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Redistricting: Federal Law, State Constitution, and the Courts

Gerrymandering through the method of redistricting poses a grave threat to our democracy. Redistricting is the redrawing of voting districts to reflect the census data collected every decade.[1] Redistricting is supposed to be a bipartisan process that is reflective of the population, but laws surrounding the practice allow for partisan manipulation and racial discrimination.[2] The practices of including or excluding specific groups from specific districts, also called gerrymandering, allow for districts to be redrawn so that the district favors one political party over another in elections and is inherently undemocratic.[3] Section 2 of the Voting Rights Acts (VRA) prohibits any voting requirements or processes that result in the “abridgment” of voting rights based on race, color, or membership in a language minority regardless of the intent.[4] The Department of Justice, or DOJ, uses section 2 in conjunction with section 5 of the VRA to prevent discrimination in redistricting.[5] Section 5 of the VRA requires certain jurisdictions, those determined to have a history of discrimination, to have their voting law changes approved by the federal government before they go into effect.[6] The VRA is supposed to protect voters, yet gerrymandering practices still influence elections.[7] Below is a look at some of the factors that play a role.

Redistricting decisions are made by the state legislatures in majority of the states, while a few states employ bipartisan committees for redistricting.[8] As such, whoever controls the state legislature controls the redistricting process, allowing political parties to take advantage of the system.[9] In the past few decades, SCOTUS has underenforced voting rights [10] and states have either taken advantage of it by making it harder people to vote[11] or trying to fill in the legal gap through State legislation and the State Constitution.[12] In a recent ruling in New York, the court struck down a law that would have allowed non-citizens to vote if they had lived in New York for the last 30-days.[13] The court’s rationale was based on the state constitution with Judge Porzio writing that there “is no statutory ability for the City of New York to issue inconsistent laws permitting non-citizens to vote and exceed the authority granted to it by the New York State Constitution.”[14]

While the DOJ’s Civil Rights Division is responsible for enforcing the Voting Rights Act and preventing discrimination “on the basis of race, color, or membership in a protected language minority group,”[15] courts have diminished the power DOJ wields under VRA. In one of the landmark decisions for voting rights in *Shelby County v. Holder*, the United States Supreme court struck down section 5 of the VRA, essentially making it so that states no longer needed to have their voting plans approved by the federal government.[16] States can take advantage of this holding and implement policies stemming from racial discrimination because it is the burden of the DOJ to locate and then challenge those discriminatory policies.[17]

While these policies and procedures have diminished protections under VRA, it is predicted that during the 2022 SCOTUS term, these minimal protections will be even further stripped away.[18] In October 2022, SCOTUS heard arguments for *Merrill v. Milligan* in which a lower court deemed that Alabama violated section 2 of the VRA by diluting black voters across districts.[19] Alabama has appealed to the SCOTUS arguing that “if a state has to violate its self-described ‘race-neutral’ map-drawing rules to comply with the Voting Rights Act, the result would be an unconstitutional racial gerrymandering in which race impermissibly predominates.”[20] It is predicted that the court will rule in favor of Alabama and overturn the lower court’s ruling, removing protections provided by the VRA.[21] Due to the court’s recent precedent in gutting voting rights,[22] the future of the VRA seems to be on the chopping block.[23]

With voter protections being diminished by both the States and the SCOTUS, it has become more crucial now than ever for people to exercise their right to vote to give themselves a better chance to be heard. Voting rights are being taken away and voters are being suppressed, but the only way to remedy the situation is to vote and try our best to ensure that our representatives best represent our interest in keeping our democracy intact.

[1] *Redistricting*, Brennan Ctr. for Just., <https://www.brennancenter.org/issues/gerrymandering-fair-representation/redistricting> (last visited Nov. 21, 2022).

[2] *Id.*

[3] Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, Brennan Ctr. for Just. (Aug. 10, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> (last visited Nov. 21, 2022).

[4] *Section 2 of the Voting Rights Act: Vote Dilution and Vote Deprivation*, SCOTUSblog, <https://www.scotusblog.com/election-law-explainers/section-2-of-the-voting-rights-act-vote-dilution-and-vote-deprivation/> (last visited Nov. 21, 2022).

[5] *Redistricting Information*, The U. S. Dep’t of Just., <https://www.justice.gov/crt/redistricting-information> (last visited Nov. 21, 2022).

[6] Danielle Lang, *Five Decades of Section 5: How this Key Provision of the Voting Rights Act Protected our Democracy*, Campaign Legal Ctr. (June 22, 2016), <https://campaignlegal.org/update/five-decades-section-5-how-key-provision-voting-rights-act-protected-our-democracy> (last visited Nov. 21, 2022).

[7] *See Who Draws the Lines – Congressional Redistricting*, Bloomberg Gov’t (Nov. 9, 2022) <https://about.bgov.com/brief/who-draws-congressional-districts/> (last visited Nov. 21, 2022).

[8] *Id.*

[9] Andrew Prokop, *Who Actually Does the Gerrymandering*, Vox (Nov. 14, 2018, 4:16 PM), <https://www.vox.com/2014/8/5/17991958/gerrymandering-legislatures-republicans-democrats> (last visited Nov. 21, 2022).

[10] Joshua A. Douglas, *The Right to Vote Under State Constitution*, 67 Vanderbilt L. Rev. 89, 89 (2019).

[11] *Voting Laws Roundup: October 2022*, Brennan Ctr. for Just. (Oct. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022> (last visited Nov. 21, 2022).

[12] Douglas, *supra* note 10.

[13] Matt Vasilogambros, *Judge Strikes Down New York City Law Allowing Noncitizen Voter*, PEW (June 28, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/28/judge-strikes-down-new-york-city-law-allowing-noncitizen-voters> (last visited Nov. 21, 2022).

[14] *Id.*

[15] *Redistricting Information*, *supra* note 5.

[16] Sam Levine & Ankita Rao, *In 2013 the Supreme Court Gutted Voting Rights – How has it Changed the US?*, The Guardian (June 25, 2020), <https://www.theguardian.com/us-news/2020/jun/25/shelby-county-anniversary-voting-rights-act-consequences> (last visited Nov. 21, 2022).

[17] *Id.*

[18] Nina Totenberg, *The Landmark Voting Rights Act Faces Further Dismantling at the Supreme Court*, NPR (Oct. 4, 2022), <https://www.npr.org/2022/10/04/1126619000/voting-rights-act-supreme-court> (last visited Nov. 21, 2022).

[19] Michael Li & Sonali Seth, *The Coming SCOTUS Fight Over the Voting Rights Act*, Brennan Ctr. for Just. (Sept. 21, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/coming-scotus-fight-over-voting-rights-act> (last visited Nov. 21, 2022).

[20] *Id.*

[21] Totenberg, *supra* note 18.

[22] *Id.*

[23] Andrew Chung, *After Sharp Right Turn, U.S. Supreme Court Conservatives Step on the Gas*, Reuters (Sept. 29, 2022), <https://www.reuters.com/legal/after-sharp-right-turn-us-supreme-court-conservatives-step-gas-2022-09-28/> (last visited Nov. 21, 2022).