¹²⁰ Certainly, race must still be taken into account under section 2 of the Voting Rights Act. *Section 2 of the Voting Rights Act*, U.S. DEP'T JUST., <https://www.justice.gov/crt/section-2-voting-rights-act> [<https://perma.cc/6F4J-T865>] (last updated Aug. 8, 2015).

¹²¹ *Shaw v. Reno*, 509 U.S. 630, 635 (1993) (quoting *Shaw v. Barr*, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)).

¹²² *Id.* at 647 ("Put differently, we believe that reapportionment is one area in which appearances do matter."). Racial gerrymandering cases routinely look to the shape of the district as circumstantial evidence. *See, e.g., Page*, 2015 WL 3604029, at *10–13.

¹²³ This is what happened in *Shaw*, 509 U.S. at 633–34.

¹²⁴ *See* Chen & Rodden, *supra* note 106, at 241; *see also* Cain et al., *supra* note 106, at 245.

¹²⁵ *See Page*, 2015 WL 3604029, at *10 ("Defendants and the dissent are inarguably correct that partisan political considerations, as well as a desire to protect incumbents,

by looking at partisan data: African-Americans and Latinos are distinctively more Democratic than whites and Asian-Americans.¹²⁶ The partisan cue effectively serves the purpose of the racial cue. In the context of conjoined polarization, race and politics are mirror images of each other and can be used interchangeably for redistricting.

Fourth, adapting to the Court's decisions in *ALBC* and *Wittman*, Republican legislatures may also employ other pretexts to achieve their partisan goals. For instance, some racial gerrymanders may be justified by arguing that there is no guarantee that minorities will have an ability to elect unless the minority population achieves a majority or even supermajority share of the electorate, an assertion that can only be disproven with a careful analysis of prior voting patterns. In order to determine the minority population required to prevent retrogression under preclearance, jurisdictions had the burden of conducting these kinds of voting analyses (requiring extensive data collection) to be submitted to the Department of Justice under preclearance guidelines.¹²⁷ Without such a requirement, legislatures in the future may argue, with little or no data, that a district must be packed in order to guarantee minorities the ability to elect. Their argument is a variation on the theme of "what you don't know can't hurt you": if a voting analysis is never conducted, then the line drawers would have no reason to know how many votes are needed to maintain ability-to-elect districts.¹²⁸

Even if the Voting Rights Act fades out as a plausible pretext for packing African-American voters, there are other ways to legitimize packing. For instance, packed districts may appear to fit compactness or communities of interest criteria that many states and local jurisdictions have adopted in recent years. Because these criteria are not overtly racial, they may effectively preclude a racial gerrymandering challenge.

When Democrats solely control the redistricting process, the logic reverses, creating a different path to retrogression. The Democratic strategy for increasing the Party's seat share is to crack—i.e. divide up and pair highly loyal Democratic African-American or Latino voters with white voters in order to achieve efficiently winnable seats.¹²⁹ This was, of course, the initial

played a role in drawing district lines."); see also Ala. Legislative Black Caucus v. Alabama (*ALBC*), 135 S. Ct. 1257, 1266–67 (2015).

¹²⁶ See generally Stephen Ansolabehere & Charles Stewart III, *Amazing Race: How Post-Racial Was Obama's Victory?*, BOSTON REV. (Jan./Feb. 2009), http://bostonreview.net/archives/BR34.1/ansolabehere_stewart.php [<https://perma.cc/3YFE-35XD>].

¹²⁷ Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 232–34 (2003).

¹²⁸ Indeed in *Wittman v. Personhuballah*, the legislature adopted this exact same strategy: it failed to conduct a racial bloc voting analysis to determine just how many minorities would have to be in the Third District for it to continue to be a minority ability-to-elect district. *Page*, 2015 WL 3604029, at *4.

¹²⁹ *Cox v. Larios*, 542 U.S. 947 (2007) (mem.), is such an example. For a discussion of the case, see Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 564–65 (2004).

redistricting problem the Voting Rights Act had to solve when the Democrats controlled most state legislatures, and white Democratic incumbents represented minority constituents in the 1960s and 1970s.¹³⁰ Since neither maximizing minority representation nor proportional representation are required by the Voting Rights Act, the door would be theoretically open to creating more coalitional seats in section 5 jurisdictions when conditions of polarization or exclusion do not justify such a decision. Under pressure to compete for Congressional or state legislative seats, Democrats could fail in their duty to provide equal opportunities for previously excluded minorities to elect candidates of choice.

b. *The Erosion of Section 2 Protections in Redistricting*

The demise of section 5, the unreliability of the *Shaw* line of cases, and the nonexistence of a partisan gerrymandering doctrine all shift the redistricting enforcement burden onto section 2. Despite *Shelby County*, efforts to diminish minority representation by fracturing reasonably compact minority neighborhoods where there is evidence of white majority polarization certainly still violate section 2.¹³¹ But the conjoining of party, ideology, and race complicates the standard section 2 tests for polarization—first because the *Gingles* tests were predicated on detecting racial divisions within the Democratic Party, and second, because the increased intermingling of minority communities in many areas of the country complicates all three parts of the *Gingles* test.

When the Voting Rights Act was passed, the predominant racial problem was the prejudice and domination of white conservative Democrats; at that time, partisanship could be held constant and racial effects could be more cleanly measured by examining elections that pitted African-American or Latino candidates against white candidates in Democratic primaries or nonpartisan contests.¹³² But since white social conservatives have become Republican, polarization is most evident in November races, which makes it hard to distinguish racial animus from normal partisan loyalty. Will typical November partisan voting patterns demonstrate enough racial polarization to justify a section 2 obligation to draw additional minority ability-to-elect districts? Or will the Court require a more refined analysis comparing, say,

¹³⁰ See *supra* notes 12–13 and accompanying text.

¹³¹ Section 2's utility was clearly demonstrated in Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006).

¹³² See, e.g., Bernard Grofman et al., *The "Totality of the Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 LAW & POL'Y 199, 209, 210 tbl.1 (1985) (describing vote shares in primary elections); Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 SOC. SCI. HIST. 507, 517–20 (1990) (same).

November polarization levels given white liberal candidates (e.g., John Kerry in 2004) as opposed to liberal minority candidates (e.g., Obama)?

Conjoined polarization renders futile any attempt under section 2 to distinguish between race and politics. Theoretically, the intermingling of race and politics *ought* not matter under section 2. A section 2 violation can be established based only on racially disparate results, without racially discriminatory intent.¹³³ Therefore, courts are not meant to enquire whether race, *rather than* politics, was the reason for district lines that dilute minority voting strength.¹³⁴ Doctrinally, it is sufficient that those district lines do in fact dilute minority voting strength. But *LULAC v. Clements*¹³⁵ puts this simple correlation requirement in jeopardy.¹³⁶ If section 2's prohibition against vote dilutions of minorities becomes interchangeable with a prohibition against vote dilutions of *Democrats*, it will face strong resistance from the federal judiciary.

Another challenge for section 2 will be the ever-increasing intermingling of minority populations. From the start, the Court has set a high bar for coalitional claims under section 2. *Bartlett v. Strickland* removed any obligation to create coalitional seats under the Voting Rights Act.¹³⁷ Even with the most favorable of the first prong—50% of the population as opposed to Voting Age Population or Citizen Voting Age Population—more urban areas in particular will be unprotected from partisan efforts to create packed minority seats.¹³⁸

Much of what is certain about the 2020 round of redistricting is political. Surely, the parties will ruthlessly redistrict in search of any partisan advantage. What is uncertain is legal. Conjoined polarization undermines the ability of the racial gerrymandering doctrine to keep gerrymanders in check. And when combined with demographic change, conjoined polarization compels an updating of section 2 doctrinal tools if they are to be effective in securing minority voting rights. This combination of certainty and uncertainty is toxic: even risk-averse legislatures may gerrymander first and fight any legal challenges later. In the next Part, we discuss the threats to minority voting rights through election administration given conjoined polarization. The same

¹³³ 52 U.S.C. § 10304(b) (Supp. II 2014).

¹³⁴ *See id.* This is very different from the Court's racial gerrymandering jurisprudence, where much of the focus of the Court's inquiry *is* whether race, rather than politics, dominated the drawing of the district lines. *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

¹³⁵ *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc).

¹³⁶ *Id.* at 863 ("Electoral losses that are attributable to partisan politics do not implicate the protections of § 2."); *see also* Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1393 (2010).

¹³⁷ *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (observing that crossover districts cannot meet the first prong under *Gingles* for the minority group to be sufficiently large and geographically compact enough to constitute a majority in a single-member district).

¹³⁸ *See id.* at 26–27 (Souter, J., dissenting).

theme resonates: partisan incentives to manipulate the electoral process to the detriment of minority voting rights are clear and certain, whereas the legal remedies to address them are in flux.

B. *Election Administration*

It is more than a little ironic that voter qualifications and electoral procedures have re-emerged as voting rights controversies. The initial rationale for passing the Voting Rights Act was to address the discriminatory practices that prevented large numbers of African-Americans in the South from registering and voting.¹³⁹ The bipartisan consensus against these practices was so substantial in 1964 that it was possible to pass the Twenty-Fourth Amendment¹⁴⁰ prohibiting poll taxes despite the politically complex supermajority and multilevel approval process required to amend the U.S. Constitution.¹⁴¹ One wonders whether the Twenty-Fourth Amendment would pass in the current highly polarized environment. And there is virtually no prospect at the moment for a new amendment that would prevent modern efforts to manipulate election processes for political advantage.

In the early 1960s, Southern Democrats used intimidation and onerous voter qualifications, such as poll taxes and literacy tests, to severely depress African-American participation and thereby maintain white political dominance.¹⁴² In the 1960s, moderate and liberal Republicans could support voting rights legislation to end these practices without harming their political prospects, since the South was then beyond their political reach.

¹³⁹For instance, the Voting Rights Act suspended literacy tests nationwide. See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 5 (2007). It also authorized the appointment of federal registrars and examiners to supervise minority voter registration and voting. *Id.*

¹⁴⁰“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” U.S. CONST. amend. XXIV, § 1.

¹⁴¹The House passed the 24th Amendment 295 to 86. *Historical Highlights: The 24th Amendment, August 27, 1962*, HIST. ART & ARCHIVES, <http://history.house.gov/HistoricalHighlight/Detail/37045> [<https://perma.cc/3A44-ANR4>]. A majority of states have also ratified the amendment. *An Overview of the 24th Amendment*, LAWS, <http://constitution.laws.com/24th-amendment> [<https://perma.cc/7HNS-HVGF>].

¹⁴²One of the most notorious of such institutions was the White Primary. It took four Supreme Court decisions to strike it down: *Terry v. Adams*, 345 U.S. 461, 470 (1953); *Smith v. Allwright*, 321 U.S. 649, 666 (1944); *Nixon v. Condon*, 286 U.S. 73, 89 (1932); and *Nixon v. Herndon*, 273 U.S. 536, 541 (1927). The cases challenged Texas’s exclusion of African-Americans from voting in the Democratic primary. Since it was a one party state, the primary was where voters could exercise meaningful choice over who their representatives would be. See, e.g., *Terry*, 345 U.S. at 463.

1. *Changes to Election Administration Under Conjoined Polarization*

With conjoined polarization, things have changed. Contemporary measures such as voter identification laws, restrictions on early voting opportunities, selective precinct consolidations, aggressive voter purges, voter caging, and the like, create additional bureaucratic requirements in the name of ballot security that disproportionately affect disadvantaged groups and minorities.¹⁴³ Given that these groups are on average more likely to support Democratic rather than Republican candidates, many believe that these measures are primarily intended to help Republican candidates by suppressing minority turnout.¹⁴⁴ The evidence that they do is mixed to date. It is clear, for example, that higher numbers of disadvantaged groups and minorities lack photo identification,¹⁴⁵ but there is no firm proof at the moment that these tactics actually have produced a measurable electoral advantage.¹⁴⁶

The voter ID laws have attracted considerable media attention, but they are not the only modern barriers to voting. Such barriers are imposed not only by adding, but also by subtracting, means of voting that voters have come to rely on. Early voting—casting ballots before Election Day—is a good example. When early voting was first introduced in the late 1990s, it seemed to facilitate voting for older, white voters, who faced constraints in voting on Election Day.¹⁴⁷ But the second-generation expansion of early voting in many states,

¹⁴³ *The New Face of Jim Crow: Voter Suppression in America*, PEOPLE FOR AM. WAY, <http://www.pfaw.org/sites/default/files/TheNewFaceOfJimCrow.pdf> [<https://perma.cc/JT9Y-3MXP>].

¹⁴⁴ The North Carolina law (commonly referred to as “SL 2013–381”) that imposed voter ID restrictions, retracted early voting opportunities, same day registration, etc., was passed by the general assembly by “strict party-line votes.” *N.C. State Conf. of NAACP v. McCrory*, 831 F. 3d 204, 217–18 (4th Cir. 2016), *motion to stay denied*, No. 16A168, 2016 WL 4535259 (S. Ct. Aug. 31, 2016) (mem.). The Texas voter ID law was passed by a Republican majority in both the house and the senate. Indeed, Republican control in Texas was crucial not only in passing the law, but in passing it in an expedited fashion. *Veasey v. Perry*, 71 F. Supp. 3d 627, 646–53 (S.D. Tex. 2014), *aff’d in part, vacated in part, and rev’d in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

¹⁴⁵ See, e.g., Declaration of Stephen D. Ansolabehere at 6, *Veasey*, 71 F. Supp. 3d 627 (No. 2:13-cv-193), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey6552.pdf> [<https://perma.cc/VVV8-NR9R>] (finding that Hispanics and African-Americans were up to two and three times, respectively, more likely than whites to lack ID required to vote under Texas’s voter ID law).

¹⁴⁶ Looking across the various studies, the evidence is mixed. See generally U.S GOV’T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS (Sept. 2014), <http://www.gao.gov/assets/670/665966.pdf> [<https://perma.cc/8NJ5-B2FR>].

¹⁴⁷ One study found early voters to be strong partisans, more likely to report an interest in politics, older, more conservative, more likely to be male, and more likely to be poor. Robert M. Stein, *Early Voting*, 62 PUB. OPINION Q. 57, 61 (1998). Notably, it did not observe any differences in race, ethnicity or education levels between early voters and Election Day voters. *Id.*

including North Carolina and Ohio, has been embraced by the minority population.¹⁴⁸ Early voting did not merely expand the number of days that registered voters could vote; it often allowed voters to vote in the evenings and on weekends, and in some cases, allowed them to register to vote and vote on the same day (a practice known as same-day registration).¹⁴⁹ For various reasons, minority populations have benefited disproportionately from the flexibility that early voting and same-day registration offers.¹⁵⁰ During the 2012 General Election in North Carolina, over 70% of African-Americans who cast ballots did so through early voting, compared to 51% of white voters.¹⁵¹ And in some places, early voting allows minority organizing groups to vote as part of a tradition of “Souls to the Polls.”¹⁵²

A couple of states, after having offered early voting for almost a decade, retracted these measures.¹⁵³ Their actions can only be understood in the context of conjoined polarization: the seemingly bureaucratic decision of whether to offer a method of voting conceals a philosophical fight about who should vote. It is no coincidence that early voting opportunities have been taken away by uniformly Republican governors, legislatures, and Secretaries of State.¹⁵⁴

Other seemingly mundane decisions about election administration are at heart also political. The closing of a polling station, for instance, might be a routine, administrative act that election administrators take in response to

¹⁴⁸ Sarah Smith, *Which Voters Show Up When States Allow Early Voting?*, PROPUBLICA (Sept. 22, 2016), <https://www.propublica.org/article/which-voters-show-up-when-states-allow-early-voting> [<https://perma.cc/3FUV-WCKM>].

¹⁴⁹ This is still true today. *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES (Sept. 28, 2016), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> [<https://perma.cc/6ZVA-9UHN>]; *State Laws Governing Early Voting*, NAT'L CONF. ST. LEGISLATURES (May 26, 2016), <http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> [<https://perma.cc/HZT3-RQWM>].

¹⁵⁰ See, e.g., Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331, 341 (2012).

¹⁵¹ Expert Report & Declaration of Paul Gronke at 26, *N.C. State Conf. of the NAACP v. McCrory*, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (No. 1:13-cv-660), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/League1551.pdf> [<https://perma.cc/X7P-BMQT>].

¹⁵² This was a tradition started by the NAACP. For more history, see Herron & Smith, *supra* note 150, at 332 n.3.

¹⁵³ This was the impetus for litigation in *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 529 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), and *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 234 (4th Cir. 2014).

¹⁵⁴ In Ohio, early voting was retracted pursuant to a directive by Republican Secretary of State John Husted and a bill passed by the general assembly. *Ohio State Conf.*, 768 F.3d at 531–32. And in North Carolina, it was retracted by a Republican led legislature. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 218 (4th Cir. 2016) (noting that the voter ID law and other provisions were ratified by “strict party-line votes”), *motion to stay denied*, No. 16A168, 2016 WL 4535259 (S. Ct. Aug. 31, 2016) (mem.).

declining populations in certain areas. But it might also be undertaken in order to make it harder for those who live in those areas to vote. In places with high levels of residential segregation, such tactics can discourage a political or racial group from voting. Conjoined polarization politicizes administrative decisions, and the effects that any election administration change might have on voters cannot be evaluated without a holistic understanding of the context in which the changes are implemented. Such context was available to the Department of Justice lawyers as they evaluated changes in election administration under the preclearance regime, but now that jurisdictions no longer have to justify any changes they make, citizens can only rely on uncertain and costly litigation to reverse any consequential and discriminatory burdens the state imposes on their franchise.

2. *Conjoined Polarization and the American Electoral System*

The potential for a renewed battle over restrictive voter qualifications is baked into the unique features of American election administration. Despite the professionalization and bureaucratization of election administration during the Progressive Era, the American system continues to retain several features that make it highly vulnerable to political manipulation. These include the constitutional allocation of the time, place, and manner of election to the states.¹⁵⁵ The invocation of the Equal Protection Clause in *Bush v. Gore*¹⁵⁶ to stop the Florida count because the state lacked a uniform recount standard¹⁵⁷ gave rise to some speculation that the Clause might play a larger role in policing election administration. But as many commentators have noted, the Court explicitly disclaimed the decision's precedential value, realizing that applying the Equal Protection principle to ballot procedures across the board would substantially disrupt the American electoral system and threaten state sovereignty.¹⁵⁸

Layered on top of a system that allows considerable variation in how national elections are administered, the United States allows partisan officials to run the elections in many states and localities. As a consequence, we have seen in election disputes in Ohio, Florida, and Minnesota that decisions by Secretaries of State about whether to interpret the law loosely or strictly can

¹⁵⁵ U.S. CONST. art. I, § 4.

¹⁵⁶ *Bush v. Gore*, 531 U.S. 98, 103 (2000).

¹⁵⁷ Votes were counted in inconsistent manners in the different counties—a vote cast in a certain county might not have qualified as a viable ballot in another. *Id.* at 106.

¹⁵⁸ See, e.g., Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386–92 (2001). The Court in *Bush v. Gore* itself suggested that the decision might be *sui generis*. *Bush*, 531 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

swing the balance in a tight election.¹⁵⁹ Even when partisan officials arguably attempt to be fair-minded, the perception of bias is strong. Such disputes may be intra-governmental: when the state legislature and the state generally is Democratic, but the Secretary of State is a Republican, there can be vicious divides *within* the state on how elections are administered. Other countries use neutral civil servants to administer elections.¹⁶⁰ The United States entrusts the economy to an unelected body of experts at the Federal Reserve Bank, but by contrast, hands the responsibility for administering elections to party loyalists.¹⁶¹

American politics is also highly professionalized and specialized. Long before *Bush v. Gore*, there were firms and consultants that specialized in recounting ballots and lawyers who had mastered the arcane rules that govern them. Disqualifying ballots was a recognized political expertise. This trend has only intensified since *Bush v. Gore*. Each party recruits teams of lawyers to watch for ballot irregularities and to file motions in court if necessary.¹⁶² The lasting effect of *Bush v. Gore* is the prolongation of electoral contests: political warfare does not conclude when ballots are cast.

3. Shelby County's Effect

These innate features of American election administration, coupled with heightened political incentive to tamper with election administration for partisan goals, pose grave dangers for minority voting rights.¹⁶³ Without section 5,¹⁶⁴ minorities are left with the more limited and uncertain scope of

¹⁵⁹ For a discussion of the Ohio and Florida election disputes, see *supra* notes 153–54, 156–58 and accompanying text.

¹⁶⁰ Australian federal elections, for instance, are run by a single, independent administrative agency. Kenneth R. Mayer, *Comparative Election Administration: Can We Learn Anything From the Australian Electoral Commission?* 11 (2007) (unpublished paper), <https://works.bepress.com/mayer/17/download/> [<https://perma.cc/7ZJ6-HZAU>]. For further discussion of how Australian federal elections are run, see *id.* at 9–15. This method of administering elections is not unusual among developed democracies. Shaheen Mozaffar & Andreas Schedler, *The Comparative Study of Electoral Governance—Introduction*, 23 INT'L POL. SCI. REV. 5, 15 (2002).

¹⁶¹ Daniel P. Tokaji, *Teaching Election Administration*, 56 ST. LOUIS U. L.J. 675, 686 (2012).

¹⁶² See Erick Trickey, *How Hostile Poll-Watchers Could Hand Pennsylvania to Trump*, POLITICO MAG. (Oct. 2, 2016), <http://www.politico.com/magazine/story/2016/09/2016-election-pennsylvania-polls-voters-trump-clinton-214297> [<https://perma.cc/5GZF-RWBW>] (discussing the use of “poll watchers” in the current election).

¹⁶³ These dangers include the introduction of voter ID laws, cutbacks to early voting, same day registration and other reforms adopted to expand access to the polls, and the resurgence of dual registration systems. See generally Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675 (2014).

¹⁶⁴ Section 5 was especially important in protecting minorities' access to the ballot. Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L.

section 2 of the Voting Rights Act and constitutional provisions to protect their voting rights.

Even more fundamentally, minorities are left only with the tool of litigation to safeguard their rights. Litigation has two main pitfalls: (1) it is necessarily selective in the way it enforces rights, and (2) it is retrospective rather than prospective. Section 5 put the burden on jurisdictions to justify changes they wanted to make to election administration.¹⁶⁵ Those potentially affected had the status quo on their side—the burden of persuasion was on the jurisdiction. Without section 5, minorities have to rely on affirmative litigation. Given the decentralized nature of election administration, the costs are stacked significantly against minority plaintiffs. For instance, while statewide reductions like those in Texas, North Carolina, and Wisconsin were challenged by large coalitional lawsuits, including sometimes the Department of Justice, many localized changes could easily have a large effect—but not large enough to be worth high litigation costs. To borrow an analogy from Justice Ginsburg in *Shelby County*, battling the multi-headed hydra¹⁶⁶ will require going after some heads and not others, leaving some grave harms necessarily unremedied.

Section 5 preclearance is arguably more important for the protection of minorities from manipulations of the electoral process than from redistricting plans. This is because localized electoral changes can happen quickly, and often without outside consultation or scrutiny. Redistricting, by contrast, is slow and public. The public is often invited to participate through notice and comment. And as a legislative act, many decision-making processes are open to members of the public and the press.¹⁶⁷ Administrative changes, especially at the local level, can occur quickly with little to no public notice. Because decisions about whether to close a polling place or offer changed hours for early voting *can* sometimes be innocuous, members of the public or even the press may not be aware of or care about these changes. Section 5 was especially valuable because the Department of Justice was notified of these

REV. 189, 190 (1983). Preclearance scrutinized many things, among them changes made to registration requirements, *id.* at 198–201, and changes in polling locations, *id.* at 201.

¹⁶⁵ *About Section 5*, *supra* note 84.

¹⁶⁶ *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2633 (2013).

¹⁶⁷ In the 2010 round of redistricting in Florida, for instance, public hearings were held. *Redistricting: Public Hearings 2011*, FLA. SENATE, <https://www.flsenate.gov/Session/Redistricting/Hearings> [<https://perma.cc/3VSG-KMVS>]. The public was also invited to submit plans of their own. See *Redistricting: Submitted Plans*, FLA. SENATE, <https://www.flsenate.gov/Session/Redistricting/Plans?type=State%20Senate&from=ALL&sortBy=PlanDate&sortOrder=descending> [<https://perma.cc/S3DV-4QQE>]. Arizona is similar, even though redistricting is conducted by an independent redistricting commission. The commission conducts three weeks of public hearings, and takes public comment for a minimum of thirty days. Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 580 (2003).

often minute administrative changes, and was therefore able to monitor them or seek more information if their motive or effect was unclear.

Litigation is also necessarily reactive, not proactive. It can only be employed after an evil has occurred. And litigation moves at a slow pace. While changes to election administration are often challenged immediately after they become law, obtaining an injunction that prevents such a law from taking effect can be difficult without hard evidence that the law will do harm. The burden of proof puts advocates in the position of having to prove a hypothetical harm.

In the North Carolina litigation, advocates sought a preliminary injunction before the midterms, and since they could not muster evidence on the possible deleterious effects on the law, the law was allowed to take effect.¹⁶⁸ During the actual trial, the judge denied the permanent injunction in part based on evidence from the November midterms, in which turnout did not decrease.¹⁶⁹ It is hard to use turnout to measure the effect of a law,¹⁷⁰ but advocates are often hard-pressed to rely on such defective evidence when persuasive, causal evidence is difficult, if not impossible, to find.¹⁷¹ The core issue is whether a qualification or procedure imposes an unequal and unnecessary burden on disadvantaged voters, not whether nonprofit and party-related groups can find ways to compensate for this burden by turning out other voters or expending additional resources.

4. *Remaining Doctrinal Solutions*

a. *The Fourteenth Amendment*

Predating the Voting Rights Act, the Fourteenth Amendment was available to voters seeking to challenge discriminatory electoral practices.¹⁷² The availability of the Voting Rights Act, especially the preclearance regime, obviated the need to rely on the Court's Fourteenth Amendment jurisprudence: discriminatory practices were either banned or failed to be precleared. After

¹⁶⁸ N.C. State Conf. of NAACP v. McCrory, 997 F. Supp. 2d 322, 372 (M.D.N.C.), *aff'd in part and rev'd in part sub nom.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014).

¹⁶⁹ N.C. State Conf. of NAACP v. McCrory, No. 1:13CV658, 2016 WL 1650774, at *17 (M.D.N.C. Apr. 25, 2016), *rev'd*, 831 F.3d 204 (4th Cir. 2016), *motion to stay denied*, No. 16A168, 2016 WL 4535259 (S. Ct. Aug. 31, 2016) (mem.).

¹⁷⁰ Veasey v. Abbott, 830 F.3d 216, 276 & n.5 (5th Cir. 2016) (en banc) (Higginson, J., concurring) (citing various sources).

¹⁷¹ Looking to change in turnout as a way to measure the effect of a voting law is not only faulty inferential practice, but may be legally quite beside the point. For a discussion of why the burden on the right to vote should be assessed at the individual, rather than aggregate level, see Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Voting Denial Claims*, 77 OHIO ST. L.J. 763, 769–75 (2016). See also Veasey, 830 F.3d at 260 n.58.

¹⁷² U.S. CONST. amend. XIV.

Shelby County, the Fourteenth Amendment may become important again in setting a constitutional floor on discriminatory practices. Yet given structural defects in the doctrine itself, and the Court's reluctance to use the Fourteenth Amendment aggressively, the Fourteenth Amendment's ability to prevent discretionary but discriminatory election administration changes from going through is doubtful.

The Supreme Court's jurisprudence on proving a Fourteenth Amendment discrimination violation requires proving discriminatory intent.¹⁷³ Intent is difficult to prove because there are usually at least facially reasonable reasons to erect administrative barriers to voting. Preventing ballot fraud is the most common rationale, even though there is little documented evidence of widespread and systematic in-person voter fraud.¹⁷⁴ But there is also as yet no strong evidence that restrictive voting qualifications have either significantly reduced turnout among minority voters and Democrats or boosted confidence in the integrity of the electoral system.¹⁷⁵ And in the case of removing existing voting measures, jurisdictions can always present the rationale of cost reduction.

The intent requirement presents not only a substantive barrier to these cases, but also a psychological one. Judges are hesitant to find a Fourteenth Amendment violation because it means calling legislators or government officials who passed these laws racist. And judges' observation and awareness of conjoined polarization adds to this hesitation—racial outcomes may be a result of primarily partisan factors. In other words, conjoined polarization may operate as an excuse for racially discriminatory outcomes.

The contrast in findings between the Fourth Circuit in the North Carolina photo ID case¹⁷⁶ and the Fifth Circuit in the Texas photo ID case¹⁷⁷ demonstrates this point. The Fourth Circuit, after finding that the North Carolina election law had a discriminatory effect at the preliminary injunction stage,¹⁷⁸ found that the law was implemented with discriminatory intent. It arrived at this finding after interrogating the history of voting rights in North Carolina and all the circumstances of the passage of the law. It gave great weight to the Supreme Court's decision in *Village of Arlington Heights v.*

¹⁷³ See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (finding that discriminatory purpose requires a course of action to be taken “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

¹⁷⁴ See Levitt, *supra* note 54; see also MINNITE, *supra* note 54, at 5–7; Schultz, *supra* note 54, at 494–501.

¹⁷⁵ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 146.

¹⁷⁶ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016), *motion to stay denied*, No. 16A168, 2016 WL 4535259 (S. Ct. Aug. 31, 2016) (mem.). The case did not only involve a challenge to North Carolina's voter ID law, but also other components of the law involving cutbacks to early voting, same day registration, out-of-precinct voting, and pre-registration (registering eligible voters at the age of sixteen so that they can vote immediately upon turning eighteen). *Id.* at 216–18.

¹⁷⁷ *Veasey v. Abbott*, 830 F.3d 216, 260 n.58 (5th Cir. 2016) (en banc).

¹⁷⁸ *N.C. State Conf.*, 831 F.3d at 233.

Metropolitan Housing Development Corp.,¹⁷⁹ which listed the circumstantial evidence courts can take into account in finding discriminatory intent.¹⁸⁰ In essence, the court was willing to look to both context and subtext of the law. By looking holistically,¹⁸¹ the court was able to discern a discriminatory purpose.

The Fifth Circuit, by contrast, struggled with a finding of discriminatory intent. Even when faced with the extensive record found by the District Court, the court needed more evidence of intent before it was willing to make such a finding.¹⁸² It was reluctant to take anything but recent history into account¹⁸³ and to impute the statements of a few legislators to the rest of the legislature.¹⁸⁴ By requiring proof of discriminatory intent at a highly granular level, the Fifth Circuit decision forces courts to squint even harder than the District Court in the case already did for a finding of discriminatory intent.

With section 5, the Department of Justice evaluated whether any change in ballot procedures would reduce the political opportunities of disadvantaged minority groups. The Department was able to apply a functional analysis to determine whether restrictive voting procedures were part of a systematic racial pattern of reducing minority power and political influence. But it is hard to see how the courts can intervene unless minority plaintiffs can show actual harm from voter ID laws, precinct consolidation, flawed voter purge procedures, and the like.

b. *Section 2*

After *Shelby County*, challenges to election administration will have to be channeled through section 2. Since section 2 uses an “effects” standard, and does not require a showing of intent, it avoids some of the pitfalls of the Fourteenth Amendment.¹⁸⁵ Nevertheless, the applicability of section 2 to vote denial claims for changes in election administration is highly uncertain and speculative at this point.

While the language of section 2 encompasses “[a]ny voting . . . practice[s] or procedure[s]” that discriminate against protected classes,¹⁸⁶ the provision has been almost exclusively applied in what are known as vote dilution

¹⁷⁹ *Id.* at 220–21 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

¹⁸⁰ For instance, the historical background of a decision, departures from the normal procedural sequence, and the legislative or administrative history can all be taken into account. *Metro. Hous. Dev.*, 429 U.S. at 267–68.

¹⁸¹ The key difference in the approach taken by the Fourth Circuit and by the district court is in whether intent can be discerned holistically. See *N.C. State Conf.*, 831 F.3d at 223.

¹⁸² See *Veasey*, 830 F.3d at 232–33.

¹⁸³ *Id.* at 232.

¹⁸⁴ *Id.* at 232–33.

¹⁸⁵ See 52 U.S.C. § 10304(b) (Supp. II 2014).

¹⁸⁶ *Id.*

cases.¹⁸⁷ These are cases that fall primarily within the category described in the earlier Part of this Article concerning redistricting. Cases about changes to election administration are known as vote denial cases. They did not have to be brought under section 2 because the preclearance regime filtered out those election practices that would have created injuries amounting to vote denial. The challenge after *Shelby County* for both advocacy groups and courts is in translating section 2's protections against vote dilution to vote denial cases.

Advocacy groups, courts, and scholars have begun in earnest the work of operationalizing section 2 for vote denial cases. A main question that courts face is how much to borrow from the *Gingles* vote dilution line of cases.

The Fourth Circuit's position is that the vote dilution requirements should be imported directly into the vote denial context: proof of racial polarization would become a threshold requirement for vote denial cases as well.¹⁸⁸ This approach has the benefit of experience: courts are familiar with racial polarization analysis in the redistricting context. But the Fourth Circuit has chosen to rely on the racial polarization test at a time when its utility is waning: as mentioned in Part III.A.2, conjoined polarization blurs the boundaries between racial polarization and political polarization.

The Fifth Circuit took a different approach, applying a balancing test that includes the Senate factors from section 2.¹⁸⁹ This borrows from a different doctrinal tradition: the Court's constitutional cases on election administration. In the Fourth Circuit, after overcoming the racial polarization threshold, the court also applied a variation of this balancing approach. A robust version of the balancing/totality of the circumstances test could end up being quite similar to what the Department of Justice or a district court in the District of Columbia would have had to decide under the preclearance regime.¹⁹⁰ But other courts may hesitate to apply such a robust version. Given the Court's hostility to the preclearance formula, labeling it as "strong medicine,"¹⁹¹ courts may choose to shy away from the application of a section 5-like

¹⁸⁷ For a discussion of the term vote denial, see generally Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006). See also *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014) (describing vote denial cases as involving "challenges to methods of electing representatives—like redistricting or at-large districts—as having the effect of diminishing minorities' voting strength"), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

¹⁸⁸ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, at 221–22 (4th Cir. 2016), *motion to stay denied*, No. 16A168, 2016 WL 4535259 (S. Ct. Aug. 31, 2016) (mem.).

¹⁸⁹ *Veasey v. Abbott*, 830 F.3d 216, 243–65 (5th Cir. 2016) (en banc). Indeed, the Fourth Circuit seems to have taken a similar position of applying a balancing test in its opinion reversing in part and affirming in part the district court's denial of preliminary injunction. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239–41 (4th Cir. 2014).

¹⁹⁰ See *League of Women Voters*, 769 F.3d at 245–47.

¹⁹¹ *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618 (2013).

decision-making process. In that case, courts may define a “burden” in such a way as to exclude truly mundane or trivial voting changes.

While the Fifth Circuit did not explicitly apply the constitutional test for the burden on the right to vote, its decision may be instructive in future cases if courts choose to adopt the balancing approach.¹⁹² The Court in *Burdick v. Takushi* answered the question of what constitutes a cognizable burden on the franchise.¹⁹³ Registered voters challenged the Hawaii Director of Elections and others over Hawaii’s prohibition of a practice known as write-in balloting, which allows voters to vote for a candidate by writing his or her own name on a ballot instead of simply choosing among the candidates whose names appear on the ballot.¹⁹⁴ The Court struggled with whether this prohibition on write-in balloting burdened the fundamental right to vote under the Fourteenth Amendment.¹⁹⁵ Elections laws “invariably impose some burden upon individual voters.”¹⁹⁶ Anxious about getting courts involved in all administrative decisions regarding electoral administration, the Court established a flexible standard that weighs the character and magnitude of the asserted injury caused by the election law against the state’s justification for the law.¹⁹⁷

To be sure, a balancing test has its pitfalls. The test suffers from a lack of consistency in how it is applied. But its flexibility also has advantages in the context of election administration. Applying a balancing test that draws from the *Anderson-Burdick* tradition will help sharpen section 2’s applicability to voting changes that are consequential and for which the state has no strong justification. It assuages the anxiety that district courts will be flooded with section 5 preclearance-like cases. Such a standard allows courts to adjudicate claims involving early voting and same-day registration, voting measures that affect large number of voters, and measures that have a disproportionate racial impact.

c. Section 3 Bail-in

Shelby County left open the possibility that jurisdictions might be “bailed in” to the preclearance regime under section 3 of the Voting Rights Act.¹⁹⁸

¹⁹² A balancing test under section 2 for vote denial cases can take on many different flavors. Consider, for example, Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 613–17 (2013); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 473–89 (2015); and Tokaji, *supra* note 187, at 718–27.

¹⁹³ *Burdick v. Takushi*, 504 U.S. 428, 430 (1992). A similar dilemma was presented in *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983). The test for whether a voting practice burdens the right to vote is hence informatively known as the Anderson-Burdick test.

¹⁹⁴ *Burdick*, 504 U.S. at 430.

¹⁹⁵ *See id.* at 433–34.

¹⁹⁶ *Id.* at 433.

¹⁹⁷ *Id.* at 434.

¹⁹⁸ *See* 52 U.S.C. § 10302(a), (c) (Supp. II 2014).

However, before a jurisdiction can be bailed in, a court must make a finding that the jurisdiction purposefully discriminated against minorities under the Constitution. The bail-in procedure is therefore not a workaround to the high constitutional bar set by the intent standard. Even a finding of discriminatory intent may not be sufficient to trigger a bail-in. For instance, after the Fourth Circuit found that the North Carolina legislature enacted election laws with a discriminatory purpose, it declined to bail North Carolina in under section 3.¹⁹⁹ If the standard for bail-in is not only that a court must find that election changes were implemented with a discriminatory intent, then the bail-in provision is not a viable remedial tool, except in the most extreme instances of manipulation of the electoral process to disadvantage minorities.

It is also important to note that a judicial finding of a section 2 violation would not suffice to bail a jurisdiction in under preclearance. Therefore, the likeliest doctrinal tool that will be used to challenge, and perhaps find voting violations, will likely only provide one-off remedies. Even the rare victories may only be short-lived.

IV. CONCLUSION

As with redistricting, the conflation of racial, party, and ideological motives makes it hard for minority voters who have been adversely and differentially affected by restrictive voter qualifications to prove intentional discrimination. The standard will therefore have to be discriminatory effects. In the 1960s, poll taxes and literacy tests dramatically suppressed African-American voting.²⁰⁰ In the redistricting context, the courts tolerate moderate levels of partisan discrimination in line-drawing, even though when it affects Democrats it can also have negative consequences for racial minorities. Applying the same tolerance to discriminatory voter restrictions will severely erode minority voting rights.

The temptation to manipulate the electoral system—through the placement of district lines or the administration of elections—for racial advantage will not abate unless party coalitions become more heterogeneous again. The Republican post-2012 autopsy recommended broadening its racial and ethnic appeal, in recognition of demographic trends.²⁰¹ The Trump nomination shut that option down in 2016. Conjoined polarization could still lessen in the future, but in the interim, the overlap of racial with partisan motives increases the urgency of putting limits on political manipulation. With no immediate prospects of fixing section 5 and given the still limited application of equal protection to electoral administration after *Bush v. Gore*, the voting rights

¹⁹⁹ N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016), *motion to stay denied*, No. 16A168, 2016 WL 4535259 (S. Ct. Aug. 31, 2016) (mem.).

²⁰⁰ See Davidson, *supra* note 13, at 13.

²⁰¹ REPUBLICAN NAT'L COMM., GROWTH & OPPORTUNITY PROJECT 7–8 (2013), http://goproject.gop.com/mc_growth_opportunity_book_2013.pdf [<https://perma.cc/HEK3-79C8>].

community will need to devise some other means to limit the mischiefs of conjoined polarization.

One answer might be to make better use of the totality of circumstances test to identify holistic patterns of partisan and racial discrimination that have the effect of undercutting the political influence of racial and ethnic minorities. States that both pass restrictive voter qualification legislation and engage in partisan redistricting practices that negatively affect racial and ethnic minorities deserve special scrutiny. Is it simply a coincidence that states like North Carolina, Texas, and Florida have passed both restrictive election administration bills and partisan gerrymanders in the last decade? The timing of such efforts (i.e., just after a change in party control and before an election) should also trigger concern. A holistic assessment under section 2, borrowed from the *Anderson-Burdick* test, of the burdens on voting weighed against the state's justification for imposing those burdens may help remedy some of the most egregious attempts to erode minority voting rights after *Shelby County*.

Additionally, rights-restricting efforts should be treated differently from rights-enhancing efforts or even maintaining the status quo.²⁰² The right to vote is a First Amendment right. Since the Court regards efforts to cap or limit speech as inherently odious, it should regard efforts to limit the fundamental right to vote with suspicion as well. If a state or jurisdiction asserts that it must increase the cost and inconvenience of voting, it should provide solid evidence that there is a problem that requires the proposed measures. And if there is evidence of a need to boost ballot security, the administrative solution should be narrowly tailored to ease the burden on vulnerable populations.

For doctrine to take more seriously the difference between rights-restricting and rights-enhancing efforts in the context of voting rights is unremarkable given that such a distinction is often made in other areas of law. In the context of obtaining a preliminary injunction, for instance, many courts make the distinction between a status-quo-altering injunction (i.e., mandatory injunction) and one that merely preserves the status quo (i.e., prohibitory injunction).²⁰³ Injunctions that seek to alter the status quo are subject to a heightened burden of proof: the theory behind the doctrine is that the presumption ought to be in favor of preserving the status quo.²⁰⁴ While commentators seem to generally disfavor the distinction in the context of preliminary injunction doctrine,²⁰⁵ the presumption against change in voter qualifications and means of casting ballots makes good sense. It allows courts

²⁰² Some commentators believe that the Voting Rights Act itself makes this distinction. *See, e.g.*, Karlan, *supra* note 171, at 779–85. Therefore, cutbacks to voting opportunities are actionable under section 2 of the Voting Rights Act. *See id.*

²⁰³ For a discussion of how courts approach these two different kinds of injunctions, see generally Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001).

²⁰⁴ *See id.* at 110.

²⁰⁵ *See, e.g., id.* at 166.

to err on the side of protecting minority voting rights while still permitting the state to make changes in justified ways.

Certainly, if the Court decides to adjudicate partisan gerrymandering claims, it would obviate much of the quagmire it has created over the years on how racial motivations may be disentangled from partisan ones. But if not, the Court is limited doctrinally in what it can do with respect to redistricting. The courts need assistance from the political process to arrive at a definition of political fairness. Without political guidance, there is no clear path from the U.S. Constitution to any particular fairness standard. Proportional representation, the most intuitive standard, has been ruled out. But if states or local jurisdictions could agree on some standard, it would be possible to limit political unfairness to some reasonable and measurable amount.

Political scientists have suggested a number of alternative measures in addition to proportional representation deriving from the symmetry and slope of the seats-vote curve.²⁰⁶ Recent advances in computation will allow them in the near future to generate large samples or the entire population of feasible fully balanced plans for Congress or the state legislature in any given state.²⁰⁷ A proposed plan could be measured against all possible alternative plans with respect to each of the criteria, including equal population, to identify outliers. If a state adopts legislation that stipulates that any plan must be no more disproportionate or asymmetric than 75% of all possible fully balanced plans (i.e., meeting all the criteria as well), this would give the courts enough guidance to limit political unfairness.

Many reformers regard the decentralized structure of American government as an obstacle to sensible election administration reform. One redeeming feature of the U.S. political system is that it fractures efforts to manipulate the political system. The biases of one state's redistricting often offset those of another. Conjoined polarization has nationalized racial polarization and created a more widespread problem than in the immediate post-World War II period when racial discrimination was more heavily concentrated in certain regions. The challenge is to develop new evidence-based approaches to meet these new circumstances.

²⁰⁶ See, e.g., Wendy K. Tam Cho & Yan Li Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. (forthcoming 2016) (manuscript at 11–20) (on file with author).

²⁰⁷ *Id.* (manuscript at 23).