

NOTE

THE INDEPENDENT CITIZEN COMMISSION: OUR BEST CHANCE AT ENDING RACIAL GERRYMANDERING AND RESTORING THE PROMISE OF THE VOTING RIGHTS ACT OF 1965

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In 2013, the United States Supreme Court struck down a critical part of the Voting Rights Act of 1965, making it easier than it’s been in decades to quiet the voices of racial minorities at the ballot box. In 2019, the Court then decided that it would not stop states from redrawing their voting districts to accomplish their own political goals. While redrawing voting districts for racially discriminatory purposes is still technically illegal on paper, the combined effect of these decisions will be to allow states to get away with it in practice. Now, in the wake of the decennial Census, states will again have the opportunity to redraw their voting districts, shaping the landscape of our electoral system for the next decade, and without the protections of the Voting Rights Act for the first time in over five decades. This Note argues that we find ourselves in a critical moment—one that will decide whether our belief in democratic governance will be a myth or a reality. I argue that the best chance at ending racial gerrymandering and restoring the promise of the Voting Rights Act comes in the form of an independent citizen commission that is specifically designed to be nonpartisan and must follow clear guidelines when drawing voting districts as well as abide by transparency requirements to ensure proper accountability. Without the independent citizen

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commission and other important interventions such as ending felon disenfranchisement, making Election Day a holiday, and expanding early voting, the practice of racial gerrymandering will make it impossible for the people to choose their own representatives.

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INTRODUCTION

Writing for the Court in *Shelby County v. Holder*, Chief Justice John Roberts explained the Court’s decision to strike down section 4 of the Voting Rights Act of 1965 (VRA) by arguing that “things ha[d] changed” since its enactment.¹ Have they, though?

In 1965, Congress, pursuant to its enforcement powers under section 2 of the Fifteenth Amendment, enacted the Voting Rights Act to eliminate racial discrimination in voting.² At the time, the Fifteenth Amendment, which declared that the right to vote could not be denied or abridged based on race, had been in place for almost 100 years.³ Despite that, many Southern states began to pursue a second, less overt wave of discriminatory practices to prevent African Americans from exercising

¹ *Shelby Cnty. v. Holder*, 570 U.S. 529, 531 (2013).

² Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, CONG. RES. SERV. (July 20, 2015), <https://fas.org/sgp/crs/misc/R43626.pdf>.

³ *Passage of the 15th Amendment*, PBS: AM. EXPERIENCE (2020), <https://www.pbs.org/wgbh/americanexperience/features/grant-fifteenth/>.

their right to vote.⁴ These included practices such as administering literacy tests, requiring the payment of poll taxes as a prerequisite for voter registration, and instituting grandfather clauses which granted the right to vote only to those whose grandfathers had been voters.⁵ Given the history of discrimination against black people academically, professionally, and economically, these practices created an effective ban on their ability to vote.

The Act as originally written had several parts. It begins with a general provision providing nationwide protection for voting rights;⁶ section 2 prohibits any practice or procedure that *results* in the denial or abridgement of the right to vote on the basis of race.⁷ Then, section 3 allows plaintiffs, following a showing of intentional discrimination, to ask a judge to require a state or county to obtain permission from the federal government before implementing new election laws and allows for the deployment of federal election observers;⁸ section 4 provides a coverage formula that subjects states and counties that had employed literacy tests for voting and that had total (black and white) voter turnouts of less than 50% in the 1964 presidential election to obtain pre-clearance under section 5;⁹ and finally, section 5 requires that states covered by the formula submit any proposed changes to their election procedure to the United States Attorney General or a panel of federal district court judges for review and approval prior to implementation.¹⁰ Sections 6–9 also deal with the deployment of federal election observers;¹¹ sections 11–14 outline penalties for violations;¹² and sections 15–19 mainly pertain to the codification of the Act, the preservation of voting rights guaranteed by the states, and funding.¹³

Section 4(b)'s preclearance formula originally covered nine states: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Caro-

⁴ Russell Brooker, *Voting Rights for Blacks and Poor Whites in the Jim Crow South*, AM. BLACK HOLOCAUST MUSEUM, <https://abhmuseum.org/voting-rights-for-blacks-and-poor-whites-in-the-jim-crow-south/>.

⁵ *Id.*

⁶ Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a) (2014).

⁷ *Id.*

⁸ Voting Rights Act of 1965 § 3, 52 U.S.C.A. § 10302(a) (2014); *see also* Abby Rapoport, *Get to Know Section 3 of the Voting Rights Act*, AM. PROSPECT, (Aug. 19, 2013), <https://prospect.org/power/get-know-section-3-voting-rights-act/>.

⁹ Voting Rights Act of 1965 § 4(b), *invalidated by Shelby Cnty.*, 570 U.S. at 557.

¹⁰ Voting Rights Act of 1965 § 5(a), 52 U.S.C.A. § 10304(a) (2014).

¹¹ Voting Rights Act of 1965 §§ 6–7, 9, *repealed by* Pub. L. No. 109-246, 120 Stat. 577 (2006); Voting Rights Act of 1965 § 8, 52 U.S.C.A. § 10305 (2014).

¹² Voting Rights Act of 1965 §§ 11–14, 52 U.S.C.A. §§ 10307–10 (2014).

¹³ Voting Rights Act of 1965 §§ 15–16; Voting Rights Act of 1965 §§ 17–19, 52 U.S.C.A. §§ 10311–13 (2014).

lina, Texas, and Virginia.¹⁴ Although the Act was initially set to expire after five years in 1970, Congress repeatedly re-authorized it in 1975, 1982, and most recently, in 2006 for 25 years, recognizing that although progress had been made, the discrimination that first gave life to the Act persisted.¹⁵

Since the decision in 2013, jurisdictions previously covered by the pre-clearance formula have collectively closed almost 2,000 polling places,¹⁶ removed voters from the rolls at a rate almost double that of other jurisdictions,¹⁷ and made countless other procedural changes to their election processes that have had a disproportionately negative impact on minority voters. In addition to closing polling places and purging voter rolls, some of those changes have included requiring photo identification to have residential addresses, even for those living on tribal reservations lacking formal street names; enacting exact match laws which require that names on voter identification *exactly* match those on the voter rolls (this includes minor differences in spacing and capitalization);¹⁸ cutbacks on early voting;¹⁹ discriminatory annexation;²⁰ switching district seats to at-large seats;²¹ and most relevantly to this Note, redrawing election districts in an attempt to reduce the political influence of communities of color.²² Prior to the *Shelby* decision, all of these changes would have been curbed prior to implementation by the combined power of section 4(b)'s coverage formula and Section 5's enforcement mechanism.

However, without section 4(b)'s pre-clearance formula, the Department of Justice is now left litigating these attempts at voter dilution on a

¹⁴ Benjamin Barber, *The States Facing Federal Preclearance under Proposed Voting Rights Act Fix*, FACING SOUTH (Mar. 13, 2019), <https://www.facingsouth.org/2019/03/states-facing-federal-preclearance-under-proposed-voting-rights-act-fix>.

¹⁵ 152 CONG. REC. 91 (2006).

¹⁶ Andy Sullivan, *Southern U.S. States Have Closed 1,200 Polling Rights Group*, REUTERS (Sept. 10, 2019), <https://www.reuters.com/article/us-usa-election-locations/southern-u-s-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J>.

¹⁷ Kevin Morris, *Voter Purge Rates Remain High, Analysis Finds*, BRENNAN CENT. FOR JUST. (Aug. 1, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

¹⁸ Ted Enamorado, *Georgia's 'exact match' law could potentially harm many eligible voters*, WASH. POST: MONKEY CAGE (Oct. 20, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/20/georgias-exact-match-law-could-disenfranchise-3031802-eligible-voters-my-research-finds/>.

¹⁹ Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2153 (2015), <https://columbialawreview.org/content/administering-section-2-of-the-voting-rights-act-after-shelby-county/>.

²⁰ John Reynolds, *City of Jasper Warned Annexation Plan Could Violate Voting Rights*, TEXAS TRIB. (Mar. 17, 2014), <https://www.texastribune.org/2014/03/17/city-jasper-warned-annexation-plan-could-violate-v/>.

²¹ Elmendorf & Spencer, *supra* note 20, at 2146.

²² *Id.* at 2182.

case by case basis, and only after the harm of vote dilution has already taken effect.²³ Section 2, which remains untouched, only allows for challenges to pre-existing laws.²⁴ In other words, laws cannot be challenged until they take effect. Even when laws are challenged in section 2 lawsuits, the burden of proof is on the person bringing the lawsuit to demonstrate a discriminatory purpose and impact; before *Shelby*, when a potentially discriminatory practice was identified, the burden was on the state to offer evidence to the contrary.²⁵

In 2020, the next Census will occur.²⁶ Every decade following the decennial Census states are told how many representatives they will be able to send to the House of Representatives based on new state population numbers.²⁷ If states add or lose congressional seats, the state legislature (in most states) is then responsible for re-drawing districts in response to those changes.²⁸ Depending on who is in charge of the legislatures at the time re-drawing occurs, there may be incentives to draw district lines in a manner that reduces the political influence of racial minorities at the ballot box.²⁹ Although the practice of racial gerrymandering is technically illegal, the reality is that it continues to happen.³⁰

That is, in large part, because before *Shelby County*, states and counties with a history of discriminatory election practices would have been required to obtain federal approval before re-drawing district lines to ensure that redistricting efforts neither stemmed from a racially discriminatory purpose nor had a racially discriminatory impact.³¹ These challenges will now be further complicated by the Supreme Court's decision in *Rucho v. Common Cause*, which held that claims of partisan gerrymandering present political questions that should not be reviewed by federal courts.³² Although this technically still leaves space for racial

²³ *Id.* at 2176.

²⁴ Maya Noronha, *New Applications of Section 2 of the Voting Rights Act to Vote Denial Cases*, 18 FEDERALIST SOC. REV. 32, 33 (2017), <https://fedsoc.org/commentary/publications/new-applications-of-section-2-of-the-voting-rights-act-to-vote-denial-cases>.

²⁵ Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 62–66 (2014), https://www.jstor.org/stable/10.1086/675346?seq=1#metadata_info_tab_contents.

²⁶ 2020 Census Research, Operational Plans, and Oversight, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/2020-census.html> (last visited Sept. 22, 2020).

²⁷ Our Censuses, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/censuses.html> (last visited Sept. 22, 2020).

²⁸ In the United States, 37 states use the traditional re-districting model for their own legislatures, and 42 states use it for congressional re-districting.

²⁹ Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, PROPUBLICA (Oct. 9, 2017), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race>.

³⁰ *Id.*

³¹ *Id.*

³² *Rucho v. Common Cause*, 139 S.Ct. 2484, 2484 (2019).

gerrymandering claims to be brought under section 2 of the Voting Rights Act, it is almost impossible to distinguish attempts to draw maps based on party from those based on race.³³ Because of this difficulty, legislators who draw gerrymandered maps can easily hide race-based mapmaking under the guise of partisan mapmaking.³⁴

This Note will argue that this upcoming opportunity for states to redistrict will be especially problematic following the Supreme Court's gutting of section 4(b) of the Voting Rights Act in *Shelby County* because the only mechanism left to challenge these attempts at racial vote dilution is the reactive, case-by-case approach afforded to us by section 2. Part I explains the Supreme Court's decision in *Shelby County* and explores the impact the decision has had. Part II argues that modern gerrymandering represents a third wave of voting discrimination (the first wave being direct disenfranchisement and the second wave being voter dilution efforts impacting the individual voter) and considers how the gutting of the Voting Rights Act will affect redistricting efforts following the next Census. Part III describes legislative developments since *Shelby County*. Part IV offers a policy solution to fill the void created by *Shelby* and bring us closer to eliminating discriminatory voting practices. Lastly, Part V is the conclusion.

I. *SHELBY COUNTY v. HOLDER*

The 2006 re-authorization vote for the Voting Rights Act of 1965 passed the House 390-33, the Senate 98-0, and was signed into law by President George W. Bush³⁵ Despite that, in *Shelby County v. Holder*, government officials representing Shelby County, Alabama filed a lawsuit against the United States Department of Justice and then-Attorney General Eric Holder in 2010 challenging the constitutionality of section 4 and section 5 of The Voting Rights Act.³⁶ The Supreme Court in a 5-4 opinion held that the conditions that justified pre-clearance in 1965 no longer applied in 2013 and that section 4 was unconstitutional under the Tenth Amendment, which places election regulation under the purview of the states.³⁷ While the remaining provisions of the Voting Rights Act remain good law, the decision struck down section 4, which was considered to be the heart of the Act.³⁸ Because section 5 relies on section 4(b)'s coverage formula to determine which states and counties are subject to pre-clearance, section 5 was also effectively rendered inoper-

³³ Pierce & Rabinowitz, *supra* note 29.

³⁴ *Id.*

³⁵ *Bush Signs Voting Rights Act Extension*, CBS News (July 27, 2006), <https://www.cbsnews.com/news/bush-signs-voting-rights-act-extension/>.

³⁶ See *Shelby Cnty.*, 570 U.S. at 529.

³⁷ *Id.*

³⁸ *Id.*

able.³⁹ The Court left the future of the Act in the hands of Congress, encouraging it to pass legislation to remedy the Act's shortcomings and specifying that any burdens imposed by future legislation must be justified by current conditions to survive constitutionality.⁴⁰

Although one could argue—as Justice Ginsburg did in a scathing dissent⁴¹—that the Voting Rights Act of 1965 was a constitutional exercise of Congress's enforcement power under section 2 of the Fifteenth Amendment because Congress's decision to re-authorize the VRA in 2006 relied on evidence of ongoing discrimination in jurisdictions subject to preclearance,⁴² proponents of *Shelby* continue to argue that section 4(b)'s coverage formula was a violation of state sovereignty and not rooted in contemporary information.⁴³ In support of their argument, they have pointed to new turnout data which indicates that the gap in voter registration between blacks and whites in covered states has closed.⁴⁴ In response, Justice Ginsburg famously penned that “throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁴⁵

II. THE THIRD WAVE OF VOTING DISCRIMINATION

Before *Shelby*, we saw two distinct waves of voting discrimination. The first wave was the direct disenfranchisement of black voters that we saw before the implementation of the Fifteenth Amendment.⁴⁶ The second was characterized by Jim Crow era laws, such as literacy tests and poll taxes, that were not discriminatory on their face, but were discriminatory in intent and impact.⁴⁷ Although the practice of drawing district

³⁹ *Id.*

⁴⁰ *Id.* at 550–51.

⁴¹ *Id.* at 559–61, 563 (“Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve”).

⁴² See *id.* at 555–56.

⁴³ *Id.*; See also Edward Blum, *Justice John Roberts Was Right: Things Have Changed in the South*, NAT'L REV. (June 25, 2018), <https://www.nationalreview.com/bench-memos/john-roberts-voting-rights-shelby-county-correctly-decided/>.

⁴⁴ *Shelby Cnty.*, 570 U.S. at 559–61.

⁴⁵ *Id.* at 590.

⁴⁶ Sarah Pruitt, *When Did African Americans Actually Get the Right to Vote?*, HISTORY (Jan. 29, 2020), <https://history.com/news/african-american-voting-right-15th-amendment>.

⁴⁷ Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 735–40 (1998), <https://scholarlycommons.law.case.edu/caselrev/vol48/iss4/3>.

maps with political ends in mind has existed since the early 1800s,⁴⁸ it has become more partisan and less regulated as time has passed.⁴⁹ For those reasons, the redistricting efforts that take place following the next Census will represent a *third* wave of voting discrimination: unregulated partisan and racial gerrymandering.

Broadly, gerrymandering refers to efforts that do not directly disenfranchise voters of certain political identities or demographics, but instead quietly and strategically dilute the power of their votes.⁵⁰ It comes in two primary forms: (1) “cracking,”⁵¹ which means drawing districts that spread minority voters across multiple districts so that they can never constitute a majority of any district and (2) “packing,”⁵² which means drawing district lines so that a large number of minority voters are concentrated across a small number of districts. In both cases, the primary objective is to keep leadership from a specific party, ideology, or identity group in power and make it incredibly difficult for political rivals to steal that power. Because redistricting only happens once every 10 years,⁵³ its impact is both significant and long-lasting.

Although section 2 of the Voting Rights Act prohibits both vote denial and vote dilution, which includes gerrymandering, relying on it to combat this third wave of voting discrimination will ultimately prove ineffective for three reasons: (1) Section 2 claims are reactive and litigating them is cumbersome and expensive; (2) Section 2 claims shift the burden away from the state and onto the plaintiff; and (3) partisan redistricting efforts, which are legal, are almost indistinguishable from those based on race.

A. *Section 2 Claims are Reactive, Cumbersome, and Expensive*

Section 2 litigation only rarely leads to a preliminary injunction, which is a court order that requires a certain action be stopped.⁵⁴ In most cases, that means that any recourse available will happen *after* candidates have already been elected and voters have already been disenfranchised. That kind of harm cannot be undone. Additionally, section 2 litigation is cumbersome and expensive. Recognizing voter discrimination in one ju-

⁴⁸ Michael Wines, *What Is Gerrymandering? And Why Did the Supreme Court Rule on It?*, N.Y. TIMES, (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerry-mandering.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *7 Things to Know About Redistricting*, BRENNAN CENT. FOR JUST. (July 3, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/7-things-know-about-redistricting>.

⁵⁴ *Injunction*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/injunction>.

risdiction will not prevent another jurisdiction from re-litigating the same issue, depleting taxpayer resources that could be saved by avoiding litigation through preclearance. Each instance of voter dilution will need to be decided on its own merits. In effect, section 2 requires us to ignore the repeated discriminatory actions that certain states have taken to disenfranchise voters of color. It requires us to ignore a well-documented history of racial discrimination at the voting booth.

B. Section 2 Shifts the Burden from the State to the Plaintiff

To succeed in section 2 claims, plaintiffs must establish that: (1) the relevant minority group is “sufficiently large and geographically compact” to realistically constitute a numerical majority of the citizen voting-age population in a single-member legislative district, (2) the minority group is “politically cohesive,” and (3) the majority group in the relevant geographic region “votes sufficiently as a block” to defeat the minority group’s preferred political candidates.⁵⁵ After meeting the aforementioned requirements from *Gingles*, a plaintiff must demonstrate that the totality of the circumstances supports the argument that the challenged plan will result in vote dilution.⁵⁶ That analysis considers factors such as: (1) the history of discriminatory voting-related practices in the relevant state; (2) whether voting in the state is “racially polarized;” (3) whether the state has used “voting practices or procedures that may enhance the opportunity for discrimination against the minority group;” (4) whether minorities have been denied access to “candidate slating process[es];” (5) whether minorities “bear the effects of discrimination in such areas as education, employment, and health;” (6) whether political campaigns in the state make “racial appeals;” and (7) whether minorities “have been elected to public office in the jurisdiction.”⁵⁷

As a result of this difficult burden, preliminary injunctions are granted in “fewer than one-quarter of ultimately successful Section 2 lawsuits.”⁵⁸ This evidentiary standard is one that even the most blatant cases of racial discrimination cannot survive. Take, for example, *Gonzalez v. Arizona*, a 2010 case in which the Ninth Circuit Court of Appeals denied plaintiffs’ challenge to an Arizona voter identification law despite compelling evidence that minority groups were almost three times less likely to possess the state-issued identification that Arizona made requi-

⁵⁵ Joseph P. Viteritti, *Unapportioned Justice: Local Elections, Social Science, and the Evolution of the Voting Rights Act*, 4 CORNELL J. OF L. AND PUB. POL’Y 200, 213 (1994).

⁵⁶ *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

⁵⁷ S. REP. NO. 97-417, at 28–29 (1982).

⁵⁸ McLean Crichton, *A Fool’s Errand: Why Congress Should Amend the Voting Rights Act but Not Section 4’s Coverage Formula*, 80 BROOK. L. REV. 223, 236 (2014) (quoting Transcript of Oral Argument at 38, *Shelby Cnty. v. Holder*).

site to vote.⁵⁹ This insurmountable standard is in direct tension with the Fifteenth Amendment's promise.

C. Partisan Redistricting Efforts are Indistinguishable from those Based on Race

In *Rucho v. Common Cause*, the Supreme Court considered whether a North Carolina congressional map was an unconstitutional partisan gerrymander after Representative David Lewis proposed that maps be drawn “to give a partisan advantage to 10 Republicans” at a North Carolina state legislative hearing.⁶⁰ He justified his statement by arguing that the re-drawing was motivated not by race, but instead by partisanship.⁶¹ Writing for the majority, Chief Justice Roberts argued that the framers were aware of the practice of partisan gerrymandering and that there was no constitutional basis for the Court to intervene to prevent the practice.⁶² In other words, drawing district lines to advance the interests of a particular political party is now permissible unless a state constitution says otherwise. Even if you accept his decision and reasoning, because of the overlap between racial identity and party affiliation, the practical reality is that it is virtually impossible to decipher whether racial or partisan motives underlie these types of gerrymandering efforts. Further, because the Supreme Court in *Rucho* held that the Court does not even have jurisdiction to hear cases involving partisan gerrymandering,⁶³ there can be no analysis conducted to verify that the proposed rationale for gerrymandering is not a mere guise. Finally, regardless of motivation, the problem with making partisan and racial gerrymandering permissible is the same: both suppress the will of the people. As Justice Kagan explained in her dissent in *Rucho*,⁶⁴ allowing either violates the Fourteenth Amendment and contravenes the “one person one vote” principle that this Court first recognized in *Baker v. Carr* and *Reynolds v. Sims*.⁶⁵

III. LEGISLATIVE DEVELOPMENTS

Since *Shelby County*, Congress has, unfortunately, failed to respond to the Court's call to amend the VRA. However, it has made two attempts at doing so in the form of The Voting Rights Advancement Act

⁵⁹ *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012).

⁶⁰ See *Rucho v. Common Cause*, 139 S.Ct. 2484, 2510 (2019).

⁶¹ *Id.* at 2496–97.

⁶² *Id.* at 2508.

⁶³ *Id.*

⁶⁴ *Id.* at 2510.

⁶⁵ *Baker v. Carr*, 369 U.S. 186, 207–08 (1962); *Reynolds v. Sims*, 377 U.S. 533, 560 (1964).

and the Voting Rights Amendment Act.⁶⁶ The Voting Rights Advancement Act seeks to respond to the criticism in *Shelby County v. Holder* while preserving the spirit of The Voting Rights Act of 1965.⁶⁷ It does this by creating a coverage formula that applies to *all* states and hinges on a finding of repeated voting rights violations during the previous 25 years.⁶⁸ Significantly, that 25-year period continuously moves to keep up with current conditions, covering only states with a recent record of racial discrimination in voting.⁶⁹ It also provides a mechanism for states to come out of coverage if they demonstrate a clean record moving forward, provides a list of “known” practices such as changes to multilingual voting materials, jurisdiction boundaries, and documentation or qualifications to vote that would automatically subject any state proposing them to pre-clearance; allows the Attorney General to send federal election observers to any jurisdiction where there is a serious threat of racial discrimination in voting; and requires that when changes to election administration are approved, they are widely publicized so that the public is not blind-sided and can prepare accordingly.⁷⁰ Under its formula, 11 states would be subject to pre-clearance.⁷¹ Those states are Alabama, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, Texas, and Virginia.⁷² The Voting Rights Amendment Act, similarly, applies equally to all states but would only look to the previous 15 years and require that states subject to pre-clearance have a minimum of five violations during that period.⁷³ That formula would only place four states—Georgia, Louisiana, Mississippi, and Texas—under pre-clearance.⁷⁴

Critics of these bills argue that they may pave the path for voter fraud to occur by striking down measures, such as voter identification laws, that maintain the integrity of our election system.⁷⁵ Most allega-

⁶⁶ Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong.; Voting Rights Amendment Act of 2019, H.R. 1799, 116th Cong.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Nick Thieme & Mark Niesse, *U.S. House Bill Would Restore Voting Rights Act Protections*, ATLANTA J.-CONST. (Dec. 3, 2019), <https://www.ajc.com/news/national-govt-politics/house-bill-would-restore-voting-rights-act-protections/a8puSjWxWtjhUPS4TwDogO/>.

⁷² *Id.*

⁷³ See H.R. 1799.

⁷⁴ Jack Fitzpatrick & Dustin Volz, *New Voting Rights Act Rewrite Would Revive Federal Oversight for Only 4 States*, ATLANTIC (Jan. 16, 2014), <https://www.theatlantic.com/politics/archive/2014/01/new-voting-rights-act-rewrite-would-revive-federal-oversight-for-only-4-states/443466/>.

⁷⁵ Key Vote: “NO” on the Voting Rights Advancement Act (H.R. 4), HERITAGE ACTION FOR AM. (Dec. 5, 2019), <https://heritageaction.com/key-vote/key-vote-no-on-the-voting-rights-advancement-act-h-r-4/>.

tions of voter fraud, however, turn out to be entirely baseless.⁷⁶ For example, a 2012 study demonstrated that out of 2,068 alleged cases of in-person voter fraud since the year 2000, “there have been only ten cases of in-person voter fraud that could have been prevented by photo ID [sic] laws.”⁷⁷ To the extent that voter fraud exists at all, it is happening through the use of mail ballots rather than at the polls.⁷⁸ Voter identification laws, however, do not address mail ballot fraud.⁷⁹ Critics also argue that the bills violate principles of federalism by unnecessarily infringing on states’ rights to regulate and control their own election laws.⁸⁰ However, simply establishing that a state cannot implement a particular law or procedure that is racially discriminatory does not deprive states of the ability to craft their own election laws. All it does is establish that states cannot craft election laws that disenfranchise voters or dilute votes based on race. This leaves plenty of room for creativity and experimentation. Further, Congress’s enforcement power allows it to “uproot all vestiges of unfreedom and inequality” and “enact appropriate legislation targeting state abuses.”⁸¹ These reforms are a valid exercise of that power, and that power, being based in the Constitution, will always trump a state’s right to craft its election laws.

IV. PROPOSED POLICY SOLUTION

A. *Leaving Redistricting to an Independent Redistricting Commission*

Although passing either of these bills, and particularly the Voting Rights Advancement Act, would be a step in the right direction, neither goes far enough. This Note argues that to truly ensure the promise of the Fifteenth Amendment and adequately protect against the third wave of voting discrimination, states must leave redistricting up to independent citizen redistricting commissions as is done in Arizona, California, Idaho, Colorado, Michigan, Montana, and Washington.⁸² In the 1960s, Canada also transferred the power to draw district lines to independent

⁷⁶ Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CENT. FOR JUST. (Nov. 9, 2007), <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud>.

⁷⁷ Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST. 1, 7 (2014).

⁷⁸ Mark J. Stern, *Voter Fraud Exists. Republican Restrictions Won’t Stop It.*, SLATE (Sept. 1, 2016), <https://slate.com/news-and-politics/2016/09/voter-fraud-exists-through-absentee-ballots-but-republicans-wont-stop-it.html>.

⁷⁹ *Id.*

⁸⁰ See *supra* note 76; see also Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2218 (2018).

⁸¹ U.S. Const. amend. XV, § 2.

⁸² *Independent And Advisory Citizen Redistricting Commissions*, COMMON CAUSE, <https://www.commoncause.org/independent-redistricting-commissions/>.

citizen commissions.⁸³ Representatives elected to implement the will of the people should not be able to take actions that directly suppress that will. But that is exactly what the system that we currently have allows to happen.

Rather than leaving the power to re-draw district lines in the hands of a partisan legislature, we can transfer the power to craft the infrastructure of our electoral system to an independently appointed or elected commission that is specifically engineered to be nonpartisan, or at least bipartisan. Establishing clear, prioritized factors that commissioners must consider when drawing maps and establishing transparency requirements, such as equal population and geographic contiguity, can also provide additional barriers to guard against attempts at partisan gerrymandering.⁸⁴ One way to neutralize partisanship on redistricting commissions is by requiring that an equal number of members are derived from each political party. In Arizona, for example, a judicial selection committee selects commissioners.⁸⁵ No more than two members of their five-person Commission can be members of the same political party, and at least one member cannot be affiliated with either the Democratic or Republican party.⁸⁶ In California, the Citizen Redistricting Committee has 14 members who apply and are subsequently screened and selected by the State Auditor, an office that is entirely independent from the state legislature.⁸⁷ To guard against the possibility of a commissioner falsely claiming to be a member of one political party and therefore bringing partisan imbalance to the Commission, Commissioners must have been registered to vote with the same party, or as nonpartisan, for the previous five years to be eligible.⁸⁸ If an applicant or an applicant's immediate family member has contributed more than \$2,000 to any candidate for elected office, been a registered lobbyist or a consultant for a political party, or has been a candidate for or elected to any office, that person is ineligible to serve.⁸⁹ Once applicants have been screened for conflicts of interest, they are entered into a lottery system

⁸³ Andrew Prokop, *How Canada Ended Gerrymandering*, Vox (Oct. 4, 2017), <https://www.vox.com/2014/4/15/5604284/us-elections-are-rigged-but-canada-knows-how-to-fix-them>.

⁸⁴ *Redistricting Commissions: What Works*, BRENNAN CENT. FOR JUST., <https://www.brennancenter.org/sites/default/files/analysis/Redistricting%20Commissions%20-%20What%20Works.pdf>.

⁸⁵ Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1813 (2012), <https://www.yalelawjournal.org/feature/redistricting-commissions-a-better-political-buffer>.

⁸⁶ *Id.* at 1831–32.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

that selects the initial 8 commissioners.⁹⁰ Those eight then select the remaining six with an eye towards racial, ethnic, gender, and political diversity.⁹¹

In other states such as Iowa, redistricting commissions exist, but play more of an advisory role, with the state legislature retaining the ultimate power to approve or reject plans.⁹² But establishing an essentially powerless commission under the façade of having a public-driven process is disingenuous. Put simply, legislators should not have the ability to choose their voters. Other measures to neutralize the impact of partisanship may include (1) allowing the legislature to design district maps but not finalize them without the approval of the majority of the electorate; (2) having the Supreme Court develop fairness criteria for partisan redistricting as it has done in racial gerrymandering cases; and (3) instituting supermajority rules in the legislature that require more than a simple majority of legislators to vote in favor of a plan for it to take effect.

Of these alternatives, the first is probably the most viable, but it still only offers everyday citizens a minimal opportunity to participate in the process of map-drawing. Perhaps of greater concern is that without addressing many of the other factors that keep low-income voters and voters of color from getting to the polls, there is also no guarantee that the voices most impacted will be represented when votes are taken. The second option is not a realistic possibility, particularly in the wake of *Rucho* and with the current composition of the Supreme Court. And because the third option keeps the power to draw districts in the hands of legislators without any kind of check or balance, it will not protect against legislative vote trading or logrolling, a political practice in which a legislator votes a certain way in exchange for another legislator's support on a bill she cares more deeply about.⁹³ Establishing independent redistricting commissions is the only way to create a public-driven process that neutralizes the impact of partisanship and ensures that the voices of racial minorities are not silenced.

⁹⁰ *Id.* at 1824–25.

⁹¹ *Id.* at 1825.

⁹² *Id.*

⁹³ Eric M. Uslaner & J. Ronnie Davis, *The Paradox of Vote Trading: Effects of Decision Rules and Voting Strategies on Externalities*, 69 AM. POL. SCI. REV. 929, 929 (1975), https://www.jstor.org/stable/1958407?seq=1#metadata_info_tab_contents.

B. Criticisms of Policy Solution

One criticism of independent citizen redistricting commissions is that they are counter-majoritarian in nature.⁹⁴ In other words, the idea is that because the legislature is democratically elected, any action it takes—including re-drawing district lines—represents, in essence, the will of the people. But if the people's representatives are making decisions that are specifically designed to suppress the will of the people, they are no longer the people's representatives. Re-drawing district lines to serve partisan goals is inherently undemocratic and countermajoritarian. One cannot both claim to represent the will of the people and engineer a system that thwarts it. It is also important to remember that the people serving on the aforementioned commissions and making the decisions that impact redistricting efforts are both selected by the states and are themselves residents of the states impacted by their decisions. It is difficult to argue that there is anything undemocratic about that.

Another criticism of independent citizen redistricting commissions is that everyday citizens lack the content-area expertise to adequately perform the role of commissioners.⁹⁵ But legislators are not necessarily any more qualified than any other person to be commissioners. There are typically very few requirements for becoming a state legislator,⁹⁶ and yet, few seem to take issue with them drawing district lines despite their frequent lack of expertise. Additionally, if content-area expertise were truly the issue, that could easily be screened for during an application process. It is simply not a reason not to empower everyday citizens with the power to draw district lines.

A third criticism is that legislative conflicts of interest are not the true problem; partisan tensions are.⁹⁷ In other words, the legislature is just a mirror for the problems already present in the electorate. While there may be some truth to this position, its validity presumes that the legislature is representative of the people in the first place. But in considering the impact that consistently low voter turnout, disenfranchisement, and voter dilution and suppression has on who our elected representatives are, this argument is a bit too simplistic to withstand scrutiny. In

⁹⁴ David Doerr, *Independent Commission Won't Fix Gerrymandering*, DETROIT NEWS (Nov. 28, 2018), <https://www.detroitnews.com/story/opinion/2018/11/28/independent-commissions-wont-solve-gerrymandering/2127115002/>.

⁹⁵ Lisa Brody, *Redistricting: Putting Power in Citizens' Hands*, DOWNTOWN NEWS MAG. (Nov. 25, 2019), <https://www.downtownpublications.com/single-post/2019/11/25/Redistricting-Putting-power-in-citizens%28%29-hands>.

⁹⁶ *How to Become a Candidate for State Legislator*, NAT'L CONF. STATE LEGISLATURES (June 3, 2015), <https://www.ncsl.org/research/elections-and-campaigns/how-to-become-a-candidate-for-state-legislator635423970.aspx>.

⁹⁷ Caroline Cournoyer, *Can Redistricting Ever Be Fair?*, GOVERNING (Nov. 2011), <https://www.governing.com/topics/politics/can-redistricting-ever-be-fair.html>.

essence, it is difficult to argue that a system that has long been rigged but claims to be democratic offers an accurate image of the problems present within the electorate.

Finally, the constitutionality of independent citizen redistricting commissions has also been a topic of spirited debate.⁹⁸ The Supreme Court put the issue to rest in *Arizona State Legislature v. Arizona Independent Redistricting Committee* in 2015.⁹⁹ In that case, the Arizona legislature sued, arguing that a referendum establishing an independent citizen redistricting committee violated the Elections Clause of the U.S. Constitution¹⁰⁰—which specifically mentions state legislatures—by taking redistricting authority away from the legislature.¹⁰¹ Significantly, the Court held that the independent citizen commission was constitutional based on a broad reading of the word “legislature” in the Elections Clause—interpreting it to include the electorate when it is exercising legislative powers either by initiative or referendum.¹⁰² The Court in *Rucho v. Common Cause* also referred briefly to independent citizen redistricting commissions as a potential action states could pursue to address the issue of partisan gerrymandering in the absence of the Court’s intervention, thereby implying their constitutionality.¹⁰³

C. Making Election Day a Holiday and Expanding Access to Early Voting

Like most policy solutions, however, independent redistricting citizen commissions are not an all-encompassing solution. They can create the infrastructure for a fair election system, but their success will always rest on the presumption that voters can make it to the polls in the first place. Ideally, they would be paired with other interventions that make getting to the polls easier for working-class people and people of color.¹⁰⁴ Most notably, we should make Election Day a holiday and expand access to early voting. We cannot, in good faith, talk about race without also talking about class. Because of their many intersection points, states that only allow voting on Election Day during traditional working hours end up preventing many voters of color in blue-collar jobs

⁹⁸ Tarini Parti, *Supreme Court Considers Constitutionality of Independent Redistricting*, POLITICO (Mar. 2, 2015), <https://www.politico.com/story/2015/03/supreme-court-independent-redistricting-115642>.

⁹⁹ 135 S. Ct. 2652 (2015).

¹⁰⁰ U.S. CONST. art. I, § 4, cl. 1.

¹⁰¹ See *Ariz. State Legislature*, 135 S. Ct. at 2658.

¹⁰² *Id.* at 2656.

¹⁰³ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

¹⁰⁴ Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/>.

who are unable to take time away from work from getting to the polls.¹⁰⁵ No one should have to choose between exercising their right to vote and getting a day's pay or keeping a job. But because federal law does not require employers to give their employees time off to vote,¹⁰⁶ that is exactly the choice that our current system asks people to make. In fact, the Census Bureau found that people from families that made more than \$100,000 a year were two times as likely to vote as those whose total household income was less than \$20,000 annually.¹⁰⁷

The reasons that we hold Election Day on a Tuesday during November are quite archaic.¹⁰⁸ The tradition stems from a time when most Americans were Christian farmers.¹⁰⁹ November made sense because the fall harvest was over but winter had not yet come, and Tuesday allowed for voters to attend church on Sunday and then allocate enough time to travel to their polling locations.¹¹⁰ That is not the world that we currently live in, which is likely why two-thirds of Americans have expressed support for making Election Day a national holiday.¹¹¹ Together with the creation of independent citizen commissions, these important interventions to get voters to the polls can ensure that our elected officials are, in fact, the people's representatives.

D. Ending Felon Disenfranchisement

Similarly, restoring the right to vote for those convicted of felony offenses is an important step towards ensuring true racial equity at the ballot box. At this very moment, over six million Americans cannot vote because of a felony conviction.¹¹² The overwhelming majority of those individuals are not even in prison; they have either completed their sentences or are on parole and living in their communities.¹¹³ Quite dis-

¹⁰⁵ Victoria Shineman, *Would turnout go up if we didn't have to vote on a workday*, WASH. POST (Nov. 6, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/06/why-is-election-day-always-a-tuesday-7-things-you-should-know-about-the-timing-of-u-s-voting/>.

¹⁰⁶ Kenneth Quinnell, *Know Your Rights: State Laws on Employee Time Off to Vote*, AM. FED'N LAB. & CONG. INDUS. ORG., <https://aflcio.org/2016/11/5/know-your-rights-state-laws-employee-time-vote>.

¹⁰⁷ Beenish Ahmed, *Should Elections Be Held on Weekends*, NPR (Jan. 20, 2012), <https://www.npr.org/2012/01/18/145397003/why-vote-on-tuesday-why-not-the-weekend>.

¹⁰⁸ Domenico Montanaro, *Why Do We Vote on Tuesdays?*, NPR (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500208500/why-do-we-vote-on-tuesdays>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Drew Desilver, *Weekday elections set the U.S. apart from many other advanced democracies*, PEW RSCH. CTR. (Nov. 6, 2018), <https://www.pewresearch.org/fact-tank/2018/11/06/weekday-elections-set-the-u-s-apart-from-many-other-advanced-democracies/>.

¹¹² *Felony Disenfranchisement*, SENT'G PROJECT (2019), <https://www.sentencingproject.org/issues/felony-disenfranchisement>.

¹¹³ Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENT'G PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/reports/6-million-lost-voters-state-level-estimates-felony-disenfranchisement>.

turbingly, Black Americans constitute over two million of those disenfranchised voters.¹¹⁴ That means that they are prevented from voting at four times the rate of all other racial groups combined.¹¹⁵ This is in direct contravention to the Fifteenth Amendment's promise. In addition to being wrong, preventing those who have served time from voting contradicts principles of common sense. Without addressing the problems in our criminal legal system, if we are to accept that disenfranchising felons is thought of as being a part of a punishment, why would that punishment not end upon the completion of one's sentence? And if common sense is not reason enough, research also shows that restoring the right to vote for those who have previously served time for felony-level offenses can prevent recidivism by encouraging the formerly incarcerated to become more invested in the communities they live in.¹¹⁶

CONCLUSION

While there are many important policy issues worthy of public attention, our ability to advance any of them ultimately depends on the integrity of our electoral system. Voter suppression efforts may have changed in form over time, but they have undoubtedly persisted. And while the flaws of our electoral system have long been present, because of the combined impact of heightened partisanship and eroding constitutional protections, they will inevitably be exacerbated in the wake of the next Census, as well as each Census thereafter. Without the full protection of the Voting Rights Act of 1965 and the willingness of the Court to intervene in cases of partisan gerrymandering, the only way to properly protect against the devastating consequences of racial gerrymandering is for states to implement independent citizen redistricting commissions, make Election Day a holiday and expand access to early voting, and put an end to felon disenfranchisement. Justice Kagan said it best in her dissent in *Rucho v. Common Cause*: "If there is a single idea that made our nation . . . it's this one: The people are sovereign . . . The people get to choose their representatives . . . Election Day . . . is what links the people to their representatives, and gives people their sovereign power. That day

www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

¹¹⁴ Jennifer R. Taylor, *Jim Crow's Lasting Legacy at the Ballot Box*, MARSHALL PROJECT (Aug. 20, 2018), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box>.

¹¹⁵ *Id.*

¹¹⁶ Nila Bala & Lars Trautman, *Restoring voting rights for felons embraces the American tenet of second chances*, HILL (Dec. 16, 2019), <https://thehill.com/opinion/criminal-justice/474650-restoring-voting-rights-for-felons-embraces-the-american-tenet-of>.

is the foundation of democratic governance. And . . . gerrymandering can make it meaningless.”¹¹⁷

¹¹⁷ See *Rucho v. Common Clause*, 139 S. Ct. 2484, 2511–12 (2019).