RACE-BASED POLITICAL EXCLUSION AND SOCIAL SUBJUGATION: RACIAL GERRYMANDERING AS A BADGE OF SLAVERY

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INTRODUCTION

The 2016 United States presidential election sent shockwaves through the political arena. As commentators and political pundits scrambled to determine *what* happened across America on November 8th, one thing is surely clear: there was a historically low turnout by eligible voters. Nearly fifty percent of the country's electorate did not cast a ballot for president. While some attribute the catastrophic voter turnout to the nation's apathetic feelings toward the two candidates, a more pernicious mechanism may be partially responsible for low turnout in the presidential election, as well as congressional and local elections around the country. The practice of discriminatory racial gerrymandering may have caused both low voter turnout with racially disparate impacts and the dilution of the voices of black voters. What was once used as a tool to ensure representation of the black electorate has been manipulated to favor a particular political party, in turn depressing the black vote.

Racial gerrymandering is a redistricting act by state legislators to "stack, crack, or pack clusters of minority voters in single-member district systems."[1] While civil rights advocates have relied on non-race-neutral redistricting schemes to enable disenfranchised minorities to elect their preferred candidates, other schemes have been utilized for the opposite effect. Such schemes include, for example, the use of racial gerrymandering in contexts where racially polarized voting does not enhance minorities' ability to elect their candidate of choice. In this case, when racially polarized voting is not a significant factor in minorities' ability to elect their candidate of choice, racial gerrymandering is a dilutive measure that decreases minority political influence.[2] When critiquing subtle forms of vote dilution, it is important to analyze the intent and the effect these practices and procedures have in diminishing the black vote. The districting mechanisms' disparate impact on black voters and their right to fairly participate in American democracy is illustrated by the ever-growing

1. STEVEN A. LIGHT, "THE LAW IS GOOD": THE VOTING RIGHTS ACT, REDISTRICTING AND BLACK REGIME POLITICS 22 (2010).
2. *Id.*

number of cases on this topic before the judiciary.[3] Discriminatory redistricting harms black voters by limiting their influence and constraining their ability to build voting strength in surrounding districts.[4]

The Fourteenth and Fifteenth Amendments provide the governing constitutional test for racial gerrymandering claims. The Fourteenth Amendment prohibits legislatures from engaging in both intentional race-based voter dilution and racial sorting.[5] Furthermore, the Voting Rights Act of 1965 (VRA) invokes the Fifteenth Amendment's voter protection enforcement arm,[6] statutorily prohibiting redistricting that results in racial vote dilution, regardless of intent.[7] For decades, the VRA served as a significant check on redistricting schemes that used race to sort and pack black voters. Given these clear constitutional and statutory protections, courts had no occasion to develop other bases for protecting against racial gerrymandering, such as the Thirteenth Amendment. However, in 2013, the Supreme Court amputated a portion of the VRA, making it more difficult to monitor and attack racial gerrymandering schemes that do not comport with constitutional guarantees.[8]

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3. Federal courts in North Carolina, Virginia, and Alabama have recent or pending cases challenging racial gerrymandering. *See, e.g.*, Harris v. McCrory, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (M.D.N.C. 2016) (holding that the state's redistricting plan was a denial of equal protection), *aff'd sub nom*, Cooper v. Harris, 137 S. Ct. 1455 (2017); Dickson v. Rucho, 368 N.C. 481 (2015), *modified*, 368 N.C. 673 (2016), *vacated and remanded*, 137 S. Ct. 2186 (2017); Page v. Va. State Bd. of Elections, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. June 5, 2015); Wittman v. Personhuballah, 136 S. Ct. 1732 (2016); Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015); North Carolina v. Covington, 137 S. Ct. 808 (2017); Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505 (E.D. Va. 2015), *aff'd in part, vacated in part, remanded*, 137 S. Ct. 788 (2016).

4. Brief for NAACP & Va. NAACP as Amici Curiae Supporting Appellants at 3–4, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788 (2017) (No. 15-680).

5. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage Is Unconstitutional*, 24 WM. & MARY BILL RTS. J. 1107, 1113 (2016).

6. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301 et seq. (2012)).

7. Parsons, *supra* note 5.

8. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (finding the jurisdictional coverage formula unconstitutional, thereby largely eliminating the application of § 5 of the Voting Rights Act as the law is currently written); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301 et seq. (2012)).

With statutory protection now limited, the Thirteenth Amendment's badges and incidences of slavery framework may serve as an alternative source for protecting black voters from pernicious racial gerrymandering schemes. In the eighteenth century, the phrase "badges and incidences of slavery" was used to characterize practices that were oppressive to a class of individuals.[9] In the nineteenth century, the expression gained legal significance with the rise of Thirteenth Amendment adjudication. Originally enacted as one of the Reconstruction Amendments, the Thirteenth Amendment has been construed excessively narrowly in recent decades.[10] Properly understood, however, the Thirteenth Amendment embodies a more robust understanding of the types of measures that should be prohibited as a badge of slavery.

The Supreme Court considered the Thirteenth Amendment and the "badges" phrase for the first time in the *Civil Rights Cases* of 1883.[11] At issue in these consolidated cases was the Civil Rights Act of 1866. In the opinion, the phrase "badges and incidents of slavery" was used to depict a caste system that subjugated blacks, keeping them "in their place."[12] The Court granted Congress an affirmative duty to eliminate social markers that subordinated blacks.[13] State voting mechanisms that exclude black voices from the political arena rise to

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9. JAMES E. CLAPP ET AL., LAWTALK: THE UNKNOWN STORIES BEHIND FAMILIAR LEGAL EXPRESSIONS 24 (2011).

10. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1316 n.12, 1379 (2007) [hereinafter Carter, *Race, Rights, and the Thirteenth Amendment*] (stating that the lower courts have consistently found that the Amendment itself prohibits only literal slavery, involuntary servitude, or other forms of coerced labor and that one court has even suggested that asserting the Thirteenth Amendment as a direct cause of action for the badges or incidents of slavery was so improper as to be sanctionable under Federal Rule of Civil Procedure 11); Crenshaw v. City of Defuniak Springs, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995) ("While neither the Supreme Court . . . [n]or the Courts of Appeal have decided the extent to which a direct cause of action exists under the Thirteenth Amendment, district courts have uniformly held that the amendment does not reach forms of discrimination other than slavery or involuntary servitude."); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 213 (1992) ("[T]he Thirteenth Amendment is generally, albeit implicitly, interpreted by the courts [solely] as a prohibition against coerced wage labor in the market economy. . . . If one accepts this limited perspective, the Thirteenth Amendment guarantees workers nothing more than the freedom to contract their labor.").

11. The Civil Rights Cases, 109 U.S. 3 (1883).

12. CLAPP ET AL., *supra* note 9, at 24.

13. *See The Civil Rights Cases*, 109 U.S. at 20.

this level of subordination. Thus, defects in the political process, like the exclusion of black and minority voters, should not only be given heightened scrutiny by courts, but should also be disbanded by affirmative legislation through the power of the Thirteenth Amendment.

Access to the political process through voting is the pinnacle of exercising citizenship rights and the cornerstone of the foundation of the American Republic. American consciousness is framed by the notion that every citizen has the opportunity to express his or her voice through a vote, and the elective process is open and accessible to all who seek it. Since America's inception, blacks have been deliberately or systematically blocked from freely utilizing their right to vote. After the abolishment of slavery under the Thirteenth Amendment and passage of the Fourteenth Amendment, granting equal protection under the law, there was no clear repudiation of voter discrimination.[14] Even after the Fifteenth Amendment,[15] systematic exclusion of minority voters continued to be commonplace in America. Until the 1960s, the Court generally deferred to the states in determining the qualifications to vote except where a particular qualification was expressly prohibited by a specific amendment.[16] Voter intimidation and Jim Crow laws, like literacy tests and poll taxes, permeated the political sphere, deliberately excluding black voters. In the decades since, redistricting schemes that use race as a predominant feature, without a legitimate interest, have continued to limit the voice of black citizens. Historically and today, discrete groups have been overtly and systematically denied opportunities to access the political process without interference. The Thirteenth Amendment can respond to that history of exclusion. The text goes beyond forced labor and compels Congress to "obliterate the

14. The Fourteenth Amendment did not directly prohibit discrimination in voting. U.S. CONST. amend. XIV, § 2 (providing for a reduction in representation in the House of Representatives in proportion to the number of "male inhabitants of [the] State, being twenty-one years of age, and citizens of the United States," who were not permitted to vote).

15. U.S. CONST. amend. XV, § 1 ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.").

16. Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 52 (1959) (unanimously upholding a North Carolina statute providing that an individual must be able to read and write any section of the state Constitution to be eligible to vote, based on the rationale that a state might conclude that only those who were literate should exercise the franchise).

last lingering vestiges of the slave system . . . [and] everything connected with it or pertaining to it."[17]

This Note will address how the Thirteenth Amendment's concept of "badges and incidents of slavery" may be applied to state voter manipulation schemes that are used to attack black voting power. Part I will address the construction of the Thirteenth Amendment using a doctrinal analysis. Employing both historical resources (like legislative history) and case law, this analysis seeks to develop a consistent and coherent concept of the Amendment's reference to badges and incidents of slavery. This part will also illuminate how the Thirteenth Amendment can be used as a tool to advance civil rights. Part II describes and characterizes the history of racial gerrymandering schemes in America and how this form of redistricting has caused insidious consequences for black voters. This part will discuss the impact of racial gerrymandering schemes in both past and present electoral cycles to determine how the courts have addressed redistricting schemes based on race. Part III then ties the impact of racial gerrymandering to the Thirteenth Amendment's badges and incidents of slavery framework using a two-pronged analysis: (1) a historical link to slavery, and (2) a showing of subjugation of the protected class.[18] The purpose of Part III is to showcase the historical political exclusion of protected minorities and the ways in which the Thirteenth Amendment can be utilized as an effective tool for addressing persistent forms of inequality and discrimination. This part will end by addressing the need for Congress to use its enforcement power to improve the Voting Rights Act or introduce new prophylactic legislation that will dismantle state laws habitually excluding minorities from the electoral process. In conclusion, the Note will link historical references and social-scientific evidence to rationalize how these political schemes have subordinated and in some cases eliminated the black voice in the electoral process, constituting a badge and incident of slavery.

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17. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 177 (1951) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Wilson)).

18. Jennifer M. McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 566 (2012); *see also* Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 256 (2015) (taking a historical link to slavery and the possibility of renewed subjugation as "minimum" requirements to support the argument that felon disenfranchisement is a badge of slavery).

This argument against some forms of racial gerrymandering does not neglect the value of considering race as a factor in drawing district lines when used in jurisdictions to elect a preferred candidate, nor does it assume that racial gerrymandering contravenes principles of a color-blind Constitution. To the contrary, the argument rests on the recognition that America's issues with race—and particularly the subordination of races other than "white"—has been and continues to be a major problem. Whenever the state considers race as a factor in its choice to use a legal mechanism, the process should be heavily scrutinized so as to ensure the promises of anti-subordination and equal protection that are legally guaranteed to black Americans through the Thirteenth and Fourteenth Amendments.[19] Forms of racial gerrymandering that do not work to ensure minority representation, and instead serve to systematically exclude and subordinate groups trying to engage in the political process, are unconstitutional under the Thirteenth Amendment's badge of slavery framework.

I. DISSECTING THE THIRTEENTH AMENDMENT

The text of the Thirteenth Amendment is fairly short and direct. The Amendment provides that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[20] The following section will discuss the Framers' intent to use this amendment not only to abolish slavery, but also to eliminate all badges and incidents of slavery, that is, laws and customs that create a second-class citizenship.

Scholars have traced the definition of the phrases "badge of slavery" and "incidents of slavery" to the public meaning of the terms at the time the Thirteenth Amendment was adopted. Drawing on contemporaneous colloquial usage and mid-nineteenth century dictionaries, Professor Jennifer McAward argues that in a general sense, the term "incident of slavery" referred to property law aspects of the slave system, and "badge of slavery" referred to indicators of African-Americans' subordinate status.[21] The Thirteenth Amendment's framers recognized that slavery consisted of more than forced labor, lack of property rights, and unequal treatment. They

19. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004).

20. U.S. CONST. amend. XIII, § 1.

21. McAward, *supra* note 18, at 575.

understood that the system of slavery also included the foundation of customs, practices, and systemic forms of subordination that allowed white supremacy to persist and enabled slavery to flourish for centuries.[22] As this section will show, contemporaneous congressional records and case law can be utilized to adequately address the purpose and scope of the Thirteenth Amendment as a tool to eliminate pervasive remnants of the slave system.

A. Legislative Record of Thirteenth Amendment

At the time of the Amendment's drafting and final debates on its adoption, Congress realized that the end of the legal institution of slavery was imminent. With the Northern victory in the Civil War, Northern conservatives could no longer avoid denying the institution of slavery.[23] Therefore, congressional debates focused less on the morality of slavery and more on "what would follow the end of slavery."[24] Based on those political assumptions, the debates that developed the Thirteenth Amendment reflected the predominant view of anti-slavery Republicans: that slavery was more than a single institution; it was a vicious system of racial oppression. Development of the Thirteenth Amendment was used as a tool to repudiate slavery and the difficulties it created for enslaved populations.[25]

One of the main topics of discussion during the debates was rights and privileges that could be granted to freedmen after the abolishment of slavery. At the time of the Amendment's enactment, Congress distinguished between social rights and fundamental rights of citizenship.[26] During the Thirteenth Amendment debates, advocates

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22. William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 50–52 (2002).

23. *See* William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 586 (2014). The Thirteenth Amendment debates carry significant discussion on the fact that the Amendment would amplify the federal government's power of civil rights, weakening state power in this realm. *See also* Ex Parte Virginia, 100 U.S. 399, 345 (1879) (stating that the Thirteenth and Fourteenth Amendments are "limitations of the power of the States and enlargements of the power of Congress").

24. Carter, *supra* note 23, at 586.

25. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 102 (2004) ("The Thirteenth Amendment . . . signaled a break from moderate anti-slavery leanings. Moderates wanted states gradually and separately to end slavery."); RONALD G. WALTERS, AMERICAN REFORMERS: 1815–1860 80 (1997) (noting that antislavery doctrine, from the 1830's onward, rejected what William Lloyd Garrison called the "pernicious doctrine of gradual abolition").

26. *The Civil Rights Cases,* 109 U.S. 3, 22 (1883).

knew that emancipation included more than an exemption from servitude, but also included citizenship rights to freely participate in government.[27] However, *social rights* were rights that Amendment-drafters recognized as state-concerned civil rights, which would protect freedmen from forms of social subordination, like private discrimination.[28] There was widespread debate over whether the Amendment should protect social equality or merely full political participation. Some framers of the Thirteenth Amendment realized the social and legal limitations that blacks would face in the country after becoming freepeople. For example, Senator James Harlan spoke about disenfranchisement as it related to rights in the judicial context, including the inability to testify or bring suit in court, as badges and incidents of slavery.[29] Further, the debates often included discussion of expansive natural rights (or inalienable rights like life and liberty) that should be guaranteed to eliminate the legacy of slavery in America.[30] Senator Henry Wilson stated that the Thirteenth Amendment was created to "obliterate the last lingering vestiges of the slave system: its chattelizing, degrading, and bloody codes . . . everything connected to it or pertaining to it."[31] Senator Charles Sumner also supported the broad and expansive scope of the Amendment during debates, stating that in enacting the Amendment, slavery is abolished entirely, from "root to branch . . . in every detail."[32] On the other hand, opponents of the expansive nature of the Amendment denounced the call for freedom and equality. Leaning on fears that abolishing slavery would entitle African-Americans to citizenship rights, like voting and jury service,

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27. Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 8 (1995) (referencing CONG. GLOBE, 39th Cong., 1st Sess. 2962 (1866)).

28. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 866–67 (1986) (arguing that "[t]he most important question for the Framers [of the Reconstruction Amendments] was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens"); Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 10, at 1379. Some drafters argued for provisions that would uplift both the social *and* political status of the former slaves. Congressman William D. Kelley stated that the proposed amendment was meant to cause the political and social elevation of African Americans so that they would enjoy all the rights of whites. CONG. GLOBE, 38th Cong., 1st Sess. 2985 (1864).

29. CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864).

30. HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875 392 (1982).

31. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

32. CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872).

they claimed such a step would make the United States government a "mongrel Government."[33]

While there was no clear consensus on what rights should be afforded to black Americans through the Thirteenth Amendment, both proponents and opponents of the Amendment recognized the breadth of the Amendment's potential to uplift the social and political rights of newly freed slaves. This discussion provides clear insight into the definitions of badges and incidents of slavery as contemplated in the Amendment's drafting, and its message was further confirmed by the enactment of the Civil Rights Act of 1866 and the remaining two Reconstruction Amendments.

B. Illumination of the Thirteenth Amendment: The Civil Rights Act and Fourteenth and Fifteenth Amendments

A year after the enactment of the Thirteenth Amendment, Congress clarified the scope of the Amendment by ratifying the Civil Rights Act of 1866. After a wave of violence against Southern blacks, lack of prosecution by local law enforcement, and the institution of Black Codes that perpetuated white supremacy, Congress enacted the Civil Rights Act to re-emphasize and re-define the scope of equality the Thirteenth Amendment provided.[34] The legislation outlined fundamental rights guaranteed via citizenship[35] that may be repressed by incidents of slavery.[36] With majority support for the bill,[37] Republicans

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33. *See* Colbert, *supra* note 27, at 10–11 (quoting CONG. GLOBE, 38th Cong., 2d Sess. 216 (1865) (statement of Rep. White)).

34. DONALD NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–68, 112–113 (1979); *see also* Colbert, *supra* note 27, at 55. The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master–slave relationship by denying African Americans civil rights and due process of law.

35. The 1866 Act's citizenship clause superseded Dred Scott v. Sandford, 60 U.S. 393 (1857), which had denied African Americans citizenship rights provided to white people, including the right to sue in federal court. Senator Trumbull, Chairman of the Senate Judiciary Committee and author of the 1866 Civil Rights Act, declared that the Act's guarantees included "those inherent, fundamental rights which belong to free citizens or free men in all countries." CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866); *see also* Colbert, *supra* note 33, at 55.

36. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1982 (1988)). Congressman Thayer spoke of the Thirteenth Amendment as intended to relieve former slaves from "all the oppressive incidents of slavery" and to secure to them the fundamental rights of citizenship "which make all men equal before the law." CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

37. CONG. GLOBE, 39th Cong., 1st Sess. 1367 (1866). Both Houses of Congress provided substantial support for the civil rights statute: senators voted

determined that badges and incidents of slavery consisted of not just physical servitude, but also social and legal limitations that accompany subordinated class status.

The enactment of the Fourteenth and Fifteenth Amendments also provides insight on rights Congress intended to be a guarantee for black Americans. The Fourteenth Amendment, which was enacted only three years after its predecessor, sets out the definition of citizenship rights and guarantees equal protection under the law to all citizens.[38] The Fourteenth Amendment defines the formula for determining political representation by apportioning representatives among states based on a count of all residents as whole persons, in contrast, the pre-Civil War count of enslaved people as three-fifths in representation.[39] This formula is significant to claims that Congress valued the political rights of black Americans. Moreover, the Fifteenth Amendment continued a constitutional guarantee to unbiased and unimpeded political participation by prohibiting interference with the right to vote based on race, color, or past servitude.[40] The past servitude language illuminates the terms, "badge" and "incident" of slavery. Each of these amendments codifies congressional intent to guarantee black Americans both social and political rights that lead to fair and equal participation in the electoral process. Rejecting unequal political participation constituted the elimination of a "badge" or "incident" of slavery.

C. Thirteenth Amendment Jurisprudence

Case law also confirms and supports a flexible definition and scope of badges and incidents of slavery as imagined by the Framers of the Amendment. The phrase "badges and incidents of slavery" is a term of art first used in the *Civil Rights Cases* of 1883.[41] Although the Court in these cases denied the constitutionality of the Civil Rights Act of 1875, the dissent articulated an expansive definition for a badge and incident of slavery. The *Civil Rights Cases* consisted of five consolidated cases involving private discrimination and the Civil Rights Act of 1875. The Civil Rights Act of 1875 was a bill enacted by Congress to protect all citizens from discrimination in places of

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thirty-three to twelve in favor, and representatives approved the measure by 111 to thirty-eight.

38. U.S. CONST. amend. XIV.

39. *Id.*

40. U.S. CONST. amend. XV.

41. McAward, *supra* note 18, at 570.

public accommodation.[42] Although the accommodations at issue were privately owned, they exercised public functions (benefitted the public) and were subject to the Act's jurisdiction.[43] In each of the five cases, a black person was denied accommodations by a privately owned—but publicly operated—business.[44] This was the Supreme Court's first opportunity to establish the scope of Congress's enforcement power.[45] First, the consolidated cases made it clear that the Thirteenth Amendment "abolished slavery, and established universal freedom."[46] When addressing the scope of Congress's enforcement power, the Court articulated that the Amendment emboldened Congress with the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery" in the United States.[47] The case continues by describing what effects would constitute a badge and incident of slavery. Beyond eliminating the physical shackles slavery sustained, the Thirteenth Amendment authorized Congress to extended to black Americans the "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," which Congress did with the Civil Rights Act of 1866.[48] But the Court ultimately held that the 1875 Act was unconstitutional, relying predominately on the Fourteenth Amendment and interpreting it to only prohibit the denial of equal protection by the state, not private actors.[49]

However, Justice Harlan, the lone dissenter of the *Civil Rights Cases*, provided a framework for a broader interpretation of the Thirteenth Amendment's badges and incidents language. Harlan correctly inferred that if privately owned recreational establishments, "used in a manner to make them of public consequence and to affect the community at large," were allowed to discriminate, such actions would cause widespread segregation and subjugation that

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42. *The Civil Rights Cases*, 109 U.S. at 9 (noting that the Act in part stated that people in the United States "shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of [public places and services] subject only to . . . conditions . . . applicable alike to citizens of every race and color, regardless of any previous condition of servitude").

43. *Id.* (citing § 2 of the Act of 1875, which provides a penalty of $500 for any *person* denying equal access to public accommodations) (emphasis added).

44. *Id.* at 4.

45. *Id.* at 10.

46. *Id.* at 20.

47. *The Civil Rights Cases*, 109 U.S. at 20.

48. *Id.* at 16–17.

49. *Id.* at 13, 25.

could be considered a badge of slavery.[50] Harlan noted that if the Reconstruction Amendments and Bills were to be interpreted correctly, in the spirit of the drafters, they not only enable Congress to prohibit physical slavery, but also to promote equality and equal treatment.[51] By protecting black citizens from various forms of social discrimination, Congress is ensuring they are afforded the same enjoyment of citizen privileges as their white counterparts.[52]

The *Civil Rights Cases* opinion is noteworthy because the majority provides an interpretation of badges and incidents of slavery beyond solely physical shackles, and the dissent offers more expansive definitions that are used and developed in later jurisprudence. This characterization presumes extreme instances of discrimination and exclusion to be a badge of slavery, and therefore illegal under the Thirteenth Amendment.

After the *Civil Rights Cases*, serious judicial interpretation of the construction and scope of the Thirteenth Amendment was neglected for over eighty years. The limited case law available during this time period took a restrictive approach to Thirteenth Amendment jurisprudence.[53]

It was not until 1968, in *Jones v. Alfred H. Mayer Co.*, that Thirteenth Amendment jurisprudence began to re-rise as a civil rights tool.[54] In *Jones*, an interracial couple seeking to purchase a home in St.

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50. *Id.* at 42.

51. *Id.* at 26 (Harlan, J., dissenting).

52. *The Civil Rights Cases*, 109 U.S. at 61 (Harlan, J., dissenting) ("[T]he one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.").

53. *See* Plessy v. Ferguson, 163 U.S. 537, 540 (1896) (ruling that refusal of accommodations to colored people and the maintenance of "equal but separate accommodations for the white, and colored races" was not a badge of slavery), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Hodges v. United States, 203 U.S. 1, 19 (1906) (limiting the scope of the Thirteenth Amendment by declaring that § 2 of the Amendment gave Congress the authority to legislate on actual conditions of slavery, and not its badges, despite overwhelming dicta to the contrary); *but see Hodges*, 203 U.S. at 37 (Harlan, J., dissenting) (discussing Clyatt v. United States, 197 U.S. 207 (1905) (upholding the Peonage Act of 1867 and reaffirming the Amendment in permitting congressional intervention even when state laws do not explicitly discriminate on the basis of race)).

54. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 n.78 (1968) (stating that "[t]he Thirteenth Amendment authorizes Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last vestiges and

Louis alleged that the defendant refused to sell them the home because the husband was African-American.[55] The plaintiffs initiated their claim under the Civil Rights Act of 1866, which prohibited racial discrimination.[56] The defendant argued that Congress's Thirteenth Amendment power did not reach private racial discrimination and was limited to prohibiting physical enslavement.[57] The Court held that the law was a reasonable exercise of Congressional power and that the Thirteenth Amendment enabled Congress to legislate against not only literal slavery, but also actions that restrict African Americans' free exercise of rights, including private racial discrimination of this kind.[58] The Court reasoned that:

> Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[59]

Although *Jones* seemed to reinvigorate Thirteenth Amendment civil rights jurisprudence, the Court slowly began to retract its broad interpretation of the Amendment. Beginning with *Palmer v. Thomson*, in 1971, the Court refused to apply the Thirteenth Amendment to a prohibition on blacks swimming in public swimming pools.[60] *Palmer* left the door open for Congressional legislation to attack badges of slavery, but also illustrated judicial discomfort in determining what constituted a badge of slavery. Nevertheless, *City of Memphis v. Greene* provided some insight as to what a badge of slavery is not. The case involved a class action challenging the closing of a road separating an all-white neighborhood from a predominately black neighborhood.[61] The Court determined that inconvenience and speculative loss of property value to black

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incidents of [slavery]," overruling *Hodges v. United States*, 203 U.S. 1 (1906) and part of *Clyatt v. United States*, 197 U.S. 207 (1905)).

55. *Id.* at 412.

56. *Id.* at 422; 42 U.S.C. § 1982 (2012).

57. *Jones*, 392 U.S. at 412.

58. *Id.* at 440–42.

59. *Id.* at 441–43.

60. Palmer v. Thompson, 403 U.S. 217, 226–27 (1971) (recognizing that the Thirteenth Amendment granted Congress the power to legislate in this area but determining that it would "severely stretch" the text of the Amendment to prohibit the pool's policy when Congress itself had not chosen to pass a law to that effect).

61. City of Memphis v. Greene, 451 U.S. 100, 103 (1981).

residents caused by the road closure were insufficient to be considered "a badge of slavery," protected against by the Thirteenth Amendment.[62] Although the Court reasoned that since there was no direct effect on property interests, there was no badge of slavery, the case did highlight Congress's power to dismantle badges of slavery generally.[63]

Despite a retrenchment in Thirteenth Amendment doctrine at the Supreme Court level, federal circuit courts have reinforced the basic message of *Jones* and affirmed Congressional power to remove badges of slavery. In *United States v. Nelson*, the Second Circuit upheld a federal hate crimes statute passed pursuant to the Thirteenth Amendment.[64] The Court recognized that Congress has the power to legislate against cognate institutions of slavery, like a private actor inflicting violence on an identifiable racial group.[65] Analogously, in *United States v. Hatch*, the Tenth Circuit upheld a federal hate crimes act, reasoning that Congress can enforce legislation to eliminate badges of slavery—a power that "extends to eradicating slavery's lingering effects."[66] Each court rationally concluded that physically attacking a person of a particular race because of animus toward or desire to assert superiority over that race was a badge or incident of slavery.

At the time of the Amendment's enactment, legislators and judges generally held the common conception that slavery also included institutionalized customs, practices, and pervasive forms of racial subordination that conserved white supremacy. At the cusp of Reconstruction and the demise of slavery, both state and private actors strategically and systematically imposed provisions to disadvantage freepeople.[67] While recently the Court has been hesitant to define what constitutes a badge of slavery, the prior definitions are sufficient to develop an interpretation of the doctrine. Moreover, case law thus far has emboldened Congress to determine what this definition means. Just as Black Codes were a legal mechanism used to disenfranchise and perpetuate (physical and virtual) violence on African-Americans, similarly, state-sponsored legislation today continues to subordinate and disenfranchise the African-American voter. Beyond forced labor,

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62. *Id.* at 124, 128.
63. *Id.* at 131.
64. United States v. Nelson, 277 F.3d 164, 213 (2d Cir. 2002).
65. *See id.* at 189 (stating that violence used against a specific race of people with the intention to prevent them from using public facilities has a historic relationship to slavery and its cognate associations and is restricted by law).
66. United States v. Hatch, 722 F.3d 1193, 1197 (10th Cir. 2013).
67. McAward, *supra* note 18, at 581.

unequal treatment, and property law, the Thirteenth Amendment works to eliminate lingering vestiges of the slave system.

II. EXCLUSION OF BLACK VOTERS THROUGH RACIAL GERRYMANDERING

One specific instance in which African-Americans have been reduced to second-class citizenship is through voting. Today, black voters are targeted and manipulated through gerrymandering or redistricting schemes that dilute their voting strength.[68]

As noted earlier, gerrymandering is a term coined to describe a legislature's politically motivated redistricting and has long been used in American politics. Residents in each congressional district elect a member of Congress to represent their district area. It is expected that the congressional member will be well acquainted with the needs and makeup of his or her district area and that he or she will be best fit to serve his or her constituencies. The 1842 Apportionment Act required congressional districts to be adjacent and compact. The Act set a ratio of one member of Congress to a discrete number of residents and decreed that states be split into congressional districts according to the number of representatives allotted to them.[69] Throughout American history, territorial tricks have been used to bias the districts toward one party or another.

Racial gerrymandering is realized through two different types of redistricting mechanisms. One form of gerrymandering, which can be referred to as "negative" racial gerrymandering, involves spreading minorities across voting districts, leaving them in too few numbers to elect preferred candidates in any district. This practice disperses a significant minority population across several districts to dilute voting strength.[70] Negative gerrymandering is an example of "cracking" black voting blocks by spreading voters throughout several districts. This practice is prohibited by the VRA.[71]

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68. Voter suppression has also been realized through voter ID laws, changes to early voting, and felon disenfranchisement, among other practices.

69. Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), http://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/#slide3.

70. CAROL SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 197 (2006).

71. *See* Thornburg v. Gingles, 478 U.S. 30 (1986) (determining that five of six contested redistricted districts in North Carolina discriminated against blacks by diluting the power of their collective vote).

The second form of gerrymandering, referred to as "affirmative" racial gerrymandering, creates "majority-minority" districts, which enables minority populations to elect a candidate who represents their interest in office. The creation of "majority-minority" districts allows states to consider race when drawing congressional districts and is intended to remedy historical discrimination.[72]

The VRA allowed legislators to consider race as part of efforts to ensure that minority voting bloc preferences were not consistently negated by a larger set of white voters in a given district.[73] Throughout history, parties in power have leveraged legislative map drawing to their advantage. Often, those with the power have been non-minority legislators and politicians, who dilute particular demographics to maintain their political advantage. Courts consider the goal of creating more representative legislatures a compelling state interest, that meets strict judicial scrutiny of race-based classifications.[74] This form of gerrymandering was offered as a tool to combat the negative impacts of the first mechanism, vote dilution.[75] In some jurisdictions, state legislators have exploited the acceptance of majority-minority districts to over-pack districts with black voters and dilute their influence elsewhere. There is a delicate balance between race conscious redistricting that enables black voters to elect their preferred candidate and those schemes that are designed to dilute black political power throughout the state.

Although the Fifteenth Amendment explicitly recognizes universal voting rights, protection against pernicious gerrymandering schemes has typically been covered under the Fourteenth Amendment and the VRA.

A. Constitutional Approaches to Racial Gerrymandering

The Fifteenth and Fourteenth Amendments provide a clear Equal Protection standard for analyzing racial gerrymandering claims.

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72. Barasch, *supra* note 69.

73. German Lopez, *The Supreme Court's Big Racial Gerrymandering Decision, Explained*, VOX (May 22, 2017), https://www.vox.com/policy-and-politics/2017/5/22/15676250/supreme-court-racial-gerrymandering-north-carolina.

74. Bush v. Vera, 517 U.S. 952, 990 (O'Connor, J, concurring).

75. Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/?utm_term=.d06c88b31c10.

1. Fifteenth Amendment and Vote Dilution

Gomillion v. Lightfoot was one of the earliest Supreme Court cases to address the use of electoral districting along racial lines.[76] The case, which rested on the Fifteenth Amendment, involved an act passed by the Alabama legislature redefining electoral boundaries for the city of Tuskegee.[77] Districts were redrawn from a square to a twenty-eight-sided figure that essentially excluded all blacks from the city limits.[78] The central issue revolved around whether or not the redrawing violated the Fifteenth Amendment by denying citizens the right to vote on account of race, color, or previous condition of servitude.[79] Justice Frankfurter, who wrote the opinion of the Court, acknowledged that when a "[s]tate exercises power wholly within the domain of state interest, it is insulated from federal judicial review."[80] In this example, the Court determined that the creation of a majority-minority district, which was originally considered a solution for "negative" gerrymandering or minority spreading, reduced minority political power from two districts to one.[81] In a unanimous decision, the Court held that the Alabama legislature violated the Fifteenth Amendment because Alabama's representatives were unable to identify a countervailing municipal function other than to deprive blacks of political power.[82] Subsequent vote dilution claims have been alleged through the Equal Protection Clause of the Fourteenth Amendment.

2. The Fourteenth Amendment and Racial Gerrymandering

The Fourteenth Amendment prohibits two forms of gerrymandering: intentional racial vote dilution[83] and racial sorting.[84] In the first form of prohibited racial gerrymandering, vote dilution, states "crack" racial groups apart between districts, causing a sufficient group of voters to be an ineffective minority in each district,

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76. Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960).
77. *Id.* at 340.
78. *Id.*
79. *Id.* at 341.
80. *Id.* at 347.
81. *Gomillion,* 364 U.S. at 341.
82. *Id.*
83. *See* Rogers v. Lodge, 458 U.S. 613, 617 (1982); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980).
84. *See* Miller v. Johnson, 515 U.S. 900, 913–20 (1995); Shaw v. Reno, 509 U.S. 630, 649 (1993).

or they "pack" groups into as few districts as possible so they will not influence elections in adjacent districts.[85] The Supreme Court determined that both discriminatory intent and discriminatory effect are required to establish a claim of unconstitutional racial vote dilution.[86] The requirements of intent and effect establish a high bar, and under this framework cracking and packing black voting blocs are not per se unconstitutional.[87]

Racial sorting is also prohibited under the Fourteenth Amendment. Under these schemes, states sort citizens into districts based on race, which is undeniably a constitutionally suspect classification.[88] Case law has clarified that courts apply strict scrutiny to instances of this kind of state action. The Supreme Court addressed this form of racial gerrymandering in *Shaw v. Reno*.[89] At issue was a North Carolina congressional reapportionment plan that created two black-majority districts, one which winded in a "snakelike fashion" through "enclaves of black neighborhoods."[90] The Court ruled that although the scheme was created with the intention to secure the election of an additional black representative, the resulting district shape and size separated voters on the basis of race without sufficient justification.[91] *Shaw* exposed the ambiguity with which courts have handled racial gerrymandering.

Immediately following *Shaw*, throughout the 1990s, a series of cases refined the Court's approach to redistricting schemes through Equal Protection frameworks. For example, in *Miller v. Johnson*, the Court determined that redistricting schemes that use race as an

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85. *See* Parsons, *supra* note 5, at 1114.

86. *Bolden*, 446 U.S. at 66 (plurality opinion). This requirement was confirmed in *Rogers v. Lodge*. *See* 458 U.S. 613, 617 (1982) (providing that "a showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination") (emphasis added); *see also* Parsons, *supra* note 5, at 1116.

87. *Bolden*, 446 U.S. at 66.

88. *Johnson*, 515 U.S. at 911–13 (citing *Shaw*, 509 U.S. at 647; Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)); *see also id.* at 930 (Stevens, J., dissenting).

89. 509 U.S. 630 (1993).

90. *Shaw*, 509 U.S. at 635–36.

91. *Id.* at 649; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 285 (1986) (O'Connor, J., concurring) (stating that "this standard reflects the belief, apparently held by all Members of this Court, that racial classifications of any sort must be subjected to 'strict scrutiny,' however defined").

"overriding and predominant force" are subject to strict scrutiny.[92] Significantly, similar to *Shaw,* this case held that racially-motivated redistricting must be held to strict scrutiny under the Equal Protection Clause. This level of scrutiny, which applies to a state action that considers race on its face, mandates that the action will be held constitutional only if the government can identify a narrowly tailored, compelling interest that justifies race-based decision-making.[93]

Fourteenth Amendment vote dilution cases can be distinguished from the cases discussed above. Racial gerrymandering schemes involving sorting are "analytically distinct" because suspect classification jurisprudence is used, rather than analyzing intent and effect.[94] Equal Protection jurisprudence began to set the standard for racial gerrymandering cases. The Equal Protection Clause of the Fourteenth Amendment prohibited racial gerrymandering without "sufficient justification."[95] To challenge redistricting as racial gerrymandering, a plaintiff must first demonstrate that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[96] Second, if race is proven to be a predominate factor, the burden shifts to the State to prove the race-based redistricting serves a "compelling interest" and is "narrowly tailored" to that end.[97] While compliance with the VRA is considered a compelling interest, this can be a very tough standard to meet.[98]

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92. *Johnson*, 515 U.S. at 909, 913 (affirming the lower court's application of strict scrutiny to Georgia's redistricting plan and its holding that the plan was unconstitutional).

93. *Id.* at 920.

94. *See* Miller v. Johnson, 515 U.S. 900, 911–14 (1995); Parsons, *supra* note 5, at 1119.

95. Bethune–Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017).

96. *Miller*, 515 U.S. at 916. Plaintiffs must show that other factors like compactness and partisan advantage were subordinated to racial considerations. *Id.*

97. *Bethune–Hill*, 137 S. Ct. at 800.

98. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 915 (1996) (assuming, *arguendo*, that intent to achieve compliance with VRA § 2 could be a compelling interest, but finding nonetheless that this example of redistricting on the basis of race to create a majority-minority district was not sufficiently narrowly-tailored means).

B. Voting Rights Act and Racial Gerrymandering

Congress determined that the Voting Rights Act (VRA) was necessary to address racial discrimination in voting.[99] The VRA comprehensively addresses racial gerrymandering. The Act "prohibits redistricting legislation that results in racial vote dilution (regardless of intent) or, in some jurisdictions, redistricting legislation that causes a retrogression in minority voters' ability to elect their preferred candidate of choice."[100] Section 2 and Section 5 of the Act directly address race-conscious gerrymanders by states.

1. VRA Section 2 and Vote Dilution

The Supreme Court has interpreted the VRA to prohibit vote dilution, which can "nullify [minority voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting."[101] Section 2 of the VRA bars states from adopting redistricting legislation that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."[102] The language of this statute requires states to take into consideration the potential vote dilution of minorities. The precondition and key to VRA advocacy is racially polarized voting, which has been a tradition in American democracy.[103]

Regardless of a legislature's intent, a gerrymander is a violation of Section 2 if minorities have a lesser ability to elect their candidate of choice as compared to other members of the electorate.[104] *Thornburg v. Gingles* is a landmark case addressing gerrymandering schemes and racial animus.[105] Using guidance from Section 2 of the VRA, the *Gingles* Court determined three conditions necessary, under

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99. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 180–82 (1980) (discussing Congress' reasoning for determining that VRA § 5 is necessary to counter years of voting discrimination).

100. Parsons, *supra* note 5, at 1113.

101. Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).

102. 52 U.S.C. § 10301(a) (2012).

103. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 427 (2006) (noting that the district court had found "'racially polarized voting' in south and west Texas, and indeed 'throughout the State'") (internal citations omitted).

104. 52 U.S.C § 10301(b) (2012).

105. Thornburg v. Gingles, 478 U.S. 30, 49 (1986) (stating that for a redistricting scheme to constitute a § 2 violation, "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group").

the totality of circumstances, to find a violation:[106] (1) a sufficiently large and geographically compact racial minority in a single-member district; (2) political cohesiveness among the minority group; and (3) a demonstration that the white majority votes in a bloc that enables it to defeat the minority group's preferred candidate of choice.[107] This framework established that the VRA requires states to ensure minority voters have an "equal opportunity" to "elect representatives of their choice."[108] To allow minorities to elect preferred candidates, some legislators have relied on the use of majority-minority districts[109] in regions where racial polarization in voting is stark.[110] By using majority-minority districts, the states require majority factions—made up of white voters—to give up some power by electing some black officials.[111] It is important to note, however, that nothing in the VRA requires states to create majority-minority districts,[112] and the language of *Gingles* references cohesive "geographically compact" minority groups.[113] The creation of these districts is critical to maintain the ideas and choices of minorities in the electoral process.[114]

2. VRA Section 5 and Retrogression

Section 5 of the VRA prohibits "voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of [minority] citizens . . . 'to elect their preferred candidates of

106. *Id.* at 50.

107. *Id.* at 50–51.

108. Parsons, *supra* note 5, at 1120.

109. *Id.* (referring to districts where minority voters represent more than 50% of the voting population).

110. *Id.*

111. *See, e.g.*, Ga. State Conference NAACP v. Fayette Cty. Bd. of Comm'rs, 950 F. Supp. 2d 1294, 1312, 1316, 1322, 1326–27 (N.D. Ga. 2013) (finding that the creation of a majority-minority district was necessary to remedy a § 2 violation because racially polarized voting in at-large elections prevented Black voters from electing their preferred candidates to local boards for nearly two centuries).

112. Bartlett v. Strickland, 556 U.S. 1, 23–24 ("Our holding that § 2 does not require [the State to create] crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. . . . Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.").

113. Thornburg v. Gingles, 478 U.S. 30, 50 (1986); *see also Strickland*, 556 U.S. at 13 (establishing numerical majority requirement).

114. *Gingles*, 478 U.S. at 48 (noting that the voting strength of minorities is minimized or cancelled out in districts where the majority and the minority consistently prefer different candidates).

choice.'"[115] Section 5 requires a number of states—all of which had created districts that systematically disadvantaged minority voters—to get the Department of Justice's approval of any redistricting plan.[116] This section focuses on changes to voting procedures, including procedures that may cause "retrogression" or "diminish[] the ability" of a minority group to "elect their preferred candidate of choice."[117] In lay terms, a redistricting plan cannot disrupt a minority group's past success in electing their candidate of choice. The use of a retrogression analysis requires district mappers to consider the race of constituents, which may be at odds with "predominant" factor analysis.

Modern precedent has shifted on the constitutionality of using race as a predominant factor in drawing district lines through the VRA. One of the most prominent modern cases to address the VRA's effect on racial gerrymandering was *Bush v. Vera*.[118] Following the 1990 census, Texas planned the creation of three additional congressional districts, which were challenged as the results of racial gerrymandering.[119] Under strict scrutiny, the Court determined that the proposed districts would deprive minorities of equal participation in the electoral processes, violating the VRA's "results" test prohibiting activity that "results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color," and "nonretrogression," which prohibits state action hampering blacks' ability to elect representatives of their choice.[120] The Court's opinion is unclear, to say the least. On one hand, the Court acknowledges a jurisdiction's responsibility to be conscious of race in drawing district lines, in order to ensure that black voters are able to choose the candidate of their choice. On the other hand, the Court also acknowledges the use of racial gerrymandering as a scheme to disenfranchise minority voters.

The VRA has dominated litigation on racial gerrymandering. However, recent jurisprudence has crippled the dominance and clarity of the VRA. Section 5 of the VRA is triggered by a coverage

115. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2621 (2013) (quoting the Voting Rights Act of 1965, 42 U.S.C. §§ 1973(b), (d) (2012) (now codified as amended at 52 U.S.C. § 10304 (2012)).

116. *Id.* at 2620.

117. Voting Rights Act of 1965, codified as amended at 52 U.S.C. §§ 10304(b),(d) (2017); *see* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1287 (2015) (discussing the means by which a district could choose to dilute minority votes using districting before the 2006 amendments to 52 U.S.C. § 10304(b)).

118. 517 U.S. 952 (1996).

119. *Id.*

120. *Id.* at 976–77, 983.

formula in a preceding Section.[121] In 2013 the Supreme Court ruled the coverage formula used in Section 4 of the Act void, rendering Section 5 powerless.[122] As a consequence, states with a history of voting procedures that disenfranchise black voters are no longer subject to Section 5's scrutiny, and can more easily avoid the VRA's mandate to ensure nonretrogression.

At the time the VRA was enacted, less than one hundred African Americans held any public office across the country. While the major strides the VRA has achieved should be acknowledged and celebrated, more recent legislative backsliding has undermined the VRA's promise of political empowerment. With sections of the VRA crippled, voting rights have been at risk from discriminatory redistricting schemes and a wave of ALEC-sponsored voter suppression laws, which have had disproportionate impact on black voters.[123]

C. Current Status of Supreme Court Jurisprudence Surrounding Racial Gerrymandering

In December 2016, two Supreme Court cases considered the constitutionality of race in redistricting schemes. With the invalidation of Section 5 of the Voting Rights Act, the rulings in these cases provided major insight into the future of racial gerrymandering.

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

122. *See Shelby Cty.*, 133 S. Ct. at 2630–31 (striking down the coverage formula in § 4).

123. *See e.g.*, Ari Berman, *The GOP's Attack on Voting Rights Was the Most Under-Covered Story of 2016*, NATION (Nov. 9, 2016), https://www.thenation.com/article/the-gops-attack-on-voting-rights-was-the-most-under-covered-story-of-2016/ (examining discriminatory voting practices' effects on the 2016 presidential election); Scott Keyes et al., *Voter Suppression 101: How Conservatives Are Conspiring to Disenfranchise Millions of Americans*, CTR. FOR AM. PROGRESS (Apr. 4, 2012), https://www.americanprogress.org/issues/democracy/reports/2012/04/04/11380/voter-suppression-101/; John Nichols, *ALEC Exposed: Rigging Elections*, NATION (July 12, 2011), https://www.thenation.com/article/alec-exposed-rigging-elections/; *see also Restore the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Feb. 4, 2016), https://www.brennancenter.org/analysis/restore-voting-rights-act (discussing the frequency with which discriminatory voting changes were blocked in the years leading up to *Shelby County* and how states rushed to implement such voting changes after § 4 was struck down).

One case, *Bethune-Hill v. Virginia Board of Elections*, began in Virginia, a state formerly subject to Section 5 of the VRA.[124] It involved the Virginia General Assembly's redrawing of the legislative districts for the Virginia Legislature. In December of 2014, plaintiffs returned to Fourteenth Amendment assertions, alleging that the redistricting plan's twelve majority-minority districts violated the Equal Protection Clause.[125] The district court held that in the creation of eleven of the twelve districts, the plaintiffs did not establish that race was a predominant factor. Regarding the twelfth district, the district court held that even though the plaintiffs did prove that race was a predominant factor in the Assembly's choice to create it, the government had a compelling interest for weighing it so heavily.[126] In March of 2017, the Supreme Court held that the lower court did not utilize the correct standard in determining whether or not race was a predominant factor in the drawing of the disputed districts. The case was remanded back to the lower courts.[127]

As recently as May of 2017, the Supreme Court handed down a decision that provided more guidance on racial gerrymandering claims. The Court determined that congressional districts drawn in North Carolina were unconstitutionally racially motivated in *Cooper v. Harris*.[128] Here, two districts in North Carolina were subject to the Court's scrutiny. After the 2010 census, Republican lawmakers redrew congressional district maps to add more black voters to the contested districts.[129] For one district, the state acknowledged that it had taken race into account but argued that the addition of black voters in the district was to uphold minority political power, a goal consistent with the VRA.[130] For the second disputed district, the state argued that race was not a predominant factor in drawing district lines; rather, partisan affiliation was the main consideration.[131] Despite the state's

124. Bethune-Hill v. Va. State Bd. of Elections, 141 F. Supp. 3d 505, 511 (E.D. Va. 2015) (noting that Virginia had been a covered jurisdiction under §4 of the VRA and was therefore subject to the requirements of § 5); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 52 U.S.C. § 10304(a)).

125. *Bethune-Hill*, 141 F. Supp. 3d. at 512.

126. *Id.* at 510–11.

127. *Id.* at 793.

128. Cooper v. Harris, 137 S. Ct. 1455, 1460 (2017).

129. *Id.* at 1459.

130. *Id.* at 1460.

131. *Id.* at 1476. Stricter legal standards apply to race-based rather than partisan gerrymandering. For racial gerrymandering, courts will undertake a fact-intensive analysis to determine the legislature's intent, directing its focus at "whether the plaintiffs have managed to disentangle race from politics and prove

arguments, the use of race trigged strict scrutiny, requiring it to prove a compelling interest for the use of race. The district court agreed with plaintiffs' claims that race was a predominant factor in motivating North Carolina's redistricting schemes. Because the state could not convey a compelling interest, the scheme violated the Equal Protection Clause.[132] Relying on the Fourteenth Amendment, the Court concluded that the North Carolina state legislature violated the Equal Protection Clause by using racial classifications without a "sufficient justification" for doing so.[133]

Both of these cases send a powerful message to state legislators that have threatened or thought of manipulating well-meaning majority-minority standards to disenfranchise minority communities. Black voters cannot be used as pawns in legislative map drawing to gain political advantage.

D. Impact of Discriminatory Racial Gerrymandering

One may argue that with the decline of segregation and overt racism, and a rise in African-Americans' education levels, political interests of blacks and whites should increasingly turn on factors other than race. This arguably means that "as a result, fewer minority voters are required for a district to elect their favored candidate."[134] In a 2002 study by Richard Pildes of New York University School of Law, the author researched racially polarized voting patterns using a combination of social-scientific evidence and case studies of the legal compulsion of minority election districts by the VRA. Pildes found that after the passage of the VRA, and into the 1980s, black voters needed a greater than 50% share of the district's total population in order to effectively elect their preferred candidate.[135] Next, he analyzed the

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that the former drove a district's lines." *Id.* at 1473 (quoting Hunt v. Cromartie, 526 U.S. 541, 546 (1999)); *see also* Bush v. Vera, 517 U.S. 952, 968 (1996) (plurality opinion) (stating that political gerrymandering is constitutional while racial gerrymandering is suspect); Miller v. Johnson, 515 U.S. 900, 914 (1995) (differentiating party-based redistricting from race-based redistricting, with the implication that party-based redistricting was acceptable); *id.* at 1473 n.7 ("The sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.").

132. Harris v. McCrory, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016).

133. *Cooper*, 137 S. Ct. at 1481–82.

134. Soffen, *supra* note 75.

135. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1527 (2002) (finding that at the extreme, some commentators and courts suggested that the total black population in a district had to reach 65% to overcome racial bloc voting patterns).

racial patterns of voting in the early 2000s, finding that the race of voters still correlates with race of candidates, but to a lesser degree than it did before the VRA. More recent studies allege that optimal minority district makeup can be as low as 35%.[136] While this social-scientific work demonstrates undeniable progress when it comes to racially polarized voting, there is still recognition of polarized voting and underrepresentation of minority communities.[137] Data even shows that in some areas, the extent of racial polarization in presidential elections has increased over the past decade, including information from the 2016 presidential election.[138]

The use of blunt demographics like race to draw district lines that are not geographically concise and compact in racially polarized jurisdictions may have some major effects on the political power of those manipulated. Justin Levitt analyzes the use and negative impact of racial gerrymandering in seven states that have historically had racially polarized voting: Alabama, California, Florida, North Carolina, South Carolina, Texas, and Virginia. States unnecessarily over-pack minority districts creating a detrimental policy impact that concentrates minority political power to a single district, so the demographics cannot influence other districts. The study also showed an under-concentration of real minority political power, so individuals

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At least until the 1990s, the paper found that (1) voting was pervasively and substantially polarized along racial lines; (2) black-majority electorates were therefore required to enable black voters to overcome racial bloc voting; (3) black political participation, even among eligible voters, was lower than among white voters, and that it was appropriate, indeed, required, for the law to take these differences into account; and (4) as a result, where voting was in fact racially polarized, election districts must have majority-black populations, roughly around 55%, to be "safe" havens for the overcoming of racial bloc voting. *See also* Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1212–14 (1999) (citing the "sixty-five percent rule" to describe the percentage of African American voters traditionally needed to maintain an equal opportunity to participate).

136. Joe Mitchell, *Breaking Out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege*, 42 WASH. U. J.L. & POL'Y 235, 251 n.134 (2013) (stating that in other states, optimal percentages range from 35 percent to greater than 46 percent and that districts where more whites are willing to vote for a non-white candidate require smaller non-white populations).

137. Bartlett v. Strickland, 556 U.S. 1, 25 (2009) (Kennedy, J.) (plurality opinion).

138. *See* Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 210, 218 (2013).

cannot elect their candidate of choice, as required by the VRA.[139] These schemes are not consistent with the intent of the tailored and nuanced structure of the VRA. Levitt notes that this trend goes beyond these states, describing the use of these mechanisms as sufficiently prevalent to be a "worrisome" indication of a "profound and pernicious racial essentialism."[140] Other researchers have realized this disturbing trend, describing racially gerrymandered districts in North Carolina that resemble a "squid" used to reach exclusively black neighborhoods and segregate white voters, in order to illuminate widespread influence of communities of color.[141] A 2011 complaint from advocacy groups in North Carolina described these schemes as an "intentional and cynical use of race that exceeds what is required to ensure fairness to previously disenfranchised racial minority voters."[142]

Some claim that the use of racial gerrymandering may be utilized as a tool to both diminish the ability of black voters to influence elections and segregate the political thicket, deepening white Republican legislative control over key social issues.[143] This sort of systematic minimization and compartmentalization of the black electorate is widespread, especially in the South, as the cases discussed below indicate.[144]

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139. Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U.L. REV. 573, 576 (2016).

140. *Id.* at 573, 605.

141. Ari Berman, *How the GOP is Resegregating the South*, NATION (Jan. 31, 2012), https://www.thenation.com/article/how-gop-resegregating-south/.

142. Amended Complaint at 2, N.C. State Conference of Branches of the NAACP v. North Carolina, No. 11CVS16896 (N.C. Super. Dec. 9, 2011).

143. *See* Berman, *supra* note 141 (explaining that in virtually every state in the South, at the Congressional and state level, Republicans—to protect and expand their gains in 2010—have increased the number of minority voters in majority-minority districts represented overwhelmingly by black Democrats while diluting the minority vote in swing or crossover districts held by white Democrats). According to one prominent lawyer in the region, "[t]he bigger picture is to ultimately make the Democratic Party in the South be represented only by people of color." *Id.* Berman summarizes, "[t]he GOP's long-term goal is to enshrine a system of racially polarized voting that will make it harder for Democrats to win races on local, state, federal and presidential levels." *Id.; see also* Heddy Nam, *Vote 2012: Racial Gerrymandering Resegregates the U.S. South*, OPEN SOC'Y FOUNDS. (Feb. 15, 2012), https://www.opensocietyfoundations.org/voices/vote-2012-racial-gerrymandering-resegregates-us-south.

144. *See generally* Cooper v. Harris, 137 S. Ct. 1455 (2017) (affirming the district court's finding of racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment in an action brought by registered voters challenging the redistricting of two North Carolina congressional districts); Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (vacating judgments

The technical ease of racial gerrymandering today has only expedited these effects. Today, computer programs are readily available and comprehensive demographic information allows legislative mappers to easily "add voters of one selected race to a district and to subtract voters of other races."[145] The accessibility of racial gerrymandering makes its impact even more palpable. Racial gerrymandering that discriminates against black voters is particularly constitutionally troublesome because it sits at the intersection of the most suspect classification, race, and the most supreme political right, the right to vote.[146]

Another of racial gerrymandering's impact can be illustrated in North Carolina from 2010 to 2014. North Carolina has a history of racially polarized voting. In 2010, the Republican Party had a dramatic win in North Carolina, gaining responsibility for drawing new district lines for North Carolina's congressional delegation following the 2010 census.[147] In 2008, when the Democrats won the statewide vote, Democrats won eight of the thirteen seats.[148] In 2010, before the legislature's racial gerrymander, Democrats won seven seats

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in favor of Alabama and remanding separate cases brought by black political caucus, political party, office holders, and county commissioners of Alabama against Alabama and various state officials alleging racial gerrymandering in redistricting plans for Alabama's Senate and House of Representatives); Dickson v. Rucho, 766 S.E.2d 238 (2014), *cert. granted, judgment vacated*, 135 S. Ct. 1843 (2015) (affirming a ruling in favor of members of the General Assembly in an action brought by registered voters alleging that redistricting plans for the North Carolina Senate and House of Representatives were unconstitutional and in violation of federal statutes).

145. Michael Kent Curtis, *Using the Voting Rights Act to Discriminate: North Carolina's Use of Racial Gerrymanders, Two Racial Quotas, Safe Harbors, Shields, and Inoculations to Undermine Multiracial Coalitions and Black Political Power*, 51 WAKE FOREST L. REV. 421, 435 (2016); *see also* Christopher Ingraham, *This Computer Programmer Solved Gerrymandering in His Spare Time*, WASH. POST: WONKBLOG (June 3, 2014), http://www.washingtonpost.com/news/wonkblog/wp/2014/06/03/this-computer-programmer-solved-gerrymandering-in-his-spare-time/ (explaining the utility of computer programming for redistricting).

146. Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Petitioners, Ala. Legislative Black Caucus v. Alabama, 4, 135 S. Ct. 1257 (2015) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

147. *See* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2010 10, 12 (2011), http://www.fec.gov/pubrec/fe2010/federalelections2010.pdf; *see also* Jane Mayer, *State for Sale*, NEW YORKER, (Oct. 10, 2011), http://www.newyorker.com/magazine/2011/10/10/state-for-sale (describing well-funded and successful Republican efforts to make gains in the North Carolina 2010 elections).

148. Curtis, *supra* note 145, at 434; *see Official Results, 2008 General Election*, N.C. STATE BD. OF ELECTIONS, http://results.enr.clarityelections.com/NC/7937/21334/en/summary.html (last updated Mar. 17, 2010 10:59:05 AM).

and Republicans won six.[149] The 2012 and 2014 congressional elections took place after the Republicans had redistricted the state.[150] In 2012, although Democrats won nearly 51% of the popular vote, Republicans won nine of thirteen congressional seats.[151] In 2014, the Republicans won with fifty-five percent of the vote and ten of thirteen seats in North Carolina.[152] Although racial gerrymandering was not the only reason for this dramatic shift, the use of racial quotas was an important factor.[153] The manipulation of black voters was so egregious that a group including black and white legislators, citizens, and the National Association for the Advancement of Colored People (NAACP) of North Carolina sued.[154]

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149. Curtis, *supra* note 145, at 434; *see Official Results, General Election, November 2, 2010*, N.C. STATE BD. OF ELECTIONS, http://results.enr.clarityelections.com/NC/22580/41687/en/summary.html (last updated Dec. 20, 2010, 9:25:08 AM).

150. Gary D. Robertson, *North Carolina Justices Ponder 2011 Redistricting Again*, CITIZEN-TIMES (Aug. 31, 2015), http://www.citizen-times.com/story/news/politics/2015/08/31/north-carolina-justices-ponder-2011-redistricting-again/71489038/ ("The North Carolina maps were used in the 2012 and 2014 elections, helping Republicans expand their political control of the state into veto-proof majorities at the legislature and holding 10 of the 13 seats in the state's congressional delegation.").

151. Curtis, *supra* note 145, at 435; *see Official Results, November 6, 2012 General Election*, N.C. STATE BD. OF ELECTIONS, http://results.enr.clarityelections.com/NC/42923/123365/Web01/en/summary.html (last updated Nov. 18, 2013, 12:13:54 PM).

152. Curtis, *supra* note 145, at 435; *see 11/04/2014 Official General Election Results - Statewide*, N.C. STATE BD. OF ELECTIONS, http://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0 (last visited Nov. 8, 2017). In 2014, the Republican candidate for congressional District 9 ran unopposed. *Id.* If this election is not included in the statewide total, Republicans won 53% of the congressional statewide vote while Democrats won 47%.

153. Curtis, *supra* note 145, at 435–36.

154. *Id.* at 437. The Supreme Court of North Carolina originally held that race was not a predominant factor in the redistricting scheme and that the state had a compelling interest. Later, the original judgment was vacated, and the case was remanded for further consideration in light of *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). On remand, the Supreme Court of North Carolina held that the compelling state interest and narrow tailoring indicated no racial gerrymandering in violation of equal protection. In *Dickson II*, the case was remanded to the Supreme Court of North Carolina for further consideration in light of *Cooper v. Harris*, 137 S. Ct. 1455 (2017). Dickson v. Rucho (*Dickson I*), 766 S.E.2d 238, 242 (N.C. 2014), *cert. granted, judgment vacated*, 135 S. Ct. 1843 (2015); Dickson v. Rucho (*Dickson II*), 781 S.E.2d 404 (N.C. 2015), *opinion modified on denial of reh'g*, 789 S.E.2d 436 (2016), *cert. granted, judgment vacated*, 137 S. Ct. 2186 (2017).

Similar insidious mechanisms of gerrymandering black voters have been seen recently in Alabama, which also has a history of racially polarized voting. After the 2010 congressional election, Alabaman Republican legislators packed more black voters than necessary[155] into districts with existing black supermajorities, diminishing black political power.[156] African Americans in the state claimed that Alabama's redistricting policy overpacked majority-minority districts and dismantled districts where blacks, even though they were not the majority, had built coalitions with white voters.[157] In a suit filed by the Alabama Legislative Black Caucus, the Supreme Court observed that Alabama needed a strong basis for race-based packing of its majority-minority districts. The Court took notice of the irregular shape of a supermajority black district, which was the result of a scheme used to pack several pre-existing black districts.[158] While the court remanded this case, it highlights how racial gerrymandering can be used to limit or exclude black voters under the guise of VRA compliance.

Political exclusion of black voters through racial gerrymandering can also be viewed through the redistricting schemes in Mississippi. In 2012, the state used redistricting schemes to create four new decisively black districts. While this scheme may have resulted in the election of new black state legislators, it also eliminated incumbent challenges in Mississippi districts that had closely contested elections in the previous year.[159] This sort of strategic redistricting maintains the domination of legislators who are unconcerned with the interests of black voters—voters who are not in these legislators' districts and do not have the potential to control Congress. Creating majority-minority districts significantly above the appropriate threshold excludes black voices in the political process through deprivation and dilution.

As discussed earlier, district lines should be consistent and continuous as imagined in the original conception of districting

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155. *See Ala. Legislative Black Caucus,* 135 S. Ct. at 1263 (stating that "[a] gerrymander [occurs] . . . when the State adds more minority voters than needed for a minority group to elect a candidate of its choice").

156. *Id.* at 1263, 1282 (Thomas, J., dissenting); Curtis, *supra* note 145, at 455.

157. Michael Li, *Racial Gerrymandering Returns to the Supreme Court,* BRENNAN CTR. FOR JUST. (Dec. 12, 2014), https://www.brennancenter.org/blog/racial-gerrymandering-returns-supreme-court.

158. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1271, 1274.

159. Thomas B. Edsall, *The Decline of Black Power in the South,* N.Y. TIMES: OPINIONATOR (July 10, 2013, 9:34 PM), http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/.

schemes, with exceptions made only to allow disenfranchised voters to elect their candidate of choice. An attempt to move or manipulate black voters, whether by spreading or by packing them into particular district lines that are not geographically concise and natural, should be deemed presumptively suspicious and assessed as an attempt to dilute black influence and exclude black voters from the political process. Racial gerrymanders accomplished by creating non-compact and non-contiguous districts may be a red flag, as they are not consistent with the language used in *Shaw*.[160] Moreover, given the defective status of Section 5 of the VRA and the high procedural bar to raise a Fourteenth Amendment claim, the VRA and the Equal Protection Clause provide limited protection from racial gerrymandering schemes.

The natural boundaries of the VRA's majority-minority districts have often been construed as unnatural schemes. State legislators have been strategic to suggest that their redistricting schemes merely dilute the clout of their political opponents. Republican legislators claim that district drawing that creates dramatic shifts in black voters' districts is a shuffling of Democrats, rather than blacks, which is not unconstitutional. However, this explanation is tenuous.

Black voters should not be used as fungible tokens to further the political motives of a particular party. Gerrymandering schemes that were originally meant to enable minorities to elect their candidate of choice have been used to dilute the influence of the black electorate and do not support the ideal of fair representation. Racial discrimination in voting is a grave constitutional injury because it involves the most suspect classification—race—and the right to vote—the right "preservative of all rights."[161] Perhaps a different framework of legal analysis will allow for sturdier challenges to redistricting schemes that have dramatic and negative effects on black voters and their communities. The manipulation of black voters is a deprivation of the fundamental right to vote of black Americans, but it also constitutes a status designation, which is strictly prohibited as a badge of slavery under the Thirteenth Amendment.[162]

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160. Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 887 (2016).

161. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

162. Zaman, *supra* note 18, at 256.

III. DEFINING RACIAL GERRYMANDERING AS A BADGE OF SLAVERY

Thirteenth Amendment litigation prohibits all forms of slavery.[163] A deprivation of the political power of blacks, as realized through some forms of racial gerrymandering, is a badge and incident of slavery. The Thirteenth Amendment has not been used in the context of voting rights up until now. When the Amendment was passed, current and former slaves were denied the opportunity to vote. Framers of the Amendment did not solidify consistent messaging on black citizenship, but the Fourteenth and Fifteenth Amendments can further illuminate the Thirteenth Amendment's content and limits. The passage of these subsequent Amendments explicitly provided for and protected voting rights for black Americans. The Fourteenth Amendment provided equal protection under the law and the Fifteenth Amendment affirmed that the right to vote "shall not be denied . . . on account of race."[164]

Although citizenship and voting rights were not guaranteed to black residents at the time of the Thirteenth Amendment's passage, now that voting is within its broad scope of protections, the amendment should be available to protect against vestiges of slavery that may appear in the political arena. Supreme Court jurisprudence has also made it clear that, unlike the Fourteenth Amendment, the Thirteenth Amendment is not limited to instances of intentional or purposeful discrimination.[165] Moreover, the effects of racial gerrymandering are not merely a voting rights issue. The severe limitations to which this scheme subjects a protected class of individuals represents a discriminatory system that can be equated to a badge of slavery.

The framers of the Thirteenth Amendment wanted to end slavery itself and "to act so as to obliterate the last vestiges of slavery in America."[166] Additionally, the Court has interpreted Section 2 of the Amendment to "authorize[] Congress not only to outlaw all forms of slavery and involuntary servitude but also to eradicate the last

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163. Slaughter-House Cases, 83 U.S. 36, 72 (1872).

164. *See* U.S. CONST. amends. XIV, XV.

165. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (holding that the Equal Protection Clause is only violated by intentional discrimination); *see also* City of Memphis v. Greene, 451 U.S. 100, 128–29 (1981) (stating that "to decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by [the Thirteenth Amendment] itself. We merely hold that the impact [in this case] . . . does not reflect a violation of the Thirteenth.").

166. Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 10, at 1332.

vestiges and incidents of a society half slave and half free."[167] To analyze the framework of the Thirteenth Amendment, it would seem obvious to focus on exercises of congressional power under Section 2. However, there are very few Congressional actions promulgated through the Thirteenth Amendment.

Existing legal scholarship and principles from federal case law provide a reasonable standard for analyzing civil rights-based complaints through the Thirteenth Amendment.[168] The fulfillment of this authorization and the determination of whether or not a practice or institution is a badge or incident of slavery involves a two-prong analysis. Some scholars have recognized that a Thirteenth Amendment badge of slavery must: (1) be conduct with a cognizable link to the institution of slavery; and (2) "pose a risk of causing the renewed legal subjugation of the targeted class."[169] Application of the badges and incidents of slavery framework to an institution should involve a targeted class, a "concrete connection" to the slave system, and discriminatory animus.[170] Not everything that has a connection to slavery or that is discriminatory in nature constitutes a badge of slavery. Each prong must be fulfilled and does not require a showing of discriminatory intent. To make a reasonable argument that racial gerrymandering is, in fact, a badge of slavery, there should be a historical link to the institution of slavery and modern marginalization.

A. Prong One: Racial Gerrymandering and Its Historical Link to the Institution of Slavery

The first prong of the analysis involves a link between the conduct and the institution of slavery. The earliest conceptions of slavery defined the institution as a "status or condition over who[m]

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167. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 411 (1968).

168. *See* Lauren Kares, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372 (1995) (concluding that the best understanding of Thirteenth Amendment jurisprudence on badges and incidents of slavery applies to both public or widespread private action aimed at any racial group or population that has previously been held in slavery or servitude, that mimics the law of slavery, and has significant potential to lead to the de facto re-enslavement or legal subjugation of the targeted group).

169. McAward, *supra* note 18, at 622; *see* Zaman, *supra* note 18, at 256.

170. Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 10, at 1362, 1366; *see also* Westberry v. Gilman Paper Co., 507 F.2d 206, 210 (5th Cir. 1975) (noting, in construing the scope of § 1985(3), that "[t]he aim of the [Thirteenth] amendment is to provide protection for racial groups which have historically been oppressed").

any or all of the powers attached to the right of ownership are exercised."[171] American slaves did not wear actual badges, but rather people with particular phenotypical characteristics were subject to physical and social violence and oppression. Some scholars have characterized slavery as an extreme lack of control over one's work, including a lack of voice over one's conditions.[172] To satisfy this first prong, racial gerrymandering must be linked to involuntary servitude of a historically marginalized group of people.

Nelson provides some insight as to what may be considered a link to slavery. The injury in *Nelson* involved violence for the purpose of intimidation against a definable and historically despised minority group.[173] Violence and intimidation of a group as determined in the first prong has historical roots in the slave system. Alternatively, in *Hodges*, the Supreme Court determined that the denial of the right to work is not unique to slavery.[174] Congressional considerations on what actions are linked to slavery are clarified by the provisions enacted through the Thirteenth Amendment. The 1866 Civil Rights Act prohibits race discrimination in making and enforcing contracts;[175] the anti-blockbusting section of the Fair Housing Act (1968) prohibits realtors from using race-based rumors to intimidate sellers;[176] the Hate Crimes Act (1968) prohibits interference in "federally prosecuted activities" (like assault) on the basis of race;[177] and the 1871 Enforcement Act creates civil and criminal penalties for conspiring to deprive a person of any privilege or right of a citizen of the

171. Convention to Suppress the Slave Trade and Slavery art. 1, Sept. 25, 1926, 60 L.N.T.S. 254.

172. Andrew E. Taslitz, *The Slave Power Undead: Criminal Justice Successes and Failures of The Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 245, 251 (Alexander Tsesis ed., 2010).

173. Carter, *Race, Rights, and the Thirteenth Amendment*, *supra* note 10, at 1367 (discussing the use of such private violence by slave masters to maintain control over enslaved persons and the continued use of such violence after slavery's abolition to prevent freedmen from exercising their legal freedom in meaningful ways) (referencing United States v. Nelson, 277 F.3d 164, 189–90 (2d Cir. 2002)); *see also Nelson*, 277 F.3d at 189–90.

174. George Rutherglen, *The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 163, 175 (Alexander Tsesis ed., 2010) (noting that *Hodges* was overruled by *Jones*, which means that the Thirteenth Amendment bars private discrimination).

175. 42 U.S.C. §1981 (2012); 42 U.S.C. § 1982 (2012).

176. 42 U.S.C. §§ 3601–19 (2012).

177. 18 U.S.C. § 245(b)(2) (2012).

United States.[178] The constitutionality of each of these Acts rests on the prohibited actions' and institutions' concrete connection to slavery.[179]

The previous section of this Note discusses ways in which racial gerrymandering dilutes and excludes the influence of the black voter. Reduction and, more often, denials of the black vote were utilized during slavery and into the twentieth century to exclude blacks from the political system. Representation was not an option for black voters. Slaves and their descendants lacked their most basic of political rights throughout the majority of American history.

The specific act of re-drawing district lines to disenfranchise black voters can be linked to the institution of slavery as well. Even after voting rights were guaranteed for all, immediately following the VRA's enactment, many southern jurisdictions created mechanisms to limit the new surge of black votes and maintain white supremacy. Including reconfiguring legislative districts and replacing geographic districts with at-large voting.[180]

This nation has a long history of racial discrimination in voting. Calculated attempts to suppress and deny the black vote, especially through the use of district mapping, is a modern practice connected to the institution of slavery and its vestiges.

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178. *See* 18 U.S.C § 242 (2012); 42 U.S.C. § 1985 (2012); Rebecca E. Zietlow, *The Promise of Congressional Enforcement*, *in* THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 182, 185 (Alexander Tsesis ed., 2010).

179. *See, e.g.*, *Nelson*, 277 F.3d at 190 (reasoning that there were "indubitable connections" between slavery and racially motivated attacks against any race of persons using public facilities); Williams v. City of New Orleans, 729 F.2d 1554, 1579 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part) ("Under the Jones v. Mayer rationale, current forms of racial discrimination are badges of slavery that may be proscribed under the thirteenth amendment if they are historically linked with slavery or involuntary servitude."); Carter, *supra* note 10, at 1366 (arguing that a badge of slavery exists where there is a "connection between the class to which the plaintiff belongs and the institution of chattel slavery"); McAward, *supra* note 18, at 622 (claiming that conduct considered a badge of slavery must be linked to a historical incident of slavery).

180. Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, AMER. ENTER. INST. (Apr. 6, 2010), http://www.aei.org/publication/redistricting-race-and-the-voting-rights-act/.

B. Prong Two: Renewed Subjugation of a Targeted Class

1. Racial Gerrymandering Applies to a Protected Class

To fulfill the second prong, there must be proof that the policy affects a protected class. The language of the Thirteenth Amendment prohibits slavery and involuntary servitude, but it does not distinguish a particular race or ethnicity. The Court has interpreted the protections of the Thirteenth Amendment broadly, to reach beyond the population of just freemen.[181] In *Saint Frances College v. Al-Khazraji*, the Court pointed out that at the time the Reconstruction Amendments were drafted, there were more racial classifications in existence than today. Someone who may presently be considered Caucasian may not have necessarily been considered so at the time, and they could bring a discrimination claim under the Civil Rights Act of 1866.[182] Therefore the protection of Thirteenth Amendment legislation is expansive.

Regarding racial gerrymandering, such expansive terms as to what constitutes a protected class are not necessary. The predominate class of people affected by racial gerrymandering schemes are black, whose ancestors were also subjected to slavery and involuntary servitude at the time of the Amendment's drafting. The individuals most often subject to—and manipulated through—racial gerrymandering schemes are the exact individuals (freedmen) that were envisioned as beneficiaries of the Thirteenth Amendment's protections.

2. Racial Gerrymandering Causes Renewed Subjugation

Fulfillment of the second prong also relies on an illustration of disparate impact. In context of the Thirteenth Amendment, this subjugation entails more than just chattel slavery.[183] This sort of expansive definition incorporates de jure slavery, where a person physically owns another, as well as de facto slavery, where unequal power relationships, rather than physical ownership, constrain individuals' rights.[184] The conception can encompass "social

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181. Zietlow, *supra* note 178, at 188.

182. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610–13 (1987); *see* Zietlow, *supra* note 178, at 188.

183. *See generally* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1778–1819 (2006) (discussing how revolutionary and abolitionist ideology influenced the Framers of the Thirteenth Amendment).

184. Zaman, *supra* note 18, at 260.

and civil dominations that impede self-rule and self-sustainability."[185] The definition that is relevant to this analysis is the anti-subordination component. Slavery and its legacy involve exploitative actions that limit the social, economic, and political capabilities of freedmen and their descendants. This designation relies on the supremacy of one race and the manipulation of another.

Gerrymandering is a widespread tactic used to game the political system. One way in which discriminatory systems of racial gerrymandering cause renewed subjugation is by unnecessarily diluting or packing black voters' political preferences. For example, North Carolina has carried out a series of exploitative gerrymandering uses on the basis of race. Last year, district courts ruled against gerrymandering practices used in the state for congressional districts, as well as State House and Senate redistricting plans.[186] This year, the Supreme Court supported those rulings. In both cases, voting districts were drawn with race as a predominant factor in attempts to dilute the political power of black voters, not to enable voters to elect their candidate of choice. In the predecessor of *Cooper*, *Harris v. McCrory*, the Court discusses the reality that for several decades the targeted districts had already successfully elected black lawmakers, as the electorate in those districts consisted of a sufficient number of black voters to realize that population's electoral preferences.[187] With this fact in mind, the Court reasoned that packing a minority district unnecessarily beyond 50 percent was a guise used to limit the population's voting power. One of the seated judges went as far as to say that, "unfettered gerrymandering is negatively impacting our republican form of government."[188] Similar cases in Alabama, Virginia, and other parts of the country have scrutinized the use of gerrymandering schemes to pack minority voters in a minimum

185. Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447, 1452 (2012).

186. *See* Harris v. McCrory, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016), *aff'd sub nom*, Cooper v. Harris, 137 S. Ct. 1455 (2017) (involving an action brought by voters challenging the constitutionality of two North Carolina congressional districts as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment); *see also* Covington v. North Carolina, 316 F.R.D. 117 (M.D.N.C. 2016), U.S. S. Ct. appeal filed (Nov. 14, 2016) (involving registered voters in North Carolina challenging 28 majority-black districts in North Carolina's State House and Senate redistricting plans as racial gerrymanders in violation of Equal Protection Clause).

187. *McCrory*, 159 F. Supp. 3d at 606.

188. *Id.* at 628 (Cogburn, J., concurring).

number of districts in order to reduce the influence of black voters, interfering with a crucial civil right.[189]

Another way racial gerrymandering causes renewed subjugation is by undermining class interests. It guarantees a limited number of black representatives, while conversely ensuring that there will be more uncontested districts for the white representatives who continue to dominate the assembly. David Lublin uses empirical science to analyze racial fairness in representation and redistricting. He illustrates the discriminatory impact of racial gerrymandering on black voters in relation to other voting populations.[190] Using data of all congressional representatives elected between 1972 and 1994, findings suggest that although the use of some form of racial redistricting is important to guarantee black elected officials, schemes can create discriminatory effects.[191] Lublin concludes that racial gerrymandering in the South made the House less likely to adopt legislation favorable to African-Americans, assured more Republican legislative control (black voters more often lean toward the Democratic party), and invalidated the 65 percent rule.[192] Under the guise of drawing the VRA's beneficial majority-minority districts, racial gerrymandering schemes have been used as a ploy to control black voters discriminatorily. Other scholars have acknowledged the use of race-based gerrymander schemes to elect minority representatives, but they also acknowledge vote dilution and the reality that votes are deliberately squandered through an over-reliance on race-based proportional representation.[193]

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189. *See* Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) (ruling that lower courts should focus on the role that race played in each individual district, rather than looking at the state as a whole and noting that the states do not necessarily need to retain the same percentage of minority voters in a specific district; what is important is the ability of minority voters to elect the candidates of their choice); *see also* Wittman v. Personhuballah, 136 S. Ct. 1732 (2016) (dismissing for lack of standing a suit that was brought by voters against the Virginia State Board of Elections claiming an Equal Protection Clause violation due to a dilution of minority votes through packing into one district).

190. DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 104 (1997).

191. *See id.* at 41–54 (identifying different race-based effects of racial redistricting).

192. *Id.* at 45, 96–97 (stating that some advocates of majority-minority districts believe that minorities must comprise at least 65 percent to elect their candidate of choice).

193. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 303 (1991); *see also* Richard L. Hasen, *Race or Party? How Courts*

Moreover, this form of racial gerrymandering creates discriminatory diminution of voting power. The Thirteenth Amendment prohibits conduct that would amount to slavery on its own, and "empower[s] Congress to do much more."[194] The Brennan Center for Justice, a leading civil rights nongovernmental organization, argues that "underrepresented minority communities are often hit the hardest" under redistricting schemes.[195] According to the Center's democracy research, thirty-nine states leave redistricting in the hands of partisan elected officials, who are motivated to adopt the sorts of redistricting schemes that pack minorities, disfavoring their political interests and influences.[196] These schemes reduce black voters' political influence and make it "hard to gain a foothold" in American democracy.[197]

Even the Department of Justice has scrutinized various states for discriminatory racial gerrymandering schemes. In 2011, the Department asserted that Texas's redistricting plans for Congress and the state legislature were unconstitutional for "diminishing the ability of citizens of the United States, on account of race, color, or membership in a language minority group, to elect their preferred candidates of choice."[198] The following year, a federal court concurred with the Department's determination, finding that Texas's redistricting maps were both "enacted with discriminatory purpose" and had a disparate impact on racial minority groups, diminishing the

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Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere, 127 HARV. L. REV. F. 58 (2014) (discussing extensive gerrymandering and voter suppression schemes in North Carolina used to reverse major political victories produced by a large turnout of the black electorate).

194. Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 37 (2012) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968)); *see also* United States v. Nelson, 277 F.3d 164, 184–85 (2d Cir. 2002) (emphasizing "the extent to which Congress's powers under Section Two of the Thirteenth Amendment extend beyond the prohibition on actual slavery and servitude expressed in Section One" because enforcement authority granted by Section Two empowers Congress "to control conduct that does not come close to violating Section One directly").

195. *Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 3, 2017, 7:00 PM), https://www.brennancenter.org/issues/redistricting.

196. *Democracy Agenda: Redistricting*, BRENNAN CTR. FOR JUST. (Feb. 4, 2016), http://www.brennancenter.org/analysis/democracy-agenda-redistricting.

197. *Redistricting*, BRENNAN CTR. FOR JUST., *supra* note 195.

198. Ari Berman, *Federal Court Blocks Discriminatory Texas Redistricting Plan*, NATION (Aug. 28, 2012), https://www.thenation.com/article/federal-court-blocks-discriminatory-texas-redistricting-plan/.

voting strength of blacks.[199] After the invalidation of Section 4 of the VRA, it is impossible for plaintiffs to pursue this case in Texas, as well as similar cases around the country.[200] Under the Obama Administration, the Department of Justice emphasized the critical need for Section 5 of the VRA to combat continuing overt and subtle voting discrimination through persisting mechanisms like racial redistricting schemes.[201] The evisceration of Section 5 enforcement powers will allow these schemes to go unchecked, continuing the subjugation of black voters without consequence.

While the use of majority-minority districts has supported growth of black political power, other forms of racial gerrymandering have manifested extreme limits on representation and, in some cases, exclusion of factions of the black electorate. These same effects of systematic disadvantage cannot be seen for white constituencies. As discussed prior, a badge of slavery can be characterized as a form of second-class citizenship that causes systemic discrimination against a protected class. Since their rights and interests are not upheld and maintained on a group or on an individual basis, their status is regulated to a form of second-class citizenship, which is a badge of slavery. Gerrymandering on the basis of race has morphed from a tool to ensure black representation into one that is used to maintain white supremacy.

Often, avenues for fighting unconstitutional gerrymandering through the Equal Protection Clause of the Fourteenth Amendment are limited, because there is no clear standard for separating unconstitutional race-based gerrymandering from permissible partisan consideration.[202] Unlike the Fourteenth Amendment, the Thirteenth Amendment does not have an intent requirement. Deconstructing racial gerrymandering through the Thirteenth Amendment is a more powerful and expansive way of ensuring the rights and privileges of all Americans.[203]

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199. Texas v. United States, 887 F. Supp. 2d 133, 159, 163 (D.D.C. 2012), *vacated,* 133 S. Ct. 2885, *remanded to* 970 F. Supp. 2d 593 (W.D. Tex. 2013).

200. *Id.*

201. U.S. DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION ACCOMPLISHMENTS, 2009–2012, https://www.justice.gov/crt/us-department-justice-civil-rights-division-accomplishments-2009-2012 (last updated Nov. 20, 2015).

202. Hasen, *supra* note 193, at 68–69.

203. Rutherglen, *supra* note 174. *Hodges* was overruled by *Jones*, which determined that the Thirteenth Amendment bars private discrimination. *Id.* at 175 (stating that "in particular, legislation to enforce the Fourteenth Amendment must exhibit 'congruence and proportionality between the inquiry injury to be prevented

CONCLUSION

The goal of this Note is not to provide a blueprint of what can determine fair representation for black voters. Rather, it exposes an unfair representation of black voices in the American political arena. Racial gerrymandering used beyond the intentions of the VRA is a systematic method to dismantle the influence of black Americans in the American electorate and achieve race-based political exclusion. America has failed to ensure the promises of the Thirteenth Amendment and the intentions and objectives of its framers. While the Civil Rights movement achieved major successes, institutions of power, privilege, and manipulation that run counter to the assurances of emancipation persist.

On one side, congressional legislation requires states to consider race when drawing district lines to ensure the election of minority representatives. On the other side, many federal and Supreme Court cases have ruled redistricting schemes that use race as a predominant factor unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. This sort of inconsistent law is both confusing and open to invidious manipulation. Around the country, legislators have used this contradictory rhetoric to guide plans of dilution, disenfranchisement, and denial of black voices in local and national elections.

Racial gerrymandering schemes not only target a protected class, but also involve actions so linked to slavery that they cause renewed subjugation. *Jones* only requires Congress to establish a "rational basis" to define a system or action as a badge of slavery and legislate based on that conclusion.[204] The fulfillment of each of the two prongs outlined by this Note provides a rational basis and defines gerrymandering, with race used as a predominant factor, as a badge of slavery. Congress is empowered through the Thirteenth Amendment to eliminate all badges and incidents of slavery, and it should create prophylactic legislation that prohibits all redistricting schemes that use race as a predominant factor in redrawing district lines. This same

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or remedied and the means adopted to that end'"); *see also* City of Boerne v. Flores, 521 U.S. 507, 527 (1997) (reasoning that the Fourteenth Amendment is strictly remedial and not intended to alter states' authority to allocate their political power as they see fit); United States v. Morrison, 529 U.S. 598, 619–26 (2000) (noting the limitations of Congress's enforcement powers under the Fourteenth Amendment).

204. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

analysis can be applied to other forms of political subjugation, like voter ID laws and felon disenfranchisement.[205]

Moreover, this Note does not demonstrate a society so post-racial that race should not be considered in the election process. Quite the opposite, this Note supports the intentions of majority-minority districts but attacks those redistricting schemes that are not in fact being used to amplify minority voices. Equal Protection and VRA jurisprudence has worked towards equality in the political process for blacks for decades. However, mechanisms of racial gerrymandering have subverted the original impact and intentions of these provisions and created second-class citizenship for black voters.

While one form of race-conscious redistricting takes into account the plights of marginalized communities, enabling them to elect their candidate of choice, another uses the race of the electorate to limit minority voting power in other districts. This latter form of racial gerrymandering creates majority-minority districts when racially polarized voting is not significant enough to disempower minority communities from electing their candidates of choice. America has an insidious and pervasive history of disenfranchising black voters. Black voter suppression through racial gerrymandering schemes is no accident or mistake. Denying, restricting, or limiting the vote of an entire class of Americans is a deliberate and systematic measure to strip the protections guaranteed by the political process from a historically marginalized group of citizens and is counterproductive to the legitimacy of our democracy. The integrity of the election process and discrimination relating to voting rights for people of color persists. Voting is not only fundamental to our nation, but also impacts the political and social mobility of marginalized populations. Elections should be determined by the political will of the people, as articulated through their unwrought and freely executed vote along natural boundaries and communities. Representation should not rely on the skill of master mappers.

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205. Both voter ID laws and felony disenfranchisement statutes overwhelmingly limit the voting rights of people of color, who fall under protected classes. The statutes are related to post-reconstruction provisions utilized to suppress the political power of particular groups of people. Further academic research on the Thirteenth Amendment's application to these devices would be extremely valuable.