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# DISASTER DISTRICTS: MID-DECADE REDISTRICTING IN THE FACE OF CLIMATE CHANGE

J. GRAY WHITSETT\*

## INTRODUCTION

Electoral redistricting is a long-standing fixture of the American political system.<sup>1</sup> The U.S. Constitution prescribes reapportionment after each mandated decennial Census,<sup>2</sup> and gerrymandering takes its name from a Founding Era politician.<sup>3</sup> The Constitution delegates and reserves the power to draw electoral districts to state governments,<sup>4</sup> and because Congress historically placed few parameters on how redistricting occurs or what districts should consist of, the process often reflects the political and social interests of the majority at the time.<sup>5</sup> Throughout the twentieth century and into the present, redistricting has garnered considerable attention from the legal and political community, especially in cases of racial and partisan gerrymandering,<sup>6</sup> and some criteria for redistricting

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<sup>1</sup> See generally CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 3 (2d ed. 2021); NICHOLAS R. SEABROOK, DRAWING THE LINES: CONSTRAINTS ON PARTISAN GERRYMANDERING IN U.S. POLITICS 3–47 (2017). Before the First Congress was even seated, Patrick Henry, as an influential delegate in the Virginia legislature, attempted to block James Madison from the U.S. House of Representatives by drawing him an unfavorable district. Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUD. 781, 782–83 (2011).

<sup>2</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>3</sup> Elbridge Gerry—a signatory of the Declaration of Independence, Framers of the Constitution, and former vice president—signed into law an infamous redistricting plan as governor of Massachusetts in 1812. SEABROOK, *supra* note 1, at 7.

<sup>4</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>5</sup> BULLOCK, *supra* note 1, at 7–10.

<sup>6</sup> See, e.g., BULLOCK, *supra* note 1, at 59–98, 121–66; SEABROOK, *supra* note 1, at 61–94; STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND

have been imposed through court rulings and federal and state law.<sup>7</sup> A less publicized but concerning trend is the advent of mid-decade redistricting, wherein a state legislature redraws electoral districts after adopting a ten-year electoral map but before the next decennial redistricting process.<sup>8</sup>

The Supreme Court held this practice to be constitutional,<sup>9</sup> and state courts and federal and state legislators have moved to restrict such practices.<sup>10</sup> These regulations are understandable, as constant revision of electoral maps jeopardize basic guarantees of free and fair elections,<sup>11</sup> but blanket bans on mid-decade redistricting assume no valid reasons exist to make mid-decade changes to district boundaries. Unfortunately, natural and manmade disasters present a compelling justification for state legislatures to redraw districts ahead of the ordinary decennial

THE DOWNFALL OF TOM DELAY 15–31, 32–35 (2007); *see also* Shaw v. Reno, 509 U.S. 630 (1993) (declaring electoral districts drawn on the basis of race alone violate the Equal Protection Clause); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (finding partisan gerrymandering claims nonjudicial under the Constitution).

<sup>7</sup> *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973(a) (2000)); FLA. CONST. art. III, §§ 20–21; CAL. CONST. art. 21, § 2; IDAHO CODE § 72-1506; ME. REV. STAT. tit. 21A, §§ 1206, 1206-A; *see also* Wesberry v. Sanders, 376 U.S. 1 (1964) (requiring equal population between congressional districts within the same state); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (requiring “substantially equal” population between state legislative districts); Karcher v. Daggett, 462 U.S. 725 (1983) (stating compactness, local government boundaries, and other traditional redistricting principles constitute legitimate state interests).

<sup>8</sup> Erik J. Engstrom, *Stacking the States, Stacking the House: The Partisan Consequences of Congressional Redistricting in the 19th Century*, 100 AM. POL. SCI. REV. 419, 420 (2006); Richard Gladden, *The Federal Constitutional Prohibition Against “Mid-Decade” Congressional Redistricting: Its State Constitutional Origins, Subsequent Development, and Tenuous Future*, 37 RUTGERS L.J. 1133, 1134 (2006); Patrick Marecki, Note, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 VAND. L. REV. 1935, 1935–36 (2004).

<sup>9</sup> League of United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399, 415 (2006) (Kennedy, J., plurality opinion) (stating the U.S. Constitution contains “no explicit prohibition” on mid-decade redistricting).

<sup>10</sup> *See, e.g.*, People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003); Legislature v. Deukmejian, 669 P.2d 17 (Cal. 1983); For the People Act, H.R. 1, 117th Cong. § 2402 (2021) (as passed by House of Representatives, Mar. 3, 2021); Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2023, H.R. 42, 118th Cong. § 2 (previously introduced in 2013 and each year thereafter); John Tanner and Jim Cooper Fairness and Independence in Redistricting Act, H.R. 3221, 118th Cong. § 2 (2023) (requiring, *inter alia*, congressional districts be drawn only once after the federal Census and apportionment). *See generally* Justin Levitt & Michael P. McDonald, *Taking the “Re” out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247 (2006) (reviewing, just prior to LULAC, state constitutional requirements on when redistricting may occur).

<sup>11</sup> SEABROOK, *supra* note 1, at 3–6.

process.<sup>12</sup> Disasters can cause dramatic shifts in population that result in districts violative of equal population requirements<sup>13</sup> and unrepresentative of voters' interests.<sup>14</sup> Mid-decade redistricting under these circumstances—which could be thought of as “emergency redistricting”—should not be precluded by judicial and legislative attempts to regulate suspect apportionment processes.

While disasters, like redistricting, have occurred since the Founding, it is especially important for lawmakers to be prepared now because of the effect climate change is having on weather events, regional conditions, and manmade infrastructure.<sup>15</sup> Climate change is making weather events more frequent and severe<sup>16</sup> and local environments more disaster-prone,<sup>17</sup> while infrastructure is deteriorating faster and being placed under increasing stress.<sup>18</sup> The ongoing recovery efforts from Hurricane Ian, among so many others, put in striking relief the size, scope, and immediacy of climate-change-driven disasters on local communities.<sup>19</sup> This trend is not expected to stop any time soon.<sup>20</sup>

This Note argues that judicial and legislative efforts to constrain redistricting should incorporate legal stopgaps to allow for mid-decade redistricting in the wake of disasters that result in significant population displacement. Part I reviews how climate change is exacerbating natural and manmade disasters and the potential for these disasters to cause population displacement, particularly in the context of urbanization. Part II provides an overview of the typical redistricting process and requirements for electoral districts. It also details the debate over mid-decade redistricting, including efforts to prevent it. Part III proposes preconditions for “emergency redistricting” that judges and legislators should consider when regulating mid-decade redistricting. It then discusses how population displacement owing to disasters may drive districts out of

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<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part I.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See WORLD METEOROLOGICAL ORG. (“WMO”), WMO ATLAS OF MORTALITY AND ECONOMIC LOSSES FROM WEATHER, CLIMATE AND WATER EXTREMES (1970–2019) (2021).

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

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

<sup>18</sup> *Id.*

<sup>19</sup> Ian Livingston, *What Made Hurricane Ian so Intense: By the Numbers*, WASH. POST (Oct. 4, 2022), <https://www.washingtonpost.com/climate-environment/2022/10/04/hurricane-ian-statistics-deaths-winds-surge/> [https://perma.cc/6X7G-LR95].

<sup>20</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (“IPCC”), SIXTH ASSESSMENT REPORT: CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS (SUMMARY FOR POLICY-MAKERS) 14 (2021).

compliance with established redistricting criteria, and concludes by noting how unrepresentative districts may complicate recovery efforts and implicate political, social, and democratic norms in the electoral process.

Emergency redistricting will not prevent the worst effects of climate change or resolve tension over mid-decade redistricting, but as both problems unfold, lawmakers should not eliminate their only tool for ensuring districts accurately reflect communities disrupted by environmental tragedy.

## I. CLIMATE-DRIVEN DISASTERS RISK SIGNIFICANT POPULATION DISPLACEMENT

### A. *Disasters: More Frequent and Severe*

To be expected, “disaster” means different things to different people, and the same is true among academics and professionals.<sup>21</sup> At first glance, “disaster” is nearly interchangeable with emergency, crisis, catastrophe, or “act of God,” but scholars rightfully distinguish between how such terms are used colloquially and technically.<sup>22</sup> This nuance doesn’t just effect clarity; it has legal implications.<sup>23</sup> For conceptual ease, this Note uses “disaster” capaciously to include events with global, domestic, or local effects and varieties of origins. Fittingly, the Texas Disaster Act of 1975 offers a helpful definition:

“Disaster” means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action,

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<sup>21</sup> Austin Sarat & Javier Lezaun, *The Challenge of Crisis and Catastrophe in Law and Politics*, in *CATASTROPHE: LAW, POLITICS, AND THE HUMANITARIAN IMPULSE* 1–4 (Austin Sarat & Javier Lezaun eds., 2009).

<sup>22</sup> *Id.*; Peter Schuck, *Crisis and Catastrophe in Science, Law, and Politics: Mapping the Terrain*, in *CATASTROPHE: LAW, POLITICS, AND THE HUMANITARIAN IMPULSE* 26–30 (Austin Sarat & Javier Lezaun eds., 2009).

<sup>23</sup> Schuck, *supra* note 22; Susan Sterett, *New Orleans Everywhere: Bureaucratic Accountability and Housing Policy After Katrina*, in *CATASTROPHE: LAW, POLITICS, AND THE HUMANITARIAN IMPULSE* 85–87 (Austin Sarat & Javier Lezaun eds., 2009); DANIEL A. FARBER, JIM CHEN, ROBERT R.M. VERCHICK & LISA GROW SUN, *DISASTER LAW AND POLICY* 3, 161 (2d ed. 2010).

extreme heat, cybersecurity event, other public calamity requiring emergency action, or energy emergency.<sup>24</sup>

Because this Note highlights disasters linked to climate and environmental change, coordinated violence, hostile military action, and similar security threats are not included.<sup>25</sup> And since the focus here is primarily on the intersection of population displacement and electoral redistricting,<sup>26</sup> situations like localized outbreaks of disease or dramatic rises in crime, though disastrous, are deprioritized for more “conventional” disasters.<sup>27</sup>

Disasters are by nature rare and difficult to predict, but they are on the rise and present serious policy concerns for lawmakers.<sup>28</sup> Disasters upend communities, interrupt economic activity, and often leave in their wake a record of destruction and death.<sup>29</sup> In the twenty-first century, high-profile hurricanes and wildfires put national attention on disaster destruction,<sup>30</sup> and crises like the Fukushima nuclear disaster in Ōkuma, Japan, indicate how natural events can collide with policy decisions to devastating effect.<sup>31</sup>

The frequency and severity of these disasters are increasing as the climate worsens.<sup>32</sup> Climate change makes extreme weather events more common and destructive.<sup>33</sup> Average annual severe systems that

<sup>24</sup> TEX. GOV'T CODE ANN. § 418.004(1) (West 2019).

<sup>25</sup> However, the linkage between climate change and national security events is duly noted. *See, e.g.*, Andrew R. Hohen & Thom Shanker, *Climate Security Is National Security*, RAND CORP.: THE RAND BLOG (June 30, 2023), <https://www.rand.org/blog/2023/06/climate-security-is-national-security.html> [<https://perma.cc/R6JL-QC3H>].

<sup>26</sup> *See infra* Part III.

<sup>27</sup> *See infra* Part I.

<sup>28</sup> WMO, *supra* note 15; IPCC, *supra* note 20.

<sup>29</sup> WMO, *supra* note 15.

<sup>30</sup> *See, e.g.*, James Barron, *The Scars of Hurricane Sandy, 10 Years Later*, N.Y. TIMES (Oct. 28, 2022), <https://www.nytimes.com/2022/10/28/nyregion/the-scars-of-hurricane-sandy-10-years-later.html> [<https://perma.cc/8G49-G5FZ>]; Melodi Smith, *Reflections on Katrina*, CNN (Aug. 15, 2015), <https://www.cnn.com/2015/08/18/us/hurricane-katrina-reflections/index.html> [<https://perma.cc/Y5QN-YTU6>]; *California Wildfires Map*, L.A. TIMES (2022), <https://www.latimes.com/wildfires-map/> [<https://perma.cc/EJZ6-XBMJ>].

<sup>31</sup> WORLD NUCLEAR ASS'N (“WNA”), FUKUSHIMA DAIICHI ACCIDENT, <https://world-nuclear.org/information-library/safety-and-security/safety-of-plants/fukushima-daiichi-accident.aspx> [<https://perma.cc/JQK7-A7XV>] (Aug. 2023). Although this Note focuses on the American context, international examples of disasters are valuable for conceptualizing the improbable when there is not yet a U.S. corollary.

<sup>32</sup> WMO, *supra* note 15, at 14–15.

<sup>33</sup> *Id.*

produce wind damage, lightning strikes, and tornados are trending up.<sup>34</sup> So too are tropical storms capable of hurricanes and monsoon-like conditions,<sup>35</sup> and with them severe flooding, water contamination, and structural damage to buildings.<sup>36</sup> Climate even alters ecological conditions such that normal weather patterns have disastrous effects, like drought conditions for wildfires and warmer headwaters making areas downstream flood-prone.<sup>37</sup> In each case weather events may be relatively mild, but climate change sits as an environmental powder keg amid lightning storms, heavy rains, and severe heat.

These impacts create additional stress on critical infrastructure like water management, transportation, and energy supply because changes in climate cause antiquated systems to deteriorate faster and operate above capacity.<sup>38</sup> For example, of the 615,002 highway bridges in the United States, nearly 55,000 are considered structurally deficient, and most bridges nationwide may reach absolute carrier capacity under even conservative climate modeling.<sup>39</sup> Higher average daily temperatures coupled with changes to water composition corrode bridges and similar structures more quickly with attendant economic and budgetary consequences.<sup>40</sup> Extreme heat and flooding adds pressure to water supply systems and electric grids,<sup>41</sup> accelerating normal deterioration with greater odds of catastrophic failure during a simultaneous catastrophe.<sup>42</sup> These risks are disproportionately felt in coastal regions,<sup>43</sup> but they are

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<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.* at 40–47.

<sup>37</sup> IPCC, *supra* note 20, at 24.

<sup>38</sup> ORG. FOR ECON. CO-OP. & DEV. (“OECD”), CLIMATE-RESILIENT INFRASTRUCTURE 2–3 (2018).

<sup>39</sup> Susan Palu & Hussam Mahmoud, *Impact of Climate Change on the Integrity of the Superstructure of Deteriorated U.S. Bridges*, PLOS ONE, Oct. 2019, at 2–7, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0223307> [<https://perma.cc/HD5Y-AF97>].

<sup>40</sup> Anne Manning, *Climate Change Could Hasten Deterioration of U.S. Bridge Infrastructure*, COLO. STATE UNIV. (Oct. 23, 2019), <https://enr.source.colostate.edu/climate-change-could-hasten-deterioration-of-u-s-bridge-infrastructure/> [<https://perma.cc/E3FD-Q9HW>].

<sup>41</sup> Paul Chinowsky, *Intense Heat Waves and Flooding Are Battering Electricity and Water Systems, as America’s Aging Infrastructure Sags Under the Pressure of Climate Change*, PREVENTIONWEB (Sept. 7, 2022), <https://www.preventionweb.net/news/intense-heat-waves-and-flooding-are-battering-electricity-and-water-systems-americas-aging> [<https://perma.cc/P2K2-QEKN>].

<sup>42</sup> *Id.*

<sup>43</sup> James E. Neumann, Paul Chinowsky, Jacob Helman, Margaret Black, Charles Fant, Kenneth Strzpek & Jeremy Martinich, *Climate Effects on US Infrastructure: The*

not so contained.<sup>44</sup> Though coastal areas bear the heavier burden for now, as climate effects continue, shorelines may only be front lines in the fight to adapt to the climate.<sup>45</sup> Across the country, legal decision-makers need to assume the heightened risk of disasters are sufficient to anticipate extreme and unpredictable circumstances, even while the immediacy of the problem may vary.

Environmental and energy policy decisions, such as domestic oil drilling and fracking, show the indirect risks policymakers have baked into communities nationwide.<sup>46</sup> These forms of energy production increase the rate of earthquakes and mudslides, with immediate consequences for area communities.<sup>47</sup> Climate and other environmental concerns are also requiring leaders to explore alternative energy sources.<sup>48</sup> Many hold promise for reducing carbon emissions and pollution,<sup>49</sup> but they present further risks in the context of disasters. Common renewables like wind and solar are susceptible to worsening environmental patterns<sup>50</sup> and present technical and logistical challenges for which administrators are less prepared during an emergency.<sup>51</sup> Nuclear energy, while less pervasive in the United States, is an intuitive example: efficient and clean energy makes it attractive for diversifying energy sources, but the changing climate increases the chance for reactor failure.<sup>52</sup> A nuclear event would, of course, be a disaster of highest order for the environment and surrounding populations.<sup>53</sup>

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*Economics of Adaptation for Rail, Roads, and Coastal Development*, CLIMATIC CHANGE, Aug. 19, 2021, at 1, 1–3.

<sup>44</sup> *Id.*

<sup>45</sup> Daniel Wood & Matt Dozier, *MAP: How Climate Change Threatens America's Energy Infrastructure in Every Region*, U.S. DEP'T OF ENERGY (Oct. 9, 2015), <https://www.energy.gov/articles/map-how-climate-change-threatens-americas-energy-infrastructure-every-region> [<https://perma.cc/2MRC-YGQS>].

<sup>46</sup> NAT'L RSCH. COUNCIL, *INDUCED SEISMICITY POTENTIAL IN ENERGY TECHNOLOGIES* 1 (2013).

<sup>47</sup> *Id.*

<sup>48</sup> Tricia White, *Countering Climate Change with Renewable Energy Technologies*, FED'N AM. SCIENTISTS (July 8, 2021), <https://fas.org/blogs/sciencepolicy/countering-climate-change-with-renewable-energy-technologies/> [<https://perma.cc/ZS6K-QG64>].

<sup>49</sup> *Id.*

<sup>50</sup> David E.H.J. Gernaat, Harmen Sytze de Boer, Vassilis Daioglou, Seleshi G. Yalaw, Christoph Müller & Detlef P. van Vuuren, *Climate Change Impacts on Renewable Energy Supply*, 11 NATURE CLIMATE CHANGE 119, 119–25 (2021).

<sup>51</sup> *Id.*

<sup>52</sup> WNA, *supra* note 31.

<sup>53</sup> *Id.*



Mitigation and resiliency efforts are under way, and they may reduce disaster effects, but their benefits are not uniform and may take years or decades to materialize.<sup>54</sup> Preparation is more effective with some types of disasters than others. While hurricanes and flooding present opportunities for resiliency investment,<sup>55</sup> it is less clear how communities can accommodate direct impacts by tornadoes, earthquakes, and wildfires.<sup>56</sup> Less clear still is how enough communities could quickly adopt, much less implement, effective deterrence sufficient to render contingency planning irrelevant.<sup>57</sup> This would take herculean efforts by federal, state, and local leaders to pool resources and manpower—and political will—that seem utopian after passage of the Inflation Reduction Act and the end of near-term opportunities for major investment in federal climate prevention.<sup>58</sup> Mitigation and resiliency nevertheless remain vital to managing the climate, but immediate risks require policymakers anticipate how communities will respond to unlikely but foreseeable situations.

Disaster after disaster, climate change raises the odds and stakes of emergency situations. The effects of a changing climate—be it extreme weather, depleted infrastructure, or adaptive energy production—allocate the probability of disaster unequally but broadly.<sup>59</sup> As such, populations across the United States, like so many globally, are increasingly vulnerable to disaster scenarios. Policymakers rightfully prioritize prevention, but they must also contend with the inevitability of crises and their consequences.

### *B. Disasters Can Cause Significant Population Displacement*

Climate-driven disasters dovetail with a U.S. population increasingly concentrated in urban and suburban settings,<sup>60</sup> worsening the odds

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<sup>54</sup> See OECD, *supra* note 38.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; Christopher C. French, *America on Fire: Climate Change, Wildfires & Insuring Natural Catastrophes*, 54 U.C. DAVIS L. REV. 817, 819–26 (2020).

<sup>57</sup> *Id.*; but see Uma Outka & Richard Feiock, *Local Promise for Climate Mitigation: An Empirical Assessment*, 36 WM. & MARY ENV'T L. & POL'Y REV. 635, 639–48 (2012).

<sup>58</sup> See Silvio Marcacci, *The Inflation Reduction Act Is the Most Important Climate Action in U.S. History*, FORBES (Aug. 2, 2022), <https://www.forbes.com/sites/energyinnovation/2022/08/02/the-inflation-reduction-act-is-the-most-important-climate-action-in-us-history/?sh=10c1cc82434d> [<https://perma.cc/D9TF-PN8F>].

<sup>59</sup> See Wood & Dozier, *supra* note 45.

<sup>60</sup> *Causal Analysis/Diagnosis Decision Information System (CADDIS): Urbanization—Overview*, ENV'T PROT. AGENCY (“EPA”), <https://www.epa.gov/caddis-vol2/urbanization>

of major population centers being hit and countless people being displaced. No matter the absolute population in any given area, growing percentages of people in each region live in more tightly packed areas.<sup>61</sup>

For electoral districts, sustained urbanization has led to more districts incorporating or bordering dense population centers.<sup>62</sup> These districts, particularly at state and local levels, cover smaller geographic areas, making them particularly sensitive to changes in population.<sup>63</sup> While disasters vary in how they impact different regions, urban centers are as likely to be affected by a disaster as nearby, less populated areas. Urbanization does not necessarily increase the likelihood of a particular area being hit by a disaster, but it raises the stakes in the event of impact.<sup>64</sup>

The history of U.S. disasters doubles as a grim litany of dislocation. Many are familiar with the devastating effects of Hurricane Katrina on the city of New Orleans. In August of 2005, the Category 5 hurricane wrought havoc on communities along the Gulf Coast, especially in Louisiana and Mississippi.<sup>65</sup> Residents of New Orleans found themselves caught in an historic “set of catastrophes,”<sup>66</sup> enduring not just the initial onslaught of severe weather, but subsequent flooding, emergency mismanagement, and media frenzy.<sup>67</sup> When the levees broke, eighty percent of the city was submerged in floodwaters, with some neighborhoods experiencing over twenty feet of water.<sup>68</sup> By the following January, nearly two-thirds of the population of Orleans Parish was displaced; that July, more than half of parish residents remained dislocated.<sup>69</sup> A tragic ninety-five percent of residents in neighboring St. Bernard Parish were

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-overview [<https://perma.cc/B6VD-SJKB>] (Apr. 10, 2023); FARBER ET AL., *supra* note 23, at 23.

<sup>61</sup> EPA, *supra* note 60.

<sup>62</sup> *See id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Cf.* FARBER ET AL., *supra* note 23.

<sup>65</sup> Sterett, *supra* note 23, at 85.

<sup>66</sup> The Aftermath of Katrina (CNN television broadcast Sept. 3, 2005) (*available at* <https://transcripts.cnn.com/show/cst/date/2005-09-03/segment/04> [<https://perma.cc/V7FP-V4QK>]).

<sup>67</sup> Thomas A. Birkland, *Emergency Management and the Courts in the Wake of Hurricane Katrina*, in CATASTROPHE: LAW, POLITICS, AND THE HUMANITARIAN IMPULSE 85–87 (Austin Sarat & Javier Lezaun eds., 2009).

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

<sup>69</sup> Gregory S. Stone, Alden K. Henderson, Stephanie I. Davis, Michael Lewin, Iris Shimizu, Ramesh Krishnamurthy, Kris Bisgard, Robin Lee, Aisha Jumaan, Erin Marziale, Miranda Bryant, Clayton Williams, Karen Mason, Maria Sirois, Makiko Hori, Jonathan Chapman & David J. Bowman, *Lessons from the 2006 Louisiana Health and Population Survey*, 36 DISASTERS 270, 280 (2012).

lost,<sup>70</sup> contributing to a total of 1.1 million people displaced across southern Louisiana.<sup>71</sup> As one study reported, this “mass population movement changed the size and demographics of the population in the hurricane-affected areas and in the cities and the towns that received the displaced people.”<sup>72</sup> Modern cities are remarkably resilient even in the face of catastrophe,<sup>73</sup> but New Orleans’ seventy-two neighborhoods remain altered today in both overall population and demographic composition.<sup>74</sup>

Hurricane Katrina was in many ways exceptional, but it is far from isolated. The Mississippi Flood of 1927 ravaged residents spanning eleven states, from the Deep South through the northern Midwest.<sup>75</sup> Between 700,000 and one million people lost their homes after waters as high as thirty feet decimated communities along the river.<sup>76</sup> Across 27,000 square miles of flooded land, numerous municipalities and counties were permanently changed,<sup>77</sup> with Greenville, Mississippi, serving as a harrowing example of the devastation.<sup>78</sup> In a matter of days, the overwhelmingly Black city of 15,000 people was transformed into a tent city, as members of the National Guard, Red Cross, and state government attempted to organize levee repairs and administer aid.<sup>79</sup> For months after, the city operated as a dystopic American Venice.<sup>80</sup> Across the

<sup>70</sup> WILLIAM FREY & AUDREY SINGER, *KATRINA AND RITA IMPACTS ON GULF COAST POPULATIONS: FIRST CENSUS FINDINGS 1* (Brookings Inst. ed., 2006).

<sup>71</sup> Stone et al., *supra* note 69, at 270.

<sup>72</sup> *Id.*

<sup>73</sup> FARBER ET AL., *supra* note 23, at 24.

<sup>74</sup> See Kelsey Nowakowski, *Charts Show How Hurricane Katrina Changed New Orleans*, NAT’L GEOGRAPHIC (Aug. 29, 2015), <https://www.nationalgeographic.com/science/article/150828-data-points-how-hurricane-katrina-changed-new-orleans> [<https://perma.cc/5LV2-ECJG>]; Richard Hornbreak & Suresh Naidu, *When the Levee Breaks: Black Migration and Economic Development in the American South*, 104 AM. ECON. REV. 963, 975–76.

<sup>75</sup> See Laura Coyle, *The Great Mississippi River Flood of 1927*, SMITHSONIAN, <https://nmaahc.si.edu/explore/stories/great-mississippi-river-flood-1927> [<https://perma.cc/SK46-7GJ5>] (Jan. 11, 2019).

<sup>76</sup> Linda Wertheimer, *The Mississippi Flood of 1927*, NPR (Sept. 3, 2005), <https://www.npr.org/2005/09/03/4831423/the-mississippi-flood-of-1927> [<https://perma.cc/SKW9-FYDY>].

<sup>77</sup> *Great Mississippi River Flood of 1927*, LAFAYETTE COLL. ART GALLERIES (Mar. 25, 2016), <https://galleries.lafayette.edu/2016/03/25/mississippi-flood-of-1927/> [<https://perma.cc/8FVV-8MP3>].

<sup>78</sup> Princella Wilkerson Nowell, *The Flood of 1927 and Its Impact in Greenville, Mississippi*, MISS. HIST. NOW (Mar. 2006), <https://www.mshistorynow.mdah.ms.gov/issue/the-flood-of-1927-and-its-impact-in-greenville-mississippi> [<https://perma.cc/9Y4W-8A4K>].

<sup>79</sup> *Id.* It should be noted that the relief offered by state and private actors was typically to the benefit of white residents. Many Black residents were not allowed to leave and were functionally conscripted without compensation to assist with recovery efforts. *Id.*

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

Mississippi Delta region, flooded counties lost fourteen percent of the Black share of their populations, a trend that persisted until at least 1970.<sup>81</sup> Paying tribute to a concurrent flood, blues artist Bessie Smith captured the reality of millions: “Backwater blues done called me to pack my things and go / ’cause my house fell down and I can’t live there no more.”<sup>82</sup>

Unfortunately, potential population displacement is not limited to flooding. The Great Alaska Earthquake of 1964 and ensuing tidal wave killed 115 people in the largest earthquake in U.S. history.<sup>83</sup> Though total loss of life was small relative to the quake’s magnitude, officials noted this was partially attributable to the low population density of affected areas.<sup>84</sup> Tellingly, when another serious earthquake occurred in 2018, some Native Alaskan villages that were relocated after the 1964 destruction were likely spared.<sup>85</sup> In California, the earlier San Francisco earthquake of 1906 thrust over half the city’s inhabitants into homelessness,<sup>86</sup> and a future San Andreas Faultline event may dwarf it, with an estimated 400,000 to 600,000 people at risk of displacement and over \$100 billion in property damage.<sup>87</sup>

Other threats abound. Wildland–urban interface (“WUI”) areas are proliferating as more people move near wildlands reliant on seasonal wildfires to replenish ecosystems.<sup>88</sup> With an estimated 2.2 million homes in the western Rocky Mountains being built in WUI areas by the end of 2030, local and state governments are forced to mitigate wildfires that would ordinarily not touch urban areas.<sup>89</sup> Even worse, mitigation efforts actually increase the eventual magnitude of wildfires, with less vegetation burned naturally during cyclical fires.<sup>90</sup>

<sup>81</sup> Hornbreak & Naidu, *supra* note 74, at 975–78.

<sup>82</sup> BESSIE SMITH, *BACKWATER BLUES* (Columbia Records 1927).

<sup>83</sup> ALASKA DEP’T OF HEALTH & SOC. SERVS., DIV. OF PUB. HEALTH, *ALASKA FACTS AND FIGURES: 1964 EARTHQUAKE MORTALITY IN ALASKA 1* (2019).

<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.*

<sup>86</sup> *The Great 1906 San Francisco Earthquake: Casualties and Damage*, U.S. GEOLOGICAL SURV., <https://earthquake.usgs.gov/earthquakes/events/1906calif/18april/casualties.php> [<https://perma.cc/D9A8-NWQE>] (last visited Dec. 4, 2023).

<sup>87</sup> FARBER ET AL., *supra* note 23, at 39–40. The authors note despite improvements in disaster response and building codes, the population of San Francisco has doubled since 1906, with the Bay Area growing tenfold.

<sup>88</sup> *Id.* at 41.

<sup>89</sup> See OFF. OF INSPECTOR GEN. W. REGION, U.S. DEP’T OF AGRIC., *AUDIT REPORT: FOREST SERVICE LARGE FIRE SUPPRESSION COSTS*, REPORT NO. 08601-44-SF (2006).

<sup>90</sup> FARBER ET AL., *supra* note 23, at 41–43.

Disasters have the potential to displace individuals in large quantities, with many unable to return to where they lived. Some cannot afford to return and rebuild, perhaps because the affected area is so devastated that near-term rebuilding is impossible.<sup>91</sup> Some may have the resources and opportunity to return but choose otherwise for fear of future impact or traumatic experiences from the disaster.<sup>92</sup> In especially extreme circumstances, deaths from a disaster could alter population distribution, though this is unlikely.<sup>93</sup>

Immediate displacement compounds with projected rates of internal migration among the U.S. population due to coastal erosion, extreme heat, and agricultural depletion.<sup>94</sup> This may be especially intense as the initial effects of climate change manifest, since current migration rates do not reflect the anticipated climate risks of their respective areas.<sup>95</sup> While elevated migration rates are not statistically significant enough to implicate redistricting concerns, they may combine with or aggrandize disaster-driven population displacement.

To illustrate, one study found nearly twenty percent outmigration occurred in the hardest hit Dust Bowl counties across four states.<sup>96</sup> While that alone might very well draw concern for affected districts, if an acute disaster were introduced into that context it would have a dynamic effect on existing migration patterns. Communities in the identified counties were already hobbled economically, which undermined the resilience of neighboring counties less impacted by the Dust Bowl.<sup>97</sup> Additional pressure on an already volatile situation could have led to skyrocketing outmigration, with ripple effects across the affected states and regions, including the political subdivisions that received the majority of migrants and displaced persons.

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<sup>91</sup> Shannon Van Zandt, *Disasters Can Wipe Out Affordable Housing Forever Unless Communities Plan Ahead—That Loss Hurts the Economy*, TEX. A&M TODAY (Feb. 10, 2022), <https://today.tamu.edu/2022/02/10/disasters-can-wipe-out-affordable-housing-for-ever-unless-communities-plan-ahead-that-loss-hurts-the-economy/> [https://perma.cc/J4K9-9TQG].

<sup>92</sup> Nikunj Makwana, *Disaster and Its Impact on Mental Health: A Narrative Review*, 8 J. FAM. MED. & PRIMARY CARE 3090, 3091 (2019).

<sup>93</sup> Elizabeth Frankenberg, Maria Laurito & Duncan Thomas, *The Demography of Disasters*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 4 (2d ed. 2014).

<sup>94</sup> U.S. CLIMATE CHANGE SCI. PROGRAM (“CCSP”), WEATHER AND CLIMATE EXTREMES IN A CHANGING CLIMATE 25 (2008).

<sup>95</sup> *Id.*

<sup>96</sup> Jason Long & Henry E. Siu, *Refugees from Dust and Shrinking Land: Tracking the Dust Bowl Migrants* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22108, 2016).

<sup>97</sup> *Id.* at 2–3.

This is precisely what happened after the Great Mississippi Flood, as displaced Black laborers and families joined the larger Great Migration of Black Americans away from Southern poverty and Jim Crow apartheid.<sup>98</sup> Depending on how quickly policymakers, economic leaders, and individuals adopt practices less disruptive to the climate, the United States may face worse internal migration than during the Dust Bowl or the Great Migration in some areas.<sup>99</sup> The full impact such migration would have on society and culture is outside the scope of this Note, but the implications of heightened migration in conjunction with acute displacement on redistricting are profound.

For the purposes of electoral districts, one can conceptualize population displacement as taking any of the following forms: (1) district to nearby district (residents of one area of the city are displaced to another); (2) district to non-local district (residents of a population center are displaced to an area outside it); and (3) district to out-of-state district (residents are displaced across state borders).<sup>100</sup> In addition, population displacement may be (4) nation to nation, which implicates important international law and foreign districting processes not covered here.<sup>101</sup> Nonetheless, foreign nationals could become refugees because of a disaster in their home country, and U.S. communities taking them in must consider refugees' needs in political decision-making. Conceptually, foreign-born refugees and migrants under these circumstances would be treated be as new residents for redistricting purposes.<sup>102</sup>

Each scenario has obvious implications for the affected area, but districts the disaster spared may still experience sizeable population influx. More localized displacement may warrant looking only to the immediate area, but widespread devastation may shift population around and across state lines. Protecting, resettling, and supporting displaced persons is a nuanced process with material and political consequences, requiring a mix of technical and community knowledge.<sup>103</sup> And

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<sup>98</sup> See Coyle, *supra* note 75.

<sup>99</sup> CCSP, *supra* note 94.

<sup>100</sup> See Nowakowski, *supra* note 74; Hornbreak & Naidu, *supra* note 74, at 975–76; Stone et al., *supra* note 69, at 280.

<sup>101</sup> Michelle Rupp, Note, *Internally Displaced Persons and Electoral Participation: A Call for Best Practices*, 25 GEO. IMMIGR. L.J. 681 (2011).

<sup>102</sup> Representatives are apportioned based on the total number of people in a given jurisdiction, regardless of their citizenship. See Earl M. Maltz, NAT'L CONST. CTR., *Power in Numbers: Reapportionment and the Constitution*, CONST. SPOTLIGHT SERIES 3 (2011).

<sup>103</sup> See ERNEST ABBOTT, OTTO HETZEL & ALAN COHN, STATE, LOCAL, AND FIRST RESPONDER ISSUES: HURRICANE KATRINA TASK FORCE SUBCOMMITTEE REPORT (2006); Walter Kälin,

recovery efforts in affected areas are no less fraught, necessitating significant administrative and decision-making authority by local governments, many of whom are elected.<sup>104</sup>

## II. REDISTRICTING, TRADITIONAL DISTRICT PRINCIPLES, AND MID-DECADE REDISTRICTING CONCERNS

### A. *Redistricting Processes and Traditional District Principles*

At the outset of any redistricting process, it is important to distinguish between apportionment and redistricting. At the federal level, apportionment refers to the allocation by population of each state's number of seats in the House of Representatives.<sup>105</sup> Apportionment is constitutionally required every ten years and must be based on an "Enumeration" conducted by the federal government.<sup>106</sup> This "Enumeration" has almost always been the national Census, and it forms the bedrock data states then use to draw districts for the representatives they've been apportioned.<sup>107</sup> The Supreme Court and federal law now requires apportionment based on valid Census information every decade.<sup>108</sup> As a result, most redistricting for federal, state, and local districts occurs every ten years as well, after the release of the Census and confirmation of the number of congressional seats awarded to each state.<sup>109</sup>

Though decennial redistricting was not always the norm in American politics, modern states almost always draw new districts every ten years following the Census. The Supreme Court has not held this to be a constitutional requirement, but it has indicated that failure to do so would be treated with scrutiny and likely require an extraordinary circumstance.<sup>110</sup> As such, this Note will treat decennial redistricting as a mandatory floor for the frequency with which states draw new electoral maps.

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*A Human Rights Perspective for Major Natural Disasters*, BROOKINGS INST. (Jan. 14, 2008), <https://www.brookings.edu/on-the-record/a-human-rights-perspective-for-major-natural-disasters/> [<https://perma.cc/58RQ-33P4>].

<sup>104</sup> ABBOTT ET AL., *supra* note 103; Kälin, *supra* note 103.

<sup>105</sup> Maltz, *supra* note 102, at 1–2.

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

<sup>107</sup> *Id.*

<sup>108</sup> *Census in the Constitution*, U.S. CENSUS BUREAU (Nov. 23, 2021), <https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html> [<https://perma.cc/K8EY-6485>].

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

<sup>110</sup> See *Reynolds v. Sims*, 377 U.S. 533, 583–85 (1964).

When states are enacting new electoral districts, a basic requirement for nearly all districts is for them to be based on equal population.<sup>111</sup> Beginning with federal congressional districts, the Supreme Court has extended this requirement to state legislative districts.<sup>112</sup> Under current redistricting jurisprudence, congressional districts must be virtually equal in population and state legislative districts must have “substantial equality of population,”<sup>113</sup> which the Court later construed to be a ten percent deviation in population among state level districts.<sup>114</sup> Congressional districts that are not mathematically equal may be challenged by showing that the legislature could have adopted an equipopulous district plan, but the state can defend their enacted plan by demonstrating that adherence to other legitimate district criteria necessitated the deviation.<sup>115</sup> State legislative districts are afforded more leeway, with deviations below ten percent treated as presumptively constitutional, but challengers may still overcome this presumption by showing the deviation is attributable to invalid redistricting objectives.<sup>116</sup>

With population as a fundamental principle,<sup>117</sup> states also take into consideration other redistricting criteria. So-called traditional redistricting principles include ensuring districts are compact and contiguous, respecting political subdivisions within district boundaries, and preserving communities of interest within the district’s population.<sup>118</sup> Depending on the demographic composition of the state, legislatures may be required to draw district lines to allow certain groups of voters the opportunity to elect a candidate of their choice.<sup>119</sup> State legislators may also prioritize such goals as political competitiveness, incumbency protection, and maintenance of the “core” of existing districts.<sup>120</sup> Though equal

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<sup>111</sup> *Redistricting Criteria*, NAT’L CONF. STATE LEGISLATURES (“NCSL”) (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> [https://perma.cc/SN3E-YYY4].

<sup>112</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964); *Reynolds*, 377 U.S. at 568.

<sup>113</sup> *Reynolds*, 377 U.S. at 579.

<sup>114</sup> *Gaffney v. Cummings*, 412 U.S. 735 (1973).

<sup>115</sup> *Karcher v. Daggett*, 462 U.S. 725 (1983).

<sup>116</sup> See *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (2004).

<sup>117</sup> *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 245 (2015).

<sup>118</sup> NCSL, *supra* note 111; see Frederick McBride & Meredith Bell-Platts, Practitioner’s Note, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. C.R. & C.L. 327, 349–58 (2005) (providing useful analyses of “traditional redistricting principles” and the challenge of meaningfully implementing them).

<sup>119</sup> *Bartlett v. Strickland*, 556 U.S. 1, 2, 11, 12 (2009); see also NAACP LEGAL DEF. & EDUC. FUND, *The Impact of Redistricting in YOUR Community: A Guide to Redistricting* (2010).

<sup>120</sup> NCSL, *supra* note 111.



population requirements are usually enforced, it is not always clear how other district criteria are weighed when a court is reviewing an electoral map; however, states are heavily incentivized to include these principles in their map drawing to avoid political blowback,<sup>121</sup> and they are powerful evidentiary showings of good faith if an electoral map is subject to legal challenge.<sup>122</sup>

Besides population, the qualities of any given district vary widely and typically result from a lengthy political and social process.<sup>123</sup> Nonetheless, district principles are a valuable metric for determining if a state legislature has upheld its constitutional responsibility to create representative districts. If a district so drawn were to suddenly and unforeseeably be stripped of one or more of these characteristics, courts and legislatures could then have an affirmative reason to amend district lines.<sup>124</sup> A disaster that displaces a substantial number of district residents or otherwise significantly disrupts the composition of a district may require just such a re-redistricting.

### B. *The Mid-Decade Redistricting Debate*

As mentioned, redistricting is assumed to occur at least every ten years. Historically, however, redistricting has occurred much more frequently. This practice—typically referred to as mid-cycle or mid-decade redistricting—was prevalent in the nineteenth century and often had considerable political impact.<sup>125</sup> The first recorded mid-decade redistricting occurred in New York ahead of the 1804 and 1806 national elections.<sup>126</sup> Following the Civil War, mid-decade redistricting was commonplace

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<sup>121</sup> See, e.g., David Meyers, *A New Poll Maps Opposition to Gerrymandering*, FULCRUM (Feb. 11, 2022), <https://thefulcrum.us/gerrymandering-is-unpopular> [<https://perma.cc/VAS9-JVSN>].

<sup>122</sup> *Redistricting Criteria: Equal Population*, PUB. MAPPING PROJECT (Sept. 2023), <http://www.publicmapping.org/what-is-redistricting/redistricting-criteria-equal-population> [<https://perma.cc/7CNG-73WM>].

<sup>123</sup> David Stebenne, *Re-Mapping American Politics: The Redistricting Revolution Fifty Years Later*, OHIO STATE UNIV., ORIGINS: CURRENT EVENTS IN HIST. PERSP. (Feb. 2012), <https://origins.osu.edu/article/re-mapping-american-politics-redistricting-revolution-fifty-years-later> [<https://perma.cc/2FMJ-FQV6>].

<sup>124</sup> See generally *Redistricting and the Supreme Court: The Most Significant Cases*, NCSL, <https://www.ncsl.org/redistricting-and-census/redistricting-and-the-supreme-court-the-most-significant-cases> [<https://perma.cc/Z2AB-WXPD>] (Sept. 14, 2021); see also Levitt & McDonald, *supra* note 10, at 1269.

<sup>125</sup> Engstrom, *supra* note 8, at 420.

<sup>126</sup> Gladden, *supra* note 8, at 1160.

enough to have altered partisan control of the U.S. House of Representatives following the 1878 and 1888 elections. In one particularly egregious example, the Ohio legislature redrew congressional districts seven times over a fourteen-year period. Five of these redistrictings occurred in consecutive years.<sup>127</sup>

While mid-decade redistricting was rare during the twentieth century,<sup>128</sup> the early 2000s witnessed a renewed interest in changing district boundaries once an electoral map was already in place.<sup>129</sup> After changing partisan control, the legislatures of Colorado, New Hampshire, Georgia, and Texas each sought to redraw electoral districts.<sup>130</sup> Though the facts differed between states, in each instance the majority party was attempting to reduce the electoral power of the newly ousted party.<sup>131</sup> In all four states, the decennial redistricting process broke down due to legislative deadlock, requiring a court to impose a judicially drawn map.<sup>132</sup> After the 2002 elections were conducted using these districts, state leaders decided to redistrict their states using legislatively enacted plans.<sup>133</sup> By the 2004 elections, three of the states had established new maps, with Georgia following suit in 2006 when the Republican-majority legislature and governor agreed to “cleaner” maps to ostensibly correct past Democratic gerrymanders.<sup>134</sup>

The Colorado and New Hampshire supreme courts both ruled that their respective state constitutions only allowed the legislature to redistrict

<sup>127</sup> Engstrom, *supra* note 8, at 420–21.

<sup>128</sup> *But see* Legislature v. Deukmejian, 669 P.2d 17 (Cal. 1983) (invalidating an attempted mid-decade redistricting plan under the state constitution).

<sup>129</sup> Charlie Cook & Amy Walter, *Mid-Decade Redistricting Growing More Popular*, NAT'L J., Feb. 26, 2005, at 622.

<sup>130</sup> Marecki, *supra* note 8, at 1935; M.V. Hood III & Seth C. McKee, *Gerrymandering on Georgia's Mind: The Effects of Redistricting on Vote Choice in the 2006 Midterm Election*, 89 SW. SOC. SCI. ASS'N 60, 64 (2008); Anna Brown, *Recent History of Redistricting in N.H.*, CONCORD MONITOR (May 17, 2022), <https://www.concordmonitor.com/A-recent-history-of-redistricting-in-NH-46364737> [<https://perma.cc/UKY9-NJJN>].

<sup>131</sup> Marecki, *supra* note 8, at 1947–48; Hood & McKee, *supra* note 130; Brown, *supra* note 130; LUCAS POWE, AMERICA'S LONE STAR CONSTITUTION: HOW SUPREME COURT CASES FROM TEXAS SHAPE THE NATION 237–45 (2018).

<sup>132</sup> Marecki, *supra* note 8, at 1947–48; Hood & McKee, *supra* note 130; POWE, *supra* note 131.

<sup>133</sup> Marecki, *supra* note 8, at 1947–48; Hood & McKee, *supra* note 130; POWE, *supra* note 131; Charles Bullock III, *The History of Redistricting in Georgia*, 52 GA. L. REV. 1057, 1092–95.

<sup>134</sup> Marecki, *supra* note 8, at 1947–48; Hood & McKee, *supra* note 130; POWE, *supra* note 131; Bullock, *supra* note 133.

once per decade, although with important differences in each opinion. In *People ex rel. Salazar v. Davidson*, the Colorado court held that redistricting *must* occur “after and only after” the ten-year apportionment process.<sup>135</sup> When the legislature failed to exercise this power, the court had to intervene, and this intervention exhausted the once-per-decade limit.<sup>136</sup> Importantly, the court declared redistricting may not “happen spontaneously or at the inducement of some other unspecified event,” seemingly closing off any conceivable reason to redistrict mid-decade.<sup>137</sup> Relying in part on the language of the state constitution, the court distinguished Colorado from other states whose constitutions offer more ambiguous redistricting provisions, such as “from time to time,” or which are silent on the matter.<sup>138</sup> The court gestured toward the lack of historical precedent for mid-redistricting in Colorado and referenced a similar line of reasoning by the California Supreme Court dating back to 1907,<sup>139</sup> underscoring the interstate influence of state supreme courts in shaping redistricting jurisprudence.

By contrast, the New Hampshire Supreme Court found that the legislature was entitled to adopt one, but only one, set of districts each decade.<sup>140</sup> Because the court-drawn map was not adopted by the legislature, the new plan was validly enacted.<sup>141</sup> Interestingly, the dissenting justices in the Colorado decision would have likely agreed with their New Hampshire counterparts and welcomed their ruling, as their dissent referenced the supreme courts of Minnesota, Kansas, Iowa, and Massachusetts interpreting their state constitutions to allow for mid-decade redistricting under certain conditions.<sup>142</sup> The dissent did not, however, explore what restrictions, if any, should apply to mid-decade redistricting efforts.<sup>143</sup>

Georgia’s mid-decade redistricting plan was never challenged in court, but the situation in Texas spilled into federal court and was definitively resolved after the Supreme Court’s landmark ruling in *League*

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<sup>135</sup> *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1238 (Colo. 2003).

<sup>136</sup> *Id.*

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

<sup>138</sup> *Id.* at 1240 (referencing the South Carolina and Wyoming state constitutions that do not set a redistricting limit, and the Texas state constitution that makes no mention of redistricting).

<sup>139</sup> *Id.* at 1240–41 (citing *Wheeler v. Herbert*, 92 P. 353 (Cal. 1907)).

<sup>140</sup> *In re Below*, 855 A.2d 459 (N.H. 2004).

<sup>141</sup> *Id.*

<sup>142</sup> *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1249–50 (Colo. 2003) (Kourlis, J. dissenting).

<sup>143</sup> *Id.*

of *United Latin American Citizens (LULAC) v. Perry*.<sup>144</sup> After hearing arguments against Texas's mid-decade plan, the District Court upheld the new maps, finding the state's ability to redistrict "unlimited by constitutional text" and unrestricted to once every decade.<sup>145</sup> On a separate challenge to Texas's districts, the Supreme Court affirmed this reasoning on the issue of mid-decade redistricting: the U.S. Constitution does not prohibit state legislatures from redistricting more than once in a decade.<sup>146</sup> Any restriction on redistricting between Censuses, therefore, must come from federal or state statute, or state court rulings under state law like in Colorado and New Hampshire.

Several state supreme courts have prohibited or limited mid-decade redistricting.<sup>147</sup> Though each jurisdiction applies unique interpretations of their state constitutions, the California Supreme Court summarized the interpretative nuances well in *Legislature v. Deukmejian*.<sup>148</sup> In *Deukmejian*, the court applied its total ban on mid-decade redistricting announced in *Wheeler v. Herbert* to a ballot initiative that attempted to amend the existing redistricting plan.<sup>149</sup> The court rejected the argument that the state constitution's prohibition on mid-decade redistricting applied only to districts enacted by the *legislature*; instead, district maps in California can only be implemented once per decade, regardless of the enacting process.<sup>150</sup> This was the logic that Colorado aligned with in *Salazar*, focusing on whether new districts had been adopted for the decade, not whether the legislature had their opportunity to draw new maps.<sup>151</sup>

As stated, New Hampshire took a different direction, reasoning that a judicially imposed map should be treated differently from a legislatively adopted one.<sup>152</sup> The New Hampshire court is not alone in distinguishing between enacting bodies. For example, in *In re Initiative Petition No. 317 v. Albert*, the Supreme Court of Oklahoma held that the electorate had a right to use the initiative process to alter an act of redistricting,

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<sup>144</sup> *LULAC v. Perry*, 548 U.S. 399 (2006).

<sup>145</sup> *Sessions v. Perry*, 298 F. Supp. 2d, 459 (2004).

<sup>146</sup> *LULAC*, 548 U.S. at 418–19 (plurality opinion, Kennedy, J.).

<sup>147</sup> See, e.g., *Legislature v. Deukmejian*, 669 P.2d 23 (Cal. 1983); *State ex rel. Smith v. Zimmerman*, 63 N.W.2d 58 (Wis. 1954); *Lanning v. Carpenter*, 20 N.Y. 462 (1859); *Noecker v. Woods*, 1-2 A. 510 (Pa. 1917).

<sup>148</sup> 669 P.2d at 24–25.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 29–31.

<sup>151</sup> *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003).

<sup>152</sup> *In re Below*, 855 A.2d 459, 472 (N.H. 2004).

“even though the initiative and the legislative enactment occur[red] during the same ten (10) year period and [were] based upon the same federal census.”<sup>153</sup>

Other state supreme courts have focused less on the enacting body and emphasized the lack of temporal restraints on redistricting. In *Selzer v. Synhorst*, the Supreme Court of Iowa ruled that the ability to redistrict continues “until the duty is performed.”<sup>154</sup> This was echoed by the Massachusetts and Minnesota supreme courts, with Minnesota construing the legislature’s redistricting power to persist “at will.”<sup>155</sup>

Beyond the judicial prohibitions on mid-decade redistricting at the state level, Democratic congressmembers have sought to ban the practice through federal legislation, going so far to include it in their signature election reform package, the For the People Act.<sup>156</sup> Though it stalled in the Senate,<sup>157</sup> the Act was a display of party priorities and suggests Democratic leaders may bring it back for consideration in the future. With talk in North Carolina of redrawing congressional districts after a court-drawn map contributed to disappointing results for Republicans, mid-decade redistricting may be thrust into the national debate again.<sup>158</sup> And while the Supreme Court declined to embrace the so-called “independent state legislature theory” presented in *Moore v. Harper*, the nature and gravity of the case underscored the power—and abusive potential—state legislatures have in setting the rules and landscapes of elections.<sup>159</sup>

For now, opponents of mid-decade redistricting have two paths—federal and state laws and state courts—and they are right to use them. Both avenues have produced or proposed outright bans on mid-decade redistricting, with only the states that mirror the New Hampshire

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<sup>153</sup> 648 P.2d 1207, 1213 (1982); *see also* *Harris v. Shanahan*, 387 P.2d 771, 781 (Kan. 1963).

<sup>154</sup> 113 N.W.2d 936, 952 (Iowa 1962).

<sup>155</sup> *State v. Weatherill*, 147 N.W. 105, 106 (Minn. 1914); *Lamson v. Sec’y of Commonwealth*, 168 N.E.2d 480 (Mass. 1960).

<sup>156</sup> For the People Act, H.R. 1, 117th Cong. § 2402 (2021).

<sup>157</sup> Amanda Becker, *Sweeping Voting Rights Bill Stalls in the Senate*, 19TH (June 22, 2021), <https://19thnews.org/2021/06/voting-rights-for-the-people-act-vote-senate/> [<https://perma.cc/G9T7-QYVE>].

<sup>158</sup> Gary D. Robertson & Hannah Schoenbaum, *NC Democrats’ Parity in Congress Delegation May Be Fleeting*, AP NEWS (Nov. 28, 2022), <https://apnews.com/article/2022-mid-term-elections-us-supreme-court-legislature-raleigh-redistricting-2bbf72f5161344750c54aa965f211aa9> [<https://perma.cc/49LK-GMJM>].

<sup>159</sup> 600 U.S. 1 (2022) (rejecting the “independent state legislature theory,” which could have prevented state court review of, and thus the application of state constitutions to, state legislatures during redistricting).

Supreme Court suggesting a middle path that could curb mid-decade districting without barring its potential legitimate uses.

### III. MID-DECADE REDISTRICTING AS EMERGENCY REDISTRICTING

Mid-decade redistricting is not a tool that legislatures should use lightly. Shifting district lines repeatedly can have disastrous effects for a community, and democracy itself. But so too can functionally disenfranchising devastated populations render electoral boundaries mere lines on a map. State and local officials who draw their authority directly or indirectly from the electorate are crucial actors in the aftermath of a disaster, establishing and implementing both short-term recovery efforts and future growth and mitigation strategies.<sup>160</sup> It is entirely possible that a disaster could strike shortly after new maps are adopted, resulting in multiple election cycles and several years of unrepresentative government. In the words of Justice Richardson, it will come as no comfort to the displaced to be told to “come back again in 10 years and maybe we’ll talk about.”<sup>161</sup> Profound decisions may already have been made and implemented by the next decennial redistricting process. A modern and responsive democracy should be able, if it chooses, to offer displaced communities a meaningful opportunity to have state legislators, county commissioners, and school board members with their interests in mind as they decide how best to rebuild.<sup>162</sup>

#### A. *Preconditions for Emergency Redistricting*

To balance the pernicious effects of mid-decade districting<sup>163</sup> with the need for accurate electoral districts, this Note proposes at least three preconditions judges and legislators should adopt to overcome potential restrictions on mid-decade redistricting. Put another way, redistricting conducted mid-decade should be construed as “emergency redistricting”

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<sup>160</sup> Rupp, *supra* note 101.

<sup>161</sup> *Legislature v. Deukmejian*, 669 P.2d 23, 39 (Cal. 1983) (Richardson, J., dissenting).

<sup>162</sup> For a detailed and thoughtful analysis of local influence in the context of redistricting, see Michael Halberstam, *Process Failure and Transparency Reform in Local Redistricting*, 11 ELECTION L.J. 446, 456–61 (2012).

<sup>163</sup> See James Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1242 (2002); Nicholas M. Goedert, *Redistricting, Risk, and Representation: How Five State Gerrymanders Weathered the Tides of the 2000s*, 13 ELECTION L.J. 406, 412–16 (2014).

when such conditions are satisfied. Accordingly, emergency redistricting should enjoy a presumption of validity when: (1) at least one cycle of elections has yet to occur in the relevant districts before the ordinary decennial redistricting process; (2) a disaster occurred that triggered a state or federal declaration of emergency; and (3) a significant proportion of the population was displaced from the disaster-affected area.

The first precondition provides an effective way to close off obvious abuse in line drawing. If the redistricting process has yet to begin or conclude, it should be expected that legislators or their institutional equivalent would factor disaster effects into promulgating new maps. If new districts have been validly adopted but elections have yet to be conducted, the adopting body could reopen district maps, assuming the remaining preconditions are met and state law allows it.<sup>164</sup> Otherwise, there is little to justify invoking emergency redistricting other than to meddle with usual redistricting timelines or garner political attention.

The second precondition, “actual disaster,” is similarly straightforward. Ample law governs the declaration of emergencies, with the primary responsibility for disaster and emergency management residing with state and local governments.<sup>165</sup> Indeed, it is widely accepted that the obligations and powers of executive actors are at their height under emergency circumstances, particularly when their coordinate legislative bodies have conferred certain authorities on them.<sup>166</sup> As such, in determining if an “actual disaster” occurred, courts and other actors would not need to adopt any new standards or look much beyond the emergency

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<sup>164</sup> Existing rulings that prohibit all mid-decade districting would need to be reinterpreted to allow for such a disaster exemption. See Levitt & McDonald, *supra* note 10.

<sup>165</sup> *Legislative Oversight of Emergency Executive Powers*, NCSL (Sept. 22, 2023), <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers> [<https://perma.cc/9W74-XPUM>] (collecting state laws authorizing and regulating executive declarations of emergency).

<sup>166</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629–33 (1952) (Douglas, J., concurring); ABBOTT ET AL., *supra* note 103 (“[T]he authority of state and local elected officials to act under a state’s police powers is at its apex during a disaster.”). See also William Rice, *States & the Separation of Powers in Times of Emergency*, GEO. PROJECT ON STATE & LOC. GOV’T POL’Y & L., <https://www.law.georgetown.edu/salpal/states-the-separation-of-powers-in-times-of-emergency/> [<https://perma.cc/7WHF-43SJ>] (last visited Dec. 4, 2023); Meryl Justin Chertoff, *The Cavalry Isn’t Coming: Governors and Mayors Take Lead on Coronavirus Pandemic*, GEO. PROJECT ON STATE & LOC. GOV’T POL’Y & L., <https://www.law.georgetown.edu/salpal/the-cavalry-isnt-coming-governors-and-mayors-take-lead-on-coronavirus-pandemic/> [<https://perma.cc/Q27D-GF4U>] (last visited Dec. 4, 2023) (noting the “admittedly broad powers” of governors and some mayors during emergencies).

determination of an executive official in compliance with applicable statutory requirements.

The final precondition, substantial population displacement, is by far the most important, as it provides the evidence of a disaster's impact and a legitimate justification for a mid-decade redistricting. It is also, however, intentionally broad so as to be flexible. In analyzing substantial displacement, an immediate guide would be to apply traditional redistricting requirements to the affected districts.<sup>167</sup> For instance, if the equipopulous requirement for districts was not met, that would clearly constitute substantial displacement for emergency redistricting purposes. Likewise, an existing minority community that was displaced such that it could not elect its candidate of choice would indicate substantiality.

Other redistricting principles would be less powerful but still probative tools in determining if substantial displacement occurred. If communities of interest, especially those recognized during the previous redistricting process, are significantly disrupted, legislators may deem that important enough to edit district lines.<sup>168</sup> If the people living in the "core" of an existing district have been pushed out, some of the justification for that district's boundaries would be undermined and may warrant redrawing.<sup>169</sup>

Crucially, courts and other legal institutions are not simply bound to accept that after an emergency declaration a free-for-all must ensue under the guise of emergency redistricting. It is only when population displacement diminishes the representative capacity and democratic legitimacy of existing districts that emergency redistricting is applicable.

### *B. Final Considerations for Emergency Redistricting*

Acknowledging the potential for disaster-driven displacement is not to overstate its likelihood or imply that line-drawers *must* redistrict after a disaster. Disasters are rare by nature, and depending on the circumstances, there will almost certainly be compelling administrative, political, or social reasons to not engage in this process. Most notably, even if objectively large quantities of people are displaced, their relative share of the given district population may be negligible. For instance,

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<sup>167</sup> See *supra* Part II.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*



displacement is unlikely to impact the population of federal congressional districts to an extent that would require redistricting. The number of individuals living in federal congressional districts, coupled with their geographic size, makes them statistically “hardier” than others to population shifts.<sup>170</sup>

For reasons outlined above, however, state and local districts are far more sensitive to population shifts, leaving open the chance for a disaster to result in abruptly malapportioned maps. Depending on the timing of such an event, several election cycles may take place with unrepresentative populations, elections that will determine the composition of government bodies closest to disaster relief decisions.<sup>171</sup> Under these circumstances, a state or local body may feel it is appropriate to redraw district lines to account for population increases or decreases, an ability that is threatened if courts and legislatures preclude all mid-decade redistricting. Furthermore, establishing the parameters of when it is appropriate to redistrict may prove fraught and inefficient once the effects of a disaster are underway.<sup>172</sup> Legislators should be empowered to plan ahead for possible emergency redistricting, the same way they have for conducting elections under emergency conditions.<sup>173</sup> Judges need not be caught flat-footed either.

## CONCLUSION

As with so many areas of law, climate change demands consideration when setting policy and establishing legal guidance. The realities

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<sup>170</sup> Federal congressional districts are required to contain approximately 700,000 people each, making it unlikely for population displacement to seriously disrupt them. See Daniel McGlone, Jeff Frankl & Luke McKinstry, *Which Congressional Districts Are Over and Under Populated*, AZAVEA (July 29, 2020), <https://www.azavea.com/blog/2020/07/29/which-congressional-districts-are-over-and-under-populated/> [<https://perma.cc/M95J-VTFD>].

<sup>171</sup> FARBER ET AL., *supra* note 23, at 83–84; see also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 522–36 (2007).

<sup>172</sup> Birkland, *supra* note 67 (detailing how difficult it is for courts to conduct ordinary judicial business in the wake of a disaster).

<sup>173</sup> *E.g.*, David Jacobs, *House Committee Reworks Proposed Changes to Emergency Election Procedures*, NEW ORLEANS CITY BUS. DAILY (Oct. 20, 2020), <https://neworleanscitybusiness.com/blog/2020/10/20/house-committee-reworks-proposed-changes-to-emergency-election-procedures/> [<https://perma.cc/CRN6-7U5W>]; see generally Michael Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018).

of a changing climate manifest themselves in vast and unpredictable ways. Its influence on our political system is apparent; its impact on our political districts is unfolding. Legal decision-makers need to factor in the near certainty that, eventually, a disaster will necessitate emergency redistricting to ensure districts are reflective of their population and capable of producing political leaders who are responsive to disaster relief for all their constituents.