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## **DID THE AFRICAN-AMERICAN ELECTORATE UNINTENTIONALLY HELP ELECT DONALD TRUMP PRESIDENT?**

*C. Daniel Chill\**

### **INTRODUCTION**

Political scholars generally posit that income inequality is the primary cause for considering America to be electorally flawed.<sup>1</sup> But, in fact, it is race, not wealth, that fundamentally impacts the electoral dynamic in the United States, at least during this past decade and more. Examples of racially driven electoral influences abound.

Statistical analysis proves beyond peradventure that Barack Obama could not have been twice elected President if not for the massive vote he received from the African-American electorate, an electorate that clearly is not associated with wealth and can be counted among the poorest of American citizenry. In 2000, Republican dirty tricksters used push polling to spread a false rumor that Senator John McCain had fathered an illegitimate African-American child.<sup>2</sup> That same year, Mr. McCain called the Confederate flag a “symbol of heritage,” saying it should be up to South Carolinians whether to display it on their statehouse grounds.<sup>3</sup> He later apologized, admitting that he had compromised his principles in an effort to win the state’s primary.<sup>4</sup> In 2008, after Barack Obama defeated Hillary Clinton in

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<sup>1</sup> Ross Zucker, *What Type of Political System is the US?*, 9 J. OF POL. POWER 5, 8 (2016).

<sup>2</sup> Ann Banks, *Dirty Tricks, South Carolina and John McCain*, THE NATION (Jan. 14, 2008), <https://www.thenation.com/article/dirty-tricks-south-carolina-and-john-mccain/>.

<sup>3</sup> Steven A. Holmes, *After Campaigning on Candor, McCain Admits He Lacked it on Confederate Flag Issue*, N.Y. TIMES (Apr. 20, 2000), <http://www.nytimes.com/2000/04/20/us/after-campaigning-on-candor-mccain-admits-he-lacked-it-on-confederate-flag-issue.html>.

<sup>4</sup> *Id.*

South Carolina, Bill Clinton intimated that Obama only won because of race: “Jesse Jackson won South Carolina in ‘84 and ‘88.”<sup>5</sup> Several weeks later, Geraldine Ferraro, who backed Mrs. Clinton’s candidacy, alluded to the same effect: “[i]f Obama was a white man, he would not be in this position[,]” she told a reporter.<sup>6</sup> “He happens to be very lucky to be who he is. And the country is caught up in the concept.”<sup>7</sup> In 2016, without a massive African-American vote in her favor, Hillary Clinton likely would have lost the Democratic primary to Bernie Sanders. Mrs. Clinton won large majorities over Sanders in every state with a large population of African-Americans. For example, on June 14, 2016, Mrs. Clinton won 79% of the vote in Washington, D.C., which has the largest African-American voter concentration in the United States.<sup>8</sup> In the recent Alabama U.S. Senate contest, a 95% African-American vote for the Democratic candidate propelled him to a narrow victory.

From the founding of our republic to the present, race has been at the center of our body politic, and what to do about it has been an American political and legal conundrum. Examples of the centrality of race in American politics can be found in many areas such as slave owner founding fathers (Washington, Jefferson, etc.), the Three-Fifths Compromise, the Civil War, Reconstruction, segregation, Jim Crow, *Plessy v. Ferguson*, and *The Dred Scott* decision, all of which played a central and dismal role in the drama of racial representation in the United States. Recent events in Charlottesville and Virginia, and President Trump’s remarks with respect to same, have set off a racial firestorm throughout the country. Sports (“Taking the Knee”), patriotism and the President have become a national race issue.

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<sup>5</sup> Melissa Clyne, *Hillary Asks South Carolina Blacks for a Second Chance*, NEWSMAX (May 28, 2015, 12:21 PM), [www.newsmax.com/politics/hillary-clinton-south-carolina-blacks-vote/2015/05/28/id/647247/](http://www.newsmax.com/politics/hillary-clinton-south-carolina-blacks-vote/2015/05/28/id/647247/).

<sup>6</sup> Katharine Q. Seelye & Julie Bosman, *Ferraro’s Obama Remarks Become Talk of Campaign*, N.Y. TIMES (Mar. 12, 2008), <http://www.nytimes.com/2008/03/12/us/politics/12campaign.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Yamiche Alcindor & Patrick Healy, *Hillary Clinton and Bernie Sanders Meet as Their Battle Ends*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/us/politics/bernie-sanders-campaign.html>. *The New York Times* article on July 13, 2016 reported that polls indicate that whites feel aggrieved by African-Americans and that race relations in the United States are bleak. See Giovanni Russonello, *Race Relations Are at Lowest Point in Obama Presidency, Poll Finds*, <https://www.nytimes.com/2016/07/14/us/most-americans-hold-grim-view-of-race-relations-poll-finds.html>.

The empowerment of African-Americans and other minorities in the American electoral arena traces directly to the Voting Rights Act of 1965 (hereinafter “VRA”).<sup>9</sup> With the passage in 1965 of the VRA, race entered election fora with gladiatorial force. This article explores how starting in 1965, the VRA produced an apex of electoral success for African-Americans (and ultimately language minorities) only to recede a half century later with the unintended consequences of possibly helping to elect as President of the United States, Donald Trump, a man very much not a candidate of choice of the minority community.

Part I reviews the various statutes making up the VRA, as well as the legislative history that informed its mission. Part II probes the negative political consequences of majority-minority VRA districts, namely lower voter turnout, how the VRA helped the Republican Party to take control of the House of Representatives, and specifically, its influence on the election of Donald Trump as President. Part III analyzes the various Supreme Court decisions involving the VRA and demonstrates the Supreme Court’s steady erosion of the constitutionality and/or the validity of the VRA. Part IV suggests remedies designed to correct collateral and undesired political fallout resulting from an overconcentration of minorities in majority-minority congressional districts. The conclusion will summarize the points articulated in this article and suggest future redistricting steps to be taken.

## I. THE VOTING RIGHTS ACT

The original VRA was designed to address existing barriers to fulfillment of African-American participation in the electoral process. It contained two primary sections, § 2 and § 5.

Section 2 of the Act<sup>10</sup> follows the language of the Fifteenth Amendment<sup>11</sup> forbidding discrimination in the voting franchise on

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<sup>9</sup> 42 U.S.C. § 1973 (1965) (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437) (current version, as amended, at 52 U.S.C. § 10301 (2016)).

<sup>10</sup> Voting Rights Act of 1965 § 2 (stating “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

<sup>11</sup> Section 1 of the Fifteenth Amendment states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition or servitude.” U.S. CONST. amend. XV, § 1.

account of race or color. In *City of Mobile v. Bolden*,<sup>12</sup> the Supreme Court held that to prevail in a § 2 action, the plaintiff must prove that the discrimination was purposeful and that the state authorities intended such discrimination.<sup>13</sup> In response to the *Mobile* case, Congress in 1982 amended § 2 to explicitly proscribe any voting practice that had a discriminatory *effect* irrespective of whether the voting discrimination was purposefully intended.<sup>14</sup>

However, during congressional debates on the 1982 Amendments, a racial concern immediately manifested itself on account of the proposed results test.<sup>15</sup> Many legislators, particularly those from the South, were deeply concerned that the effects test would result in a standard of proportional representation by race.<sup>16</sup> In other words, they were worried that minorities would be entitled to be elected to the legislative body in proportion to their share of the relevant population, irrespective of whether the actual votes for minority candidates warranted such an outcome.<sup>17</sup> In the view of these Southern legislators, under the results test, any voting law or procedure in the country that failed to result in mirroring minority population makeup in a particular community would be vulnerable to legal challenge under § 2.<sup>18</sup>

On April 24, 1982, Senator Robert Dole of Kansas proposed a compromise on both § 2 and § 5 that was designed to allay the concern of those troubled by the proportional representation issue.<sup>19</sup> The new

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<sup>12</sup> 446 U.S. 55 (1980).

<sup>13</sup> *Id.* at 66.

<sup>14</sup> The relevant portion of Section (a) of § 2 relating to *Mobile*, as amended in 1982, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .*

42 U.S.C. § 1973 (1982) (current version as amended at 52 U.S.C. § 10301 (2016)) (emphasis added), *amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982).

<sup>15</sup> *See generally* *Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Comm. on the Judiciary United States S., 97th Cong.* 342-66 (1982) [hereinafter “Senate Hearings”].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> As discussed later in this article, this concern of unconstitutionally broad affirmative electoral action for minorities proved to be prescient.

<sup>19</sup> *See* Senate Hearings, *supra* note 15.

language of § 2 proposed to retain the results language but to append a new subsection (b) as follows which became part of the final bill:

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*<sup>20</sup>

This compromise, however, contains within itself an inherent tension because § 2 has a built-in preference and is remedial while lack of proportionality speaks a different and opposing theme.

Section 2 claims are vote dilution claims that focus on voting systems, practices and procedures that dilute the ability of minorities to elect candidates of their choice. They usually arise when whites and minorities “consistently prefer different candidates . . . when voting is ‘racially polarized.’”<sup>21</sup> Minority votes can be diluted in two ways: spreading the minority group among many districts so they are never a majority in any one district (fracturing, which is also known as cracking) or over-concentrating minority voters into one or two districts thereby reducing minority electoral power in other districts (packing).<sup>22</sup> Accordingly, obstacles that interfere with the ability of members of minority racial and language groups to have a fair opportunity to elect candidates of their choice lie at the heart of the § 2

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<sup>20</sup> 42 U.S.C. § 1973b (1982) (current version at 52 U.S.C. § 10301(b) (2016)) (emphasis added), amended by Voting Rights Act Amendments of 1982 § 3. See Senate Hearings, *supra* note 15. For an extensive review of the legislative history of the § 2 Amendments to the Voting Rights Act, refer to Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

<sup>21</sup> Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671-72 (2001).

<sup>22</sup> *Id.* at 1672.

vote dilution claim. The most blatant example of vote dilution occurs as a result of white polarized voting that usually results in deflating efforts of minorities to elect candidates of their choice (assumed to be fellow minorities) and would “dilute” the minority vote and thus effect minority vote dilution.<sup>23</sup>

Section 5 of the VRA prohibits certain defined jurisdictions called “covered counties” (mostly in the South), subject to its provisions (the “Coverage Formula”), from implementing changes in a “standard, practice, or procedure with respect to voting” without federal authorization (“Preclearance”).<sup>24</sup> The jurisdiction must either (1) obtain a judgment from the United States District Court for the District of Columbia declaring that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,” or (2) secure prior approval from the U.S. Attorney General.<sup>25</sup> Under a 2006 amendment to § 5 of the VRA, all covered jurisdictions were compelled to avoid drawing new districts that would “diminish[] the number of districts in which minority groups [could] ‘elect their preferred candidates of choice.’”<sup>26</sup> In other words, there could be no retrogression in the abilities of minority voters to elect candidates of their choice (called “ability to elect districts”).<sup>27</sup>

In light of the need to comply with the VRA—which requires states to give all of their citizens an equal opportunity to participate in the process and to elect representatives of their choice—legislators, the Justice Department and the courts compelled legislatures to create

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<sup>23</sup> *Id.*

<sup>24</sup> Voting Rights Act of 1965 § 5.

<sup>25</sup> *Id.* In 1970, Congress reauthorized the Act for another five years and extended the Coverage Formula in § 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. *See* 42 U.S.C. § 1973 (1970) (originally enacted as Voting Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314) (current version as amended at 52 U.S.C. § 10301 (2016)). In 1975, Congress reauthorized the Act for seven more years and extended the same coverage formula to voting conditions as of 1972. *See* 42 U.S.C. § 1973 (1970) (originally enacted as Voting Rights Act of 1965, amendments, Pub. L. No. 94-73, 89 Stat. 402) (current version as amended at 52 U.S.C. § 10301 (2016)). Congress also extended the Voting Rights Act to forbid discrimination based on membership in a language minority group. *See id.* In 1982, Congress reauthorized the Act for 25 years. *See* Voting Rights Act Amendments of 1982 § 2.

<sup>26</sup> *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1307 (2016) (quoting 52 U.S.C. § 10304(b)).

<sup>27</sup> *Id.* In *Shelby County v. Holder*, the U.S. Supreme Court held the coverage formula of § 4(b) of the Voting Rights Act unconstitutional rendering § 5 unenforceable. 570 U.S. 529, 557 (2013). *See* a more comprehensive discussion of *Shelby County* *infra* Part III.

majority-minority districts in which a majority of the voters and residents of the district are racial minorities (African-American) or language minorities (Hispanic).<sup>28</sup> These majority-minority districts were created for the specific purpose of increasing minority legislative representation.

In the 1970s, polarized anti-minority voting by whites, combined with lower registration and turnout among minorities, resulted in the perceived need to create not only majority-minority districts, but even super majority-minority districts drawn to contain at least 65% minority population.<sup>29</sup> Packing African-American voters into concentrated electoral vote ghettos, ostensibly to assure election of African-Americans, may have had the unintended consequence of helping to elect a candidate for President who surely was not the choice of African-Americans.

## II. NEGATIVE CONSEQUENCES OF MAJORITY-MINORITY VRA DISTRICTS

Majority-minority districts, however laudatory, resulted in two collateral negatives. First, they resulted, *ipso facto*, in lower voter turnout in those districts. Second, because the minority vote in those districts was overwhelmingly Democratic, the Democratic vote was concomitantly lower.

In this respect, recent Census Bureau data confirm that the African-American “voter turnout took a decided downturn in last November’s [2016] election—helping to compound the impact of the *lower than 2012 vote margins* that Democrat Hillary Clinton received in her loss to Donald Trump.”<sup>30</sup>

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<sup>28</sup> *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2208 (2003). In *Bush v. Vera*, the Court observed that the Texas legislature drew several majority-minority districts “with a view to complying with the Voting Rights Act.” 517 U.S. 952, 957 (1996).

<sup>29</sup> *Future of Majority-Minority Districts*, *supra* note 28, at 2216. The 65% number was chosen by allocating 5% over 50% for lesser voting population (predominantly underage individuals), 5% for lower voter registration, plus 5% because of lower turnout. See *Future of Majority-Minority Districts*, *supra* note 28, at 2216 n.48 (citing DEWEY M. CLAYTON, AFRICAN AMERICANS AND THE POLITICS OF CONGRESSIONAL REDISTRICTING 75 (2000)).

<sup>30</sup> William H. Frey, *Census Shows Pervasive Decline in 2016 Minority Voter Turnout*, BROOKINGS: THE AVENUE (May 18, 2017), <https://www.brookings.edu/blog/theavenue/2017/05/18/census-shows-pervasive-decline-in-2016-minority-voter-turnout/> (emphasis in original).

With Barack Obama on the ballot in 2012, the African-American voter turnout rate (66%) surpassed that of whites for the first time. As a May 18, 2017 Brookings Institute Report noted, the strong African-American voter turnout for Obama was probably “attributable to an extraordinary surge in enthusiasm for the first African-American major party nominee . . . .”<sup>31</sup> With Hillary Clinton on the ballot in 2016, the number of African-American voters declined by approximately 765,000, falling seven percentage points to 59.6%.<sup>32</sup> While this finding was politically irrelevant in blue states where Clinton won the popular vote overwhelmingly, and correspondingly the electoral vote, it made a significant difference in three swing states—Michigan Wisconsin, and Pennsylvania.

It is an axiom of the voting world that the more competitive the electoral environment, the greater voter turnout. A competitive election results in greater campaign resources, such as money, get-out-the-vote efforts, local campaign funded offices, greater media attention and intense advertising efforts. The linkage between electoral competitiveness and voter turnout is thus clear.<sup>33</sup>

### Michigan

Michigan’s 13th (formerly 14th) Congressional District is a paradigmatic example of a majority-minority district where the absence of any competitive congressional race in 2016 appears to have contributed to a lower voter turnout than in 2012. Michigan’s 13th Congressional District for more than 53 years has been represented by Representative John Conyers, an African-American Democratic congressman.<sup>34</sup> Congressman Conyers’ margin of victory against

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<sup>31</sup> *Id.*

<sup>32</sup> Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as Record Number of Americans Cast Ballots*, PEW RES. CTR. (May 12, 2017), <http://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/>.

<sup>33</sup> Alexander Agadjanian, *A Correlation Between State Competitiveness and Voter Turnout?*, DECISION DESK HQ (Dec. 19, 2016, 6:06 PM), <https://decisiondeskhq.com/data-dives/a-correlation-between-state-competitiveness-and-voter-turnout-guest-post-by-alexander-agadjanian/>. See generally MARK N. FRANKLIN, *VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945* (2004).

<sup>34</sup> *John Conyers Jr.*, BALLOTEDIA, [https://ballotpedia.org/John\\_Conyers\\_Jr.](https://ballotpedia.org/John_Conyers_Jr.) (last visited June 3, 2018). On December 5, 2017, Congressman Conyers resigned from the House of Representatives as a result of a sexual scandal. *Id.*

Republican challengers has been overwhelming, with Conyers receiving 77.1% to 92.9% of the vote.<sup>35</sup>

In 2016, a total of only 265,343 people voted for President in Michigan's 13th Congressional District.<sup>36</sup> That was 27,821 fewer voters than the 293,164 people who voted for President there in 2012.<sup>37</sup> President Trump's margin of victory in Michigan was only approximately 10,000 votes.<sup>38</sup> Had the voter turnout in Michigan's 13th Congressional District in 2016 been equal to the voter turnout in 2012, Clinton would have received approximately 21,925 additional votes (78.81% of 27,821) compared to only approximately 5,044 additional votes for Trump (18.13% of 27,821).<sup>39</sup> Consequently, the margin of victory might have swung in Clinton's favor with her winning the popular vote by 4,517 votes and, with that, Michigan's 16 electoral votes. Pellucidly, since there was no competitive congressional race in the 13th Congressional District, the low turnout in that majority-minority district was a contributing factor in Clinton losing Michigan's 16 electoral votes.

### Wisconsin

While Wisconsin's 4th Congressional District is not a majority-minority district, it is 33.6% African-American<sup>40</sup> and is represented by a long-term African-American incumbent, Gwen Moore, who has won with a large percentage of the vote.<sup>41</sup> While not a classic majority-minority district, its voting patterns closely mirror those of traditional Voting Rights Act districts.

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<sup>35</sup> *Id.*

<sup>36</sup> See *Daily Kos Elections' Statewide Election Results by Congressional and Legislative Districts*, DAILY KOS (July 9, 2013, 2:52 PM), <https://www.dailykos.com/stories/2013/07/09/1220127/-Daily-Kos-Elections-2012-election-results-by-congressional-and-legislative-districts>.

<sup>37</sup> See *id.*

<sup>38</sup> *Id.* See also *Michigan Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 1, 2017, 11:25 AM), <https://www.nytimes.com/elections/results/michigan-president-clinton-trump>.

<sup>39</sup> See *Daily Kos Elections'*, *supra* note 36.

<sup>40</sup> See *My Congressional District*, U.S. CENSUS BUREAU, <https://www.census.gov/mycd/> (last visited June 3, 2018).

<sup>41</sup> Congresswoman Moore was elected by her colleagues to serve in the leadership of the Congressional Black Caucus as Caucus Whip. *Biography*, CONGRESSWOMAN GWEN MOORE, <https://gwenmoore.house.gov/biography/> (last visited June 3, 2018).

In 2016, a total of only 308,575 people voted for President in Wisconsin's 4th Congressional District, 47,780 fewer than the 356,355 people who voted for President there in 2012.<sup>42</sup> Trump's margin of victory in Wisconsin was approximately 23,000.<sup>43</sup> Had the voter turnout in Wisconsin's 4th Congressional District in 2016 been equal to the voter turnout in 2012, Clinton would have received approximately 35,338 additional votes (73.96% of 47,780) compared to only approximately 10,421 additional votes for Trump (21.81% of 47,780).<sup>44</sup> Consequently, the margin of victory might have swung in Clinton's favor with her winning the popular vote by 2,169 votes and, with that, Wisconsin's 10 electoral votes. As in Michigan, the diminished turnout in Wisconsin's 4th Congressional District resulted at least in part, from the lack of a competitive congressional race.

### Pennsylvania

Pennsylvania was a third swing state carried by Trump by a margin of less than 1% of the vote (approximately 45,000).<sup>45</sup> Very likely his margin of victory in Pennsylvania would have been more robust but for an aberrant political occurrence in one of its Democratic stronghold majority-minority districts.

The 2nd Congressional District located in Philadelphia was a majority-minority district whose African-American Democratic congressmen traditionally won the general election by more than 90% of the vote. The turnout in the 2nd Congressional District in the 2016 election was almost as great as in the 2012 election.<sup>46</sup> While this might seem counterintuitive, there was an anomalous political occurrence in this particular district.

From 1994 until 2016, Chaka Fattah was the long term Democratic African-American Congressman from the 2nd Pennsylvania Congressional District winning the general elections almost always with nearly 90% of the vote.<sup>47</sup> On June 23, 2016, Fattah resigned from the House of Representatives following a racketeering

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<sup>42</sup> See *Daily Kos Elections*, *supra* note 36.

<sup>43</sup> See *Daily Kos Elections*, *supra* note 36.

<sup>44</sup> See *Daily Kos Elections*, *supra* note 36.

<sup>45</sup> See *Daily Kos Elections*, *supra* note 36.

<sup>46</sup> See *Daily Kos Elections*, *supra* note 36.

<sup>47</sup> See *Pennsylvania's 2nd Congressional District Elections, 2012*, BALLOTEDIA, [https://ballotpedia.org/Pennsylvania%27s\\_2nd\\_Congressional\\_District](https://ballotpedia.org/Pennsylvania%27s_2nd_Congressional_District) (last visited June 3, 2018).

conviction.<sup>48</sup> Notwithstanding his conviction, Fattah ran for re-election but was defeated in a hotly contested Democratic primary by Dwight Evans who then won the general election by 90.3% of the vote.<sup>49</sup> A special election to fill out the remainder of Fattah's term, which was also won by Evans, was also held on the same day as the general election.<sup>50</sup>

Plainly, all of the election activity (3 elections) revolving about the Fattah-Evans contests was a significant factor in contributing to the greater general election turnout in 2016. Because of this unusual election activity happening in Pennsylvania's 2nd Congressional District, we cannot draw conclusions either way as to its impact on the turnout in 2016. Also, Trump's margin of victory of 45,000 votes may have been too large to overcome even with an increased voter turnout in the 2nd Congressional District.

Admittedly, while the lower 2016 voter turnout in the Wisconsin and Michigan majority-minority districts was probably not entirely attributable to lack of congressional competitiveness in the African-American congressional districts, lack of competition in those African-American congressional races was at least a significant contributing factor in the lower voter turnout.

Concededly, had Clinton won only the Wisconsin and Michigan electoral votes and not Pennsylvania, she would have diminished Trump's total by only 26 (16+10). Nevertheless, adding 26 electoral votes to Clinton's electoral vote total of 232 and subtracting 26 electoral votes from Trump's 306 electoral vote total would have left Trump with an electoral vote margin of only 22 electoral votes,<sup>51</sup> giving Trump an Electoral College margin even lower than that of Rutherford B. Hayes.<sup>52</sup>

While even with a 22 vote electoral margin, Trump still would have won, a narrower electoral margin would have given even more

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<sup>48</sup> MaryClaire Dale, *US Rep. Fattah Steps Down After Racketeering Conviction*, WASH. TIMES (June 23, 2016), <https://www.washingtontimes.com/news/2016/jun/23/us-rep-fattah-steps-down-after-racketeering-convic/>.

<sup>49</sup> See *Pennsylvania's 2nd Congressional District Elections*, *supra* note 47.

<sup>50</sup> See *Pennsylvania's 2nd Congressional District Elections*, *supra* note 47.

<sup>51</sup> Kierston Schmidt & Wilson Andrews, *A Historic Number of Electors Defected, and Most Were Supposed to Vote for Clinton*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/interactive/2016/12/19/us/elections/electoral-college-results.html>.

<sup>52</sup> Initially, Hayes actually lost the electoral vote to Tilden 184 to 165. LLOYD ROBINSON, *THE STOLEN ELECTION: HAYES VERSUS TILDEN-1876*, 123-89 (2001). Twenty ballots were disputed but ultimately were awarded to Hayes as a result of a political compromise. *Id.* This gave Hayes the requisite electoral vote majority of 1 vote. *Id.*

impetus to those attempts to politically delegitimize the Trump presidency especially in light of Clinton's overwhelming popular vote margin of victory.<sup>53</sup>

Yet another factor in suppressing voter turnout is the incumbency advantage.<sup>54</sup> Incumbency protection is pervasive, especially in majority-minority districts. Once the district is racially gerrymandered and a minority congressperson installed, it is almost impossible to defeat them other than in a primary (and that only rarely). The majority-minority district holders are uniformly Democrats unchallenged in a competitive election, let alone in a primary. For example, Charles Rangel, an African-American congressman from Harlem, served in Congress for 46 years.<sup>55</sup> He was the second longest serving incumbent member of the House of Representatives becoming the first African-American Chairman of the House Ways & Means Committee, as well as Dean of New York's Congressional Delegation.<sup>56</sup> From 1972 onward, Rangel won re-election with over 88% of the vote, and often with over 95%, and sometimes no Republican even ran against him.<sup>57</sup>

Congressman Jose Serrano is a Hispanic congressman from the South Bronx who has served as a congressman for over 27 years.<sup>58</sup> In the last 15 years, he has not won an election with less than 63.9% of the vote.<sup>59</sup>

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<sup>53</sup> In fact, had the unusual and aberrational election activity in Pennsylvania's 2nd Congressional District in 2016 not skewed the normally low voter turnout upward, it is theoretically possible (though admittedly speculative) that Trump might have lost Pennsylvania's 20 electoral votes (and the presidency itself).

<sup>54</sup> See *Congressional Elections*, LUMEN: BOUNDLESS POL. SCI., <https://courses.lumenlearning.com/boundless-politicalscience/chapter/congressional-elections/> (last visited June 3, 2018).

<sup>55</sup> *Charles Rangel*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, [http://history.house.gov/People/Listing/R/RANGEL,-Charles-B--\(R000053\)](http://history.house.gov/People/Listing/R/RANGEL,-Charles-B--(R000053)) (last visited June 3, 2018). Congressman Rangel did not run for re-election in 2016 and was replaced by a Hispanic individual, Adriano Espaillat, who won the general election overwhelmingly. See *Charles Rangel*, BALLOTPEDIA, [https://ballotpedia.org/Charles\\_Rangel](https://ballotpedia.org/Charles_Rangel) (last visited June 3, 2018).

<sup>56</sup> *Charles Rangel*, HIST., ART & ARCHIVES, *supra* note 55.

<sup>57</sup> MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 1169 (2008).

<sup>58</sup> See *Jose Serrano*, BALLOTPEDIA, [https://ballotpedia.org/Jose\\_Serrano](https://ballotpedia.org/Jose_Serrano) (last visited June 3, 2018).

<sup>59</sup> See *id.*

James Clyburn, an African-American, has represented South Carolina's 6th Congressional District for over 25 years.<sup>60</sup> In 25 years, he has won with between 62.9% and 93.6% of the vote.<sup>61</sup>

As in other super packed majority-minority districts, John Conyers, discussed above,<sup>62</sup> has won with between 77% and 90% of the vote with ever increasing margins, sometimes with no opponent whatsoever.<sup>63</sup>

Incumbency driven lower minority turnout inevitably means a lesser overall Democratic vote.

### III. RECENT U.S. SUPREME COURT DECISIONS MAY DIMINISH THE SIGNIFICANCE OF MAJORITY-MINORITY DISTRICTS IN FUTURE ELECTIONS

#### A. Evolution of Case Law in the Supreme Court

In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,<sup>64</sup> in order to obtain preclearance from the Justice Department pursuant to § 5 of the VRA for Assembly and Senate districts in Kings County (a covered county), the legislature was required to enact a redistricting plan that deliberately split an all-white Hasidic Jewish community previously located within a single Senate and Assembly district into two separate Senate and Assembly districts.<sup>65</sup> This was considered necessary to create a super majority-minority district of 65% minority population.<sup>66</sup> The Hasidic community sued alleging that the splitting of this community “‘would dilute the value of each plaintiff’s franchise by halving its effectiveness,’ solely for the purpose of achieving a racial quota . . . in violation of the Fourteenth Amendment.”<sup>67</sup>

The Supreme Court upheld the constitutionality of this super majority-minority district notwithstanding the flat out concession that “[t]here is no doubt that in preparing the 1974 legislation the State

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<sup>60</sup> See *James Clyburn*, BALLOTPEDIA, [https://ballotpedia.org/James\\_Clyburn](https://ballotpedia.org/James_Clyburn) (last visited June 3, 2018).

<sup>61</sup> See *id.*

<sup>62</sup> See discussion of John Conyers *supra* Part II, Michigan.

<sup>63</sup> See *John Conyers Jr.*, *supra* note 34.

<sup>64</sup> 430 U.S. 144 (1977).

<sup>65</sup> *Id.* at 152.

<sup>66</sup> *Id.* at 164-65.

<sup>67</sup> *Id.* at 152-53.

deliberately used race in a purposeful manner.”<sup>68</sup> Presaging the Supreme Court’s later discomfort with race-based majority-minority districting, Chief Justice Warren Burger dissented as follows:

The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter’s interests, and that such candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York, and endorsed by the Court today, moves us one step farther away from a truly homogeneous society.<sup>69</sup>

In 1986, in *Thornburg v. Gingles*,<sup>70</sup> the Supreme Court drilled down on the ingredients of a § 2 vote dilution claim.<sup>71</sup> The Court held that plaintiffs asserting a vote dilution claim under the amended § 2 must at least prove that (1) the state could have drawn an additional, compact majority-minority district (the *Gingles* district) but failed to do so; (2) the minority group is politically “cohesive”—that is, its members vote in a similar fashion; and (3) *the white electorate votes as a bloc, thus enabling whites usually to defeat the minority group’s preferred candidates at the polls.*<sup>72</sup> Professor Samuel Issacharoff

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<sup>68</sup> *Id.* at 165.

<sup>69</sup> *United Jewish Organizations*, 430 U.S. at 186-87 (Burger, C.J., dissenting). *See also* *Johnson v. De Grandy*, 512 U.S. 997, 1030 (1994).

<sup>70</sup> 478 U.S. 30 (1986).

<sup>71</sup> *See generally id.*

<sup>72</sup> *Id.* at 50-51 (emphasis added). If all three *Gingles* requirements are established, the statute requires a further analysis of the “totality of circumstances” to determine whether members of a racial group have less opportunity than do other members of the electorate. *Id.* at 43. The totality of the circumstances analysis was derived from the Supreme Court’s analytical framework in *White* and first articulated by the Court in *Zimmer v. McKeithen*. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff’d sub nom.* *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam) (emphasis added). Those factors were adopted by the Senate Report accompanying the 1982 amendments to the Voting Rights Act. S. REP. NO. 97-417, at 28-29 (1982). The Supreme Court has invoked the Senate Report on the 1982 amendments to the Voting Rights Act, which identifies factors typically relevant to a § 2 claim, including:

the 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

noted that “*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the [VRA] . . . .”<sup>73</sup> As will be demonstrated, the corollary is when there is no polarized white voting, majority-minority districts are unnecessary and often unconstitutional as racial gerrymanders failing strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

By the early 1990s, the Supreme Court changed direction on the issue of race-based districting. *Shaw v. Reno*<sup>74</sup> involved a challenge to the constitutionality of a bizarrely shaped, newly created, African-American congressional district in North Carolina (District 12).<sup>75</sup> North Carolina was a state covered by the requirements of § 5 of the VRA.<sup>76</sup> The district contained a majority-minority population drawn to meet the objections of the United States Attorney General to an earlier version of District 12; the revised District 12 that was at issue was precleared by the Attorney General.<sup>77</sup> A lawsuit claiming that District 12 was an unconstitutional racial gerrymander reached the Supreme Court.<sup>78</sup> In recognizing a constitutional claim forbidding racial gerrymandering, the Court, in a 5-4 decision echoing Justice Burger’s dissent in *United Jewish Organizations*, stated:

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enhance the opportunity for discrimination against the minority group . . . 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 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. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State’s or the political subdivision’s use of the contested practice or structure is tenuous may have probative value.

*Gingles*, 478 U.S. at 44-45 (citing S. REP. NO. 97-417, at 28-29, 36-37) (internal citations omitted). See also *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426 (2006) [hereinafter “*LULAC*”]. *Gingles* was a multi-member district case. See generally *Gingles*, 478 U.S. at 30. In *Grove v. Emison*, the Supreme Court applied the *Gingles* analysis and holding to single member districts as well. 507 U.S. 25 (1993). See also *De Grandy*, 512 U.S. at 1015.

<sup>73</sup> Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992).

<sup>74</sup> 509 U.S. 630 (1993) [hereinafter “*Reno*”].

<sup>75</sup> *Id.* at 655-56.

<sup>76</sup> *Id.* at 634.

<sup>77</sup> *Id.*

<sup>78</sup> See generally *id.* at 630.

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.<sup>79</sup>

\* \* \*

For these reasons, we conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of

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<sup>79</sup> *Reno*, 509 U.S. at 647-48 (internal citations omitted).

race, and that the separation lacks sufficient justification.<sup>80</sup>

While recognizing for the first time a constitutional claim of racial gerrymandering, the Court remanded the case to the District Court without deciding whether the challenged district in that case, on its face, constituted an impermissible racial gerrymander.<sup>81</sup> Although it did not decide the merits of the claimed racial gerrymander, in remanding the case, the Supreme Court instructed that:

If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine *whether the North Carolina plan is narrowly tailored to further a compelling governmental interest*.<sup>82</sup>

In *Miller v. Johnson*,<sup>83</sup> the Supreme Court, in another 5-4 decision (authored by Justice Kennedy), found a Georgia congressional redistricting plan unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.<sup>84</sup> The plan contained three majority African-American districts adopted after the Justice Department refused to preclear an earlier plan that contained only two African-American majority districts.<sup>85</sup> In clarifying racial gerrymandering claims post *Reno*, the Court stated:

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Its central mandate is racial neutrality in governmental decisionmaking. Though application of this imperative raises difficult questions, the basic principle is straightforward: “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. . . . This perception of racial and ethnic distinctions is rooted in our Nation’s constitutional and demographic history.” This rule obtains with equal force regardless of “the

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<sup>80</sup> *Id.* at 649.

<sup>81</sup> *Id.* at 656.

<sup>82</sup> *Id.* at 658 (emphasis added).

<sup>83</sup> 515 U.S. 900 (1995).

<sup>84</sup> *Id.* at 924.

<sup>85</sup> *Id.* at 907-09.

race of those burdened or benefited by a particular classification.” Laws classifying citizens on the basis of race cannot be upheld unless they are *narrowly tailored to achieving a compelling state interest*.<sup>86</sup>

When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, “think alike, share the same political interests, and will prefer the same candidates at the polls.”<sup>87</sup>

First, although acknowledging that the legislature must always be aware of race when redistricting, the Court found evidence of intent to racially gerrymander overwhelming and all but stipulated to by the parties.<sup>88</sup> As such, under the *Reno* precedent, the district was subject to strict scrutiny.<sup>89</sup>

In finding the plan unconstitutional, the Court observed that there was little doubt that the state’s true interest in designing the plan was to add an extra, third African-American majority district.<sup>90</sup> The Court further found:

The Justice Department refused to preclear both of Georgia’s first two submitted redistricting plans. The District Court found that the Justice Department had adopted a “black-maximization” policy under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State made the “Macon/Savannah trade” and created a third majority-black district. It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Voting Rights Act.

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<sup>86</sup> *Id.* at 904 (internal citations omitted).

<sup>87</sup> *Id.* at 911-12 (citing *Reno*, 509 U.S. at 647).

<sup>88</sup> *Miller*, 515 U.S. at 910.

<sup>89</sup> *Id.* at 913. Rejecting the decision in *United Jewish Organizations*, the Court in *Miller* held “[t]o the extent any of the opinions in that ‘highly fractured decision,’ can be interpreted as suggesting that a State’s assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not be deemed controlling.” *Id.* at 915 (internal citations omitted).

<sup>90</sup> *Id.* at 921.

We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.<sup>91</sup>

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Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts.<sup>92</sup>

In 1996, in *Shaw v. Hunt*,<sup>93</sup> the North Carolina congressional redistricting plan (District 12) returned to the Supreme Court after the remand to the District Court.<sup>94</sup> The District Court held that the plan was racially motivated but survived strict scrutiny.<sup>95</sup> The Supreme Court reversed holding the districting plan unconstitutional.<sup>96</sup> North Carolina had deliberately drawn a bizarrely shaped majority-minority district in the center of the state (District 12).<sup>97</sup> In defending against the plaintiff's racial gerrymander claim, the state argued that it had drawn District 12 to achieve a compelling state interest in compliance with § 2 [of the VRA].<sup>98</sup> The Court assumed, *arguendo*, that compliance with § 2 constitutes a compelling state interest justifying the creation of a majority-minority district.<sup>99</sup>

The Court held that a remedy for vote dilution is not narrowly tailored to comply with § 2 if the remedial district drawn by the state substantially departs from a compact *Gingles* district.<sup>100</sup> The Court stated, a bizarrely shaped district “somewhere else in the State” does not remedy “the vote-dilution injuries suffered by” minority voters residing within the *Gingles* district.<sup>101</sup> The Court held that creating an

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<sup>91</sup> *Id.* at 921-22.

<sup>92</sup> *Miller*, 515 U.S. at 924.

<sup>93</sup> 517 U.S. 899 (1996) [hereinafter “*Hunt*”].

<sup>94</sup> *See generally id.*

<sup>95</sup> *Shaw v. Hunt*, 861 F. Supp. 408, 496 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996).

<sup>96</sup> *See generally Hunt*, 517 U.S. at 899.

<sup>97</sup> *Id.* at 903.

<sup>98</sup> *Id.* at 911.

<sup>99</sup> *Id.* at 915.

<sup>100</sup> *Id.* at 916-17.

<sup>101</sup> *Hunt*, 517 U.S. at 917.

additional majority African-American district in North Carolina was not required under a correct reading of § 5 or § 2 and that District 12, as drawn, was not a remedy narrowly tailored to the State's professed interest in avoiding Voting Rights Act liability.<sup>102</sup>

Having previously determined in *Reno*, *Miller* and *Hunt* that the VRA does not justify use of predominate racial gerrymandering as an excuse to maximize majority-minority districts, the Supreme Court in *Alabama Legislative Black Caucus v. Alabama*<sup>103</sup> questioned the very need to create majority-minority districts altogether.<sup>104</sup> Thus, while maximization was prohibited (*Miller*), even minimal numbers of majority-minority districts became constitutionally suspect.<sup>105</sup>

In 2012, the State of Alabama redrew its House and Senate districts.<sup>106</sup> In reversing the District Court,<sup>107</sup> the Supreme Court found that the District Court made four erroneous critical determinations in finding the challenged, racially driven, districts constitutional.<sup>108</sup> First, contrary to the District Court, a claim for racial gerrymandering is a claim addressed to specific electoral districts, not statewide districting as a whole.<sup>109</sup> Second, only certain plaintiffs have standing to bring the claim.<sup>110</sup> Third, the District Court erred when it did not find that race was shown to be the predominant basis for the districting.<sup>111</sup> Fourth, the districts were not narrowly tailored when the state sought to justify unconstitutional predominantly race-based districting as necessary to comply with § 5 of the VRA.<sup>112</sup>

Seeking to avoid retrogression in violation of § 5 of the VRA (as amended in 2006), the state maintained roughly the same African-American population percentage within the new districts as existed in

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<sup>102</sup> *Id.* at 911. In 2006, in *LULAC*, Chief Justice Roberts, in an opinion joined by Justice Alito, claimed that majority-minority districting is all a "sordid business, this divvying us up by race." *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). However, the principal holding in *LULAC* was a finding that Texas District 23 was a violation of § 2 of the VRA and that Texas District 25 did not violate § 2 of the VRA. *Id.* at 447.

<sup>103</sup> 135 S. Ct. 1257 (2015).

<sup>104</sup> *See generally id.*

<sup>105</sup> *See generally id.*

<sup>106</sup> *Id.* at 1263.

<sup>107</sup> *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (2013), *rev'd*, 135 S. Ct. 1257 (2015).

<sup>108</sup> *Alabama Legislative*, 135 S. Ct. at 1264.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

the earlier 2001 Alabama districting plan.<sup>113</sup> The Supreme Court held that this compliance with § 5 did not survive strict scrutiny because it was not narrowly tailored to comply with § 5.<sup>114</sup> It stated:

Section 5, which covered particular States and certain other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice.<sup>115</sup>

*Bethune-Hill v. Virginia State Board of Elections*<sup>116</sup> was a 2017 challenge to the State of Virginia's redrawn state legislative districts.<sup>117</sup> In order to comply with the non-retrogression requirements of § 5 of the VRA, the lines at issue in 12 of the districts were drawn with a goal of ensuring that each district would have an African-American voting age population (BVAP) of at least 55%, and in some cases, more.<sup>118</sup>

The Court reviewed its holdings in *Reno*, *Hunt*, *Miller* (impermissible racial predominance) and *Alabama Legislative* (narrow tailoring analysis) with respect to 11 of the 12 districts.<sup>119</sup> It reversed the District Court and remanded.<sup>120</sup> The Supreme Court held "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering,"<sup>121</sup> as the District Court erroneously had found. With respect to the remaining district (75), the Supreme Court upheld the District Court's finding that although District 75 was racially based, it was on the specific and unique facts of the case, narrowly tailored to avoid violating § 5 of the VRA.<sup>122</sup>

In May of 2017, the Supreme Court came out the other way.<sup>123</sup> In that year, North Carolina's congressional districting returned once

<sup>113</sup> *Alabama Legislative*, 135 S. Ct. at 1286.

<sup>114</sup> *Id.* at 1272.

<sup>115</sup> *Id.*

<sup>116</sup> 137 S. Ct. 788 (2017).

<sup>117</sup> *See generally id.*

<sup>118</sup> *Id.* at 794.

<sup>119</sup> *See generally id.*

<sup>120</sup> *Id.* at 802.

<sup>121</sup> *Bethune-Hill*, 137 S. Ct. at 799.

<sup>122</sup> *Id.* at 802.

<sup>123</sup> *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

again to the Supreme Court.<sup>124</sup> After the 2010 census, North Carolina created two majority-minority districts (District 1 and District 12).<sup>125</sup> The legislature increased the BVAP in District 1 from 48.6% to 52.7% and in District 12 from 43.8% to 50.7%.<sup>126</sup> The District Court found that because race predominated in the enactment of both districts, the districts became subject to strict scrutiny, which neither district survived.<sup>127</sup>

With respect to District 1, the state argued that it was narrowly tailored to avoid a § 2 vote dilution claim.<sup>128</sup> The Supreme Court affirmed the District Court's holding that compliance with § 2 of the VRA was legally impossible in that case because the third *Gingles* prerequisite to a § 2 claim (polarized white racial voting) could not be demonstrated.<sup>129</sup> Therefore, compliance with § 2 was unavailing to justify the racial motivation informing the construction of the district.<sup>130</sup> Since there was no possibility of a § 2 violation, there was no justification for a predominantly race based district as necessary to avoid § 2 liability.<sup>131</sup>

With respect to District 12, the Supreme Court found evidence that racial considerations also predominated in designing District 12.<sup>132</sup> Since North Carolina did not even attempt to justify District 12's racial classification, the district was clearly constitutionally infirm.<sup>133</sup>

Although the Supreme Court never determined the precise minority percentage a majority-minority district could contain that would pass muster against a § 2 racial gerrymander dilution claim, leaving it to a case by case factual analysis, it clearly continued to demonstrate its concern with the constitutional problems inherent in the creation of majority-minority districts.<sup>134</sup> It also continued its view

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<sup>124</sup> See generally *id.*

<sup>125</sup> *Id.* at 1466.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Cooper*, 137 S. Ct. at 1469.

<sup>129</sup> *Id.* at 1470.

<sup>130</sup> *Id.* at 1471.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1478.

<sup>133</sup> *Cooper*, 137 S. Ct. at 1478.

<sup>134</sup> See generally *id.*; see also *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

that the VRA usually cannot be used as an excuse to construct unconstitutional race based majority-minority districts.<sup>135</sup>

More importantly, the Supreme Court has recognized the fact that there has been a visible slackening of white voter polarization in the United States in recent years and African-Americans can elect candidates of their choice (presumably other African-Americans, if they so choose) without the necessity of packing a district with an excess of African-American voters. This ever changing new voting phenomenon is graphically demonstrated in the relatively recent Supreme Court decision in *Shelby County v. Holder*.<sup>136</sup>

In holding § 4 of the VRA (the Coverage Formula) unconstitutional, the Supreme Court's rationale rested on the belief that increased African-American voting strength made remedial statutes like § 4 of the VRA unnecessary and, therefore, unconstitutional.<sup>137</sup>

Writing for a 5-4 majority, Chief Justice Roberts wrote:

“[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. . . .

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” The House Report elaborated that “the number of African-Americans who are registered and who turn out to cast ballots has increased

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<sup>135</sup> See generally *id.* See also Tarini Parti, *High Court Reasserts Voting Rights Act in Alabama Decision*, POLITICO (Mar. 25, 2015, 12:04 PM), <http://www.politico.com/story/2015/03/supreme-court-alabama-redistricting-ruling-116384>.

<sup>136</sup> See introduction of this 2013 case *supra* note 27. The *Shelby County* case declared the Coverage Formula of § 4(b) of the VRA unconstitutional in light of current conditions and based on unequal sovereignty treatment of various states in violation of federalism principles. *Shelby County*, 570 U.S. at 553. Without § 4(b), § 5 became unenforceable. *Id.* at 557.

<sup>137</sup> *Id.*

significantly over the last 40 years, particularly since 1982,” and noted that “[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.” That Report also explained that there have been “significant increases in the number of African-Americans serving in elected offices”; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.<sup>138</sup>

Notwithstanding the distaste some Justices have for majority-minority districts, the Supreme Court has not yet declared § 2 of the VRA unconstitutional.<sup>139</sup>

However, the declaration in *Shelby County* that § 4(b) of the VRA was unconstitutional rested in part on the fact that white polarized voting had diminished and there was “increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress.”<sup>140</sup> That same logic could easily be applied to § 2. In essence, the claim would be that there is no longer a need for § 2, or even the VRA altogether, to remedy African-American vote dilution since the African-American vote is not being diluted anymore, white polarization has eroded, and race-based districting is inherently unconstitutional.

### **B. Partisanship and Minority-Majority Districting**

Not only does creating safe minority-majority Democratic congressional seats negatively impact voter turnout, which in turn, could cause a Democratic Party presidential candidate to lose a state’s electoral vote, but over concentrating African-Americans into urban

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<sup>138</sup> *Id.* at 547 (internal citations omitted).

<sup>139</sup> *See, e.g., Bush*, 517 U.S. at 992 (“We should allow States to assume the constitutionality of § 2 of the VRA, including the 1982 amendments.”); *De Grandy*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in part and dissenting in part) (“It is important to emphasize that the precedents to which I refer, like today’s decision, only construe the statute, and do not purport to assess its constitutional implications.”); *Shelby County*, 570 U.S. at 556-57 (“That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so . . .”). *See generally* LUIS FUENTES-ROHWER, *THE FUTURE OF SECTION 2 OF THE VOTING RIGHTS ACT IN THE HANDS OF A CONSERVATIVE COURT* (2010).

<sup>140</sup> *Shelby County*, 570 U.S. at 547.

districts (which is usually where they reside) actually hurts the Democratic Party's ability to win congressional seats.<sup>141</sup>

It is an article of political faith that African-Americans vote overwhelmingly Democratic,<sup>142</sup> which the Supreme Court has recognized in a number of cases.

In 1998, North Carolina enacted yet another congressional redistricting plan (again involving District 12).<sup>143</sup> The plan was challenged as an unconstitutional racial gerrymander.<sup>144</sup> The District Court granted summary judgment finding the 12th District unconstitutional on the ground that it was primarily race based.<sup>145</sup> The Supreme Court reversed finding summary judgment premature and remanding to the District Court for a fact based inquiry as to whether the District was drawn for political purposes, namely "to make District 12 a strong democratic District," or was an unconstitutional race based District.<sup>146</sup> In doing so, the Supreme Court stated:

Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, *even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.*<sup>147</sup>

Upon remand, the District Court, after trial, found that race, not politics, predominated in the construction of District 12.<sup>148</sup> The Supreme Court again reversed holding that the evidence showed that the motivation of the legislature in enacting the boundaries of District 12 was to create an overwhelmingly Democratic District (since African-American voters vote overwhelmingly for Democratic candidates and the district's boundaries were primarily politically, not racially, driven).<sup>149</sup>

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<sup>141</sup> See Steven Hill, *How the Voting Rights Act Hurts the Democrats and Minorities*, THE ATLANTIC: POL. (June 17, 2013), <https://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/>.

<sup>142</sup> Matthew Delmont, *When Black Voters Exited Left*, THE ATLANTIC: POL. (Mar. 31, 2016), <https://www.theatlantic.com/politics/archive/2016/03/exit-left/476190/>.

<sup>143</sup> See *Hunt v. Cromartie*, 526 U.S. 541 (1999).

<sup>144</sup> See generally *id.*

<sup>145</sup> *Id.* at 543.

<sup>146</sup> *Id.* at 549.

<sup>147</sup> *Id.* at 551 (emphasis added and in original).

<sup>148</sup> *Cromartie*, 526 U.S. at 552.

<sup>149</sup> *Easley v. Cromartie*, 532 U.S. 234 (2001).

In *Bush*, in finding the districts in question to be unconstitutional because their construction was primarily race based, the Supreme Court nevertheless recognized that the African-American vote is overwhelmingly Democratic stating: “as it happens, . . . many of the voters being fought over [by the neighboring Democratic incumbents] were African-American.”<sup>150</sup>

Accordingly, when the African-American voter turnout is diminished, the corresponding Democratic vote is similarly diminished.

Political pundits overwhelmingly have recognized that drawing of majority-minority districts not only elected more minorities, it also had the effect of bleeding minority voters out of all the surrounding districts. Given that minority voters were the most reliably Democratic voters, that made all of the neighboring districts more Republican. The black, Latino, and Asian representatives mostly were replacing white Democrats, and the increase in minority representation was coming at the expense of electing fewer Democrats.<sup>151</sup>

An article published in Sabato’s Crystal Ball echoes the view stating:

the fact is that many Democrats would prefer to weaken majority-minority districts. Part of the Democrats’ challenge in winning the House is that the VRA forces them to place their most loyal supporters into districts with one another. If Democrats could weaken these districts, they could dilute Republican strength in the suburbs and create more Democratic districts.<sup>152</sup>

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<sup>150</sup> *Bush*, 517 U.S. at 968.

<sup>151</sup> Hill, *supra* note 141.

<sup>152</sup> Sean Trende, *The 2020 Reapportionment and the Voting Rights Act*, U. OF VA. CTR. FOR POL.: SABATO’S CRYSTAL BALL (Jan. 30, 2014), <http://www.centerforpolitics.org/crystalball/articles/the-2020-reapportionment-and-the-voting-rights-act/>.

#### IV. REMEDIES

This absence of competitive races against the almost 48 incumbent African-American congresspeople<sup>153</sup> assuredly has been a major cause of the low voter turnout in those districts which, in turn, contributes to a lower Democratic vote. Further, not only are there 48 African-American congresspeople—almost all in super safe majority-minority districts and almost all Democrats—but there are also 29 Hispanic representatives (all Democrats) protected by the VRA. Like their fellow African-American congresspeople, these Hispanic representatives are elected from majority-minority districts with 75% to 90% of the vote, often with no Republican opponents.<sup>154</sup> Accordingly, at minimum, 18% of the entire House of Representatives face no real competitive races. Certainly voter turnout generally, and Democratic turnout in particular, has to be negatively affected.

Once majority-minority districts pass into election history, the congressional districts with substantial minority population (albeit not necessarily a majority) will become more competitive. This would increase minority turnout which would then result in a larger Democratic vote statewide and which, in turn, would cause the electoral vote in the swing states to go to the Democratic candidate rather than to the Republican.

Given the history of endemic discrimination against minorities, especially with respect to the voting franchise, the VRA was a compelling necessity designed to redress the voting grievances of disenfranchised minorities. Majority-minority districts proved to be a laudatory and successful mechanism to effect the election of minorities to federal, state and local legislative offices. The number of minorities elected to office grew dramatically over the years commencing in 1965 with the passage of the VRA.

While its beginnings had salutary effects, over the years those majority-minority districts caused collateral damage to the civil rights cause. Packing the districts overwhelmingly with minorities caused the Supreme Court in the 1990s to grieve majority-minority districts

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<sup>153</sup> *Black-American Representatives and Senators by Congress, 1870-Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/> (last visited June 3, 2018).

<sup>154</sup> As noted, in 1975, Congress extended the VRA to forbid discrimination based on membership in a language minority group (Hispanic, Asians, et al.). *See supra* note 25.

with increasing constitutional skepticism. Contemporaneously with this legal development, voting dynamics changed so that white polarized voting against minorities' candidate of choice abated. Minorities could begin to elect candidates of their choice with enough white votes so as to make majority-minority districts electorally unnecessary.<sup>155</sup> This led the Supreme Court to declare § 4, and inevitably § 5 of the VRA unconstitutional, and as noted in this article, placed § 2 of VRA in some constitutional jeopardy.

Worse still, the existence of packed minorities in majority-minority districts diminished the turnout in those heavily Democratic districts possibly leading to a narrow electoral victory for Donald Trump in Wisconsin and Michigan, surely not the candidate of choice of the minority voters.

The remedy for increased voter turnout in the African-American voting districts is to increase election competition. To accomplish this, it will be necessary to unpack the concentration of African-American voters presently located in single districts and spread them among more than one congressional district. Given current electoral dynamics, this can be done without effectively jeopardizing the ability of African-Americans to elect candidates of their own choice consonant with § 2 of the VRA.

## CONCLUSION

It is therefore recommended that after the 2020 census, VRA districts be drawn to walk a fine line between increasing competition while still giving minorities sufficient real opportunity to elect candidates of their choice. Given the state of the advanced technology available to effectuate accurate redistricting, the goal of giving minorities the ability to elect candidates of their choice without the necessity of creating overly concentrated majority-minority districts is eminently attainable.

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<sup>155</sup> Indeed, in the recent hotly contested U.S. Senate race in deep red Alabama, the African-American turnout of 41% exceeded the 35% turnout of white voters. Alan Blinder & Michael Wines, *Black Turnout in Alabama Complicates Debate on Voting Laws*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/us/alabama-voting-blacks-.html>. The Democratic candidate won more than 90% of the African-American vote thus enabling him to win a rare narrow victory over his Republican opponent in a State which had not elected a Democratic Senator since 1990.