

# NOTES

## YOU CAN'T HAVE YOUR VOTE AND DILUTE IT TOO: CLOSING THE VOTING RIGHTS ACT LOOPHOLE IN GERRYMANDERING CLAIMS

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## INTRODUCTION

Imagine sitting down with a blank page, extensive instructions on what to draw, and thousands of potential ways to draw the picture. You are told that there is no objectively correct way to draw the picture, but there could very well be an incorrect way. Nonetheless, you receive countless and conflicting versions of the correct way to approach this task. More importantly, if you draw incorrectly, your decision could detrimentally impact tens of thousands of lives. You have fewer than 100 days to complete the job.<sup>1</sup> This is the process of legislative redistricting.

Every ten years, the United States becomes a canvas. At the turn of each decade, legislators and commissions gather in various forms to redraw the legislative districts in America.<sup>2</sup> This is an arduous and daunting task that has significant ramifications. The factors that these line-drawers<sup>3</sup> must, should, and do consider are numerous.<sup>4</sup> At the start, a handful of “traditional redistricting principles” inform the drawing of lines.<sup>5</sup> These principles include compactness, contiguity, preserving communities of interest, and adhering to existing political boundaries.<sup>6</sup> Simply adhering to the traditional factors can create significant challenges. And the challenges do not stop at basic policy choices; they extend deep into the legal realm.

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1. For a complete breakdown of states and their redistricting timelines, see *State Redistricting Guidelines*, NAT'L CONF. STATE LEGISLATURES (Mar. 29, 2021), <https://www.ncsl.org/research/redistricting/state-redistricting-deadlines637224581.aspx> [<https://perma.cc/CNM2-8L7X>].

2. U.S. CONST. art. I, § 2; 2 U.S.C. § 2a.

3. Because each jurisdiction varies as to whether the legislature, a citizen commission, or some combination thereof draws legislative districts, this Note uses the term “line-drawers” as a catch-all term to describe those tasked with creating legislative districts.

4. See Frederick McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. C.R. & C.L. 327, 349-56 (2005) (explaining that such factors may include compactness, contiguity, respect for county and municipal lines, protecting communities of interest, protecting incumbents, and creating competitive districts).

5. *Id.* at 349.

6. *Id.* See generally Katharine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137 (2002).

In drawing legislative lines, significant legal obligations bind line-drawers, and line-drawers can suffer repercussions for drawing districts improperly.<sup>7</sup> As a baseline consideration, each district must have substantially the same number of voters.<sup>8</sup> Additionally, although redistricting is a delicate and demanding task, line-drawers must conform district lines to equal protection standards.<sup>9</sup> In 1965, Congress added yet another layer to these legal obligations by passing the Voting Rights Act of 1965 (VRA).<sup>10</sup> The Act aimed to provide specific protections to voters so that they would not be discriminated against in the voting process “on account of race or color.”<sup>11</sup> Should the line-drawers fall short of upholding these obligations, courts can find the bounds unconstitutional, sometimes forcing the line-drawers to begin the process all over again.<sup>12</sup>

The task of balancing competing interests—including policy goals, traditional considerations, and legal obligations—places line-drawers in tricky situations. If the line-drawers strike an imbalance, litigation often follows.<sup>13</sup> And although courts had long hesitated to wander into the “political thicket,” they are now deeply entrenched in adjudicating redistricting controversies.<sup>14</sup> As courts aim to interpret and enforce the legal obligations inherent in redistricting, they begin to encounter a particularly thorny thicket. In

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7. See generally Butler, *supra* note 6 (providing an overview of the case law and statutes that impose districting obligations on legislators and providing guidelines for how to meet objectives and abide by those obligations).

8. See Baker v. Carr, 369 U.S. 186, 207-08 (1962) (establishing the “one person, one vote” standard in order to avoid vote dilution and disproportionate representation).

9. See Shaw v. Reno, 509 U.S. 630, 641-42, 649 (1993).

10. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301-10314, 10501-10508, 10701-10702).

11. 52 U.S.C. § 10301(a).

12. See Butler, *supra* note 6, at 161, 226.

13. See *id.* at 195-214 (providing an extensive overview of redistricting cases that improperly considered racial criteria). Not all scholars believe that the challenge of redistricting with one eye on the VRA and one eye on the Constitution is all that much of a challenge. See Justin Levitt, *Race, Redistricting, and the Manufactured Conundrum*, 50 LOY. L.A. L. REV. 555, 603-04 (2017) (“The ostensible angst about the difficulty of complying with both the Voting Rights Act and the Constitution is a manufactured conundrum.”).

14. Compare *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (cautioning courts against entering the “political thicket” and emphasizing that the remedy for improper redistricting is to elect legislatures that will redistrict appropriately), with *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill I)*, 141 F. Supp. 3d 505, 552-71 (E.D. Va. 2015) (conducting an in-depth, district-by-district analysis of the boundaries of each district in question), *aff’d in part, vacated in part*, 137 S. Ct. 788 (2017).

racial gerrymandering cases that involve compliance with VRA section 2, many of these thorns are the Supreme Court's and Congress's own making.<sup>15</sup>

The problem with creating and enforcing redistricting standards arises poignantly in racial gerrymandering cases that involve VRA section 2 compliance. In many ways, the rights that the Equal Protection Clause seeks to protect are at odds with the rights that section 2 seeks to protect. On the one hand, equal protection asserts a certain color-blindness, an interest in minimizing the focus on race and, in doing so, maximizing equality for all.<sup>16</sup> On the other hand, the VRA suggests, and in fact requires, line-drawers keep at least one eye on race when drawing lines.<sup>17</sup>

These opposing rights create a tension, which is enhanced by the tests and standards that courts have implemented to enforce both rights.<sup>18</sup> Consistent with the color-blind aims of equal protection, in gerrymandering claims, a court's first inquiry is into race predominance—the extent to which it appears that line-drawers primarily considered race in their drawing of the lines.<sup>19</sup> In addressing section 2 claims, on the other hand, a court's primary inquiry is into the outcomes and effects of the district on racial minorities.<sup>20</sup> Put simply, equal protection demands that line-drawers do not pay attention to race; the VRA demands that they do. This tension creates a potential loophole—a situation in which line-drawers can assert compliance with section 2, but in fact dilute the minority vote by

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15. See Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1525-27 (1994).

16. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 641-42 (1993) (finding that white plaintiffs likely stated a claim when asserting the right to a “color-blind” vote). For insight as to how the notion of “color-blindness” in general can constitute a harmful assimilationist theory in the antiracism context, see IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 31-32, 201-02 (2019).

17. See 52 U.S.C. § 10301(b). For insight as to how the idea of race-consciousness in general can constitute a harmful segregationist theory in the antiracism context, see KENDI, *supra* note 16, at 31-32.

18. Compare *Thornburg v. Gingles*, 478 U.S. 30, 47, 50-51, 55-56, 58 (1986) (requiring overt racial considerations, such as a minority racial group's political cohesion and the majority racial group's ability to vote as a bloc), with *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (emphasizing that race neutrality is the “central mandate” of the Equal Protection Clause).

19. See *Miller*, 515 U.S. at 909-10.

20. See *Gingles*, 478 U.S. at 47 (“The essence of a § 2 claim is that a certain electoral law ... interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”).

drawing a racial gerrymander.<sup>21</sup> In practice, this looks like line-drawers creating a district in which there are “too many” voters of color.<sup>22</sup> In creating the district, the line-drawers may assert that they were forced to draw the lines as they did to comply with the VRA’s requirements. In reality, they may have intentionally or inadvertently “diluted” minority voting strength by “packing” voters of color in one district (thereby robbing the voters of the opportunity to make their voices heard across the state).<sup>23</sup>

This Note analyzes the loophole as a consequence of courts enforcing the “competing” rights that the Equal Protection Clause and the VRA protect. It contemplates the problems that these consequences pose and proposes a new framework for courts to use when they approach these cases. Part I provides a background as to how the Supreme Court arrived at each of the relevant standards: the race predominance test for racial gerrymandering cases and the “effects test” for VRA cases. Next, Part II discusses the problems that these tests create when they interact, specifically how the tests can create an avenue for line-drawers to discriminate based on race or dilute minority votes, whether intentionally or inadvertently.

Part III proposes a framework to address these concerns that considers the broader realities and impacts of the two tests. That Part argues that courts should establish a presumption of race predominance for racial gerrymandering cases in which section 2 compliance serves as the government’s compelling interest. Further, when evaluating narrow tailoring, courts should analyze whether the district, as drawn, has in fact diluted minority votes by asking whether the line-drawers included more voters of color in the

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21. See, e.g., Scott Reed, Commentary, *Drawing Lines: Racial Gerrymandering in Bethune-Hill v. Virginia Board of Elections*, 12 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 177, 187 (2017); Michael Kent Curtis, *Using the Voting Rights Act to Discriminate: North Carolina’s Use of Racial Gerrymanders, Two Racial Quotas, Safe Harbors, Shields, and Inoculations to Undermine Multiracial Coalitions and Black Political Power*, 51 WAKE FOREST L. REV. 421, 424 (2016).

22. See, e.g., *Bethune-Hill v. Va. State Bd. of Elections (Bethune-Hill II)*, 326 F. Supp. 3d 128, 138 (E.D. Va. 2018). Note that the concept of “too many” or “too few” voters of color in a district is itself debatable. This Note does not purport to determine the proper balance, but rather asserts that under the existing frameworks, at some point line-drawers do cross a boundary from permissible race-conscious line drawing for VRA purposes to impermissible, racially driven gerrymandering.

23. See, e.g., *id.* The *Bethune-Hill II* case is a particularly clear example of this phenomenon because the Virginia legislature was transparent about its motives. See *id.*

district than reasonably necessary to comply with the VRA. If so, courts should find that the district is not narrowly tailored to the state's interest in complying with the VRA. Lastly, Part IV addresses potential critiques of this framework, including the Court's over-involvement in the "political thicket," concerns that this Note's proposal could work against the interests of the VRA, and questions as to the usefulness of this framework, especially if the Supreme Court were to strike down section 2 in the coming years.<sup>24</sup>

### I. INTO AND AROUND THE THICKET: HOW GERRYMANDERING AND VOTING RIGHTS ACT STANDARDS EMERGED

Although line-drawers have been drawing legislative districts in the United States for centuries, racial gerrymandering claims did not emerge until the late 1950s, and VRA claims emerged over a decade later.<sup>25</sup> There are obvious reasons for this emergence—namely, the abolition of slavery, the passage of the Fifteenth Amendment, and the continued increase in Black civic participation from the late nineteenth century into the early twentieth century.<sup>26</sup>

This Part outlines the emergence of both racial gerrymandering and section 2 claims by describing the fundamental statutes and cases that formed today's standards. Section A reviews the historical and social conditions that led to the quintessential gerrymandering case, *Gomillion v. Lightfoot*, and how that case established the initial racial gerrymandering principles.<sup>27</sup> Next, Section B outlines the events leading to the passage of the VRA and the back-and-forth creation of standards between the Supreme Court and Congress in

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24. Although the Court has not overtly expressed an intent to overturn section 2, it has slowly chipped away at various provisions of the VRA over the past decade. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013) (holding section 4(b) of the VRA, which established the formula for determining which jurisdictions needed federal "preclearance" prior to enacting changes to election laws, unconstitutional); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (holding that Arizona's out-of-precinct policy and prohibition on third-party ballot collection did not violate section 2, despite the policies' disparate impacts on minority voters); *see also* Michael Li & Yuri Rudensky, *Rethinking the Redistricting Toolbox*, 62 *HOW. L.J.* 713, 720 (2019).

25. *See e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41 (1960); *Gingles*, 478 U.S. at 34.

26. *See* Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on Gomillion v. Lightfoot After Half a Century*, 50 *WASHBURN L.J.* 133, 133-35 (2010).

27. *See* 364 U.S. at 347-48.

their aftermath. Finally, Section C addresses the current standards that have been refined by decades of case law and the loophole that those standards have created.

### A. *The Emergence of Racial Gerrymandering Claims*

Although the term “gerrymandering” was recognized in the United States as early as 1812,<sup>28</sup> the racial gerrymander did not make its way into the courts until 1960 in *Gomillion*.<sup>29</sup> In the aftermath of World War II and the Civil Rights Act of 1957, activists were registering a significant number of Black voters in Tuskegee, Alabama.<sup>30</sup> The increase in Black voter registration began to drastically change the makeup of the predominantly white electorate.<sup>31</sup> In light of these social movements toward equality, a state senator introduced legislation to redraw the boundaries of the county more favorably for white voters.<sup>32</sup> The Act created an “uncouth twenty-eight-sided figure” that removed over 400 Black voters from the district, leaving merely four or five Black voters inside the district.<sup>33</sup> The Supreme Court struck down the map as a racial gerrymander.<sup>34</sup> Finding that the State asserted no compelling interest to combat the allegations of race discrimination, but instead asserted unbridled power in political decision-making, the Court held that the State’s actions amounted to a violation of equal protection.<sup>35</sup> Thus, it became clear that states could violate an individual’s equal protection rights by drawing legislative districts in an overtly discriminatory manner.<sup>36</sup> And so the racial gerrymander was born.

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28. Erick Trickey, *Where Did the Term “Gerrymander” Come from?*, SMITHSONIAN MAG. (July 20, 2017), <https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/> [<https://perma.cc/J24U-ZQC9>].

29. *See* 364 U.S. at 341.

30. Entin, *supra* note 26, at 135-38 (providing an in-depth overview of the context in which *Gomillion* took place).

31. *See id.*

32. *See id.* at 137-38.

33. *Gomillion*, 364 U.S. at 340-41.

34. *Id.* at 347-48.

35. *Id.* at 342.

36. *See id.* at 347-48.

### B. *The Emergence of the Voting Rights Act*

Shortly after *Gomillion*, in 1965, Congress passed the historic VRA, aimed at strengthening protections for minority voters.<sup>37</sup> In section 2 of the Act, Congress enacted the broad provision that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed ... to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>38</sup> This provision was quite unique and would ultimately come to cast a much wider net than the *Gomillion* Court intended the Equal Protection Clause to cover in this context.<sup>39</sup> Section 2 would not only be used to invalidate practices that overtly denied minority voters the right to vote, but it would also be used to invalidate practices that denied minority voters the *effectiveness* of their votes.<sup>40</sup> This expanded right would ultimately open the door to litigation in cases of minority vote dilution and minority vote denial.<sup>41</sup>

At first, however, section 2 was a nearly dormant provision that did little more than echo the sentiment of the Fifteenth Amendment.<sup>42</sup> The Supreme Court emphasized this point in *City of Mobile*

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37. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301-10314, 10501-10508, 10701-10702); *see also* Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 LAW LIBR. J. 663, 663 (2006) (“The Voting Rights Act of 1965 is widely considered one of the most important and successful civil rights laws ever enacted.” (footnote omitted)). Of the extraordinary nature of the VRA, some members of the Supreme Court have recently said: “The Voting Rights Act of 1965 is an extraordinary law. Rarely has a statute required so much sacrifice to ensure its passage. Never has a statute done more to advance the Nation’s highest ideals. And few laws are more vital in the current moment.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting).

38. 52 U.S.C. § 10301(a).

39. *See* Daniel McCool, *Meaningful Votes*, in *THE MOST FUNDAMENTAL RIGHT: CONTRASTING PERSPECTIVES ON THE VOTING RIGHTS ACT* 3, 5 (Daniel McCool ed., 2012).

40. Mary J. Kosterlitz, Note, *Thornburg v. Gingles: The Supreme Court’s New Test for Analyzing Minority Vote Dilution*, 36 CATH. UNIV. L. REV. 531, 531 (1987).

41. Vote dilution represents the idea that the voting strength of minority voters can be “diluted” by strategic or discriminatory line-drawing that amplifies the voices of white voters. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 35, 38 (1986). Vote denial represents the idea that certain practices, such as voter ID laws, may operate to deny minority voters the opportunity to exercise the right to vote. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 187 (2008).

42. Li & Rudensky, *supra* note 24, at 720-21.

*v. Bolden*.<sup>43</sup> In that case, the city of Mobile, Alabama, held at-large elections, meaning that multiple representatives were elected from a large district (as opposed to one representative per smaller, more divided district).<sup>44</sup> The at-large districting scheme meant that even though there were areas that had high Black voter populations, there was no district drawn to represent and protect the value of their votes.<sup>45</sup> This type of election stunted the ability of Black voters to influence the outcome because they composed only a minority of the population within the at-large district.<sup>46</sup> Because there was only a singular, at-large voting district, the majority white population could continue to elect its legislators of choice, pulling support from the entire state.<sup>47</sup> In spite of the obvious discriminatory *effect* of this scheme, the Supreme Court held that a demonstration of discriminatory *intent* was necessary to make a claim under section 2.<sup>48</sup> A showing of disparate effects was not enough.<sup>49</sup> The Court was unwilling to strike down the legislative map absent some showing of invidious purpose or intent, emphasizing that section 2's protections did not differ from or expand the protections inherent in the Fifteenth Amendment.<sup>50</sup>

In essence, the Supreme Court was attempting to create a VRA standard that perfectly mirrored the equal protection standard.<sup>51</sup> This, however, was not what Congress had in mind. Shortly after *Bolden*, and following vigorous debate, Congress spoke loudly and clearly over the Court, amending section 2 to provide for a purely results-based test.<sup>52</sup> The amendment meant that a discriminatory

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43. 446 U.S. 55, 61 (1980) (holding that section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself”).

44. *Id.* at 58.

45. Comment, *At-Large Electoral Schemes and Vote Dilution: City of Mobile v. Bolden*, 94 HARV. L. REV. 138, 139 n.10 (1980).

46. *See id.*

47. *See id.*

48. *Bolden*, 446 U.S. at 67-68.

49. *Id.*

50. *See id.* at 61 (emphasizing that section 2 did not add anything to the plaintiffs' Fifteenth Amendment claim).

51. *Compare id.* at 63-66 (analyzing appellees' claim under section 2), *with id.* at 66 (analyzing appellees' claim under the Equal Protection Clause).

52. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301(b)) (including new language providing that an analysis of vote dilution or denial shall be “based on the totality of circumstances”

purpose, or lack thereof, would not be a prerequisite for, nor dispositive of, a VRA claim.<sup>53</sup> In order to quell the opposition, Congress also included a provision to clarify that the new effects standard did not mandate proportional representation.<sup>54</sup> This put a swift end to the Supreme Court's attempt at mirroring the equal protection standards and section 2 standards.<sup>55</sup> The amendment, however, also began the ongoing saga of untangling the application of two somewhat opposing standards—the discriminatory purpose test for equal protection and the discriminatory results test for the VRA.<sup>56</sup>

Just four years after Congress enacted the 1982 amendments, the Supreme Court addressed how to interpret Congress's results test. In *Thornburg v. Gingles*, newly bound by Congress's results test, the Court struck down five North Carolina legislative districts because they were not drawn in such a way as to enable Black voters to elect their candidates of choice.<sup>57</sup> The Court in *Gingles* established that, as a threshold matter, courts should look for three specific factors in determining whether the line-drawers should draw a majority-minority district.<sup>58</sup> Known as the "*Gingles* preconditions," these factors include: (1) that the minority group is sufficiently large and compact, (2) that the minority voters are politically cohesive, and (3) that the majority consistently votes as a bloc and defeats the minority's candidate of choice.<sup>59</sup> After these conditions are met, courts will evaluate if the minority voters were meaningfully

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demonstrating that "members have less opportunity than other members of the electorate to ... elect representatives of their choice").

53. *See id.*

54. *See id.* (providing that the new provisions did not establish any right to proportional representation for members of a suspect class). The fear that the statute could be construed to require proportional representation was a significant concern of its opponents. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1390-92 (1983).

55. *See* McBride & Bell-Platts, *supra* note 4, at 337-38.

56. *See id.* at 341, 344-45.

57. 478 U.S. 30, 34, 79-80 (1986).

58. *Id.* at 48-51. Majority-minority districts are those in which racial minorities compose the majority of voters in a district. While these districts certainly help communities of color elect their candidate of choice (provided the *Gingles* preconditions are met), it is worth noting that there are arguments for the proposition that majority-minority districts can hurt the interests of minority voters by creating less statewide accountability to minority voters. *See* L. Marvin Overby & Kenneth M. Cosgrove, *Unintended Consequences? Racial Redistricting and the Representation of Minority Interests*, 58 J. POL. 540, 540-41 (1996).

59. *Gingles*, 478 U.S. at 48-51.

prevented from electing their candidates of choice under the totality of the circumstances.<sup>60</sup> To do this, courts must consider a variety of flexible factors, known as the “Senate Factors,” such as history of discriminatory voting practices, extent of racially polarized voting, use of enhancing practices, and success of minority candidates.<sup>61</sup> The Court’s decision in *Gingles* was unanimous, but for varying reasons.<sup>62</sup> Nonetheless, the result indicated that plaintiffs may, in fact, bring a claim under section 2 if these threshold conditions are met and the totality of the circumstances points to minority vote dilution, regardless of the intent or purpose of the line-drawers who created the conditions.<sup>63</sup>

### *C. Interactions Between the Voting Rights Act and Equal Protection Clause*

These developments were largely considered victories for minority voters because the intent test established in *Bolden* was too demanding and too limited to provide meaningful relief for voter suppression.<sup>64</sup> If the purpose of the VRA was to protect the right of minority voters to elect the candidates of their choice, requiring a “smoking gun” or definitive proof as to a line-drawer’s “sole’ or ‘dominant’ motivation” made it nearly impossible to realize that purpose.<sup>65</sup>

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60. *Id.* at 46.

61. S. REP. NO. 97-417, at 28-29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206-07. Congress included the Senate Factors in its report accompanying the 1982 VRA amendments “to guide courts in assessing liability under the new standard.” 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, 689 (2014).

62. *Gingles*, 478 U.S. at 34, 82-84, 106. In her concurrence, Justice O’Connor was particularly concerned by her interpretation that the Court’s holding required that states grant minority voters the “maximum feasible ... voting strength.” *Id.* at 89 (O’Connor, J., concurring). She surmised that this meant the Court was, in essence, requiring “proportional representation.” *Id.* at 91.

63. *See id.* at 80 (majority opinion).

64. *See* Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 734-40 (1983) (highlighting the “storm of criticism” that followed the *Bolden* decision and the difficulties that the intent standard created).

65. *Id.* at 740-41 (quoting *Palmer v. Thompson*, 403 U.S. 217, 225 (1971)).

But the right to select the candidate of a minority community's choice was not the only right that the Court sought to protect. Shortly after *Bolden*, the 1982 VRA amendments, and the Court's clarification of those amendments in *Gingles*, the Supreme Court heard a gerrymandering case in which these developments came face-to-face with the Equal Protection Clause.<sup>66</sup> In *Shaw v. Reno*, a group of white plaintiffs sued North Carolina for racial gerrymandering in two U.S. congressional districts.<sup>67</sup> The white plaintiffs alleged that the districts were drawn irregularly in order to intentionally concentrate Black voters together in the two legislative districts.<sup>68</sup> In evaluating what it considered some of "the most complex and sensitive issues [the] Court ha[d] faced," the majority concluded that the plaintiffs, at a minimum, stated a claim as to the constitutionality of the districts under the Equal Protection Clause.<sup>69</sup> In order to come to this decision, the Court had to grapple with precisely what right it was trying to protect, demonstrating an inherent—and perhaps, unexpected—tension between the VRA and the Equal Protection Clause.

The plaintiffs alleged that the districting process had infringed on their right to a "color-blind' electoral process."<sup>70</sup> Although the Court did not expressly adopt the plaintiffs' language with regard to a right to color-blindness, it implicitly affirmed that the right existed.<sup>71</sup> The Court acknowledged that the right may not exist absolutely—that is, race-consciousness in line drawing is not inherently unconstitutional.<sup>72</sup> However, when the districts appear so irregular on their face that they can only be perceived as an effort to segregate based on race, line-drawers may violate an equal

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66. See *Shaw v. Reno*, 509 U.S. 630, 633-34, 642 (1993).

67. *Id.* at 633-34, 638.

68. *Id.* at 637.

69. *Id.* at 633. Justice O'Connor, writing for the majority, emphasized that these "complex and sensitive issues" were "the meaning of the constitutional 'right' to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups." *Id.*

70. *Id.* at 641-42. It is important to note that the plaintiffs in *Shaw* were all white plaintiffs who did not live in the gerrymandered district. *Id.* at 638. Instead, they asserted that the statewide scheme violated their equal protection rights. *Id.* at 642. Interestingly, the Court did not consider standing.

71. See *id.*

72. See *id.*

protection right.<sup>73</sup> As a result, if race is the predominant consideration in the creation of a district, courts must subject the district to strict scrutiny.<sup>74</sup>

Two years later, the Court clarified how to determine whether race was the predominant consideration. In a Georgia gerrymandering case, *Miller v. Johnson*, the Court articulated that race predominates when a plaintiff proves “that the legislature subordinated traditional race-neutral districting principles ... to racial considerations.”<sup>75</sup> The thrust of this race-predominance test is somewhat unclear; the Court did not clarify whether this inquiry relied on purely evidentiary results or on the subjective intent of the line-drawers.<sup>76</sup> Developments in later cases indicate, however, that intent is a critical factor in determining race predominance.<sup>77</sup>

Both *Shaw* and *Miller* highlight the complex clash that had emerged between equal protection analysis and the VRA analysis by the 1990s: color-blindness measured by purpose versus race-consciousness measured by effects.<sup>78</sup>

## II. A FLOOR WITH NO CEILING: EXPLORING THE PROBLEM

The tension between these rights and obligations persists today in a confusing contradiction at times. And as long as this tension remains, it leaves the door open for mistakes, discrimination, or abuse on the part of the line-drawers. In essence, line-drawers can use the VRA as a means to discriminate.<sup>79</sup> This happens when line-drawers are required to (or believe they are required to) comply with section 2 in their creation of a majority-minority district, but in creating the district, they over-inflate the number of minority voters

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73. *See id.*

74. *See, e.g.,* Ala. Legis. Black Caucus v. Alabama, 231 F. Supp. 3d 1026, 1033 (M.D. Ala. 2017).

75. 515 U.S. 900, 916 (1995).

76. *See id.*; Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 246-49 (2001).

77. *See* Charles & Fuentes-Rohwer, *supra* note 76, at 247.

78. *See* Sue T. Kilgore, Comment, *Between the Devil and the Deep Blue Sea: Courts, Legislatures, and Majority-Minority Districts*, 46 CATH. UNIV. L. REV. 1299, 1304-05 (1997) (asking the question that these standards raise: “What is a legislature to do?”).

79. *See* Curtis, *supra* note 21, at 478-79.

needed to comply with the VRA.<sup>80</sup> This becomes a form of “packing”—placing an unnecessarily large group of minority voters in a particular district, which ultimately dilutes the group’s voting power throughout the rest of the state.<sup>81</sup>

If the Supreme Court finds that race predominated in the creation of a district, it evaluates the lines under the strict scrutiny standard.<sup>82</sup> First, the Court assesses whether there was a sufficient compelling interest for drawing the lines as they were drawn.<sup>83</sup> Although the Court has not expressly ruled on the matter, it often assumes without deciding that compliance with section 2 is, in fact, a compelling interest.<sup>84</sup> However, this is not the end of the inquiry. In order to assume that section 2 compliance was necessary, the line-drawers must demonstrate that they believed themselves to be at risk of violating section 2 if they did not create the majority-minority district in conformity with the statute.<sup>85</sup> This showing essentially shifts the responsibility onto the line-drawers to demonstrate the *prima facie* case for a potential section 2 violation.<sup>86</sup> The line-drawers must demonstrate the presence of the *Gingles* preconditions—compactness, minority political cohesion, and a majority voting bloc—and that the totality of the circumstances indicates there would have been a section 2 violation.<sup>87</sup> If all these

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80. See, e.g., *Bethune-Hill II*, 326 F. Supp. 3d 128, 138 (E.D. Va. 2018) (explaining that the legislature self-imposed a requirement that, in a majority-minority district created pursuant to the VRA, there be a minimum of 55 percent Black Voting Age Population (BVAP) in the district).

81. See Overby & Cosgrove, *supra* note 58, at 549 (noting that “[p]acking” limits the minority community’s influence in the surrounding area).

82. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (applying strict scrutiny after finding that “[r]ace was ... the predominant, overriding factor explaining the General Assembly’s decision to attach ... various appendages containing dense majority-black populations”).

83. *Id.* at 922.

84. See *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (“We assume, *arguendo*, for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest.”); see also *Bush v. Vera*, 517 U.S. 952, 1002 (1996) (Thomas, J., concurring) (demonstrating the Court’s willingness to assume, without deciding, that the State asserted a compelling interest in section 2 compliance).

85. *Shaw*, 517 U.S. at 914-15.

86. Caroline A. Wong, Comment, *Sued if You Do, Sued if You Don’t: Section 2 of the Voting Rights Act as a Defense to Race-Conscious Districting*, 82 U. CHI. L. REV. 1659, 1678 (2015).

87. *Shaw*, 517 U.S. at 914-16.

factors are present, the Court is typically willing to assume that section 2 compliance is a compelling interest.

Notably, recent developments in the partisan gerrymandering arena have further complicated the matter. Although partisan gerrymandering had a long and controversial history through the courts, in 2019, the Supreme Court ruled that partisan gerrymandering cases are nonjusticiable.<sup>88</sup> Although the Court did not condone partisan gerrymandering, it held that there was no way for courts to create judicially manageable standards to remedy the practice and found that it would be a grave expansion of judicial authority to attempt to do so.<sup>89</sup>

This holding acts as a barrier for plaintiffs right at the outset, creating a “shield” for line-drawers against racial gerrymandering claims.<sup>90</sup> In other words, if the line-drawers can demonstrate that party, rather than race, was the predominant consideration in line drawing, the map must only survive rational basis scrutiny, and it will likely pass constitutional muster.<sup>91</sup> In an increasingly partisan era, this standard is easier to satisfy, resulting in less scrutiny for potential racial gerrymanders—especially those that purport to use the VRA as their primary compelling interest.<sup>92</sup>

If the government demonstrates a compelling interest, the next step of the strict scrutiny inquiry, the narrow tailoring evaluation, may also prove unpredictable. Courts are not always clear as to what factors they look for in their narrow tailoring inquiry in racial

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88. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-08 (2019). *But see id.* at 2516 (Kagan, J., dissenting) (“[I]n throwing up its hands, the majority misses something under its nose: What it says can’t be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims.”).

89. *Id.* at 2506-08 (majority opinion) (exploring the Court’s difficulty with defining fairness in this case and highlighting that to rule otherwise would be a drastic expansion of judicial authority).

90. See Kyle Keraga, Note, *Drawing the Line: A First Amendment Framework for Partisan Gerrymandering in the Wake of Rucho v. Common Cause*, 79 MD. L. REV. 798, 830 (2020) (explaining that the *Rucho* decision weakens racial gerrymandering claims by providing partisan gerrymandering as a “shield” for lawmakers).

91. *See id.* at 807-08, 830-31.

92. See Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1840-42 (2018) (outlining three different theories as to how race and party interact and indicating that they are, in many ways, inseparable).

gerrymandering and VRA cases. The Supreme Court requires that courts look for a “strong basis in evidence in support of the (race-based) choice that [the legislature] has made.”<sup>93</sup> But what does this mean? In some cases, it appears that the Court is further scrutinizing the line-drawers’ belief that their actions were necessary.<sup>94</sup> In other cases, the Court seems to be evaluating how well or how precisely the lawmakers complied with section 2 by evaluating the challenged districts under the *Gingles* preconditions and the Senate Factors.<sup>95</sup> While the exact focus of the narrow tailoring question is sometimes unclear, courts are consistent in articulating that they are looking for a “strong basis in evidence” that the line-drawers were required to comply with section 2 in drawing the districts as they did.

This framework leaves room for error or, worse, discriminatory practices.<sup>96</sup> It opens the door for line-drawers, once they have a reasonable belief and a basis in evidence that they should comply with section 2, to place many—*too many*—voters of color in a particular district, which dilutes their overall voting strength.<sup>97</sup> In essence, the current framework creates a floor but does not create a ceiling.

The 2018 case, *Bethune-Hill v. Virginia State Board of Elections (Bethune-Hill II)*, is illustrative.<sup>98</sup> The Virginia legislature imposed a blanket requirement that, in its majority-minority districts, it would ensure that minority voters composed 55 percent of the Black Voting Age Population (BVAP).<sup>99</sup> After a long and winding road through the courts, including two trips to the Supreme Court, the district court held on remand that although the Virginia legislature

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93. Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015) (internal quotation omitted).

94. *See id.* (finding that because the legislature asked the wrong question at the outset by attempting to preserve existing minority percentages in majority-minority districts, it reached the wrong answer for the purposes of narrow tailoring).

95. *See Shaw v. Hunt*, 517 U.S. 899, 916-17 (1996) (holding that because minority voters were not geographically compact enough, the legislature did not narrowly tailor the district to comply with section 2).

96. *See Curtis, supra* note 21, at 478-79.

97. *See id.*; Overby & Cosgrove, *supra* note 58, at 549.

98. 326 F. Supp. 3d 128 (E.D. Va. 2018). Note that *Bethune-Hill II* involved section 5 of the VRA, a section that is now essentially null. *See Shelby County v. Holder*, 570 U.S. 529 (2013). Section 5 remains relevant, however, to illustrate the way that VRA compliance can result in an overly “packed” district.

99. *Bethune-Hill II*, 326 F. Supp. at 138.

may have properly invoked the VRA as a compelling interest, the generalized 55 percent BVAP floor was not narrowly tailored to meet that interest.<sup>100</sup>

Thus, the problem was not only the racial gerrymander; it was using the VRA to *justify* the gerrymander. The problem is not just placing a majority of voters of color in a particular district; the problem is placing *too many* voters of color in a particular district in the name of the VRA. The conflicting standards, however, allow this problem to persist. The standards create a loophole in which states can assert the need to comply with the VRA and then, by not adequately researching or understanding voting patterns, improperly place too many voters of color in a particular district. Because of the dangers that these conflicting standards pose, courts must remain vigilant to identify when line-drawers utilize this loophole and should create a framework that more readily accounts for this problem in order to remedy it.

### III. A NEW FRAMEWORK: NARROWLY TAILORED TO REALITY

A more workable framework requires the Court to alter the race predominance inquiry and ensure that the narrow tailoring analysis realistically and rigorously analyzes vote dilution. This Part addresses the reasons for and benefits of reconsidering both stages of the analysis. Section A focuses on the reasons for change; it explores how the current tests are out of touch with the realities that occur in the process of redistricting and in the courts when districts are challenged. Next, Section B argues for a presumption of race predominance in racial gerrymandering and VRA inquiries. This presumption will help to realign the inquiry with redistricting realities. Finally, Section C argues that if a state uses section 2 compliance as its compelling interest, courts should evaluate whether there was a strong basis in evidence to support the race-conscious districting *and* whether the race-conscious districting included more minority voters than reasonably necessary to achieve the VRA's goals. This change will strengthen accuracy and accountability in the districting process and subsequent litigation.

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100. *See id.* at 179-80.

*A. The Current Tests Are out of Touch with Reality*

The current tests do not always provide a meaningful way to evaluate and remedy the existing loophole. Because the Court created the equal protection and section 2 standards independent of one another, the standards do not communicate with one another. In other words, the racial gerrymandering test does not account for VRA compliance, and the VRA compliance tests do not account for racial gerrymandering.<sup>101</sup> Each operates in its own universe. This can become problematic, especially if section 2 is used in ways to further partisan ends. Currently, line-drawers and judges are not bound by a legal test to ensure that this problem does not occur. Mechanical application of these tests loses sight of reality and fails to protect minority voters.

It is worth noting that some scholars and commentators debate the distinctiveness of race and party, arguing that race and party are in many ways inextricable.<sup>102</sup> This creates a wrinkle in the analysis. It makes it far more difficult to determine when race predominates versus when purely partisan means or some combination of race and party predominate.<sup>103</sup> The nonjusticiability of partisan gerrymandering transforms the problem from a wrinkle in the analysis into a full roadblock for racial gerrymandering claims, as does the notion that race is a proxy for partisanship.<sup>104</sup>

Treating race as a proxy for partisanship could render much of section 2 obsolete, something that courts should not be willing to do in light of Congress's clear intent in the 1982 amendments.<sup>105</sup>

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101. See Wong, *supra* note 86, at 1659-60.

102. Hasen, *supra* note 92, at 1865 (“The argument is not that partisanship is equivalent to racism ... but that the two factors are so inextricably linked under conditions of conjoined polarization that to discriminate on the basis of one is to discriminate on the basis of the other.”).

103. See Leading Cases, Cooper v. Harris, 131 HARV. L. REV. 303, 310 (2017) (examining the “jumbled way that race and party interact in redistricting” and concluding that “race and party are two sides of the same coin”).

104. See Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 50 (2020).

105. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 131 (codified as amended at 52 U.S.C. § 10301); see Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1564 (2019) (explaining that the district court in *Bethune-Hill II* “crudely relied upon [race] as a proxy for partisanship”); see also Patino v. City of Pasadena, 230 F. Supp. 3d 667, 727 (S.D. Tex. 2017) (recognizing that Pasadena county

Nonetheless, the argument that party, rather than race, predominated in the line-drawing process may be a tempting one for line-drawers to make.<sup>106</sup> The argument affords the line-drawers significantly more freedom with significantly less accountability.<sup>107</sup> This Note does not debate nor address where that difficult line should be drawn, but rather argues that the current frameworks do not account for the broader realities that these uncertainties create. In other words, regardless of where the line should be drawn between race and partisanship, current frameworks allow line-drawers to toe, cross, or ignore that line altogether.

### *B. Introducing a Presumption of Race Predominance*

In order to ensure that the line-drawers do not abuse the section 2 defense, the framework for the analysis must change so that the gerrymandering and VRA tests better communicate with one another. To allow for this type of communication, the Court should establish a presumption of race predominance in cases for which VRA compliance serves as the compelling interest.

The key feature of this presumption would be the shifting of the burden to the other party.<sup>108</sup> This burden-shifting framework exists robustly in other areas of the law, namely in the employment discrimination context.<sup>109</sup> There, courts use a three-step framework. First, if the plaintiff establishes a *prima facie* case, the courts shift the burden onto an employer to demonstrate a nondiscriminatory reason for termination.<sup>110</sup> If the employer does so, the burden shifts back to the plaintiff to show that the alleged reason was pretextual.<sup>111</sup> Courts hearing voting rights cases can borrow the same test.

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officials openly understood race and party to be “interchangeable proxies” in the line-drawing process).

106. See *Patino*, 230 F. Supp. 3d at 704.

107. See *Sellers*, *supra* note 105, at 1564-65 (demonstrating lawmakers’ overt endorsement of using race as a rough proxy for partisanship, but emphasizing the “discomfiting” nature of this approach).

108. See Stephen Wolf, Note, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L., ETHICS & PUB. POL’Y 225, 235-36 (1997).

109. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

110. *Id.*

111. *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 760 (8th Cir. 2004).

Typically, in VRA claims, the plaintiff needs to show that race did, in fact, predominate in the government's line-drawing process.<sup>112</sup> Applying a presumption of race predominance at this stage would shift the burden to the defendant, requiring a showing that other factors predominated instead.<sup>113</sup> If the defendant asserts that other factors predominated, the plaintiff would have the opportunity to show, just as in the employment discrimination context, that the asserted factors were pretextual. If the defendant cannot demonstrate that other factors predominated or a court finds the other factors pretextual, a court should evaluate the majority-minority district under strict scrutiny.<sup>114</sup> At that point, the defendant may assert section 2 compliance as the compelling interest for race-based boundaries.<sup>115</sup>

Like other presumptions, the presumption of race predominance would be rebuttable. For example, if the defendant demonstrates particularly unique considerations to the district that line-drawers considered more heavily and predominately than race (but nevertheless created a majority-minority district), the defendant may successfully rebut the presumption. Additionally, a demonstration that the line-drawers sought to adhere to a constitutional or statutory command or priority could rebut the presumption. For example, if a state's constitution requires preservation of communities of interest and the line-drawers maintained a particular religious or social community (and in doing so, created a majority-minority district), they could rebut the presumption of race predominance.

The reason for this presumption is simple—it aligns with the reality of what line-drawers experience as they draw district lines. The presumption places emphasis and pressure on the appropriate actors and requires that governments adequately explain why

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112. See *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017).

113. See *McDonnell Douglas Corp.*, 411 U.S. at 802.

114. This presumption would reverse the approach taken by the Court in *Cooper v. Harris* by requiring that the North Carolina legislature demonstrate the traditional race-neutral criteria that it used. Although in that case the plaintiffs prevailed on the predominance point, this alternate standard would have presumed race predominance at the outset. See *Cooper*, 137 S. Ct. at 1463-64.

115. See *supra* note 84 and accompanying text; see also *Cooper*, 137 S. Ct. at 1464 (“This Court has long assumed that one compelling interest is complying with ... the Voting Rights Act of 1965.”).

something that *looks* like race predominance is not.<sup>116</sup> If line-drawers are to assert that they drew a district for the purpose of conforming with section 2, it should be presumed at the outset that race predominated in the process of drawing that district.

Courts already face uncertainty in determining just which factor predominated in the line-drawing process.<sup>117</sup> The race-predominance inquiry is neither intuitive nor easy. In the redistricting context, “predominant” means “that the legislature subordinated traditional race-neutral districting principles ... to racial considerations.”<sup>118</sup> Merriam-Webster defines “predominant” as “having superior strength, influence, or authority.”<sup>119</sup> The definition courts employ, then, is less specific than the dictionary definition of predominance. In their inquiries, courts ask if all other traditional criteria were subverted to race rather than asking if race had a superior influence. This distinction is a small but noteworthy one. Requiring a showing that all other factors were subverted in a process of countless considerations is more subjective and difficult than considering the influence and strength of the racial considerations generally.

For example, in *Alabama Legislative Black Caucus v. Alabama*, the Supreme Court held that the lower court improperly considered whether race did or did not predominate.<sup>120</sup> In that case, the district court placed the legislature’s goal of equal population in each district on equal footing with consideration of racial factors.<sup>121</sup> The Court held that the scheme was improper because the line-drawers should have treated the equal population consideration as a background condition rather than weighed evenly against racial considerations.<sup>122</sup> The Supreme Court did not hold that race predominated, but rather stated that the outcome could have been different if the district court properly weighed these factors.<sup>123</sup>

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116. See, e.g., *Bethune-Hill I*, 141 F. Supp. 3d 505, 554 (E.D. Va. 2015), *aff’d in part, vacated in part*, 137 S. Ct. 788 (2017).

117. See *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015).

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

119. *Predominant*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/predominant> [https://perma.cc/2Q4C-G8PL].

120. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1270.

121. *Id.*

122. *Id.*

123. *Id.* at 1272.

Hypothetically, if the court had applied a presumption of race predominance to the district at the outset, race-predominance would be presumed. The district court would then consider whether the equal population rationale was sufficient to rebut the presumption. If the defendants could not properly show that equal population was considered to a significantly greater degree than race, the district would be subject to strict scrutiny.

When a government asserts that the *compelling* state interest for creating a majority-minority district was to comply with an Act that demands race-consciousness and race-based considerations, it is out of touch with the very definition of “predominant” to insist that race did not predominate.<sup>124</sup> Race cannot be both an afterthought and a forethought at the same time; applying a presumption of race-predominance to majority-minority districts would foreclose that argument.

### *C. The Need for an Expanded Narrow Tailoring Analysis*

Courts should also reevaluate how they assess narrow tailoring in gerrymandering and section 2 cases. Currently, when the government asserts section 2 compliance as a compelling interest, courts primarily evaluate whether the government credibly anticipated that it would need to comply with the VRA at the narrow tailoring stage.<sup>125</sup> Courts may phrase the strong basis in evidence test in different ways, but it boils down to this:

Narrow tailoring in the context of VRA compliance means that the [jurisdiction] must show “it had ‘a strong basis in evidence’ for concluding that the [VRA] required its action,” or, stated differently, “that it had ‘good reasons’ to think that it would transgress the [VRA] if it did not draw race-based district lines.”<sup>126</sup>

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124. See Wong, *supra* note 86, at 1669-71 (explaining the complications associated with demonstrating or disproving racial dominance in gerrymandering cases).

125. See, e.g., Shaw v. Reno, 509 U.S. 630, 656 (1993); Shaw v. Hunt, 517 U.S. 899, 915 (1996).

126. Navajo Nation v. San Juan County, 929 F.3d 1270, 1281 (10th Cir. 2019) (quoting Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017)).

The Supreme Court has stated that the search for “good reasons” affords states “breathing room,” such that they may “adopt ... compliance measures that may prove, in perfect hindsight, not to have been needed.”<sup>127</sup>

In a case involving racial gerrymandering and VRA compliance, however, this inquiry may stop the analysis short, or in other words, the “breathing room” may afford states too much latitude.<sup>128</sup> On one hand, the government needs to show that the conditions were such that it had a strong basis in evidence to believe it needed to make a majority-minority district.<sup>129</sup> On the other hand, once the government establishes this strong basis in evidence, the current frameworks do not adequately account for what happens if the government goes “too far,” placing “too many” voters of color in a district, ultimately diluting their votes.

In order to more rigorously and meaningfully scrutinize these types of districts, courts should not only evaluate whether there was a strong basis in evidence to support the belief that the line-drawers needed to comply with the VRA. They should go one step further, asking whether the line-drawers added *more* voters of color than reasonably necessary to comport with section 2’s goals. This requirement would insist that courts look at the actual dilutive effect on the minority votes in that district.<sup>130</sup> If a court finds that the district was required to create a majority-minority district, but that the district has more voters of color than reasonably necessary to elect the voters’ preferred candidate, then the district is diluting minority votes. Thus, it cannot be narrowly tailored to comply with section 2, which, at its core, exists to *prevent* vote dilution.<sup>131</sup>

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127. *Cooper*, 137 S. Ct. at 1464.

128. *See id.*

129. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (reaffirming the idea that narrow tailoring requires a “strong basis in evidence” that the government should comply with section 2, as well as the requirement that the government must substantially address the fictional section 2 violation).

130. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666-67 (2001) (discussing the individual versus collective nature of vote dilution harms and the intricacies of remedying those harms).

131. *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”).

The first benefit of this more rigorous approach to narrow tailoring is it would hold line-drawers accountable to more careful and honest redistricting.<sup>132</sup> If courts consider not only the line-drawers' basis for believing the *Gingles* preconditions are satisfied, but also whether there are more minority voters than necessary to comply with the VRA's goals based on the preconditions, then line-drawers are less likely to stop short at identifying minority communities that ought to make up a majority-minority district.<sup>133</sup> Instead, the approach requires that line-drawers calculate more precisely how many minority voters ought to be in that district as they comply with section 2 to ensure that they do not dilute votes.

Additionally, a more rigorous narrow tailoring analysis would uphold the interests of section 2 and protect minority voting strength. Analyzing narrow tailoring would essentially be a game of alternatives and comparing the relative treatment of various groups.<sup>134</sup> Instead of primarily analyzing the conditions present when the line-drawers drew the districts, courts should look just as carefully at the conditions created as a result. Courts should evaluate multiple factors when determining whether there are more voters of color in a district than reasonably necessary: (1) the percentage of minority voters in the district, (2) the geographical alternatives for districting that would strengthen minority votes elsewhere, and (3) the racial bloc voting patterns for the voters of the district at issue and surrounding areas.<sup>135</sup>

The first factor a court should consider is the percentage of minority voters in the district. At the outset, there is no perfect or accurate threshold number required—it should instead be considered as a fact-based, case-by-case inquiry. Of course, the majority-minority district will be composed of over 50 percent people of

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132. J. GERALD HEBERT, PAUL M. SMITH, MARTINA E. VANDENBERG & MICHAEL B. DESANCTIS, *THE REALIST'S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* ix (2d ed. 2010) (“[T]he realist understands that states simply cannot draw districting plans that will go unchallenged in the courts. The best that realistically can be hoped for is to draw plans that will not be *successfully* challenged.”).

133. *Id.* at 41.

134. See Gerken, *supra* note 130, at 1735.

135. See HEBERT ET AL., *supra* note 132, at 70 (acknowledging the value of using reapportionment data in redistricting).

color.<sup>136</sup> In a racial gerrymandering case, it will likely be more than that.<sup>137</sup> The question then becomes—how much more is too much more?

In *Bethune-Hill II*, the district court determined that a 55 percent threshold was too much, finding an unconstitutional racial gerrymander as a result.<sup>138</sup> The 55 percent threshold was not invalid as a bright-line rule; it was invalid because the threshold meant that line-drawers were not doing the legwork to determine voting patterns and the adequate number of minority voters in each VRA-required majority-minority district.<sup>139</sup> Thus, if line-drawers set a target threshold percentage, courts should be wary of upholding the district at the narrow tailoring stage because it will likely overshoot the number of minority voters reasonably necessary to accomplish the VRA's goals.

However, because there can be no exact bright-line percentage as to how much is too much or too little, a useful lens for looking at percentage can also be the change in percentage from the last redistricting cycle.<sup>140</sup> If the district already existed as a majority-minority district and the percentage of minority voters added to the district in the next redistricting cycle drastically (or even moderately) increases without support from racial bloc voting data, it may raise a red flag to the courts that there is vote dilution hidden behind the VRA compliance.<sup>141</sup> Assessing these changes in minority voter percentage can help courts determine whether compliance with section 2 is narrowly tailored.

Additionally, courts should evaluate the geographical boundaries to examine whether communities of racial minorities were included in the district at issue that could have or should have been included elsewhere to strengthen the minority vote. Take, for example, the

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136. See Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2208 (2003).

137. *Bethune-Hill I*, 141 F. Supp. 3d 505, 553 (E.D. Va. 2015) (acknowledging that the legislature set a 55 percent BVAP population standard as the minimum for majority-minority districts), *aff'd in part, vacated in part*, 137 S. Ct. 788 (2017).

138. See *Bethune-Hill II*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018). The *Bethune-Hill II* court did not reach this finding at the narrow tailoring stage, but under this shifted analysis, it likely would have.

139. *Id.*

140. See *id.* at 155 (discussing the changes in BVAP percentage from the previous districts to the newly drawn districts).

141. See *id.*

map at issue in *Bush v. Vera*.<sup>142</sup> In that case, the legislature had used computerized racial data to draw its highly irregular-looking districts.<sup>143</sup> In determining that the district was not narrowly tailored, the Court emphasized the irregularity of the district's shape.<sup>144</sup> The Court took particular issue with the way that the district "sprawl[ed]" through multiple counties and neighborhoods to "connect dispersed minority population[s]."<sup>145</sup> When courts ask explicitly whether line-drawers included more voters of color in the district than reasonably necessary, this is the type of inquiry that courts should engage in, scrutinizing the contours of the boundaries to assess whether the government ultimately diluted minority voting strength.

Finally, courts should carefully assess racial bloc voting data to assess not only whether the data indicates that a majority-minority community should have been drawn, but also to assess whether the data indicates the line-drawers over-inflated the number of minority voters in the district.<sup>146</sup> Courts can evaluate for a baseline number of minority voters needed based on previous voting data to elect a community of color's candidate of choice. Then the courts can evaluate how far beyond that threshold the line-drawers went; the further from the baseline threshold, the less likely the district is truly narrowly tailored to achieve the VRA's goals.

Making these slight but noteworthy changes to the VRA framework would improve overall outcomes for voters and line-drawers. Establishing a presumption of race predominance for majority-minority districts provides the benefit of clarity and consistency to both the line-drawers and the courts. For the line-drawers, it allows more freedom in districting without fear of suit or repercussions.<sup>147</sup> Even well-intentioned line-drawers are caught in thorny situations

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142. 517 U.S. 952 (1996).

143. *Id.* at 961-62.

144. *Id.* at 980-81.

145. *Id.* at 965-66 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1337-38 (S.D. Tex. 1994)).

146. See generally LISA HANDLEY, VOTE DILUTION: MEASURING VOTING PATTERNS BY RACE/ETHNICITY, [https://www.ncsl.org/documents/legismgt/vote\\_dilusion.pdf](https://www.ncsl.org/documents/legismgt/vote_dilusion.pdf) [<https://perma.cc/NS6U-J2YD>].

147. HEBERT ET AL., *supra* note 132, at ix (warning state line-drawers that facing lawsuits is unavoidable and arguing that the most meaningful step states can take is to prepare to win those lawsuits).

when attempting to draw district lines with race-consciousness.<sup>148</sup> They do not know how much is too much.<sup>149</sup> Line-drawers should know that if they believe they need to comply with section 2 or claim they believe so, courts will presume race predominance and evaluate their districts using strict scrutiny. Furthermore, line-drawers should know that under strict scrutiny, courts will analyze not only whether there was a strong basis in evidence that the *Gingles* preconditions were present, but whether in drawing a race-conscious district, the line-drawers included more voters of color than reasonably necessary to achieve the VRA's goal. This will demand that line-drawers more meaningfully scrutinize alternatives to prioritize minority voting strength and more carefully assess racial bloc voting data to ensure they do not dilute minority votes when creating VRA-compliant districts.

#### IV. HOW FAR IS TOO FAR? AND OTHER COUNTERARGUMENTS

Any suggested change to the Court's current framework, especially standards so intertwined with politics and democracy, comes with critiques and questions. This Part explores those counterarguments and answers the questions that they raise. Section A addresses the concern that adopting these changes pushes courts too deep into the political thicket by explaining that the proposed test alters *when* courts make significant considerations as opposed to *what* courts consider. Next, Section B responds to questions as to whether this test works for or against the interests of the VRA, emphasizing that the test contains inherent checks to support the interests of the VRA. Lastly, Section C evaluates this proposal's significance in light of speculation that the Court may be inclined to invalidate or modify section 2 in the future. That Section highlights the utility of the framework even in the absence of section 2 as it currently stands.

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148. See generally George W. Jordan III, Note, *Navigating the Constitutional Minefield of Race-Conscious Redistricting*, 2 TEX. F. ON C.L. & C.R. 81 (1995).

149. See *id.* at 81-83, 85.

*A. Are Courts Too Deep in the Thicket?*

One of the primary and recurring concerns with making changes to the redistricting analysis is whether such changes thrust courts too far into the political thicket.<sup>150</sup> It could be argued that this Note's rigorous and targeted analysis pushes the involvement of the courts too far. Opponents of a race-predominance presumption or more rigorous narrow tailoring analysis may argue that without judicial restraint in this area, courts will measure and rule on the subjective abilities and failures of line-drawers in these complex cases. That is to say, courts will simply be ruling on whether the line-drawers did the best that they could when districting.

This argument misconstrues the nature of the suggested changes. The courts already engage in an analysis of line-drawers' motivations and measure their successes; that analysis just occurs at an earlier point in the inquiry.<sup>151</sup> By adopting the presumption at the outset and closely scrutinizing at the narrow tailoring inquiry, the bulk of the analysis merely shifts to a later stage.<sup>152</sup> For example, in *Bethune-Hill II*, instead of using the rigorous analysis the court engaged in at the race predominance stage, much of the analysis would come into play at the narrow tailoring stage to determine whether the legislature diluted the minority votes or complied with the goals of the VRA.<sup>153</sup>

Because the Court has already wandered into the redistricting and equal protection arenas, it cannot and should not wander out when the inquiries get more complex. Rather than further immersing courts in the political thicket, this proposal should instead be viewed as more precisely defining a court's role and scope of analysis in the thicket. Instead of evaluating whether line-drawers did their best by some vague or undefined standard, courts would be holding line-drawers accountable to the very standards they claim

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150. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946). The Court's cry to refrain from entering the political thicket sounds more like an echo in the wind now. Although courts often nod to the idea of refraining from entering, in practice the courts are enmeshed in the thicket. Hamilton, *supra* note 15, at 1564.

151. See *Bethune-Hill II*, 326 F. Supp. 3d 128, 155 (E.D. Va. 2018) (demonstrating the rigorous level of analysis and scrutiny by which the court assessed the contours of the Virginia districts at issue).

152. See *id.*

153. See *id.*

to abide by.<sup>154</sup> Make no mistake: courts are already in the thicket.<sup>155</sup> The more consistently and clearly their role in the thicket is defined, the more line-drawers can draw honest, VRA-compliant lines with more predictable judicial outcomes.

*B. Could This Test Work Against the Interests of the Voting Rights Act?*

Another concern that may arise from this proposed test is that it could work against the interests of the VRA by subjecting majority-minority districts to stricter scrutiny with the presumption of race predominance. At first glance, this may look like a stark concern. When looking at the purpose and motive of the change, however, the proposal furthers, rather than undercuts, the intentions of the VRA.

Under the existing framework, when a court determines that race predominated, it subjects the district to strict scrutiny.<sup>156</sup> For this reason, it may seem counterintuitive to apply a presumption of race predominance right at the outset to majority-minority districts. But this does not mean the district is dead on arrival.

When accounting for a narrow tailoring analysis that focuses on a strong basis in evidence and a direct inquiry into overinflating minority voters in a particular district, this test works hand-in-hand with the VRA. While it certainly would be counterproductive to invalidate districts just because the line-drawers assert VRA compliance, it is equally unproductive to afford the line-drawers a blank check to “pack” districts when asserting that interest. In essence, the test weeds out districts that may be legitimately created as majority-minority districts but are illegitimately racial gerrymanders. By accounting for and examining actual vote dilution when analyzing narrow tailoring, this Note’s proposal tempers, if not eliminates, this concern.

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154. *See supra* Part III.B.

155. *See, e.g.,* *Easley v. Cromartie*, 532 U.S. 234 (2001) (providing just one example of the Court parsing through race and redistricting concerns by using data, voting behavior, and statements of legislators, to name a few).

156. *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

*C. What if Section 2 Is Struck down in the Coming Future?*

Finally, it is worth considering what happens if the Court strikes down section 2. Commentators have speculated that various aspects of section 2, if not the whole provision, face a grim future.<sup>157</sup> As recently as June 2021, the Supreme Court issued an opinion in an Arizona case about section 2.<sup>158</sup> In that case, the Court considered whether Arizona's statute that required out-of-precinct voters' ballots to be discarded and a statute that made it a felony to deliver another person's mail-in ballot violated section 2.<sup>159</sup> In its opinion, the Court traced the history of the VRA and ultimately held that Arizona's laws did not violate section 2, even if there was a small disparate impact on racial minorities.<sup>160</sup> The Court took care to emphasize that its jurisprudence has been significantly developed in the vote dilution context, whereas this was an issue of first impression in the vote denial context.<sup>161</sup> While the Court may have limited the application of section 2 in vote denial cases, it did not address the constitutionality of the provision as a whole or discuss the possibility of altering its analysis within the dilution context.<sup>162</sup>

Nonetheless, it is impossible to know what exactly will remain of the VRA if, in the future, the Supreme Court does strike down section 2 in part or in its entirety. What will almost certainly remain, however, is the motivation on the part of most line-drawers to draw lines in politically beneficial—and potentially nefarious—ways.<sup>163</sup> Should section 2 become significantly diminished, it is not likely that racial gerrymandering, or variations of it, will disappear or diminish with it. When districts are challenged as racial gerrymanders, courts will likely still utilize similar standards to analyze

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157. See, e.g., Li & Rudensky, *supra* note 24, at 734-35. Just last term, the Supreme Court decided a case debating the limits of section 2. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

158. See *Brnovich*, 141 S. Ct. at 2321.

159. *Id.* at 2334.

160. *Id.* at 2346.

161. *Id.* at 2333 (“In the years since *Gingles*, we have heard a steady stream of § 2 vote-dilution cases, but until today we have not considered how § 2 applies to generally applicable time, place, or manner voting rules.” (footnotes omitted)). *But see* *Holder v. Hall*, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring) (arguing for a “systematic reassessment” of the Court’s analysis of section 2 in vote dilution cases).

162. See *Brnovich*, 141 S. Ct. at 2330-34.

163. See Hasen, *supra* note 92, at 1854-55.

those challenges. Instead of using section 2, however, line-drawers will have to assert some other compelling interest. Even if that interest is not section 2 compliance, if the line-drawers assert that in order to satisfy equal protection purposes or other statutory obligations they must draw the lines as they did, a presumption of racial predominance is equally appropriate.

Additionally, a more searching narrow tailoring analysis ensures that whatever compelling interest the line-drawers assert, courts should not only assess whether they correctly asserted that interest at the outset, but also how well they drew the district in order to adequately comply with that asserted interest. Come what may to section 2, this proposal still provides a meaningful lens and frame of analysis for courts to use by acknowledging the reality of racial predominance in redistricting and more closely scrutinizing narrow tailoring.

#### CONCLUSION

Legislative line-drawing is no easy task. Line-drawers must comb through countless policy, legal, and practical considerations at every stage of redistricting. But courts must determine if and when those considerations push beyond proper boundaries and discriminate against or dilute minority votes. Currently the Supreme Court's tests contain a loophole; that loophole provides line-drawers the opportunity to pack an improperly large number of minority voters into a legislative district and claim that the line-drawers were required to do so by the VRA. Because the VRA and equal protection assert two different interests at different phases of analysis, they do not communicate with one another or put a check on this type of improper districting.

In order to more meaningfully reflect the interests that the Equal Protection Clause and the VRA attempt to protect, the Court should establish a presumption of race predominance when considering a majority-minority district created in compliance with section 2. When evaluating these districts under strict scrutiny, compliance with section 2 serves as a compelling interest; however, in order to establish narrow tailoring, the government must not only show a strong basis in evidence that the *Gingles* preconditions were present, but that they did not include more minority voters than

reasonably necessary in the district to accomplish the VRA's goals. Amending these two stages of the analysis ensures that line-drawers comply with the VRA by creating majority-minority districts when necessary and valuable, but that they do not minimize the effectiveness of minority votes in doing so.

The interaction between racial gerrymandering and section 2 is only one tree in the voting rights thicket, but it is an important one. How we vote, when we vote, and who we vote for certainly matter, but these factors cannot be effective without confidence in where we vote from. The contours of each legislative district in the United States shape the leadership, policy, and progress of our democracy—it is important, if not fundamental, that courts and legislatures have clear and honest standards with which to evaluate these districts and promote equality.

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\* J.D. Candidate 2022, William & Mary Law School; B.A. Creative Writing 2017, University of Arizona. Thank you to everyone on the *William & Mary Law Review* staff who brought this Note from a fleeting idea to a final product. This Note is for my Aunt Jennifer, who hated nothing like she hated inequality.