

# Rethinking the Redistricting Toolbox

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## INTRODUCTION

The round of redistricting that took place after the 2010 census was in many ways a frustrating one for communities of color.

To be sure, communities of color were largely able to hang onto the gains of earlier decades, thanks to the swan-song presence of Section 5 of the Voting Rights Act.<sup>1</sup> But there were very few new gains—despite the rapid growth of Latino and Asian communities in many parts of the country. The cycle also saw the shockingly cynical use of

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1. See generally Enbar Toledano, *Section 5 of the Voting Rights Act and Its Place in “Post-Racial” America*, 61 EMORY L.J. 389 (2011).

race as a tool of political gerrymandering that took advantage of increasing division of the two major political parties along racial lines.<sup>2</sup> Egregious examples of this tactic took place not just in southern states like North Carolina, but also in northern states like New York, where the careful fracturing of African American and Latino communities on Long Island was key to engineering a pro-Republican state senate map.<sup>3</sup>

Efforts to block aggressive redistricting in the courts, likewise, proved to be a decidedly mixed bag. Racial gerrymandering claims, to the surprise of some, were an unexpectedly robust tool to challenge the packing of African American voters in the South. But the other traditional tools used to protect the electoral power of communities of color were far less effective. Constraints placed by the Supreme Court, for example, on vote dilution claims under Section 2 of the Voting Rights Act, meant that Latino communities in North Texas were unable to win any additional representation, notwithstanding explosive and record-levels of Latino growth in the region.<sup>4</sup> Similarly, courts took a highly superficial approach to questions of intentional discrimination that allowed highly discriminatory maps to remain in place.

The next cycle of redistricting is likely to be even more challenging for communities of color because of the courts' restrictive interpretation of key parts of the existing doctrinal framework. Further, because communities themselves are changing in ways that make it harder to apply existing tools—and also because the courts themselves, including the Supreme Court, are changing in ways that could make them even less favorably disposed to traditional race-based remedies.<sup>5</sup> If the 2010 map cycle was frustrating, the 2020 cycle has the

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2. Abigail Thernstrom, *Redistricting, Race and the Voting Rights Act*, 38 NAT'L AFF. (2019).

3. *See id.*

4. Cameron Langford, *Texas Defends Against Latino Voting-Rights Claims*, COURTHOUSE NEWS SERVICE (Feb. 12, 2018), <https://www.courthousenews.com/texas-defends-against-hispanic-voting-rights-claims/>.

5. Todd Ruger, *Brett Kavanaugh Could Decide How Redistricting is Done*, ROLL CALL (Feb. 21, 2019), <https://www.rollcall.com/news/congress/brett-kavanaugh-could-decide-how-redistricting-is-done> (“Kavanaugh will be the center of attention when the Supreme Court hears oral arguments in March about congressional maps in North Carolina and Maryland. He is expected to have the pivotal vote in the cases that could curtail how states use politics to draw legislative and congressional districts — or leave them free to be even more partisan in the future. And a future legal challenge to one of those newly created independent commissions could give conservatives on the Supreme Court a chance to reverse an earlier ruling and strike them down as unconstitutional, legal experts say.”).

potential for being seriously frightening. It is time for a somber reassessment of the toolkit.

This article will look at the current state of law as it relates to protection of communities of color in the redistricting process, the stress points that will make the next round of redistricting in 2021 even more challenging, and then finally some of the ways those stress points can be relieved.

I. STRESS POINTS: WHY THE NEXT REDISTRICTING  
CYCLE WILL BE DIFFERENT  
(AND POTENTIALLY WORSE)

A. The Shifting Demographic Landscape

Ensuring fair representation for communities of color has never been easy, but in 2021 rapidly changing demographics will test existing tools as never before. For decades now, the United States has been increasingly trending away from being a white-majority country toward a multi-racial and ethnic plurality society.<sup>6</sup> The most recent population release by the United States Census Bureau helps underscore the imminence of the turning point. For the first time in American history, there has been a decline in the absolute number of non-Hispanic whites.<sup>7</sup> The trend line for other racial groups are exactly the opposite. In 2018, the majority of children under nine were non-white.<sup>8</sup> The first generation to be majority people of color is in the fourth grade, and its first members will be eligible to vote by 2026—the halfway mark of next decade’s redistricting cycle.<sup>9</sup>

But, counterintuitively, as these changes accelerate, so do the challenges facing the civil rights community in race-based redistricting advocacy. One of the biggest reasons for the increased difficulty of ensuring fair representation for communities of color is the fact that, while the country is becoming more demographically diverse, it also is

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6. RUY TEIXEIRA ET AL., STATES OF CHANGE: THE DEMOGRAPHIC EVOLUTION OF THE AMERICAN ELECTORATE, 1974-2060 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/02/SOC-report1.pdf>.

7. William H. Frey, *US White Population Declines and Generation ‘Z-Plus’ is Minority White, Census Shows*, BROOKINGS INSTITUTION BLOG (June 22, 2018), <https://www.brookings.edu/blog/the-avenue/2018/06/21/us-white-population-declines-and-generation-z-plus-is-minority-white-census-shows/>; JONATHAN VESPA ET AL., DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060 (2018), [https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25\\_1144.pdf](https://www.census.gov/content/dam/Census/library/publications/2018/demo/P25_1144.pdf).

8. Frey, *supra* note 7.

9. *Id.*

simultaneously becoming increasingly interwoven. Latinos have moved into historically African American neighborhoods in Los Angeles, for example, while African Americans and Latinos have moved into previously all-white suburbs in places like Atlanta, Austin, and Raleigh-Durham.<sup>10</sup> At the same time, gentrification is upending the traditional ethnic mix of cities across the country like Brooklyn and St. Louis.<sup>11</sup>

This increasing demographic complexity runs headlong into long-standing interpretations of the Voting Rights Act assuming that communities are composed of one majority group and one minority group, with a high degree of segregation. But those predicates increasingly are not the case, making use of traditional remedies harder and harder. To be sure, nothing in Section 2 of the Voting Rights Act itself requires such interpretations.<sup>12</sup> The statute itself merely prohibits the use of electoral districts and qualifications, standards, practices, or procedures that deny or abridge the right of people “to vote on account of race or color.”<sup>13</sup> But, despite no references to racial majority or minority status in the plain text of Section 2,<sup>14</sup> the Supreme Court has generally understood the resolution of a Section 2 case to center on “the impact of the contested structure or practice on *minority* electoral opportunities.”<sup>15</sup> Indeed, the seminal three-part test couched the relevant inquiry entirely in terms of “minority voters” and “majority voters” and numerical superiority.<sup>16</sup> So beyond the complications to the application of the Section 2 analytical framework, which is discussed in Part II of this article, there are fundamental philosophical,

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10. Dakota Smith & Angel Jennings, *In L.A.’s Historic African American Core, A Growing Latino Wave Represents A Possible ‘Turning Point’*, LA TIMES (Feb. 28, 2017), <https://www.latimes.com/local/lanow/la-me-ln-blacks-latinos-south-la-20170228-story.html>; Noah Smith, *Why Charlotte and Raleigh Work for Black Residents*, BLOOMBERG (Mar. 28, 2018), <https://www.bloomberg.com/opinion/articles/2018-03-28/why-charlotte-and-raleigh-work-for-black-residents>.

11. Balazs Szekely, *Downtown LA’s 90014 Heads the List of Fastest-Gentrifying ZIPs Since the Turn of the Millennium*, RENTCAFE (Feb. 26, 2018), <https://www.rentcafe.com/blog/rental-market/real-estate-news/top-20-gentrified-zip-codes/>.

12. See generally 52 U.S.C. § 10301.

13. *Id.*

14. The only mention of the minority concept is in the context of the “language minority group” classification. See 52 U.S.C. § 10303(f).

15. *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (emphasis added).

16. To lay the foundational justification for the *Gingles* test, the Court wrote that the “theoretical basis for [a vote dilution claim] is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.” *Id.* at 47.

or at the very least conceptual semantic, adjustments that must be made, if that is even possible at this juncture.

But the issues posed by changing demographics are not limited to untethering the judiciary from its traditional majority versus minority dichotomy in interpreting the Voting Rights Act. The population shifts happening within each racial classification also make the landscape more challenging. For example, in 2012, naturalized citizens and noncitizens made up approximately 9.7 percent of the overall black population, just six years later, that percentage was up to 11 percent.<sup>17</sup> Close to 20 percent of the black population is composed of foreign born individuals or their children, predominantly from Nigeria, Kenya, Ghana, Ethiopia, Guyana, Jamaica, Trinidad and Tobago, Haiti, Dominican Republic, and Somalia.<sup>18</sup> For those identifying as Hispanic or Asian, the multiculturalism is even more pronounced.<sup>19</sup> And of course, the fastest growing racial category—those that identify with two or more races—further challenges the idea of racial monoliths.<sup>20</sup> People with multiple, and potentially competing, racial identities may not factor neatly into any paradigm that takes a formalistic approach to grouping people together based on shared racial characteristics.

In these ways, the trend toward a society composed of a racial plurality, and the simultaneously increasing diversity of the racial groups themselves, will continue to strain existing frameworks that have, up-to-now, depended on a simple, more or less static two-race dynamic and that have not been deployed in the multi-racial and ethnic coalition context.

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17. Current Population Survey Table Creator: Race Black: alone or in combo and Nativity 2012-2018, U.S. CENSUS BUREAU, <https://www.census.gov/cps/data/cpstablecreator.html>.

18. Monica Anderson & Gustavo Lopez, *Key Facts About Black Immigrants in the U.S.*, PEW RES. CENTER (Jan. 24, 2018), <http://www.pewresearch.org/fact-tank/2018/01/24/key-facts-about-black-immigrants-in-the-u-s/>.

19. Gustavo Lopez et al., *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RES. CENTER (Sep. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>; Antonio Flores, *How the U.S. Hispanic Population is Changing*, PEW RES. CENTER (Sep. 18, 2017), <http://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing/>.

20. Bill Chappell, *Census Finds A More Diverse America, As Whites Lag Growth*, NPR (June 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/22/533926978/census-finds-a-more-diverse-america-as-whites-lag-growth>.

B. The Growing Overlap of Race and Party

At the same time the country has gotten more diverse, it also has become increasingly racially polarized in political terms, especially in the South.<sup>21</sup> At the time Section 2 was designed, whites and African Americans in the South both still voted overwhelmingly in the Democratic primary.<sup>22</sup> By the 1980s this began to change, as southern white voters began a drift to the Republican Party.<sup>23</sup> This drift became a flood by 1994 and has continued even into this decade.<sup>24</sup>

As this shift was happening, the Supreme Court created a legal loophole with its ruling in *Easley v. Cromartie* (*Cromartie II*) that politics could be used to explain—and justify—a map that had been seemingly drawn along racial lines.<sup>25</sup> While a map drawn with close attention to race would fail under the court’s racial gerrymandering line of cases, it could survive if mapdrawers could show that race had been a proxy for politics.<sup>26</sup>

The opening created by the combination of *Cromartie II* and the increased polarization of the Democratic and Republican parties along political lines has proven hard for mapdrawers to resist.<sup>27</sup> Communities of color have long been used by both major parties to create or shore up a political advantage.<sup>28</sup> But the 2011 redistricting cycle saw a growing number of efforts both to target communities of color and then to defend those maps on the basis of politics. The resulting disputes, which were primarily brought as racial gerrymandering claims, proved challenging for courts to resolve – and especially frus-

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21. Alana Semuels, *Segregation Had to Be Invented*, ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/business/archive/2017/02/seggregation-invented/517158/> (“Today, schools in the South are almost as segregated as they were when Sevone Rhymes was a child. Southern cities including Charlotte are facing racial tensions over the shootings of black men by white policemen, which, in Charlotte’s case, led to massive protests and riots.”).

22. Joshua Zingher, *Whites Have Fled the Democratic Party. Here’s How the Nation Got Here*, WASH. POST (May 22, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/22/whites-have-fled-the-democratic-party-heres-how-the-nation-got-there/?utm\\_term=.e5bd1ec0debe](https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/22/whites-have-fled-the-democratic-party-heres-how-the-nation-got-there/?utm_term=.e5bd1ec0debe).

23. Merle Black, *The Transformation of the Southern Democratic Party*, 66 J. POL. 1001 (2004).

24. Charles S. Bullock, III et al., *The Consolidation of the White Southern Congressional Vote*, 58 POL. RES. Q. 231 (2005).

25. See generally *Easley v. Cromartie*, 532 U.S. 234 (2001).

26. *Id.* at 252.

27. Jason Altmire, *Gerrymandering Must Die, But It Won’t Stop Polarization*, DAILY BEAST (Jan. 13, 2018), <https://www.thedailybeast.com/gerrymandering-must-die-but-it-wont-stop-polarization>.

28. Michael Kelly, *Segregation Anxiety*, NEW YORKER (Nov. 20, 1995), <https://www.newyorker.com/magazine/1995/11/20/seggregation-anxiety>.

trating to the Supreme Court.<sup>29</sup> While the Supreme Court took tentative steps to defuse the tension (see *supra*), the growing overlap between race and party remains a source of potential mischief as the country heads into the next cycle of redistricting.<sup>30</sup>

### C. The Loss of Section 5

On the legal side, one of the most profound changes in the next round of redistricting after the 2020 census will be the absence of Section 5 of the Voting Rights Act.

When redistricting took place in 2011, seven southern states – plus Alaska and Arizona – were required to have all redistricting plans precleared (pre-approved) by the Department of Justice or a federal court before they could go into effect.<sup>31</sup> Another six states were required to obtain federal government approval for the portions of redistricting plans covering parts of the state where there had been a history of discrimination.<sup>32</sup> The preclearance requirement covered local government redistricting plans as well as legislative and congressional plans.<sup>33</sup> To win preclearance, the burden was on the jurisdiction to show that the plan was non-discriminatory and would not leave minority voters worse off with respect to “their effective exercise of the electoral franchise” (a principle known as non-retrogression).<sup>34</sup>

The impact of Section 5 was profound. Although the Justice Department and courts precleared the vast majority of redistricting plans submitted to it in 2011, there were notable exceptions.<sup>35</sup> In 2011, a federal court denied Texas’ request to preclear its legislative and congressional plans, resulting in a redraw of the maps.<sup>36</sup> A number of local government redistricting plans also were blocked from going into

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29. See e.g., *Cooper v. Harris*, 137 S.Ct. 1455 (2017).

30. *Id.*

31. Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were covered as a whole by Section 5. In addition, portions of California, Florida, New York, North Carolina, South Dakota, and Michigan also were covered. *Jurisdictions Previously Covered By Section 5*, U.S. DEP’T OF JUSTICE (Aug. 6, 2015), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

32. *Id.*

33. L. Paige Whitaker, CONG. RESEARCH SERV., 7-5700, *Congressional Redistricting: Legal and Constitutional Issues* 1 (2015).

34. See Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FL. ST. U. L. REV. 573 (2016); see also, *Beer v. U.S.* 425 U.S. 130, 141 (1976).

35. *Id.* at 579-80.

36. *Id.* at 602.

effect.<sup>37</sup> And Section 5 acted as a significant constraint on the temptation to dismantle the growing non majority-minority districts that nonetheless were electing minority-preferred candidates on a consistent basis.<sup>38</sup>

But Section 5 looks unlikely at this time to be a factor in the next round of redistricting, thanks to the Supreme Court's decision in *Shelby County v. Holder*, which invalidated not Section 5 itself, but the formula used to determine what states and jurisdictions are subject to preclearance, finding that the formula had "no logical relationship to the present day."<sup>39</sup> Congress could adopt a new coverage formula to replace the one invalidated by the Supreme Court, but it seems unlikely that could happen in the current political environment.

The loss of Section 5 is likely to be felt keenly at the local government level where there simply are not enough resources to monitor every type of potential shenanigan.<sup>40</sup> But it also could open the door to efforts, in places where it is politically beneficial, to dismantle districts where communities of color had successfully been able to elect candidates for many years. For a hint at what might be possible, consider the two-decade travail of Texas' 23rd Congressional District, where in two redistricting cycles in a row, white lawmakers attempted to dilute the ability of Latinos to elect preferred candidates.<sup>41</sup>

#### D. The Limits of Section 2

Though the Supreme Court has not yet signaled an intent to call the constitutionality of Section 2 of the Voting Rights Act into question, the Court has, in the last twelve years, nonetheless become more restrictive in how it interprets voting rights laws, expressing increasing discomfort when it comes to making nuanced judgment calls on questions of race.<sup>42</sup>

At the time of its passage, Section 2 of the Voting Rights Act provoked little controversy.<sup>43</sup> As the Supreme Court surmised, this was likely because when "first enacted, [Section] 2 tracked, in part, the text of the Fifteenth Amendment."<sup>44</sup> As a result, the Supreme

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37. *Id.* at 576.

38. *Id.* at 582-83.

39. *Shelby County v. Holder*, 570 U.S. 529, 554 (2013).

40. *Id.* at 561 (Ginsburg, J., dissenting).

41. *Id.* at 572.

42. *Id.* at 557.

43. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009).

44. *Id.*



Court interpreted the section as doing little “more than elaborate[ing] upon . . . the Fifteenth Amendment” and that it was “intended to have an effect no different from that of the Fifteenth Amendment itself.”<sup>45</sup> This reasoning informed the Court in *Mobile v. Bolden*, which, consistent with Fifteenth Amendment jurisprudence, required litigants to establish discriminatory intent as part of a Section 2 claim.<sup>46</sup>

The *Bolden* ruling prompted Congress to clarify that a Section 2 claim could be based purely on discriminatory impacts.<sup>47</sup> In 1982, Congress amended the Voting Rights Act to its current form to prohibit practices “imposed or applied . . . in a manner which results in a denial or abridgment” of the right to vote.<sup>48</sup> The 1982 amendments also added a subsection, Section 2(b), providing a test for determining whether a Section 2 violation has occurred.<sup>49</sup>

Since this amendment, section 2 of the Voting Rights Act has been the key tool for communities of color seeking to vindicate their voting rights by challenging discriminatory redistricting plans, at-large election systems,<sup>50</sup> and other electoral devices and voting regulations.<sup>51</sup> The Act, even in its 1982 update, largely contemplated a black and white paradigm where the voting power of black communities was systemically undermined in relation to their white counterparts.<sup>52</sup> Judicial interpretation of Section 2 has, for the most part, stayed true to this original conception.

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45. *Id.*

46. The Supreme Court reasoned that

[a]ssuming . . . that there exists a private right of action to enforce this statutory provision, it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself. . . . Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.

*Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980) (internal citations omitted).

47. 96 Stat. 134, 52 U.S.C. § 10301.

48. *Id.*

49. *Id.*

50. An at-large election system is one where all persons registered to vote in a particular political jurisdiction can cast ballots for all members of a multi-member democratic body. This is in contrast with a single-member district system where voters are split into districts that each elect one representative. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1839 (1992).

51. See generally United States Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States 2018 Statutory Enforcement Report* (2018); see also Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643 (2006).

52. See generally *Id.* at 678-85 (providing examples of systematically undermined voting power in black communities South Carolina, South Dakota, Georgia, Texas, etc.)

To successfully prosecute a Section 2 claim, plaintiffs must demonstrate, by a totality of the circumstances that a protected class does not have “an equal opportunity to participate in the political process.”<sup>53</sup> This statutory command has been operationalized in two steps by the Supreme Court in *Thornburg v. Gingles*.<sup>54</sup> First, litigants must satisfy the threshold *Gingles* precondition quantitative inquiry.<sup>55</sup> Second, they must meet the “Senate factors” qualitative considerations.<sup>56</sup> At both phases, litigants will likely have an increasingly difficult task meeting their burden, given practical challenges posed by increasingly racial heterogeneity in communities of color and the Supreme Court’s trend toward bright-line inquiry.

The first *Gingles* factor requires a community of color to “demonstrate that it is sufficiently large and geographically compact to constitute a majority” in a district.<sup>57</sup> In other words, the inquiry determines whether an appropriate remedy—the drawing of districts that are majority-minority—would be available to plaintiffs.<sup>58</sup> The second and third *Gingles* factors require a community of color to “show that it is politically cohesive” and “that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”<sup>59</sup> These two conditions determine whether a cognizable injury—unsuccessful cohesive minority attempts to elect candidates of choice as a result of racially polarized voting tendencies of the white majority—has occurred.<sup>60</sup>

The Supreme Court has not signaled an intention to update its understanding of these concepts to maintain the continued viability of the *Gingles* inquiry. If anything, the Court has demonstrated a preference for more mechanical applications, which will make it fundamentally more difficult to make the case and community specific inquiries to account for the growing complexity of communities of color.<sup>61</sup>

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53. 52 U.S.C. § 10301.

54. *Thornburg v. Gingles*, 478 U.S. 30, 44–45, 50 (1986).

55. See e.g., *Lopez v. Abbott*, 339 F. Supp. 3d 589, 600-01 (S.D. Tex. 2018); see also *Thornburg*, 478 U.S. at 50.

56. *Id.* at 602, *Throngurg*, 478 U.S. at 44–45.

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

58. *Id.* at 47.

59. *Id.* at 90.

60. *Id.*

61. See *Bartlett*, 556 U.S. at 17 (reasoning that “[t]he rule [adopted by the Court] draws clear lines for courts and legislatures alike. The same cannot be said for a less exacting standard . . . [that] would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions.”).

The Supreme Court, in particular, has made the first *Gingles* factor much harder for communities of color to satisfy.<sup>62</sup> In *Bartlett v. Strickland*, the Supreme Court imposed a bright-line rule for defining what it means for a minority group to be sufficiently large.<sup>63</sup> To meet the precondition, the Court held that litigants must demonstrate that members of the relevant racial group could form more than 50 percent of the citizen voting age population of a particular district.<sup>64</sup> The opinion rejected the lower court's finding that "crossover" voters from the white community who supported black candidates could be combined with the population of the black community to create a "de facto" majority black district that could elect candidates of choice.<sup>65</sup>

In arriving at this outcome, the Court's reasoning largely rested on the supposed tension that permitting such "crossover districts" would create between the numerosity requirement of the first *Gingles* precondition and the sufficiency of the racially polarized white bloc voting to defeat minority-preferred candidates of the third *Gingles* precondition.<sup>66</sup> That is, the Court balked at the thought that the white community could be bisected with one portion used to establish injury and a different portion used to establish the viability of a remedy.<sup>67</sup>

But the Court was also concerned with judicial manageability of a standard that permitted crossover districts. Justice Kennedy reasoned that

Crossover-district claims would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local jurisdictions that often feature more than two parties or candidates. Under petitioners' view courts would face the difficult task of discerning crossover patterns in nonpartisan contests for a city commission, a school board, or a local water authority. The political data necessary to make such determinations are nonexistent for elections in most of those jurisdictions. And predictions would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.<sup>68</sup>

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62. *Id.* at 15.

63. *Id.* at 25–26.

64. *Id.*

65. *See id.* at 2.

66. *Id.* at 16.

67. *Id.* at 21.

68. *Id.* at 18.

In other words, a majority of the Supreme Court believed that it is important for an adopted rule to be applicable to all possible iterations of Section 2 challenges. It was also uncomfortable with how jurisdiction and fact specific the inquiry for protecting crossover districts would be.<sup>69</sup>

Both threads of the Court's reasoning from *Bartlett* pose significant challenges to using Section 2 to protect communities that want to combine voting strength in a coalition district. For now, the Supreme Court has sidestepped the question.<sup>70</sup> However, circuit courts' attempts to bring coalition district claims have had mixed results.<sup>71</sup> But, if the Supreme Court were to take up the question, it is easy to see how, without additional developments in the field, the Court's logic from *Bartlett* could be imported to thwart coalition voting rights efforts on communities of color that increasingly occupy common neighborhoods.<sup>72</sup>

The Supreme Court's existing discomfort with making "predictive political judgments" in the crossover district context<sup>73</sup> will likely be magnified when courts are asked to parse through claims implicating the voting rights of three or more racial groups.<sup>74</sup> Indeed, for the *Bartlett* majority, the presence of "more than two parties or candidates" in certain elections was enough to make the concurrent consideration of white crossover voting unmanageable.<sup>75</sup> It is hard to imagine that factoring in additional racial groups under existing inquiries would somehow be more acceptable to the Court. New datasets, quantitative methods, and legal and evidentiary frameworks

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69. *Id.* at 36.

70. *Id.* at 13–14 (explaining that crossover districts are distinct from districts where two minority groups form a coalition and that the Court "do[es] not address that type of coalition district here.").

71. Compare *Nixon v. Kent County*, 76 F.3d 1381, 1386–87 (6th Cir. 1996) (finding that coalition claims are not cognizable under Section 2 because the plain language of the statute "does not mention minority coalitions, either expressly or conceptually" and that it "consistently speaks of a 'class' in the singular) with *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, 906 F.2d 524, 526 (11th Cir. 1990) (establishing that "[t]wo minority groups (in this case blacks and Hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner."); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both blacks and Hispanics."); and *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 235 (D. Mass. 2017) (reasoning that "Section 2's remedial purpose is best served by allowing minority coalition claims.").

72. *Bartlett*, 556 U.S. at 13–14.

73. *Id.* at 18.

74. *Id.*

75. *Id.*

must be introduced and accepted for courts to keep up with new demographic realities.

But this need is not just to make necessary advances in the multi-racial context. As discussed above in Part I(A), the growing complexity of each racial group, may raise the same manageability concerns in more “conventional” Section 2 claims brought by single racial groups. There is a fear, particularly among members of Asian and Latino communities, that subgroups of differing ethnic origins will be disaggregated much like multiple racial groups are in the crossover, and potentially the coalition, district context. Advocates and experts may well need to make additional showings in the future so that groups such as Puerto Ricans and Dominicans can be considered one cohesive Latino community or that Chinese and Indian individuals are an Asian community for purposes of Section 2 cases.

A similar set of questions applies in the other *Gingles* inquiries as well. At their core, the second and third preconditions have been designed to determine “the cause of minority voters’ lack of success.”<sup>76</sup> Though no discriminatory intent need exist or be proven,<sup>77</sup> litigants must demonstrate a causal link between a minority group’s inability to elect preferred candidates and the majority group’s tendency to vote as a bloc in opposition.<sup>78</sup>

To establish this connection, plaintiffs must analyze past elections and offer evidence detailing the voting patterns of the relevant racial groups.<sup>79</sup> First, courts generally identify the candidates that are actually preferred by the minority group.<sup>80</sup> Then, they observe whether the white majority votes as a bloc for other candidates in those elections and determine whether the white bloc vote is of a magnitude that usually suffices to defeat minority-preferred candidates.<sup>81</sup> Finally, they consider whether any of the electoral results should be discounted because of special circumstances.<sup>82</sup>

The same lack of evidence that concerned the Court in *Bartlett* would be relevant in identifying who exactly should be considered a

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76. *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 303 (D. Mass. 2004).

77. *Id.* at 298.

78. *Black Political Task Force*, 300 F. Supp. 2d at 303.

79. *Shirt v. Hazeltine*, 461 F.3d 1011, 1020 (8th Cir. 2006).

80. *See Id.*; *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1118 (3d Cir. 1993); *Collins v. City of Norfolk*, 883 F.2d 1236 (4th Cir. 1989).

81. *Black Political Task Force*, 300 F. Supp. 2d at 298.

82. *See Gingles*, 478 U.S. at 51; *Black Political Task Force*, 300 F. Supp. 2d. at 303. *See also*, *Jenkins v. Manning*, 116 F.3d 685, 691 (3d Cir. 1997) (outlining a similar inquiry).

candidate of choice. In the coalition district context, it is unclear what threshold should be required for communities to be considered politically cohesive and which elections should be used to make that determination. Already the various circuit courts use differing processes to identify candidates of choice.<sup>83</sup> Specifically, they disagree on the role of analyzing primary elections<sup>84</sup> and how to factor in the race of the candidate.<sup>85</sup> These discrepancies and complications will only grow and may even threaten to implode the entire *Gingles* framework without additional methodological and conceptual developments.

In order to satisfy the second piece of the Section 2 inquiry, plaintiffs must present evidence that satisfy the so-called Senate Factors, “a non-exhaustive and non-exclusive list of factors set forth in a Senate Judiciary Committee Majority Report that accompanied an amendment to Section 2, which aid courts in assessing the totality of the circumstances surrounding the challenged voting schemes.”<sup>86</sup> These factors include

[T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively

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83. *Compare* N.A.A.C.P., Inc. v. City of Niagara Falls, 65 F.3d 1002, 1019 (2d Cir. 1995) (holding that “when a candidate receives support from 50% or more of minority voters in a general election, a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election.”) *with* Jenkins, 4 F.3d at 693 (reasoning that determining whether a candidate is “as a realistic matter, the minority voters’ representative of choice [courts may look at whether] “the minority community can have said to have sponsored the candidate”).

84. *Id.*

85. *See e.g.* Lewis v. Allamance Cty., 99 F.3d 600, 606 (4th Cir. 1996) (requiring plaintiffs to submit “a larger, more representative sample of elections” than just elections that involve minority candidates to meet the third *Gingles* prong); *Jenkins*, 4 F.3d at 1128 (holding that plaintiffs are not “required to present evidence on white versus white elections if they do not believe that those elections are probative.”); Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 361–62 (7th Cir. 1992) (refusing to discount the election of a black Republican even though the majority of black voters were Democrats because the race of the candidate was of paramount importance).

86. *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1312 (M.D. Ga. 2018) (citing *Gingles*, 478 U.S. at 37-38).

in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.<sup>87</sup>

Many of these factors rely on demonstrating historical discrimination. While “it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of [Section] 2 under the totality of the circumstances,”<sup>88</sup> the Supreme Court’s reasoning in *Shelby County* may signal that history of discrimination has an expiration date.<sup>89</sup> Plus, given much of the demographic change is driven by immigration, courts may begin to question whether the discrimination faced by a group historically also applies to co-racial relative newcomers.<sup>90</sup>

## II. RETHINKING THE TOOLKIT

### A. Build the Jurisprudence and Arguments for Coalition Districts

In response to accelerating demographic shifts and the increasingly complicated geographic distribution of communities of color, advocates have adopted a variety of techniques aimed at preserving the political power of cohesive multiracial coalitions. In large part, tactics have been driven by necessity. Despite the few favorable rulings, as discussed above in Part I(C), federal courts have not yet definitely interpreted section 2 of the Voting Rights Act as protecting the political power of cohesive multiracial coalitions.<sup>91</sup> Residential patterns, meanwhile, show that communities of color are becoming more diverse and living in closer proximity to each other.<sup>92</sup> For example, in 1980, the typical black individual lived in neighborhoods that were roughly 60 percent black.<sup>93</sup> In 2010, those neighborhoods were less than 50 percent black.<sup>94</sup> While black-white community integration

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87. *Id.* at 1312–13; S. Rep. No. 97-417 (1982).

88. *Niagara Falls*, 65 F.3d at 1019 n.21.

89. *Shelby County*, 570 U.S. at 547.

90. See Nadra Kareem Nittle, *California Minority Groups Offer ‘Unity’ Redistricting Map*, EGP NEWS, July 14, 2011, <http://egpnews.com/2011/07/california-minority-groups-offer-%E2%80%98unity%E2%80%99-redistricting-map/>; see also *The Unity Map: Redistricting for Fair Representation*, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, <https://www.aaldef.org/unity-map>.

91. See *supra* notes 55–57.

92. John Iceland & Gregory Sharp, *White Residential Segregation in U.S. Metropolitan Areas: Conceptual Issues, Patterns, and Trends from the US Census, 1980 to 2010*, 32 POPULATION RES. POL’Y REV. 663 (2013) accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3811941/>.

93. *Id.*

94. *Id.*

over the last three decades helps explain this trend somewhat, it is mostly on account of the increased presence of Latino and Asian communities.<sup>95</sup>

To help preserve the political integrity of these complex areas and to work in solidarity with each other, black, Latino, and Asian groups came together to engage in unity mapping in certain jurisdictions.<sup>96</sup> The process brings together community leaders from various racial and ethnic groups that live in close proximity to each other to craft a consensus plan that is jointly presented to redistricting authorities. Typically, representatives of these groups begin by analyzing the demographic data and applicable legal frameworks. They then schedule extensive community hearings around the relevant area to understand the degree to which different groups share concerns and what district configurations would best preserve these coherent interests. Ultimately, they form a unified front and publicly unveil political districts that are justified by demographic commonalities and other shared interests. Overall, unity mapping makes it more difficult for map-drawers to use these communities as pieces in games of political chess or to triangulate and pit different racial groups against each other. It also can provide counterweight to gerrymandering by offering what is perceived by the public and by courts as a legitimate alternative.

During the 2010 cycle, the Asian American Legal Defense and Education Fund, the Center for Law and Social Justice at Medgar Evers College, LatinoJustice PRLDEF, and the National Institute for Latino Police engaged in a unity mapping process to draw New York City's city council districts.<sup>97</sup> The original redistricting plan that was released by New York's redistricting commission had carved up the Asian communities in Queens and Manhattan, the black communities in Queens and Brooklyn, and the Latino communities in Manhattan.<sup>98</sup> Through the unity mapping process, these organization were able to put forth plans that met all legal requirements and helped keep these

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95. *Id.*

96. Nadra Kareem Nittle, *California Minority Groups Offer 'Unity' Redistricting Map*, EGP NEWS, July 14, 2011, <http://egpnews.com/2011/07/california-minority-groups-offer-%E2%80%99unity%E2%80%99-redistricting-map/>.

97. *The Unity Map: Redistricting for Fair Representation*, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, <https://www.aaldef.org/unity-map>.

98. *See AALDEF and Civil Rights Groups Present "Unity Map" for Redistricting New York City*, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (Oct. 6, 2011), <https://www.aaldef.org/press-release/aaldef-and-civil-rights-groups-present-unity-map-for-redistricting-new-york-city/>.



communities intact in ways that respected other legitimate redistricting criteria.<sup>99</sup>

A similar process played out last redistricting cycle in California. There, the Mexican American Legal Defense and Educational Fund, the Coalition of Asian Pacific Americans for Fair Redistricting, and the African American Redistricting Collaborative came together to jointly advocate for state legislative and congressional district recommendations to the independent redistricting commission.<sup>100</sup> The original set of maps released by the commission split up communities of color in ways that would have diluted their political influence. Latino communities around the state had grown by three million people between 2000 and 2010, representing nearly 90 percent of the overall population change in California.<sup>101</sup> But the initial proposal saw Latino communities gain no congressional or state assembly seats and would have resulted in the loss of a state senate district.<sup>102</sup> The commission's first plan also split up Asian and black communities in greater Los Angeles and the San Francisco Bay Area. The California unity plan provided the redistricting commission a valid alternative that advanced the ability of communities of color to elect candidates of choice while meeting the other redistricting criteria.<sup>103</sup>

Unity mapping has proven to be effective at preserving the political power of communities of color, at least in the few iterations that it has been used. But its utility is limited to the extent that mapdrawers care to consider the unity map suggestions. Many jurisdictions, particularly ones with legacies of significant redistricting abuses, are likely to be less susceptible to the pressures of accepting public mapping than states such as California and New York. Texas, for example, largely ignored redistricting suggestions submitted by groups like the Texas Latino Task Force.<sup>104</sup>

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99. *See id.*

100. *Asian Americans, Latinos And African Americans Submit Joint Mapping Proposal to California Redistricting Commission*, ASIAN AMERICANS ADVANCING JUSTICE (June 30, 2011), <https://advancingjustice-la.org/media-and-publications/press-releases/asian-americans-latinos-and-african-americans-submit-joint-mapping#.XH1DesBKjcs>.

101. Nadra Kareem Nittle, *California Minority Groups Offer 'Unity' Redistricting Map*, EGP NEWS, July 14, 2011, <http://egpnews.com/2011/07/california-minority-groups-offer-%E2%80%98unity%E2%80%99-redistricting-map/>.

102. *Id.*

103. *See id.*

104. *See Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (discussing proposed redistricting plans).

To make such efforts enforceable, redistricting activists in an increasing number of states have advanced the next generation of race equity protections as part of state law. In all seven states, including California,<sup>105</sup> Florida,<sup>106</sup> Illinois,<sup>107</sup> Iowa,<sup>108</sup> Missouri,<sup>109</sup> Oregon,<sup>110</sup> and Washington,<sup>111</sup> have some provisions that protect the political power of communities of color.

These states have taken a variety of approaches. Washington passed a state voting rights act that makes it unlawful for local jurisdictions, such as cities and counties, to impair the ability of a protected class to have an equal opportunity to elect candidates of choice.<sup>112</sup> In others, such as Missouri and Illinois, the race equity language factors in as one of the redistricting criteria for state legislative and congressional districts.<sup>113</sup> In their best iterations, these provisions share features that help them extend beyond the protections offered by section two of the Voting Rights Act—they explicitly allow for crossover and, in certain instances, coalition districts.<sup>114</sup>

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105. The California Voting Rights Act allows members of a protected class to sue local jurisdictions if an at-large election system “impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.” Cal. Elec. Code §§ 14027, 14032.

106. In Florida, it is impermissible for congressional or state-legislative “districts [to] be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.” FLA. CONST. art. III, §§ 20(a), 21(a).

107. In Illinois, all congressional and state legislative district plans “shall be drawn . . . to create crossover districts, coalition districts, or influence districts. The requirements imposed by this Article are in addition and subordinate to any requirements or obligations imposed by the United States Constitution, any federal law regarding redistricting Legislative Districts or Representative Districts, including but not limited to the federal Voting Rights Act, and the Illinois Constitution.” 10 ILL. COMP. STAT. ANN. 120/5-5 (West 2017).

108. In Iowa “[n]o district shall be drawn . . . for the purpose of augmenting or diluting the voting strength of a language or racial minority group.” IOWA CODE ANN. § 42.4 (West 2011).

109. In Missouri, “districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice, whether by themselves or by voting in concert with other persons.” MO. CONST. art. III, § 3(c)(1)(b).

110. In Oregon, “No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.” OR. REV. STAT. ANN. § 188.010 (West 2019).

111. The Washington Voting Rights Act allows members of a protected class to sue local jurisdictions if the “method of electing the governing body of a political subdivision [is] imposed or applied in a manner that impairs the ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice.” WASH. REV. CODE ANN. § 29A.92.020 (West 2018).

112. *See id.*

113. *See* MO. CONST. art. III, § 3(c)(1)(b); 10 ILL. COMP. STAT. ANN. 120/5-5 (West 2017).

114. *Id.*

*Rethinking the Redistricting Toolbox*

The citizen-proposed constitutional amendment in Missouri, that voters overwhelmingly approved in November 2018, uses perhaps the most protective language. The relevant section reads:

Notwithstanding any other provision of this Article, districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or diminishing their ability to elect representatives of their choice, whether by themselves or by voting in concert with other persons.<sup>115</sup>

This language contains multiple standards: a plan may neither deny nor abridge the equal opportunity of racial and language minorities to participate in the political process nor diminish the ability of these communities to elect candidates of choice.<sup>116</sup> Perhaps, more importantly, the language explicitly contemplates multiracial coalitions by allowing one racial group to “vot[e] in concert with other persons.”<sup>117</sup> To put this into practice, Missouri’s state demographer will have to consider the minority’s size and turnout, as well as the level at which other communities support the minority-preferred candidates.

Such enhancements are also being introduced, if not yet adopted, in federal policy proposals as well.<sup>118</sup> The Redistricting Reform Act of 2019, for instance, contains a federal analog to Missouri’s criteria provision.<sup>119</sup> It would require Congressional Districts to “provide racial, ethnic, and language minorities with an equal opportunity to participate in the political process and to elect candidates of choice and shall not dilute or diminish their ability to elect candidates of choice, whether alone or in coalition with others.”<sup>120</sup>

Such efforts, be they state voting rights acts or new racial fairness redistricting criteria, will provide important new tools for protecting voting rights as demographic changes continue to change the makeup of the country.<sup>121</sup> These new standards, however, only solve part of the problem. The dataset and methodological challenges identified in *Bartlett* must still be addressed to make sure that relevant communities can actually use these new laws to vindicate their rights. Securing

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115. MO. CONST. art. III, § 3(c)(1)(b).

116. *See id.*

117. *Id.*

118. *See* For the People Act of 2019, H.R. 1, 116th Cong. § 2413(a)(1)(C) (2019).

119. *See id.*

120. *Id.*

121. *See* Jamal Hagler, *It Is Time to Update the Voting Rights Act*, CENTER FOR AMERICAN PROGRESS (Aug. 6, 2015, 9:03 am), <https://www.americanprogress.org/issues/race/news/2015/08/06/118888/it-is-time-to-update-the-voting-rights-act/>.

their success will require forming coherent legal inquiries and developing evidentiary approaches that courts find manageable.

B. Be Prepared to Give Teeth to Communities of Interest

If traditional race-based remedies are becoming harder to use, an important alternative could be the protections for communities of interest that a growing number of states are adding to their state constitutions.<sup>122</sup> The redistricting reform measure passed by California voters in 2008, for example, expressly requires to minimize the division of communities of interest “to the extent possible” and defines communities of interest as “a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation.”<sup>123</sup> Voters in Colorado, Michigan, and Utah adopted similar protections for communities of interest with reforms passed in 2018, and communities of interest language is also a part of federal and state legislation being considered in 2019.<sup>124</sup>

Wielded well, a communities of interest provision can be powerful in enhancing representation, sometimes in unexpected ways. In California, for instance, the state’s new independent redistricting commission chose to draw a district in the foothills of Los Angeles based on extensive citizen testimony about unmet needs related to wildfire prevention.<sup>125</sup> Communities of interest protections, likewise, can help communities of color making it possible to argue, without invoking race, that ethnically heterogenous neighborhoods with extensive socio-economic commonalities should be kept together in the same district.<sup>126</sup> This would avoid abuses like the aggressive fracturing of African American, Latino, and Asian communities that occurred this decade in places as politically different as Texas and New York.<sup>127</sup> In-

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122. See Cal. Elec. Code § 21552(a)(4) (2012).

123. *Id.*

124. MI Proposal 2 ([https://ballotpedia.org/Michigan\\_Proposal\\_2\\_Independent\\_Redistricting\\_Commission\\_Initiative\\_\(2018\)](https://ballotpedia.org/Michigan_Proposal_2_Independent_Redistricting_Commission_Initiative_(2018))), UT Proposition 4 ([https://ballotpedia.org/Utah\\_Proposition\\_4\\_Independent\\_Advisory\\_Commission\\_on\\_Redistricting\\_Initiative\\_\(2018\)](https://ballotpedia.org/Utah_Proposition_4_Independent_Advisory_Commission_on_Redistricting_Initiative_(2018))), CO Amendments Y and Z (<https://www.cpr.org/news/story/colorado-amendment-y-z-redistricting-results>), For the People Act of 2019, H.R. 1, 116th Cong. § 2413(a)(1)(C) (2019), New Hampshire HB706 (<https://legiscan.com/NH/bill/HB706/2019>).

125. Karin Mac Donald and Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U. CAL. IRVINE L. REV. 609, 632 (2013).

126. *Id.* at 633.

127. In Texas, Republican lawmakers, for example, refused to create any additional minority opportunity districts in North Texas despite growth of Latino and African American populations in the region. See Michael Li & Laura Royden, *Minority Districts: No Conflict with Fair Maps*, 15

deed, eighteen civil rights and good government groups, who often disagree about many aspects of redistricting, signed a common statement in 2014 stating that “[c]onsideration of communities of interest is essential to successful redistricting” and that “[m]aintaining communities of interest intact in redistricting maps should be second only to compliance with the United States Constitution and the federal Voting Rights Act.<sup>128</sup>”

But that is not to say communities of interest protections are self-executing. While protections for communities of interest can be a powerful tool for communities of color, the term – even with the added definitional language in California – is very broad. The challenges posed by this breadth are compounded by the fact that where protections for communities of interest exist, they are often lumped in with protections for counties and political subdivisions.

Successfully asserting that a functioning community of interest exists requires both organization and factual evidence (subjective as well as quantitative). In the absence of either, the risk is that map drawers will fall back on easier to define political subdivisions or listen to better organized groups. Data from the Census Bureau’s American Community Survey can provide a solid starting point for identifying possible communities of interest based on factors such as ethnicity, socioeconomic status, marital status, sprawl, and age.<sup>129</sup> But these are only a starting point because they flag only that people share common attributes, not that people so flagged see those common attributes as giving them a common identity.<sup>130</sup> To ascertain whether a community of interest exists, public input is essential. Although there are different forms that public input can take, the structured inquiry developed by California’s independent redistricting commission is instructive of what map drawers found helpful. In both handouts and oral statements, the commission asked participants in the public testimony

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(2017), [https://www.brennancenter.org/sites/default/files/analysis/Minority-Representation-Analysis\\_0.pdf](https://www.brennancenter.org/sites/default/files/analysis/Minority-Representation-Analysis_0.pdf). (Similarly, in New York, the division of African American and Latino communities on Long Island was key to engineering a pro-Republican bias in the state senate.)

128. Common Cause, *Redistricting Principles for a More Perfect Union*, 9 (2014), <https://www.commoncause.org/redistricting-principles-for-a-more-perfect-union/#>. The eighteen signatories to the statement are the Advancement Project, American Civil Liberties Union, Asian American Legal Defense and Education Fund, Asian Americans Advancing Justice, Brennan Center for Justice, Campaign Legal Center, CHANGE Illinois, Common Cause, Demos, Lawyers’ Committee for Civil Rights Under Law, LatinoJustice, Mexican American Legal Defense and Educational Fund, NAACP Legal Defense and Education Fund, NALGO Educational Fund, Prison Policy Initiative, Sierra Club, and Southern Coalition for Social Justice.

129. Mac Donald, *supra* note 138, at 617.

130. *Id.* at 618.

phase to provide: (a) the geographic boundaries for the neighborhood or asserted community of interest, (b) a description of the shared interests, and (c) an explanation of why it should be kept together.<sup>131</sup> This is a very different type of evidentiary case than the one that civil rights advocates and communities of color are used to making with respect to traditional race-based remedies. The time to begin preparing is now.

C. Build on the Opening of *Cooper v. Harris*

Tackling the artificial race vs. politics distinction also would help challenge maps where politics is used as the excuse for maps that adversely impact communities of color. And this is an area where advocates might be able to look for help from a surprising source: the Supreme Court.

Although the Supreme Court helped greenlight the politics as an excuse for racial discrimination argument with its 2001 decision in *Cromartie II*, by the middle of this decade there were signs that the Justices may have had enough. When asked to decide whether race or politics drove the aggressive redesign of North Carolina's Twelfth Congressional District in 2011, the Justices faced a situation where the factual record was complicated, with evidence of both racial and political considerations at play.<sup>132</sup> The state defended the map as politics rather than race and argued that under *Cromartie II*, the African American voters challenging the map could not win unless they could produce an alternative map that had the same pro-Republican political effect as the state's reconfigured Twelfth District.<sup>133</sup>

Justice Kagan rejected North Carolina's arguments in a careful 6-3 decision in *Cooper v. Harris* that, on the surface, was an unexciting opinion about deferring to the not clearly erroneous factual findings of the district court that race had predominated in the drawing of the map.<sup>134</sup> But the opinion also signaled a broader turning away – albeit a tentative one – from the notion that politics can excuse adverse racial impacts.<sup>135</sup> First, the majority rejected the notion that *Cromartie II* required plaintiffs in a racial gerrymandering case to produce an alternative map showing that it was possible to meet the state's non-

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131. *Id.* at 626.

132. *Cooper v. Harris*, 137 S.Ct. 1455, 1476 (2017).

133. *Id.* at 1479.

134. *Id.* at 1478.

135. *See generally id.*

racial objectives without using race (in this case a partisan advantage for Republicans).<sup>136</sup> The elimination of the alternative map requirement significantly undermines the viability of the politics defense in racial gerrymandering cases.<sup>137</sup> Because of the close alignment of race and politics in much of the South, it is very difficult to draw maps to give a partisan advantage to one party or the other without using racial minorities as the means. In many places, the high levels of racially polarized voting make it impossible. If the alternative map requirement in *Cromartie II* had survived as a hard and fast rule (rather than as a permissive means of showing predominance) then most racial gerrymandering claims would fail where the defense was politics.<sup>138</sup> But the Supreme Court did not stop there. In a footnote, Justice Kagan pushed the doctrine further, writing that “the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.”<sup>139</sup> In other words, whether race is considered for racial reasons or for political reasons matters not.

Of course, the footnote is only dicta. But there is reason to hope that it signals a pragmatic opening. Racial gerrymandering cases have frustrated the high court almost from the outset, with the court not willing to go all the way and strike down section 2 of the Voting Rights Act on color blindness grounds but, at the same time, struggling to put limits on a doctrine that leading scholars have called “both misguided and incoherent.”<sup>140</sup> *Cromartie II*'s alternative map itself is, in many ways, best seen as an attempt by the court to walk away from racial gerrymandering by creating a highly deferential standard for a state's non-racial redistricting objectives.<sup>141</sup> The problem, as the court found this decade, was that *Cromartie II* inadvertently opened the door to the politics defense to the use of race.<sup>142</sup> That, in turn, threw courts into the world of having to embrace the artificial dichotomy that race and politics are completely distinct. As the court found, however, untangling race and politics was cumbersome in the extreme, with Justice Breyer despairing at oral argument in *Cooper* that the question would

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136. *Id.* at 1479.

137. *Id.*

138. *See generally Cooper*, 137 S. Ct. at 1455.

139. *Cooper*, 137 S. Ct. at 1473 n. 7.

140. Pamela S. Karlan and Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996).

141. *See generally Easley v. Cromartie*, 532 U.S. 234 (2001).

142. *Id.*

have the court “spending the entire term reviewing 5,000 page records.”<sup>143</sup> The challenge for advocates in the next round of redistricting will be to see if they can build on the opening. If they can, it will be a victory for both communities of color, who often bear the heaviest share of burden of partisan gerrymandering, and for opponents of partisan gerrymandering more broadly. If courts are reluctant to embrace Justice Kagan’s footnote, a more direct approach may be needed.

#### D. Embrace Partisan Gerrymandering Claims as a Tool for Racial Fairness

The race vs. partisanship conundrum might be solvable another way – namely by taking partisanship squarely off the table. The Supreme Court has long wrestled with partisan gerrymandering. On the one hand, the court has repeatedly said that partisan gerrymanders are “incompatible with democratic principles.”<sup>144</sup> On the other hand, it has just as steadfastly failed to put in place limits on excessive partisanship, and its fractious deadlock has been blamed by many for fueling the rise of extreme gerrymandering this decade.<sup>145</sup> Things, however, likely will be different by the next round of redistricting in 2021. For better or worse, it seems all but certain that a dispositive showdown on partisan gerrymandering is coming in one of a series of cases at or headed to the Supreme Court (including three cases in October Term 2018).<sup>146</sup>

If, indeed, the Supreme Court does affirm that partisan gerrymandering claims are justiciable and articulates a standard for measuring maps for unlawful partisanship, it will be a victory that communities of color should embrace. In many instances, a theory of partisan discrimination, in fact, may be more viable than claims of race discrimination given the seeming reluctance of many courts to

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143. Transcript of Oral Argument at 15, *Cooper*, 137 S. Ct. 1455 (No. 15-1262).

144. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (decrying “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power”).

145. Thomas Wolf, *The Supreme Court Takes in Partisan Gerrymandering*, BRENNAN CENTER FOR JUSTICE (Mar. 12, 2019), <https://www.brennancenter.org/blog/supreme-court-takes-partisan-gerrymandering>.

146. The Supreme Court is scheduled to hear oral argument on March 26, 2019, in cases challenging congressional maps in North Carolina (*Rucho v. Common Cause*) and Maryland (*Benisek v. Lamone*). In addition, a district court in Michigan is expected to rule shortly on the partisan gerrymandering claims challenging legislative and congressional plans in that state, and partisan gerrymandering cases in Ohio, challenging the state’s congressional map, and Wisconsin, challenging the state assembly plan, are set to go to trial as writing.



buy into claims of race discrimination. At a minimum, having a legally cognizable claim of partisan gerrymandering would allow claims whose fact patterns more closely align with theories of political discrimination to be brought as political claims rather than shoehorned (sometimes aggressively and awkwardly) into theories of race discrimination. This would leave race discrimination claims for those cases that actually and truly are about the race. If this happens, jurisprudence would be strengthened all around.

But communities of color also should be cautious. Invidious discrimination on the basis of partisanship ought rightfully be condemned. But care also must be taken to ensure that the notions of partisan fairness are not used to trump the often precarious ability of communities of color to participate meaningfully in the political process (to use the language of Section 2). Metrics of partisan bias, for example, can be powerful tools for helping to ascertain when a map is an outlier and therefore suspect as a partisan gerrymander.<sup>147</sup> But it is important that those same metrics not be used to constitutionalize requirements that a map have the lowest possible level of partisan bias or to require that every district be competitive. Just as in the corporate world, there is a wide range of reasonable choices that the management of a corporation can make under the business judgment rule, so too there is a range of reasonable maps. Protecting the ability to maneuver within that zone of reasonableness is vital to ensuring that communities of color can be at the table. Done right, however, partisan gerrymandering claims can be a powerful additional tool for communities of color.

## CONCLUSION

Protecting the interests of communities of color in redistricting has always been challenging. But for reasons rooted both in changing courts and in a changing America, that task could be more difficult than ever in 2021. At the same time, a fluid landscape provides a rare opportunity to break away from constraining orthodoxies and to rethink and recraft tools that have long shown their limitations. There is reason both for fear and hope. What there is not, is time for complacency.

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147. Bernard Grofman and Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania* (2018), U.C. ELECTION L. J. 1, 13 (Sept. 2018).