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Thinking about Minority Political Influence: Did *Georgia v. Ashcroft* Get It Right and, If Not, Why Not?

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THIS ESSAY IS INTENDED as an empirical complement to Grofman (2006). That essay considered the evolution of the non-retrogression standard used in Section 5 of the Voting Rights Act (VRA), and proposed a new and very specific three-part operationalization of what I took to be the majority views in the Supreme Court's 2003 decision in *Georgia v. Ashcroft* on the meaning of "retrogression." Here, I show the kind of expert witness testimony that could have been presented in the D.C. district court had the Supreme Court remand of the 2001 Georgia Senate plan gone to trial—an event that never happened because it was mooted by the decision in *Larios v. Cox* (D. Ga., 2004) to invalidate the Georgia legislative plans on grounds of violations of "one person, one vote." Contrary to what appears to be the expectations of the Supreme Court majority, I argue that the 2001 Georgia Senate plan, even had it satisfied one person, one vote scrutiny, would not necessarily have passed muster under the new Section 5 retrogression test set forth by the Court majority in *Georgia v. Ashcroft*. Even looking only at retrogression in minority influence, I find the State of Georgia's defense of the 2001 plan as non-retrogressive to be flawed. Nonetheless, I view the outcome of a remand trial as "too close to call." It would have depended upon the persuasiveness of attorneys and experts, and on a handful of key factual issues about whose resolution I can now only speculate given the limitations of the empirical evidence from the public record I had available to me while writing this essay. In any case, regardless of what legal standard may ultimately be adopted, the flow chart model offered in this article (taken from Grofman, 2006), with its enumeration of a carefully sequenced set of factual questions that need to be answered, offers a powerful tool to assist courts to make best use of expert witness testimony to determine compliance with the VRA, and illustrates how this standard can be empirically implemented with real world data. And, perhaps even more importantly, it provides a roadmap to think sensibly about the complicated question of minority political influence which is germane well beyond the litigation context.

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INTRODUCTION

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a Section 5 Voting Rights Act challenge to the State Senate redistricting plan in the State of Georgia, the Supreme Court majority substantially recast the standards for Department of Justice (DOJ) Section 5 preclearance decisions under the Voting Rights Act of 1965. It permitted a jurisdiction to choose to

have its preclearance review conducted either under the test most commonly used by courts after *Beer v. U.S.*, 425 U.S. 130 (1976), a diminution in the number of districts in which minorities had a realistic opportunity to "elect candidates of choice," or under a more comprehensive—but far harder to operationalize—legal standard prohibiting reduction in overall "minority influence."

The Supreme Court majority clearly was of the view that under the legal interpretation of the Section 5 test laid down in *Georgia v. Ashcroft*, the State of Georgia had a strong (and perhaps even compelling) argument that its plan was non-retrogressive. This belief has been echoed by various scholars, even those who found the Court's new legal test less than compelling (see discussion in Karlan, 2004). For a number of reasons, however, I am, highly skeptical about this claim.

First, the notion that the State of Georgia had a winning defense against claimed retrogression in its 2001 Senate plan was based almost entirely on the limited evidence in the initial trial record. This record is especially sparse when looked at in terms of expert witness testimony. Georgia relied heavily on the statistical analyses of its expert witness, Professor David Epstein, in support of the claim that districts with less than a black voting age population majority would, nonetheless, be able to elect candidates of choice. But Epstein's testimony was largely discredited by the criticisms brought against it by Professor Jonathan Katz, who was a witness for the defendant-intervenors. On the other hand, Professor Richard Engstrom, the Department of Justice's chief expert, presented testimony only about racial polarization, and confined his testimony to the three districts (2, 12, and 26) that were objected to by DOJ; defendant-intervenors presented no expert witness testimony on matters other than rebuttal to the work of Epstein.

Although the remand trial of *Georgia v. Ashcroft* never took place, based on the preliminary filings in the case, we can make some judgments about what the trial record in that court would have looked like. First, had a remand trial taken place, the parties would have done a better job in assisting the court. Second, a court cannot decide on the basis of facts that are not brought before it. Had the remand taken place, the record was almost certain to have been opened to new evidence, including evidence about outcomes of the 2002 election, which took place under a consent plan that was very similar (except in a handful of districts) to the 2001 plan proposed by the State of Georgia—evidence I will draw upon in analyses later in the article.

In particular, there are three potentially very significant facts that are now known, but that could not have been known at the time of the first *Georgia v. Ashcroft* trial at the district court level when the 2001 plan was stuck down:[1]

> (a) There was a net decrease of one in the number of black representatives in the Georgia Senate after the 2002 election, as compared to 2000;
>
> (b) There was a net decrease of two in the number of Democratic representatives in the Georgia Senate in 2002 as compared to 2000;
>
> (c) There was a shift in the allegiances of four of the thirty Democratic senators elected in 2002, leading to a change in partisan control of the Georgia Senate (from 30 Democratic senators and 26 Republican senators, to the exact opposite proportions).

In addition, there is one other potentially very important addition to the information that the district court in D. C. would have had to work within a remand trial that may help us how to understand the legal test laid down in *Georgia v. Ashcroft* might have been implemented.

> (d) In response to a request from the district court, the State of Georgia identified the seventeen districts in the 2001 plan that it claimed to be minority influence districts. These were the seventeen districts in the plan that fell within the 25–50% black voting age population range.

This new and potentially highly relevant information, along with more detailed analyses of previously available data in the light of the new retrogression standard, could have led the district court to a quite different perspective on the effect of the 2001 Georgia Senate plan on overall

[1] These facts could not have been known even at the time of the second district court trial on proposed remedies.

minority influence in the Georgia Senate than conclusions based on what could be gleaned from the very limited evidence bearing on minority influence in the initial trial court record.

Second, and relatedly, while there are various assertions in the opinions in *Georgia v. Ashcroft* about what is meant by minority influence, there had never been a trial focusing on that question. In the *Georgia v. Ashcroft* litigation that actually took place, *essentially no evidence was presented on the specific topic of minority influence*. In terms of expert witness testimony, the case was litigated under the *Beer* test. In a remand trial the Court would have heard both expert witness and first-hand testimony about the degree of minority influence in the Georgia legislature, encouraging a very fact-specific analysis. For example in such an analysis, the notion that there is some magic number such that a minority population in excess of that number automatically guarantees that minorities will be influential on the representative from that district would have been strongly rebutted (see discussion in Grofman, 2006).

Third, alternative ways to think sensibly about minority influence, both at the level of individual districts and in the legislature as a whole, would have been presented, including the approach laid out in Grofman (2006) and applied—as best as can be done with the facts publicly available—in this essay.

The primary goals of this essay are two-fold.

First, I wish to consider an interesting counterfactual. What would have happened had the D.C. court considered the Section 5 challenge to the Georgia Senate plan under the dual option "influence *or* electability" standard laid down in *Georgia v. Ashcroft*? The 2003 Supreme Court decision remanded the case back to the District Court for the District of Columbia for further proceedings consistent with the opinion, and a remand trial date had been tentatively set for May 2004. But that remand trial never took place because it was mooted by the decisions in *Larios v. Cox* (D. Ga., 2004), which invalidated the 2002 Georgia legislative plans on grounds of violations of "one person, one vote," and then drew its own plans when the State of Georgia failed to act in a timely fashion.

Second, I wish to revisit more broadly the issue of how to measure minority influence in a way that is relevant to voting rights questions from legal, philosophical, and political perspectives, with the advantage of speaking not in the abstract but with real world evidence in front of us. I propose to do this by conducting a searching inquiry into expected overall minority influence in the Georgia 2001 State Senate plan as compared to the benchmark 1997 plan—to the extent I can with the evidence available from the public record.

In the next section I lay out the basics of the three-pronged test for retrogression proposed in Grofman (2006) that was intended to operationalize Justice O'Connor's views in a way that made them amenable to the presentation of expert witness testimony. In the succeeding section, I apply that test to the Georgia Senate data.

Until the 2006 extension of the Voting Rights Act, whose revised language sought to return Section 5 case law on retrogression to the standards in use after *Beer*, *Georgia v. Ashcroft* appeared to be in line to become the most important voting rights case of the 2000s. Now it might appear that it has been relegated to the scrap heap of history by what is commonly called the "*Georgia v. Ashcroft* fix" found in the new 2006 language of Section 5 (Canon, 2008). However, I am not so sanguine. The objections to constitutionally enshrined rights to minority representation in terms of opportunity to elect minority candidates of choice will not go away that easily, nor will the idea that there is a virtually inevitable tradeoff between minority influence and descriptive representation—an idea that has strong advocates within academia (see e.g., the debates among Grofman, Griffin, and Glazer, 1992; Epstein and O'Halloran, 1999; Lublin and Voss, 2003; Shotts, 2003a,b; and Lublin, Brunell, Grofman, and Handley, 2009), and that can serve to justify the notion that legislatures who claim to be pursuing the former at the expense of the latter may be helping rather than harming minority interests (cf. Canon, 2008). In my view, regardless of the language of the recent Voting Rights Act extension, the issue of minority influence is simply not likely to go away. Looking in factual terms at the 2001 Georgia Senate plan in terms of minority influence allows us insights that will be helpful in thinking about the Section 5 compliance issues (and Section 2 issues as well) that may arise in the next round of redistricting.

In particular, regardless of the eventual legal weight to be given the majority opinion in *Georgia v. Ashcroft* in the light of the new language of the 2006 extension of the VRA (perhaps reversing the

Georgia v. Ashcroft standard and returning to *Beer*), the flow chart model offered in this article (and in Grofman 2006), with its enumeration of a carefully sequenced set of factual questions that need to be answered, offers a powerful tool to assist courts to make best use of expert witness testimony to determine compliance with the VRA. In this context, I would emphasize that we must distinguish two distinctive aspects of the discussion that follows: on the one hand, we have a set of questions that need to be answered to evaluate the factual evidence for or against retrogression; on the other hand, we have assertions about the legal standard to be used in aggregating those answers into a judgment about the presence or absence of retrogression. As an experienced expert witness my competence is in the first domain; my claims about the legal standards to be used to evaluate that evidence simply represents my best attempt to think through the implications of Justice O'Connor's opinion in *Georgia v. Ashcroft* when it must be implemented with reference to actual case facts and is thus much more speculative. But, regardless of what the eventual legal standard for retrogression may eventually turn out to be, the first set of questions described below need to be addressed vis-à-vis the *Beer* test for retrogression, and the second and third sets of questions are ones that will need to be addressed if claims about minority influence do become relevant to the legal determination of retrogression.

IF THERE HAD BEEN A REMAND TRIAL

Grofman (2006) provided a three-part "road map" for understanding how one might operationalize the Supreme Court's 2003 *Georgia v. Ashcroft* standard for interpreting retrogression in the "effective exercise of the electoral franchise."[2] In this article I show how most of the analyses proposed in that earlier article can be done for the 2001 Georgia Senate plan. After briefly reviewing the key features of the three-pronged test proposed below for measuring retrogression, I consider how the district court might have evaluated the likely evidentiary record in the light of that test had there actually been a remand trial. In doing so, as noted earlier, I incorporate information about the 2002 election held under a plan that was virtually identical to the challenged plan except for three districts which were minimally changed.

The Grofman (2006) three-pronged approach to measuring retrogression

As argued in my previous more legally- and conceptually-oriented paper, in general, I see three (multi-part) empirical questions that are potentially critical in aiding a court (or the U.S. Department of Justice) to reach a determination about the comparative effects of benchmark and proposed redistricting plans on minority influence and in reaching the ultimate legal judgment about whether or not there has been retrogression under Section 5. While the legal weight to be given the answers to these questions may no longer be what was proposed by Justice O'Connor (and/or I may be inadvertently mischaracterizing some elements of the guidelines laid down by the Supreme Court majority in *Georgia v. Ashcroft*), and regardless of the precedential value of the *Georgia v. Ashcroft* opinion in the light of the new Section 5 language, the first part of the discussion below deals with evidentiary issues that will arise in any cases where DOJ objects to a plan subject to Section 5 preclearance under the *Beer* standard, while the second and third parts will be highly relevant only if a "minority influence" defense to a claim of retrogression is given any legal weight in future Court decisions.

The multi-part empirical questions that define this three-pronged approach are as follows:

> 1(a). Is there is a diminution in the number of minority-control districts, and/or a reduction of black population in some or all of the other districts where it might be said that minorities have a realistic opportunity to elect candidates of choice?
>
> (1b). If the answer to question 1(a) is yes, can it be shown that, nonetheless, the number of minority candidates of choice who can be expected to be elected is the same or higher in the proposed plan as in the baseline plan?
>
> 1(c). If the answer to question 1(a) is yes and the answer to question 1(b) is no, can the jurisdiction nonetheless demonstrate that the re-

[2] Grofman (2006) also reviews empirical evidence bearing on both electability and influence questions and reviews the evolution of the nonretrogression standard used in Section 5 of the Voting Rights Act.

duction in the expected success rate of minority candidates of choice was dictated by demographic changes in the jurisdiction?

2(a). If the answer to questions 1(a) is yes, and the answers to questions 1(b) and 1(c) are both no, can it be shown that the new plan substantially increases the likelihood that the party associated with minority interests will maintain (or regain) control of the legislature as compared to what might be expected were the benchmark plan to be continued?

2(b). If the answer to question 2(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of substantially increasing the probability that the party associated with minority interests would maintain (or regain) control of the legislature?

3(a). If the answer to question 1(a) is yes and the answers to questions 1(b) and 1(c) are no, and the answer to either question 2(a) or 2(b) is no, can it, nonetheless, be shown that the increase in the total number of control plus opportunity plus influence districts was large enough to compensate (in terms of overall minority influence) for whatever reductions may have occurred in the number of control districts and the number of coalition/opportunity districts?

3(b). If the answer to question 3(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of increasing the number of minority influence districts?

These questions make use of the three-fold distinction used by the Supreme Court majority in *Georgia v. Ashcroft* (and elaborated in Grofman, 2006) among

(a) majority-minority control districts,

(b) realistic opportunity to elect districts (where the success of minority candidates of choice is tied to the existence of a reliable level of white cross-over voting), and

(c) simple influence districts.

The questions also follow the Supreme Court majority opinion in *Georgia v. Ashcroft* in distinguishing between two different and potentially legally valid defenses against a claim of retrogression.

In one line of defense, prong one of the test, encompassing the first two-part question above, the jurisdiction would argue that its plan has not decreased *the minority's realistic opportunity to elect minority candidates of choice* compared to the benchmark plan. In the other line of defense, prongs two and three of the test, encompassing the last two sets of questions above, the jurisdiction would argue that, even if the court (or DOJ) were to find that its plan has decreased the minority's realistic opportunity to elect minority candidates of choice compared to the benchmark plan, this fact would not require preclearance denial, because such retrogression was necessary in order to keep *overall minority influence* at or above the level found in the benchmark plan.

Questions two and three represent, however, two distinct routes through which a claimed gain in overall minority influence might be supported. One looks at the *legislature as a whole* and examines the effects of redistricting on whether or not electoral control of the legislature will be in the hands of forces associated with minority interests. The other counts how many *individual districts* can be expected to be ones in which minorities have (some level) of influence.

Each of these questions is one whose resolution almost certainly requires testimony from expert witnesses. However, as also noted in Grofman (2006), even under the *Georgia v. Ashcroft* standard, courts (or the DOJ) may not always need to address all three questions. The set of questions listed above is constructed in the form of an implicit flowchart, so that, if the answers to earlier questions are answered in a particular way, then the deliberations may stop—either because a finding of non-retrogression is clear or because, regardless of which possible valid legal arguments the jurisdiction might choose to offer in favor of a judgment that its plan should be declared non-retrogressive, one or more of the elements necessary to that argument lacks adequate empirical support.

Evaluating retrogression in the 2001 Georgia Senate plan: A look at the evidence

As noted earlier, my analyses will go beyond reexamining the evidence that was available at the ini-

tial trial, in that I consider types of evidence that post-date that trial and which, because they were not part of the trial record, were not dealt with in the 2003 Supreme Court opinion. In the empirical analyses of Georgia Senate redistricting I do include comparison of the 2001 plan with both the 1997 benchmark plan and the 2002 consent plan used for the 2002 election; comparison of the relationship between racial demography and election outcomes in 2000 with that in 2002; and consideration of the implications for minority influence of the party-switching behavior of four white Democratic legislators which occurred after the 2002 election. The close similarities between the 2001 redistricting plan proposed by the State of Georgia and the 2002 consent plan allows for inferences to be made about how the 2001 plan would have operated had it not been denied preclearance based on the results under the 2002 consent plan.

Because of the "flow chart" nature of the three-pronged test, I will consider the three multi-part questions in our three-pronged test in the order listed earlier.

Prong One: Changes in districts where minorities previously possessed an opportunity to elect candidates of choice.

> 1(a). Is there is a diminution in the number of minority-control districts, and/or a reduction of black population in some or all of the other districts where it might be said that minorities have a realistic opportunity to elect candidates of choice?

To begin to determine if there is a case for retrogression in realistic opportunity to elect candidates of choice that even needs to answered, I first need to identify the number of majority-minority control districts in the 2001, 2002, and benchmark plans, and also the changes in black population and voting age population across plans.

Majority-minority control districts. To identify majority-minority control districts, ideally I would like to be able to classify districts according to the minority share of the actual voting electorate. Since no such data were presented at the first trial, absent such data, I propose to use a minority registration percentage of 50% as a *prima facie* indicator of a minority "control" district. While most courts have relied on voting age population (VAP), or citizen voting age population (CVAP),[3] as the legally relevant measure of minority voting strength except in settings where there is evidence that past or present discrimination has suppressed minority political participation, there are very good reasons to make use of registration data by race for present purposes if it is available. First, if you wish to understand minority voting strength, you must take into account citizenship (especially for Hispanic and other minorities with a high proportion of non-citizens). But early in the post-census redistricting season (e.g., Georgia in 2001) CVAP data at the low levels of census aggregation needed for plan drawing are simply not yet available from the U.S. Bureau of the Census (Persily, 2000), and registration data by race are often the best available general surrogate for CVAP. Second, as I have shown elsewhere (Grofman and Barreto, 2009), estimation of bloc voting levels in different racial or ethnic groups is usually better achieved with citizen voting age population, if available, than with simple voting age population (again, especially for Hispanic and other minorities with a high proportion of non-citizens). But registration data by race are even more reliable, and sign-in data by race are best of all. [4] Third, registration data reflect socioeconomic differences that can have a huge impact on the translation of eligible populations into actual voting citizens; if we wish to judge realistic opportunity to elect (or minority influence)[5], knowing the size of actual—rather than potential—electorates is critical (Brace et al., 1988).

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[3] See e.g., *Garza v. County of Los Angeles Board of Supervisors*, 918 F. 2d 763 (9th Cir. 1990).

[4] With a majority of the registrants, the minority might be expected to be able to constitute a majority of the voters on Election Day, which is our definition of minority control—but constituting a majority of the registrants is not sufficient. If there were substantial differences in the turnout levels of minority and non-minority registrants, or if there were substantial differences in minority and non-minority roll-on for the office in question (*roll-on* refers to political participation in voting for a given office relative to votes cast for the top of the ticket), then even a majority of the registrants might not translate into a majority of the voters for the office in question. Thus, the categorization scheme we present below is potentially rebuttable if better evidence about the minority composition of the actual electorate became available and led to different conclusions.

[5] Indeed, one might argue that the need to look at actual rather than hypothetical electorates is even greater when one is looking at minority influence as opposed to realistic opportunity to elect, because there is not the incentive of potential electoral control to motivate minority participation.

Table 1 shows black registration figures in the 1997, 2001, and 2002 plans. (Later in this article, I also present similar tabular analyses on the basis of population and voting age population.)

Comparing the three plans, there are thirteen black control districts in the 1997 baseline, eight in the 2001 plan, and eleven in the 2002 consent plan. Because there has been a reduction of five in the number of seats that, based on registration majorities, could clearly be regarded as ones where minorities had a realistic opportunity to elect candidates of choice from the 1997 benchmark plan to the 2001 plan, the burden would have been on the State of Georgia to show that the reductions in minority population in these five districts that are no longer majority registration were either *de minimis*, necessitated by demographic shifts in the state, or compensated by the creation of additional "opportunity to elect" districts.

However, note that of the five districts whose changed racial registration composition might suggest the need to investigate consequences for effective minority representation (Senate districts 2, 12, 22, 26, and 34), only 2, 12, and 26 were challenged by the DOJ and defendant-intervenors,[6] while 22 was challenged only by defendant-intervenors.[7] No party challenged Senate district 34 (which was taken to be the equivalent of district 44 in the 1997 plan

[6] The three districts to which DOJ objected are the only majority black registration districts in 1997 that were reduced below 49% black registration under the 2001 plan. Note that I am merely calling attention to this shared characteristic of the three districts to which DOJ objected, not claiming that a diminution from a black registration majority to a registration percentage under 49% was the sole reason DOJ chose these districts for objection when it did not object to other districts experiencing even larger drops in minority percentages. Even during the trial, the exact reasons for why DOJ objected to 2, 12, and 26 were never clearly laid out. And DOJ remained silent as to why districts such as 15 and 22 were *not* objected to. While there is no way of "proving" this fact, since in the usual preclearance review DOJ is like a poker player whose cards remain hidden if the player drops out of the pot, and even in the trial DOJ presented no evidence directly bearing on this question, it seems fairly obvious that DOJ did not object to nine of the districts that it might reasonably have objected to because it accepted Georgia's defense of these districts as ones that remained essentially safe seats for black candidates/candidates of choice despite their (often substantial) reductions in black population and black VAP and black registration. However, to borrow from Winston Churchill (BBC radio broadcast, Feb. 9, 1941), DOJ preclearance decision making is "a riddle wrapped in a mystery inside an enigma."

[7] Defendant-intervenors also objected to District 15. The criteria used by the defendant-intervenors in selecting the two additional districts to which they objected are not completely clear, although black registration clearly is playing a role. While district 22 is the previously black registration district with the next lowest black registration percentage in the 2001 plan (just under 49.5%), the previously black majority seat with the next lowest percentage (Senate 34, at 49.5% black registration in 2001), had no objection placed to it, while the district with the next lowest percentage (Senate 15, at 50.25% black registration in the 2001 plan) was objected to. A possible reason defendant-intervenors chose this district is that, among the six previously black registration majority districts that had experienced at least a ten percentage point drop in black registration from 1997 to 2001, this district is the one with the lowest black registration figure in the 2001 plan.

TABLE 1. BLACK REGISTRATION PERCENTAGES IN MAJORITY BLACK GEORGIA STATE SENATE DISTRICTS IN THE BENCHMARK PLAN, THE 2001 PROPOSED PLAN, AND THE 2002 CONSENT PLAN

Georgia State Senate District	*1997 Plan-Black Registration 2000*	*2001 Plan-Black Registration 2000*	*2002 Plan-Black Registration 2000*
2	62.38	48.42	55.8
10	69.81	63.06	same as 2001 plan
12	52.48	47.46	51.58
15	72.69	50.25	same as 2001 plan
22	64.07	49.44	same as 2001 plan
26	62.79	48.27	54.7
34	34.22	49.50	same as 2001 plan
35	81.00	64.73	same as 2001 plan
36	61.39	58.65	same as 2001 plan
38	75.33	60.38	same as 2001 plan
39	59.46	59.79	same as 2001 plan
43	89.14	63.11	same as 2001 plan
44	53.72	36.28	same as 2001 plan
55	73.07	60.99	same as 2001 plan

for comparison purposes regarding racial demography).[8] The district court focused on the changes in the three districts challenged by both the DOJ and defendant-intervenors—the only three districts about which expert witness testimony was presented at trial—as the main basis for their finding that the 2001 plan was retrogressive as a whole.[9] Only those three districts were redrawn in the consent plan, and each was restored as a district in which African-Americans constituted a registration majority (see Table 1).[10]

Opportunity to elect districts. We can gain further insight into the likely consequences of the 2001 plan for minority opportunity to elect candidates of choice by looking at changes in black population and black VAP in the 2001 plan as compared to the 1997 plan. I provide in Table 2 comparisons between the 1997, 2001, and 2002 plans for black population and black voting age population that parallel those for black registration previously provided in Table 1.[11] Table 3 shows Georgia State Senate districts grouped according to their black population and black VAP (breaking the districts down primarily into deciles)[12] in the 1997 benchmark plan, the 2001 proposed plan, and the 2002 consent plan.

A key point about Table 3 is that, as we move from the 1997 plan to the 2001 plan, there is a considerable decrease (by five) in the number of districts with 60% or higher black VAP.[13] Thus, look-

[8] A possible reason this district was not chosen for objection is that the district no longer had a white incumbent, and thus, arguably, offered minorities a greater chance at electing candidates of choice than was previously the case. (Recall that I am treating Senate district 34 in the 2001 plan as essentially equivalent to district 44 in the 1997 plan. See further discussion of this district later in the article.)

[9] Of course, the district court was also quite careful to examine the entire plan in concluding that the State had failed to justify the apparent diminution in realistic opportunity to elect candidates of choice caused by the demographic changes in these three districts either by explaining it as necessitated by demographic shifts in the State, or by demonstrating with a preponderance of the evidence that the changes were *de minimis*, or by showing that whatever retrogression in minority opportunity may have occurred in these districts was compensated for by gains in realistic opportunity to elect elsewhere in the State of Georgia. (See discussion below.)

[10] Note, however, that two of the three redrawn districts were still left with a much lower black registration proportion than they had in the 1997 plan (see Table 1).

[11] There are fourteen districts listed in Table 2. One district, #34, shifted from majority black in 1999 to less than majority black in population under the 2001 plan, while one district, #44, shifted in the opposite direction. However, Senate district 34 was already a majority black registration district as of 2000 and the district which "replaces" it, district 44, is actually lower in black registration. (See discussion above.)

[12] For VAP, I provide a further breakdown of the 20–30% decile category to allow us to report results in terms of districts that are 25–50% black in VAP. As noted earlier, districts that fall with this range of black VAP have been claimed by the State of Georgia to be ones in which minority voters possess influence. For VAP I also show a breakdown of districts into the categories of 50–55% and 55–60%, since paying attention to districts in that category is critical in understanding what I believe to be the basis of DOJ's objection to the 2001 Senate plan.

[13] Table 3 also shows an increase (by one) in the number of districts with 50% or higher black VAP and a reduction of two in the number of seats in the 40–50% black VAP category as we move from the 1997 plan to the 2001 plan.

TABLE 2. BLACK POPULATION AND VOTING AGE POPULATION PERCENTAGES IN MAJORITY BLACK GEORGIA STATE SENATE DISTRICTS IN THE BENCHMARK PLAN, THE 2001 PROPOSED PLAN, AND THE 2002 CONSENT PLAN

State Senate District	*1997 Plan % Black POP: 2000 census data*	*2001 Plan % Black POP: 2000 census data*	*2002 Plan % Black POP: 2000 census data*	*1997 Plan % Black VAP: 2000 census data*	*2001 Plan % Black VAP: 2000 census data*	*2002 Plan % Black VAP: 2000 census data*
2	65.5	55.6	54.5	60.6	50.3	54.7
10	74.5	65.7	same	70.7	64.1	same
12	59.9	54.0	53.4	55.4	50.7	55.0
15	65.7	54.8	same	62.0	50.9	same
22	68.0	55.7	same	63.5	51.5	same
26	67.2	55.4	54.7	62.5	50.8	55.4
34	37.6	54.1	same	34.0	50.5	same
35	78.9	3.7	same	76.0	60.7	same
36	66.3	62.9	same	60.4	56.9	same
38	79.0	64.4	same	76.6	60.3	same
39	59.6	60.9	same	54.7	56.5	same
43	91.0	65.9	same	88.9	62.6	same
44	54.1	39.2	same	49.6	34.7	same
55	76.0	63.6	same	72.4	60.6	same

TABLE 3A. NUMBER OF GEORGIA STATE SENATE DISTRICTS FALLING INTO VARIOUS BLACK POPULATION CATEGORIES IN THE 1997 BENCHMARK PLAN, THE 2001 PROPOSED PLAN, AND THE 2002 CONSENT PLAN

BPOP categories	*1997 benchmark plan*	*2001 plan*	*2002 plan*
above 60 %	10	7	7
50 to 60%	3	6	6
40 to 50%	3	3	3
30 to 40%	8	13	11
25 to 30%	3	2	5
20 to 25%	5	3	2
10 to 20%	14	7	8
below 10%	10	15	14

TABLE 3B. NUMBER OF GEORGIA STATE SENATE DISTRICTS FALLING INTO VARIOUS BLACK VAP CATEGORIES IN THE 1997 BENCHMARK PLAN, THE 2001 PROPOSED PLAN, AND THE 2002 CONSENT PLAN

BVAP categories	*1997 benchmark plan*	*2001 plan*	*2002 plan*
above 60 %	10	5	5
55 to 60%	1	2	4
50 to 55%	1	6	4
40 to 50%	2	0	0
30 to 40%	9	13	12
25 to 30%	2	4	5
20 to 25%	4	4	4
10 to 20%	16	6	5
below 10%	11	16	17

ing at the substantial decline in the number of districts where blacks had a registration majority and the very substantial drops in voting age black population in a large number of districts, *the answer to question 1(a) is clearly yes*. There were districts where minority control had been eliminated or where the minority community's realistic opportunity to elect candidates of choice had been diminished. Thus, there is a *prima facie* case for retrogression in the 2001 Georgia Senate plan to which the State of Georgia would have had to respond.

Prong Two: Changes in expected opportunity to elect candidates of choice.

> (1b) If the answer to question 1(a) is yes, can it be shown that, nonetheless, the number of minority candidates of choice who can be expected to be elected is the same or higher in the proposed plan as in the baseline plan?

Because the State of Georgia increased the number of majority black VAP seats in the 2001 plan as compared to the baseline, from twelve to thirteen, the State argued at the first trial that it had not merely maintained but had actually increased the number of districts in which minorities had a realistic opportunity to elect candidates of choice. However, while the 2001 plan had thirteen black majority VAP districts, there were already thirteen black registration districts in the 1997 plan, and the seeming gain of one new realistic opportunity to elect a seat in the 2001 plan is actually completely illusory.

To understand what is going on, observe that district 34 in the 2001 plan was marginally *reduced* in African-American *registration share* relative to district 44 in the 1997, at the same time as it was marginally *increased* in African-American *voting age population proportion* as compared to district 44 in the 1997 plan (compare Table 2 with Table 1). By focusing only on VAP, the State sought to obfuscate the decline in registration in district 34. Since registration share is a better indicator of realistic opportunity to elect than is proportion of the voting age population in my view,[14] the most that the State of Georgia could reasonably claim on the basis of the factual data presented in Tables 1, 2, and 3 is that it had maintained *constant* at thirteen the number of districts in which African-Americans might realistically be expected to elect a candidate of choice. The claim by the State of Georgia that its 2001 plan *increased* the number of districts in which African-Americans might realistically be expected to elect a candidate of choice from 12 to 13 is simply not credible. Moreover, as we show in the next section, the results of the 2002 election also make it hard to argue that the 2001 plan did not diminish overall the opportunity of African-American voters to elect candidates of choice who were themselves members of the community as well as gaining support of the community's voters.

Representation in terms of ability to elect candidates of choice. In this subsection, I focus on representation of the African-American community in terms of its ability to elect candidates of choice. I investigate the relationship between racial demography and the election of African-American candi-

[14] Registration is closer to the variable we really want to know, namely share of the actual electorate.

dates. Of course, for legal purposes we are not interested in descriptive representation as such but rather the ability of the minority community to elect candidates of choice, requiring a distinction between members of the minority community who are candidates of choice and those who are not. In the Georgia Senate contest, however, since all the black representatives elected appear to be candidates of choice of the African-American community, I need not pay attention to this important distinction and can simply count up the number of black candidates elected in the 1997 and 2002 plans.[15] Table 4 shows victories by African-American candidates in the various black VAP categories, as well as overall, in the 2000 and 2002 elections.[16] Many courts, but not all, have recognized that, for purposes of vote dilution, a situation in which a minority community finds it difficult or impossible to elect candidates of choice who are themselves members of the minority community is not one in which one can properly talk about the minority community having the realistic opportunity to elect its preferred candidates. A number of courts judge vote dilution only by examining contests where at least one candidate is a member of the given minority community.[17]

There are three very important points to make about Table 4.

The first point is that the number of African-American candidates winning election dropped by one between the 2000 election (under the 1997 baseline plan) and the 2002 election (under the 2002 consent plan)—from eleven to ten.[18] There were three black majority VAP districts in the Georgia Senate that failed to elect a black candidate in the 2002 election: district 12, where the white Democratic incumbent was reelected; district 36, where an Hispanic Democratic candidate narrowly defeated a black Democratic candidate in a Democratic primary runoff, and district 22, where the previous black incumbent was narrowly defeated by a white Republican in the general election—losing by only 264 votes.[19]

Taking the election results shown in Table 4 in conjunction with the data in Tables 1 and 2—data that demonstrate how all but three of the most heavily black districts in the plan were identical under the 2001 and 2002 plans—makes it clear that the *best* the State of Georgia could hope to argue is that

[15] There is, however, a question as to whether the candidate of Hispanic background who defeated a black opponent in the Democratic primary and then went on to win uncontested election in Senate district 36 in the 2002 general election was the candidate of choice of the African-American community in the Democratic primary and thus should be counted a candidate of choice despite not being black. I do not have the precinct level data to answer this question. That, presumably, would have been an important factual question to be addressed during a remand trial.

[16] I have not distinguished in this table the districts with between 50 and 55% black population from those with between 55 and 60% black population.

[17] Many of the key cases dealing with the definition of "candidate of choice" are from the early days of the Voting Rights Act. See Grofman, Handley, and Niemi (1992: 75–81) for a discussion of some of these early cases.

[18] But see footnote 15, *supra*.

[19] See <http://sos.georgia.gov/ELECTIONS/election_results/2002_1105/senate.htm>. On the other hand, district 34, a black majority VAP seat which did not have a white incumbent, did elect an African-American candidate for the first time.

Table 4. Black Voting Age Population Percentages and the Success of African-American Candidates in the Georgia Senate in the 1997 Benchmark Plan and the 2002 Consent Plan

	1997 plan—actual results from 2000 election	*1997 plan—2000 election*	*2002 plan—actual results from 2002 election*	*2002 plan—2002 election*
	# of blacks elected	*actual probability of electing a black candidate*	*# of blacks elected*	*actual probability of electing a black candidate*
above 60%	10	1	5	1
50 to 60%	1	0.5	5	0.625
40 to 50%	0	0	—	—
30 to 40%	0	0	0	0
25 to 30%	0	0	0	0
20 to 25%	0	0	0	0
10 to 20%	0	0	0	0
below 10%	0	0	0	0
TOTAL	11		10	

black electoral success under the 2001 plan would be the *same as* that under the 2002 plan. But the reduction by one in the number of African-American state senators in Georgia that we observe as occurring in the 2002 election casts doubt on the claims made by the State of Georgia at the initial trial that the plan they proposed in 2001 should maintain the same number of black state senators as were elected in 1997.[20]

The second point to emphasize about Table 4 is that in both the 2000 and the 2002 Georgia Senate elections, districts with less than fifty percent black VAP exhibited a *zero* probability of electing black candidates. Admittedly, there were few districts with between 40% and 50% black VAP.

The third point to emphasize is that even districts with between 50% and 60% black VAP had only a 50% chance of electing a black candidate in 2000, and only a 62.5% chance of electing a black candidate in 2002.[21]

The latter two empirically indisputable findings makes it apparent that the claim made by the State of Georgia at the initial trial (through the testimony of their expert witness, Professor David Epstein) that districts with considerably less than a 50 percent black VAP (specifically, for open seats, districts above a 43% VAP), nonetheless would provide minorities an "equal opportunity" to elect minority candidates of choice is almost certainly wrong. Thus, it is not at all surprising that this claim was not regarded as credible by the trial court majority (*Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (2003)), especially in the light of the devastating critique of Epstein's testimony by Professor Jonathan Katz, who testified as a witness for defendant-intervenors.[22]

To get a better handle on the first point, I provide in Table 5 a projection of the expected number of minority candidates of choice elected under the 2001 and 2002 plans under the assumption that roughly the same relationship between black VAP and black electoral success found in 2002 would hold for both the 2001 and 1997 plans.[23] In Table 5, for comparison purposes, we also provide similar projections based on the results of the 2000 Georgia Senate election—the most recent election available to the district court at the time of the first trial.

In interpreting Table 5 (and subsequent similar tables, such as Tables 7 and 9), it is important to appreciate a critical distinction between how social scientists customarily talk about prediction in the context of elections and how journalists (and most politicians) do so. Most journalists use prediction in the sense of the outcome of a horse race: the question is to predict which particular horse/politician will win the race/election. In contrast, social scientists most often use prediction in the sense of calibration across categories of outcomes, e.g., are the horses that are "odds-on" favorites more likely, *on average*, to win than they are to lose?

In Table 5 (and similar tables) we are estimating projected *average* probabilities of types of election outcomes for classes of *districts that fall within a certain range* of values on important characteristics (such as black voting age population, or previous history of Democratic success). We are not trying

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[20] The weight to be placed on the loss of a black Democrat in district 22 is very much debatable, since there were issues of scandal that are likely to have made the outcome in this district idiosyncratic. Moreover, we might note that Representative Walker, the well-known African-American Democrat who lost in 2002 to a white Republican, was vociferous in his trial testimony that he could have won his district (#22) under the 2001 plan despite a more than ten percentage point reduction in its black VAP percentage as compared to the 1997 baseline. Had there been a remand trial, trial testimony no doubt would have dealt with the meaning to be placed on Representative Walker's loss for the anticipatable effects of the 2001 plan on minority influence.

[21] Because there were only two districts in the 50–60% black VAP category in 2000, the difference between the 50% success rate in 2000 and the 62.5% success rate in 2002 is not statistically significant.

[22] In particular, according to Professor Katz, (a) Professor Epstein erred in using estimates for Senate elections that were derived from statewide data for elections not just to the Senate but also to the State House and the U.S. House of Representatives, and erred especially in applying such statewide averages to the particular districts at issue without doing any district-specific analyses; (b) Professor Epstein failed to report the degree of uncertainty in his probit-based estimate of the black proportion needed to provide an equal opportunity to elect that accompanies any attempt to fit a theoretical function to actual data, and his omission of confidence limits was exacerbated by the fact that there were almost no cases in the relevant category of 40% to 50% black population where Professor Epstein estimated the "equal opportunity" point to be located; and (c) Professor Epstein's analyses were marred by errors in coding that biased his conclusion in an important way. (Professor Epstein was forced during deposition to recalculate the statewide average percentage needed to create "equal opportunity" to elect. to correct the coding errors noticed by Professor Katz, and in so doing he obtained a revised "equal opportunity" point of 47% for open seats. However, that corrected figure was not used by the State of Georgia in its subsequent pleadings. Even that figure is still based on pooling information from non-Senate elections.)

[23] Here we are reminded by A Wuffle (personal communication, Apr. 1, 2003) that "hindsight is the only exact science."

TABLE 5. PREDICTED NUMBER OF BLACK GEORGIA STATE SENATORS FROM DISTRICTS FALLING INTO VARIOUS BLACK VAP CATEGORIES IN THE 1997 BENCHMARK PLAN, THE 2001 PROPOSED PLAN, AND THE 2002 CONSENT PLAN

BVAP categories	2000 election-probability of electing black Senator	2002 election-probability of electing black Senator	1997 plan—2000 election-predicted # of black Senators	2001 plan—2000 election-predicted # of black Senators	2002 plan—2000 election-predicted # of black Senators	1997 plan—2002 election-predicted # of black Senators	2001 plan—2002 election-predicted #of black Senators	2002 plan—2002 election-predicted # of black Senators
above 60%	1	1	10	5	5	10	5	5
50 to 60%	0.5	0.625	1	4	4	1.25	5	5
40 to 50%	0	0	0	0	0	0	0	0
30 to 40%	0	0	0	0	0	0	0	0
20 to 30%	0	0	0	0	0	0	0	0
10 to 20%	0	0	0	0	0	0	0	0
below 10%	0	0	0	0	0	0	0	0
TOTAL	1		1	9	9	11.25	10	10

to *specifically predict* the outcome of an election in *some particular district*. For these types of aggregate predictions, even knowing that a given class of district is expected to be, say, a "tossup," is a potentially important piece of information, because we can use that information to estimate outcomes over this class of districts as a function of changes in the number of districts that fall within this class in different redistricting plans.

What is apparent from Table 5 is that both the 2001 and the 2002 plan yield an *expected reduction* in the number of elected black representatives relative to the 1997 baseline, regardless of whether we use 2000 election results or 2002 election results as the bases for our projections. The reasons for these differences in expected black success rates across plans can be understood by referring back to Table 3. There, we see that the 2001 and 2002 plans created six more districts in the 50–60% black VAP category (and five fewer in the 60% and up black VAP category) than did the 1997 baseline plan. Although black electoral success was greater in the 50–60% black VAP category in 2002 than it had been in 2000, because black success was still not that much above fifty percent in those districts, the increased number of districts in this category was not enough to compensate for the concomitant decrease in the number of districts in which black success was essentially certain (60% and over black VAP districts).[24]

Thus, when I evaluate the 2001 plan as a whole in comparison to the 1997 plan as a whole with respect to the number of minority candidates whom we might expect to be elected, what we find is that the decreases in black registration share or voting age population proportions could not, *in toto*, be viewed as *de minimis* in their effects, nor were there changes elsewhere in the plan to make up for the reductions.

With a finding of reduction in effective opportunity to elect minority candidates of choice in districts such as 2, 12, and 26 that was not *de minimis*, the State of Georgia argued that compensating changes elsewhere in the plan would compensate for this diminution in minority opportunity to elect. However, while Georgia asserted that the 2001 plan would yield increases in the number of African-American candidates of choice being elected, analysis of the evidence they actually introduced at trial suggests that the only way in which this claim could possibly be justified is by counting supposed increases in the expected number of white Democrats elected as gains in minority electoral success. In contrast, DOJ took the traditional view of retrogression as a diminution in prospects for minority electoral success. Since the State presented no evidence that the 2001 plan *increased* the number of black candidates with a chance at victory, it was DOJ's position that unless the State could rebut claims of retrogression in Districts 2, 12, and 26, then, taken as a whole, the 2001 Senate plan had to viewed as retrogressive.

The trial court majority recognized fully that retrogression needed to be judged in the plan as whole, and was quite sensitive to the possibility that minority gains in other parts of the state might compensate for retrogression in the three challenged seats.[25] However, the district court majority was unequivocal on the State's evidentiary failures at trial, saying,

> [w]e note that it may well be the case that any decrease in African American electoral power in Senate Districts 2, 12 and 26 will be offset by gains in other districts, but plaintiff has failed to present any such evidence. (*Georgia v. Ashcroft*, 195 F. Supp. 2d 25 at 54 (2003).)

In short, when we focus on the minority community's overall realistic opportunity to elect candidates of choice, based on the presently available evidence, the only possible answer to question 1(b) of our three-pronged test is no.

Having found a reduction in the minority community's realistic opportunity to elect candidates of choice between the 1997 benchmark and the 2001 plan, the next question in the three-pronged multi-

[24] A directly analogous conclusion is reached if I focus on black registration rather than black VAP. Here what is critical is the decrease in the number of black registration majority districts (from 13 in the 1997 plan to only 8 in the 2001 plan). Black success in districts with black registration majorities was 11 of 13 in 2000 and nonexistent in the remaining districts. In 2002, the corresponding figures are 9 of 11, and 1 of 45—with the one black victory in the latter category coming in a district that was close to black majority registration (district 34, at a 49.5% black registration share).

[25] In my view, the Supreme Court majority in *Georgia v. Ashcroft* fails to give sufficient credit to this aspect of the trial court opinion.

part test asks whether that reduction can be explained in terms of demographic shifts, i.e., to address question 1(c).

> 1(c). If the answer to question 1(a) is yes and the answer to question 1(b) is no, can the jurisdiction nonetheless demonstrate that the reduction in the expected success rate of minority candidates of choice was dictated by demographic changes in the jurisdiction?

In the initial trial the State of Georgia made the potentially quite relevant point that, according to 2000 Census figures, many of the black majority seats were underpopulated relative to ideal population size required for the 2000 redistricting. Using 2000 Census data to calculate ideal district size, the three seats challenged by DOJ and the two additional Senate seats challenged by plaintiff intervenors (Senate districts 2, 12, 26, and 15 and 22 in the 1997 plan) were, indeed, underpopulated. However, Georgia in its various briefs went on to assert a stronger and much more implausible claim: namely, that the observed decrease in black VAP levels in the heavily black seats could not have been avoided—a point that the State claimed applied with particular force to the three districts challenged by DOJ.

At trial, the State failed to provide evidence that adding the population needed to bring the districts into one person, one vote compliance would have *required* reductions in black population (and black VAP) levels as high as those that actually took place.[26] As a consequence, the trial court essentially laughed out of court Georgia's attempts to defend its reductions of black population in the challenged districts as having been necessitated by one person, one vote considerations.

> Georgia suggests that this alleged quandary insulates its plan from a section 5 challenge. . . . This argument is unavailing. First, even if the State is correct that some reductions in BVAP were inevitable—a proposition that it asserts without attempting to prove—it certainly does not follow that Georgia was compelled to move minorities out of Districts 2, 12, and 26 to the extent that it did. Indeed, the State actually removed some majority African American precincts from each of these districts, a decision that at least casts doubt on its cries of inevitability.(*Georgia v. Ashcroft*, 195 F. Supp. 2d 25 at 47 (2003).)

Thus, *I take the answer to question 1(c) to be no*—requiring us to look at other defenses the State of Georgia might be able to offer to overcome the *prima facie* showing of retrogression demonstrated above with respect to prong one of our test.

Prong Two: Minority influence related to change in partisan control of the legislature

> 2(a). If the answer to questions 1(a) is yes, and the answers to questions 1(b) and 1(c) are all no, can it be shown that the new plan substantially increases the likelihood that the party associated with minority interests will maintain (or regain) control of the legislature as compared to what might be expected were the benchmark plan to be continued?

There are two ways to understand the likely partisan consequences of the 2001 plan. In the first approach I examine the expected partisan conse-

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[26] It might seem as if one ought to specify the retrogression standard so as to take into account one person, one vote considerations by weighting the existing districts in which African-American voters had a realistic opportunity to elect candidates of choice by the proportion of ideal district size that each contained. In this approach, if, say, the average such district was 30% underpopulated relative to the new ideal population, then the baseline number of districts against which retrogression should be measured would be only 70% of the actual number of districts in which minorities under the old plan had demonstrated a realistic opportunity to elect candidates of choice. The problem with this approach is that it fails to take into account demographic realities. In particular, if all of the districts in which minorities under the old plan had demonstrated a realistic opportunity to elect candidates of choice could easily have population added to them to bring them up to ideal size in such a way that they would remain realistic opportunity to elect districts, then failing to do so should be counted as retrogressive. Thus, critical evidence about retrogression is the existence of a plan that maintains (or increases) the previous number of realistic opportunity to elect districts. On the other hand, if population changes in a jurisdiction make it demographically and/or geographically impossible to maintain the previous number of realistic opportunity to elect districts, then absent a feasible remedy, there can be no retrogression. However, in Georgia, in the state as a whole, black population increased from 27% in the 1990 census to 28.7% in the 2000 census (<http://www.gadata.org/information_services/Census_Info/GeorgiaPopulationTrends%201990%20to%202000.htm>), so that any claim that retrogression was inevitable due to black population decline is clearly false.

quences of the differences in the distribution of black voters across districts in the 1997 and 2001 plans shown in Table 2, taking into account the fact that African-American voters are often used as sandbags to shore up the reelection chances of white Democrats (Grofman, 1993; Grofman, Griffin, Glazer, 1992). In the second approach I make use of other more direct predictors of partisan outcomes, such as the Democratic performance scores used by Georgia Democrats to assess alternative plans. However, before I proceed to these analyses some background about the partisan context in Georgia is useful.

Partisan context of the Georgia litigation. Despite a Democratic governor and Democratic control of both branches of the legislature, Georgia Democrats were running scared in 2001. The threat of Republican control of the state was a real one. Between 1990 and 1996, the Georgia congressional delegation shifted from one with 8 Democrats and 3 Republicans to one with 8 Republicans and only 3 Democrats, and that ratio held for the rest of the decade. Moreover, by 1996, the only Democratic congressional representatives from Georgia were African-American, elected from districts with very high African-American percentages.[27] While Dem-ocrats retained control of both branches of the Georgia legislature, their margins of control were not that large, especially as compared with earlier decades when Republican legislators were almost as scarce as hen's teeth. In 2000, while both of Georgia's U.S. Senators were Democratic, one had been elected in a 49% to 48% victory and the other was appointed by a Democratic governor to fill a seat formerly held by a Republican; moreover the state was carried by George W. Bush in 2000 by 55% to 43%. Also, in nearby states such as North Carolina, when Republican gains became great enough so that the party had a realistic chance of winning legislative control, some conservative Democratic legislators changed their party affiliation. The Democratic leadership in Georgia must have been aware of this threat to Democratic dominance in the state.[28]

In light of their fears and the recent political realities in Georgia (and the South more generally), Democrats designed their 2001 districting plans in Georgia with the aim of locking in Democratic control of both branches of the state legislature for the remainder of the decade, as well as to make it probable that Democrats would regain a number of the previously Democratic seats in the U.S. House of Representatives that had been lost to Republicans after 1994.[29] To achieve these ends, the Democrats in charge of the Georgia districting process sought to more efficiently distribute black voters. In particular, as shown in Table 2 above, Democrats stripped all but two of the previously black majority Democratic Senate districts of a substantial number of black voters.

Georgia Democrats made these reductions in black population in the most heavily black Senate seats with the support of all but one of the African-American Senators. These Senators shared the concern of white Democrats that the State legislature (or at least one branch of it) might fall into Republican hands.[30] Previously, I co-authored a paper titled "The Race May Be Close But My Horse is Going to Win" about the predilections of voters to overestimate the success chances of candidates they favor (Uhlaner and Grofman, 1986). In like manner, with the benefit of hindsight, black legislators in Georgia now appear to have been overconfident of their ability to win reelection in districts that had been considerably lowered in black VAP and registration proportions. For example, the black incumbent in District 22, testifying at the initial trial for the State of Georgia, expressed his complete

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[27] In the U.S. House of Representatives, after the 1990 Census, the size of Georgia's House delegation was increased from 9 to 11. Democrats, who were in full control of the initial 1990s redistricting process in Georgia, attempted to hold onto their existing House seats and to pick up one of the new seats. But, when tides shifted in the Republican direction in 1994 and thereafter, control of the Georgia House delegation shifted from Democratic to Republican hands. (See Grofman and Brunell, 2005).

[28] As I show, the same phenomenon occurred in Georgia after the 2002 election.

[29] For a discussion of the partisan implications of Georgia's 1991 and 2001 congressional plans, see Grofman and Brunell (2005).

[30] It is also important to recognize that the changes in legislative demography made by Democrats in Georgia had to be acceptable to the black Senators. The arithmetic is compelling: in 2001 there were only 21 white Democrats, as compared to 24 white Republicans. Thus, the 11 black Democrats held the balance of power (Karlan, 2004: 24). And, as Karlan (2004: 24) emphasizes, the conventional (*Beer v. U.S.*) understanding of the retrogression test as requiring the preservation of black majority districts when these already existed made it risky for the white Democrats to propose changes in these districts without the support of the African-American senators.

confidence that he would win the seat again in 2002 despite a reduction in it of nearly fifteen percentage points of black registration share. In fact, he lost to a Republican in 2002 (albeit barely).[31]

By and large, the 2001 Senate plan reallocated the black voters stripped from the most heavily black seats to Senate districts where it was thought they would either enhance the safety of marginal Democratic seats held by white Democrats or, more commonly, where they could be used in an attempt to unseat sitting Republicans. In particular, comparing the 1997 plan and the 2001 plan, there are four Senate seats held by Republicans where the black VAP has been increased by roughly 10 percentage points or more (districts 5, 6, 40, and 41), and a fifth, Senate district 16, showing a VAP gain very near to ten percentage points. These five are districts where there is a strong *prima facie* case that Democrats sought to "pick-off" Republicans via the 2001 redistricting plan. In the 2002 consent plan, when black population was added back in to districts 2, 12, and 26 to satisfy DOJ objections, black population was removed from district 16, but it was also added to district 18. Thus, in the 2002 election, there were again five districts where, arguably, the Democrats sought to "eliminate" Republicans: districts 5, 6, 18, 40, and 41. Based on the 2002 election (in districts identical or virtually identical to those drawn in 2001, except for the reversal of relative black population proportions in districts 16 and 18 and the changes in districts 2, 12, and 26), Democrats succeeded in three out of five instances (with Republicans holding on only in Senate districts 6 and 18).

In addition, there are three Senate seats held by Republicans where the black VAP was decreased by 10 percentage points or more (districts 27, 32, 45). These are districts where there is a strong *prima facie* case that Democrats conceded the district to Republicans by making the district less black (and as we shall see later, not surprisingly, more Republican). All three of these districts easily reelected a Republican to the Senate. Indeed all three seats went uncontested by Democrats in 2002.

Generally, Table 3 above shows that Democrats controlling the Georgia Senate redistricting process[32] increased the number of districts falling in the 25% to 30%, the 30% to 40%, and the 50% to 60% black VAP ranges, at the expense of districts with substantial black populations (over 60%). Comparing the 2001 redistricting plan with the 1997 baseline, Table 3 shows: (a) a dramatic decrease (by five) in the number of districts with 60% or higher black VAP, (b) an increase (by one) in the number of districts with 50% or higher black VAP, (c) a decrease (by one) in the number of districts with 40% or higher black VAP, (d) an increase (by three) in the number of districts with 30% or higher black VAP, and (e) an increase (by five) in the number of districts with 25% or higher black VAP, as we move from the 1997 plan to the 2001 plan.

Projecting expected Democratic success using black voting age population. While Democrats were largely successful in their efforts at targeting Republicans in the 2001 (and 2002) plans, they did not do a particularly good job of using the black population freed from the heavily black seats to shore up the reelection chances of marginal Democrats. Although the 2002 plan knocked off three Republican incumbents (and the 2001 plan would probably have done likewise had it been put into place), five Democratic incumbents also went down to defeat, for a net loss of two seats to the Republicans, shifting the legislature from 32D–24R to 30D–26R. These losses cannot be blamed on the imposition of the 2002 consent plan to replace the 2001 plan, since the districts where these Democratic losses occurred are either identical or substantially identical in the 2001 and the 2002 plans.

Table 6 below shows the numbers and percentages of Democrats elected from the districts in the 2002 consent plan falling within each of our black

[31] However, as noted in footnote 15, *supra*, the reasons for his loss may well have been idiosyncratic. Nonetheless, given his support among African-Americans in 2002 and the African-American population in his old district, it seems very likely that he would have won a district in which black population had not been so dramatically reduced.

[32] At the time the 2001 State Senate plan was drawn, the governorship and both branches of the state legislature were in Democratic hands, with the Georgia Senate consisting of 32 Democrats, 23 Republicans, and one vacancy. After the 2002 elections, when the governorship was won by a Republican, the Georgia Senate remained in Democratic hands despite a net loss of two Democratic seats. It initially had 30 Democrats and 26 Republicans. Almost immediately after the election, however, four previously Democratic white incumbents changed their party affiliation to Republican, and so the Senate came under Republican control (with 26 Democrats and 30 Republicans).

TABLE 6. DISTRICTS ELECTING DEMOCRATS TO THE SENATE BY PERCENT BLACK VOTING AGE POPULATION* BASED ON THE 2000 AND 2002 ELECTIONS (FOR THE LATTER, BOTH BEFORE AND AFTER FOUR SENATORS SWITCHED PARTY)

Range in Black VAP	1997 Plan	2001 plan	2002 consent plan	2000 Election (under 1997 baseline plan)	2002 Election-Before Party Switch (under 2002 consent plan)	2002 Election-After Party Switch (under 2002 consent plan)
above 55%	11	7	9	100% (11)	100% (9)	100% (9)
50–55%	1	6	4	100% (1)	75% (3)	75% (3)
40–50%	2	0	0	100% (2)	—	—
30–40%	9	13	12	100% (9)	83%(10)	67% (8)
25–30%	2	4	5	100% (2)	80% (4)	40% (2)
20–25%	4	4	4	50% (2)	25%(1)	25%(1)
below 20%	27	22	22	19% (5)	14% (3)	14% (3)

*The percent black voting age population is based on the 2000 census for all three plans.

VAP categories[33] in both the 2000 election and the 2002 election, except that we now use 55% black VAP as the cutoff at the upper end. For purposes of electing Democrats (as opposed to electing African-Americans), the 55% cutoff is useful. For the 2002 election Table 6 also shows the percentages of Democratic success you get when you recalculate results of the 2002 election by classifying the four senators elected as Democrats who subsequently switched their party affiliations as the Republicans that they now are.[34]

Table 6 above indicates that Democrats in 2001 had good reason to believe (given the results of the 2000 election) that they had an excellent chance of winning seats that were 25% or more in black voting age population, and near certainty in winning districts that were 30% or more black in VAP. Drawing more of the latter could be regarded as prudential, insuring against even a bad electoral tide. Eliminating districts that were between 40% and 50% black VAP also seemed to make sense from the perspective of optimizing Democratic chances of keeping control of the Senate. The black voters in such districts would do more for Democratic re-election chances if they were used to shore up districts with less than 20% black populations and convert them to ones with more than 25% black population. (For a discussion of how such optimizing calculations are done see Grofman, Griffin, and Glazer, 1992.)

Table 6 also shows the percentage of Democrats elected from each category of minority VAP districts for the 2002 elections. The plan in place for the 2002 election was a minimally modified version of the 2001 Plan, with the main changes (in terms of these categories) coming in the districts previously in the 50–55% black VAP category. The two plans, however, are identical in terms of the number of districts with more than a 50% black VAP and in the number of districts with more than a 25% black VAP. The Democrats' net loss of two seats immediately following the elections (they went from 32 seats to 30 seats) [35] could not be attributed to the relatively minor differences between the 2001 plan and the 2002 consent plan. Rather it occurred for two key reasons: (a) the decreased probability of electing a Democrat to the State Senate in the categories with black VAP below 55% (see column labeled "2002: Before Party Switch" in Table 6 above), and (b) the fact that Democrats had failed to protect some of their most vulnerable incumbents by placing more black (voting age) population in their districts.

Table 7 below shows the number of Democrats that might expect to be elected to the Georgia Senate under the 1997, 2001, and 2002 redistricting

[33] Breaking the 20–30% range into 20–25% and 25–30% subcategories permits reporting the results in line with the state's threshold for black influence.

[34] As noted earlier, after the 2002 election, which resulted in the first Republican governor in Georgia since Reconstruction (McKee and Hayes, 2004), the defections of four Democrats reversed party control of the Senate to 26D–30R.

[35] The loss of two Democrats is a net loss; as noted earlier some seats changed hands in the R to D direction (Republicans targeted by the Democrats in the redistricting) but more seats changed hands in the D to R direction (Democrats whose marginal districts were note shored up enough).

TABLE 7. EXPECTED NUMBER OF DEMOCRATS ELECTED TO THE GEORGIA SENATE UNDER DIFFERENT PLANS, UNDER ALTERNATIVE ASSUMPTIONS ABOUT VOTING BEHAVIOR (BASED ON BLACK VOTING AGE POPULATION CATEGORIES)

Range in Black VAP	Actual 1997 plan—2000 election numbers	Expected 2001 plan—2000 election numbers	Expected 2002 plan—2000 election numbers	Expected 1997 plan—2002 election numbers (before party switches)	Expected 2001 plan—2002 election numbers (before party switches)	Actual 2002 plan—2002 election numbers (before party switches)	Expected 1997 plan—2002 election numbers (after party switches)	Expected 2001 plan—2002 election numbers (after party switches)	Actual 2002 plan—2002 election numbers (after party switches)
55%+	11	7.0	9.0	11.0	7.0	9.0	11.0	7.0	9
50–55%	1	6.0	4.0	0.8	4.5	3.0	0.8	4.5	3
40–50%	2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0
30–40%	9	13.0	12.0	7.5	10.8	10.0	6.0	8.7	8
25-30%	2	4.0	5.0	1.6	3.2	4.0	0.8	1.6	2
20-25%	2	2.0	2.0	1.0	1.0	1.0	1.0	1.0	1
below 20%	5	4.1	4.1	3.7	3.0	3.0	3.7	3.0	3
TOTAL	32	36.1	36.1	25.5	29.5	30.0	23.2	25.8	26

plans, based on three different assumptions about voting behavior (where, here, "voting behavior" means the relationship between black VAP and Democratic success as shown in Table 6).[36]

Comparing the expected performance of the 1997 and the 2001 plan shown in Table 7, the latter yields an expectation of four more Democratic seats—whether projected based on the relationships between black VAP and Democratic success found in the 2000 election results or on those found in the 2002 election. Moreover, *the projected results of the 1997 plan under the voting behavior displayed by Georgia voters in 2002 suggests that continued use of the 1997 plan would have cost the Democrats control of the Georgia legislature in the 2002 election even before any party switching occurred!*

Despite their apparent cleverness at redrawing the Senate lines for partisan advantage relative to the 1997 benchmark plan, Democrats failed to gain seats in 2002 as compared to 2000, and actually *lost* two seats. By comparing the expected results of the 1997 and 2002 plans, one can see that although there was a *compositional* change (especially a reduction in the number of seats that were below 20% black population that, on balance, based on projections of the 2000 results, could be expected to help the Democrats), the actual effects of that change in the structure of districts was more than offset by changes in the *behavior* of voters in 2002 as compared to 2000. That is, in every category of black VAP other than districts above 55% BVAP, Democrats fared worse in 2002 than they did in 2000—sometimes much worse.[37]

The data in Tables 6 and 7, considered in light of what could have been known in 2001 and the constraints the Democrats in Georgia were working under (which essentially prevented them from taking the black majority seats below 50% VAP and which required the movement of black population to contiguous districts), show that the Democrats could probably only have done slightly better in allocating black population across districts so as to enhance the expected number of Democrats elected than what they actually did in the 2001 plan. (However, as noted earlier, they could have done a better job in protecting their own most vulnerable incumbents.) In fact, although the Democrats lost control of the Georgia Senate after the 2002 election, that was only because four senators switched parties from Democrat to Republican.

Projecting expected Democratic success using Democratic performance scores. Now I repeat the same type of projections of expected number of Democrats under different plans done in Table 6 for black VAP, this time using the relationship between the Democratic performance scores introduced at trial by the State of Georgia[38] and the actual election outcomes in 2000 and 2002. See Table 8.

Table 8 shows the percentage of Democrats elected from each category of Democratic performance for the 2000 and the 2002 elections.[39] Whether looking at the 2000 election or the 2002 election, Democratic performance scores above 55% are highly predictive of Democratic success, while Democratic performance scores below 45% are highly predictive of Republican success. Table 8 also shows that (a) the Democrats reduced substantially the number of districts in the above 75% performance category—districts where clearly Democratic votes were being wasted;[40] (b) there was a huge increase in the number of districts in the 50–60% category, with the bulk of that increase coming in the 50–55% Democratic performance category, an increase from 8 to 17; and (c) there was a large decrease, from 24 to 18, in the number of districts with less than a 45% Democratic performance rating. In other words, the Democrats unpacked their own districts where they were wasting

[36] We may reasonably assume that it was possible to draw a plan that satisfied one person, one vote that would be identical to the 1997 plan in terms of the number of districts in each black VAP category shown in Table 2. It is that plan whose probable consequences we are evaluating. Of course, projecting results from black VAP categories is inherently limited in predictive power, since I am not including information on the characteristics of the white voters in the districts. Still, this method gives at least a ballpark figure on the likely consequences of alternative plans. Moreover, I will next consider the results of an alternative analysis based on district-specific Democratic performance scores and show that it leads to virtually identical conclusions.

[37] For a discussion of how to measure the relative effects of compositional, behavioral and interactive effects of line drawing, see Grofman, Handley, and Arden, 1998.

[38] These Democratic performance scores were calculated based on previous election outcomes. For present purposes the exact details of how they were calculated is irrelevant. What is important is that the State saw these as a reasonable way to project partisan outcomes.

[39] As emphasized throughout this essay, the plan used for the 2002 election was a minimally modified version of the 2001 Plan.

[40] Most of these were the most heavily black seats.

Table 8. Percentage of Districts Electing Democrats to the Senate by Grouped Categories of Democratic Performance Scores* Based on the 2000 and 2002 Elections (for the Latter, Both Before and After Four Senators Switched Party)

Range in Democratic Performance	1997 Plan	2001 plan	2002 consent plan	2000 Election (under 1997 baseline plan)	2002 Election-Before Party Switch (under 2002 consent plan)	2002 Election-After Party Switch (under 2002 consent plan)
above 75%	9	2	2	100% (9)	100% (2)	100% (2)
60–75%	5	10	10	100% (5)	90% (9)	90% (9)
55–60%	4	7	7	100% (4)	100% (7)	100% (7)
50–55%	8	17	17	88% (7)	59% (10)	41% (7)
45–50%	6	2	2	83% (5)	100% (2)	50% (1)
40–45%	10	1	1	20% (2)	0% (0)	0% (0)
Below 40%	14	17	17	0% (0)	0% (0)	0% (0)

* The percent black voting age population is based on the 2000 census for all three plans.

votes, packed some additional Republican seats so as to assure that Republicans would be wasting votes, and tried to create a large number of districts that would go Democratic, but not by very large margins.

Table 9 uses the data on Democratic performance scores to project Democratic shares under the 1997, 2001 and 2002 plans, based on the 2000 and 2002 election results (with the 2002 election looked at both before and after the party switching). Note that, as pointed out earlier, one does not have to regard Democratic performance scores as perfectly predictive of partisan success (which they are not—especially in the 50–55% category) to regard analyses done using them to be informative about partisan control of the Georgia Senate, since even information about near toss-up seats can translate into expectation about differences in plans if the plans differ in terms of the number of seats they have in that category.[41]

The main insights from Table 9 reinforce what Table 7 revealed, namely: (a) that the 1997 plan, under the voting behavior observed in 2002, is projected to result in loss of Democratic control of the Senate even before there is any party switching; and (b) that the 2001 plan yields an expectation of more Democratic seats in both 2000 and 2002 than does the 1997 plan—although the projected differences in partisan outcomes between the 2001 plan and the 1997 benchmark plan are now not estimated to be as large in 2002 as they would have been in 2000.

Georgia Democrats almost certainly relied on the strong relationship between Democratic performance scores in 2000 and the outcomes of the 2000 elections to decide how to craft the 2001 plan. However, while decreasing the number of districts above 75% and decreasing the number of districts below 45% in Democratic performance clearly made sense from the partisan perspective of Democrats, the choice they made to create so many districts in the 50–55% category seems, with hindsight to be quite ill-advised.

A glance at Table 8 makes it clear that Democratic success was apparently substantially lowered in 2002 as compared to 2000 in the category of 50–55% Democratic performance.[42] In this critical category, putative marginal Democratic wins, the predictive power of Democratic performance scores for outcomes was much reduced in 2002. Some of the seats that would previously have been predicted

[41] Moreover, Democratic performance scores are important in their own right, because it was in part on the basis of these scores that Democrats in Georgia based their claims about expected changes in the partisan composition of the Senate. Also, Democratic leaders in the state apparently used these projections to help persuade black Democrats that they should support the 2001 plan because of its favorable expected consequences for retaining Democratic control of the Senate.

[42] Because of small sample sizes, differences in partisan outcomes in the 40–45% categories and the 45–50% categories between the 2000 and the 2002 elections were not statistically significant. Even the differences in partisan outcomes in the 50–55% category were statistically significant at only the .06 level.

TABLE 9. EXPECTED NUMBER OF DEMOCRATS ELECTED TO THE GEORGIA SENATE UNDER DIFFERENT PLANS, UNDER ALTERNATIVE ASSUMPTIONS ABOUT VOTING BEHAVIOR (BASED ON DEMOCRATIC PERFORMANCE SCORES)

Range in Democratic Performance	Expected 1997 plan—2000 numbers	Expected 2001 plan—2000 numbers	Expected 2002 plan—2000 numbers	Expected 1997 plan—2002 numbers (before switches)	Expected 2001 plan—2002 election (before switches)	Actual 2002 plan—2002 election numbers (before switches)	Expected 1997 plan—2002 election numbers (after switches)	Expected 2001 plan—2002 election numbers (after switches)	Actual 2002 plan—2002 numbers (after switches)
Above 75%	9	2.0	2.0	9.0	2.0	2	9.0	2.0	2
60–75%	5	10.0	10.0	4.5	9.0	9	4.5	9.0	9
55–60%	4	7.0	7.0	4.0	7.0	7	4.0	7.0	7
50–55%	7	14.9	14.9	4.7	10.0	10	3.3	7.0	7
45–50%	5	1.7	1.7	6.0	2.0	2	3.0	1.0	1
40–45%	2	0.2	0.2	0.0	0.0	0	0.0	0.0	0
0–40%	0	0.0	0.0	0.0	0.0	0	0.0	0.0	0
TOTAL	32	35.7	35.7	28.2	30.0	30	23.8	26.0	26

to be marginal Democratic victories now ended up in the hands of the Republicans.[43]

Nonetheless, while it may not have been an *optimal* partisan gerrymander, the 2001 plan was clearly better for Democrats than the 1997 plan would have been. Thus, in reviewing the evidence presented in Tables 6–9 above, in my view, *the answer to question 2(a) is a clear yes*. The State of Georgia might have made a plausible claim that the 2001 plan led to a substantially greater chance for the maintenance of minority influence than the 1997 benchmark when judged in terms of partisan control of the legislature. Thus, the State of Georgia had a *prima facie* defense against retrogression based on a potential showing that the 2001 plan fostered the maintenance of Democratic control of the Senate and that such control was indeed threatened had the 1997 plan continued in use.

Given the yes answer to question 2(a), the next question becomes whether the changes from the 1997 plan made in 2001 that were held by the district court to be retrogressive with respect to the minority's effective ability to elect candidates of choice were *necessary* in order to preserve Democratic control of the legislature.

> 2(b) If the answer to question 2(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of substantially increasing the probability that the party associated with minority interests would maintain (or regain) control of the legislature?

The answer to question 2(b) is, in my view, clearly no. Both Table 7 and Table 9 show that there are only minuscule differences in expected Democratic success under the 2001 Senate plan as compared to elections held (or projected) under the 2002 consent plan, regardless of whether I predict behavior on the basis of the results of the 2000 Senate election or on the basis of outcomes in 2002, and regardless of whether I base projections on districts grouped according to categories of black VAP or grouped based on Democratic performance scores. Thus, any argument that the changes ordered in the 2001 plan by the district court to reverse retrogression in the minority community's realistic opportunity to elect candidates of choice damaged the Democrat's chances of holding onto the Senate appears unjustified.

The 2002 consent plan, itself, and especially the actual election results under that plan, provides compelling rebuttal to any claim that the retrogression in the minority community's realistic opportunity to elect candidates of choice found to be present in the 2001 plan could be justified by the need to protect Democratic control of the Georgia legislature. The results of the 2002 election under the 2002 consent plan shows that there were ways to protect Democratic control of the Georgia legislature (and the goal of maintained minority influence that comes with keeping control of the legislature in the hands of the party most associated with minority interests) without the need to retrogress in the minority community's realistic opportunity to elect candidates of choice in the way that was done in the 2001 plan.

Prong Three: Changes in overall minority influence at the district level.

> 3(a). If the answer to question 1(a) is yes and the answers to question 1(b) and 1(c) are no, and the answer to either question 2(a) or 2(b) is no, nonetheless, can it be shown that the increase in the total number of control plus opportunity plus influence districts was large enough to compensate (in terms of overall minority influence) for whatever (net) reductions may have occurred in the number of control districts and in the number of coalition/opportunity districts?

In Part I of this article, following the Supreme Court majority in *Georgia v. Ashcroft*, I divided districts into four categories, the nature of which we

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[43] Here, obviously the Democrats drawing the 2001 plan had failed to read Owen and Grofman (1988). If they had, they would have understood that it can be a fatal mistake to draw too many districts with very thin expected margins of victory, because when you do, you risk the possibility of losing seats if one's opponents have a good year. As that article demonstrates, truly optimal partisan gerrymandering involves building in cushions of safety against the occasional electoral tide that goes against one. It is particularly embarrassing that the Democrats in Georgia failed to understand the dangers of cutting margins too thin and then losing seats to the other party because the congressional plan they crafted in the 1990s exhibited exactly this same kind of stupidity in spreading one's supporters too thin (extending further to a cupidity in overreaching by seeking to pick up additional seats at the expense of the other party when they did not have enough loyal Democratic voters to hold on to their own seats, much less pick up new ones. (See Grofman and Brunell, 2005.)

may remember through the mnemonic COIN (Control, (realistic) Opportunity to elect, (mere) Influence, No influence). Table 10 presents a first cut at identifying transitions between these four types of districts from the 1997 benchmark plan to the 2001 plan. The transition assignments shown in Table 10 reflect those that can be considered most favorable to the State of Georgia's case for the plan being nonretrogressive. In particular, they accept the State's characterization of the 17 districts that the State identifies as minority influence districts in the 2001 plan.

I present the case for the State of Georgia first because, as I show, *even giving all the State's claims full credibility*, the best one can find is that the plan reflects no diminution in minority influence. Thus, if *any* of the State's claims about district level influence would have been rebutted by the factual evidence of the sort that might have been presented had there been a remand trial, then the answer to question 3(a) must be no.

To fill in the cells in Table 10 that involve changes in estimated minority control between the 1997 and the 2001 plans I used the data from Table 1 on districts with black registration majorities.[44] As Table 1 showed, there were thirteen such seats in 1997 and only eight in the 2001 plan.[45]

To fill in the cells in Table 10 that involve estimated realistic opportunity to elect, we looked at the districts that were either found to be retrogressive by the district court (2, 12, and 26), or in which a black candidate lost in 2002 (district 22). Here, in filling in the cells of Table 10 I deliberately gave the State of Georgia the benefit of the doubt by classifying districts 2, 12, and 26 in the 2001 plan as opportunity districts rather than mere influence districts. These districts are so close to the fifty percent black registration level that it seemed to us most

[44] As a reminder, these calculations use minority registration as the best proxy then available to identify the districts in which minorities make up a majority of the actual electorate.

[45] In Table 2, five seats (2, 12, 22, 26, and 44) are shown as shifting away from control to a lower category, although only three of these (2, 12, and 26) were challenged by DOJ or redrawn under the consent plan adopted in 2002.

TABLE 10. ASSIGNMENT OF GEORGIA SENATE DISTRICTS TO COIN TRANSITION CATEGORIES (AS WE MOVE FROM THE 1997 BENCHMARK TO THE 2001 PLAN) IN THE FASHION MOST FAVORABLE TO THE STATE OF GEORGIA'S EMPIRICAL CLAIMS ABOUT INFLUENCE DISTRICTS

CC	*CO*	*CI*	*CN*	*OC*	*OO*	*OI*	*ON*	*IC*	*IO*	*II*	*IN*	*NC*	*NO*	*NI*	*NN*
10	2	44							34	3				5	1
15	12									4				6	7
35	22									8				16	9
36	26									11				40	17
38										13				41	18
39										14					19
43										20					21
55										23					24
										25					27
										29					28
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															54
															56

reasonable to classify them as opportunity districts. Moreover, I also chose to give the State of Georgia a large benefit of the doubt in classifying district 22 as an opportunity to elect district despite the fact that it was in 2004 held by a Republican, who could be expected to have the considerable advantages of incumbency (Gelman and King, 1990) in holding on to the district in the future.[46] I also classify district 34 as an opportunity to elect district in the 2001 plan.[47] This is the only "new" opportunity to elect district, but because I will treat district 44 as a shift from "control" to "influence," the total number of "control plus opportunity" districts remains thirteen in both the 1997 and the 2001 plan.

To fill in the cells in Table 10 that involve estimated minority influence in a way that is most supportive of the position of the State of Georgia that the plan increases minority influence at the district level, I accept the claims of the State of Georgia as to which districts fall into the minority influence category. As noted earlier, the State of Georgia proposed to classify seventeen districts as influence districts in the 2001 plan, but only found twelve districts that it was prepared to classify as influence districts in the 1997 benchmark. I have listed those districts in Table 10. There are five districts shifting in 2001 from the non-influence to the influence category in the view of the State of Georgia, with eleven of the twelve districts that were classified as "influence" districts in the 1997 plan remaining as such in the 2001 plan, and with one district (district 44) being demoted from "control" to " influence," and another (district 34) being "promoted" from influence to "opportunity."

Table 11 reports the data in Table 10 as a summary matrix of change. Because I am treating transitions in ordinal terms as comparable, I use weights that collapse the 16 columns of the matrix shown in Table 10 into seven columns by combining columns that represent the same magnitude of ordinal transition, e.g., −3 (CN), −2 (CI, ON), −1 (CO, OI, IN), 0 (CC, OO, II, NN), +1 (OC, IO, NI), +2 (IC, NO), and +3 (NC), to obtain the results shown in Table 11 below. (For discussion of the reasons for treating the data in this manner see the original conceptual paper: Grofman, 2006.)

Thus, if the State of Georgia were correct in its assignments of districts into the influence category, and otherwise reporting the evidence about district transitions in a way that is generally favorable to the State's position as we have done in Table 10, then Table 11 shows that the net ordinal transfers between the 1997 plan and the 2001 plan would sum to zero, thus making a *prima facie* case that the 2001 plan preserved minority influence. There would, in this posited scenario, giving all the benefit of the doubt to the State of Georgia, have been four "demotions" from "control" to "opportunity," one "double demotion" from "control" to "influence," one "promotion" from "influence" to "opportunity," and five "promotions" from "no influence" to "influence." (See Table 10.)

This maintenance of influence shown in Table 11 would lead to a tentative yes answer to question 3(a) that would then lead me to move on to consider question 3(b). However, Georgia's proposed identification of minority influence districts is (a) empirically unsupported, and (b) on its face, invalid. *Thus, the actual answer I would give to question 3(a) is*

[46] How best to classify district 22 is clearly one of the most important factual questions that would confront the district court on remand.

[47] It is also possible that district 34 in the 2001 plan might be better classified as a control district than as an opportunity to elect district. But I do not know whether African-American voters made up a majority of the actual electorate in that district. Since I did not have the data available to make that determination, I relied on the best available proxy, black registration share.

Table 11. Summary Change in Influence Matrix From the 1997 Plan to the 2001 Plan For the Georgia Senate Based on Table 10 (Assignment of Georgia Senate Districts to COIN Transition Categories in the Fashion Most Favorable to the State of Georgia's Empirical Claims about Influence Districts)

Transition	*CN*	*CI, ON*	*CO, OI, IN*	*CC, OO, II, NN*	*OC, IO, NI*	*IC, NO*	*NC*	*TOTAL*
Number of districts	0	1	4	45	6	0	0	
Value	−3	−2	−1	0	+1	+2	+3	
Product	0	−2	−4	0	6	0	0	0

no. To see why this is so, I redo Tables 10 and 11 in a more empirically grounded fashion, as shown in Table 12 below.

In Table 12 only two districts (Senate district 6 and 16) had their category changed from those given in Table 10.

District 6 is a district which elected a Republican in both 2000 and 2002, but which had less than 25% black VAP in 2000 and more than 25% black VAP in the 2001 plan (and in the 2002 consent plan). If we switch district 6 from the category of NI to that of NN, the summary in Table 11 would need to be changed to reflect that fact. Doing so changes the sum in that table to minus 1, i.e., the 2001 plan must now be regarded as retrogressive. It seems obvious that Senate 6 is misclassified in Table 10, since this is a district that has consistently elected a Republican. Despite the high black proportion in the district, I would be surprised if it turned out that this Republican had consistently favored black interests, since it is so unlikely that African-Americans make up a significant proportion of her reelection constituency. Of course, evidence bearing on these points should, in my view, have been a critical element of the remand trial had that trial occurred, since I am merely making a judgment that is subject to factual rebuttal. Still, it is the State of Georgia which would have had the burden of supporting the claim, with a preponderance of the evidence, that district 6 is an influence district.

Another district which seems in need of reclassification from what the State of Georgia proposed is district 16—which also elected a Republican in both 2002 and 2000. Here the inference that a change in classification is needed is more indirect, since the actual district 16 in the 2002 consent plan is different from district 16 in the 2001 plan. Nonetheless, I can infer likely partisan outcomes in district 16 had the 2001 plan been used in 2002 by looking at the outcome in districts such as district 18, which has much the same character in the 2002 consent plan as district 16 has in the 2001 plan, and which,

TABLE 12. TENTATIVE ASSIGNMENT OF GEORGIA SENATE DISTRICTS TO COIN TRANSITION CATEGORIES (AS WE MOVE FROM THE 1997 BENCHMARK TO THE 2001 PLAN) IN A FASHION MORE CLEARLY REFLECTIVE OF THE LIKELY EMPIRICAL EVIDENCE ABOUT MINORITY INFLUENCE

CC	*CO*	*CI*	*CN*	*OC*	*OO*	*OI*	*ON*	*IC*	*IO*	*II*	*IN*	*NC*	*NO*	*NI*	*NN*
10	2	44							34	3				5	1
15	12									4					(6)
35	22									8					7
36	26									11				40	9
38										13				41	(16)
39										14					17
43										20					18
55										23					19
										25					21
										29					24
										33					27
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Districts in shaded cells are problematic in their coding by the State of Georgia. Circled districts are changed from Table 10.

like district 16, elected a Republican in both 2002 and 2000. While VAP and Democratic performance scores of district 16 in 2001 are very close to those of district 18 in 2002, there are some slight differences—making 16 a slightly stronger Democratic district. Nonetheless, these differences are not large enough to project a Democratic victory in district 16 had the 2001 plan version of district 16 been used in the 2002 election. Thus, there is a *strong prima facie* case for reclassifying the *expected* transition for this district as NN rather than NI. Again, however, I emphasize that evidence bearing on which transition classification is the appropriate one should have been a critical element of the remand trial, since we are merely making a judgment that is subject to factual rebuttal. It would be the State of Georgia which would have had the burden of supporting the claim, with a preponderance of the evidence, that the district is, in fact, an influence district despite electing a Republican, as the State was claiming it to be.

Switching both district 6 and district 16 from the category of NI to that of NN, as it would seem most plausible to do given the unlikelihood of compelling expert witness rebuttal had there been a remand trial, then the summary in Table 11 would be changed so that the sum in that table would be minus 2, making the 2001 plan even more retrogressive with respect to overall minority influence judged at the district level than concluded previously in looking only at the change in the classification of district 6. Table 13 shows the result of both reclassifications.

Table 13 reflects only what I regard as the appropriate reclassifications of district 6 and 16. But there are at least six other districts whose proposed classification by the State of Georgia with respect to their level of minority influence is also at best problematic. These districts are shown shaded in Table 12. All are either districts which elected Republicans in 2002 or which elected Democrats who shifted their party affiliation to the Republican Party after the 2002 election.

One problematic district with respect to its classification as an opportunity to elect district is district 22. The 2001 plan dramatically reduced black VAP and black registration percentages in the district and the 2002 plan was identical to the 2001 plan. The black incumbent lost narrowly in the general election, so a Republican now holds the district. With the Republicans now having the advantage of incumbency it is perfectly reasonable to predict that the district will remain in Republican hands, in which case it would have to be reclassified from CO to CN. But this change in classification would generate even stronger evidence of retrogression in overall minority influence at the district level attributable to the 2001 plan. If we reclassify districts 6, 16, and 22 in the fashion indicated above, the sum shown in Table 11 would now be recalculated as minus 4.

How best to classify district 22 is a matter for factual inquiry, and should have been one of the key empirical issues addressed by the parties and by the district court had there been a remand trial. But here, too, the burden would have been on the State of Georgia to show, by a preponderance of the evidence, that this district can reasonably be expected to be recaptured by the Democrats.

I regard as problematic the classification of another four of the six districts in terms of minority influence by the State of Georgia These districts were held by Democrats, but the Democrat shifted party after the 2002 election (districts 4, 13, 23, and 29). Based on what is known from other jurisdictions where this phenomenon occurred, I anticipate that evidence presented at the remand trial had such a trial taken place would have shown that the switched-party representatives now behave like the Republicans they are and not like the Democrats

Table 13. Summary Change in Influence Matrix from the 1997 Plan to the 2001 Plan for the Georgia Senate in which the Assignment of Georgia Senate Districts to COIN Transition Categories in the More Empirically Reasonable Fashion Shown in Table 11 (but Leaving Untouched the Classification of the Six Districts in Table 10 that Were Shaded)

Transition	*CN*	*CI, ON*	*CO, OI, IN*	*CC, OO, II, NN*	*OC, IO, NI*	*IC, NO*	*NC*	*TOTAL*
Number of districts	0	1	4	45	4	0	0	
Value	−3	−2	−1	0	+1	+2	+3	
Product	0	−2	−4	0	4	0	0	−2

they were. In any case, given that these are now districts held by Republican representatives, the burden would have been on the State of Georgia to show that they are correctly characterized as minority influence districts.

On the other hand, for District 11, identified in Table 12 as one whose classification I view as suspect and which if shifted in the obvious direction would provide further evidence that the 2001 plan is even more retrogressive with respect to the 1997 benchmark when judging minority influence at the district level than I had previously concluded, the State of Georgia had a potentially compelling argument. District 11 elected a Republican in 2002, but not in 2000. The 2001 plan makes this district slightly more Democratic than it was under the 2002 plan and this improvement, while slight, is still large enough to make it plausible to claim that the district would have elected a Democrat under the 2001 lines even though it did not under the 2002 lines. Of course, it is again the State of Georgia which would have had the burden of supporting the claim, with a preponderance of the evidence, that District 11 truly is a minority influence district despite having elected a Republican in 2002.

In sum, anticipating the likely evidence on minority influence that might have been presented at a remand trial *it seems virtually certain that the correct answer to question 3(a) is no, and that the 2001 plan is retrogressive with respect to minority influence at the district level*.

Of course, even if the answer given by the trial court to question 3(a) would have been yes, in our approach, we still would need to consider question 3(b).

> 3(b) If the answer to question 3(a) is yes, was the reduction in the number of control and/or opportunity districts necessitated by the goal of increasing the number of minority influence districts?

According to the State of Georgia, districts with more than 25% black VAP are influence districts. Taking them at their word, Table 3 shows that there are just as many influence districts in the 2002 consent plan as in the 2001 plan! Yet, the 2002 consent plan has more control districts (and the same number of control plus opportunity districts) as does the 2001 plan which it replaced, and the two plans are largely identical. Therefore, it would appear to be impossible for the State of Georgia to convincingly argue that the 2001 plan provides more minority influence overall than does the 2002 consent plan. But then, the reduction in the number of control and/or opportunity districts was not necessitated by the goal of increasing the number of minority influence districts, since the same end could have been achieved by adopting the consent plan. *Thus, the answer to question 3(b) is, in my view, clearly no*.

DISCUSSION

The civil rights bar widely condemned the majority opinion in *Georgia v. Ashcroft*. The Court majority's revisionist reading of the existing Section 5 case law was thought to be disingenuous at best, dishonest at worst. More importantly, the case was viewed as offering a new standard for Section 5 that would have diminished the protections afforded by the VRA to minority voting rights (see e.g., Karlan, 2004).[48] Thus, adding new language to Section 5 when the VRA was extended in 2006 to return Section 5 to the *Beer* standard was a major goal of many civil rights attorneys and concerned citizens. In this they succeeded, although the exact meaning of the new language remains to be subject to legal test.

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[48] The judgment in *Georgia v. Ashcroft* also is relevant to the debate involving law professors and political scientists who study the Supreme Court about the extent to which jurisprudential reasoning as opposed to ideological predispositions and/or (concealed) partisan motivations drives Court decisions. This case was decided by a 5–4 vote, with the usual lineup of "liberals" versus "conservatives," and with Justice O'Connor once again serving as the swing voter. But, whatever else may be said about *Georgia v. Ashcroft*, it would seem that a decision by Republican appointed Justices upholding a Georgia Senate plan drawn by Democrats with the support of African-American legislators, and proposing a standard that would allow Democrats to view African-Americans as Democrats who, *ceteris paribus*, gain increased influence when Democrats retain majority control of the legislature is hard to fit into a partisan mold. On the opposite side, however, I would also point out that the *Georgia v. Ashcroft* decision could have become advantageous to Republicans in the longer run if the wrongheaded notion became accepted that any district with a certain minority population (say 25%) was *ipso facto* a minority influence district. In states controlled by Republicans, that interpretation of what it took for minority influence would allow Republicans to fragment black voters into districts that would almost certainly elect Republicans, thus affecting both minority influence at the district level and the likelihood that a state's legislature would have a Republican majority. For a discussion of similar issues in the context of realistic opportunity to elect see Brace, Grofman, and Handley (1987).

At the heart of *Georgia v. Ashcroft* was a distinction among four types of districts. I have argued that from a political science perspective, with a focus on empirical realities in the U.S. in the twenty-first century, this four-fold distinction can best be framed in terms of (a) districts in which minorities have a realistic chance to win election because the minority community can, if unified, control the outcome; (b) districts in which minorities have a realistic chance to win election because the minority community can control the Democratic primary, but minorities can only win the general election with "reliable" cross-over voting from the white community; (c) districts in which the minority community is a key part of the elected official's winning coalition and can thus be expected to have influence; and (d) districts in which the minority community is not a key part of the elected official's winning coalition and cannot be expected to have influence. Prior to *Georgia v. Ashcroft*, courts tended to conflate types (a) and (b) usually to the neglect of the latter, or to conflate types (b) and (c), or types (c) and (d). Recognizing the distinctions among the four types is an important positive feature of *Georgia v. Ashcroft*. On the other hand, I have also argued that the Court majority in *Georgia v. Ashcroft* was not successful in laying down sensible empirical tests for minority political influence and, in particular, seemed to believe that any minority population above a certain size necessarily possessed influence.

There simply is no magic number (at least below that which gives a unified minority voting bloc effective electoral control of a district) such that minority population above that level will guarantee minority influence. Not only must we take into account context specific factors, we must also take into account party control of the district and of the legislature as a whole. As I have noted earlier, of the seventeen so called influence districts identified by the State of Georgia, seven ultimately elected white Republicans.[49] Any claim that these districts are actually ones where minorities have influence requires us to ask if and when a district represented by a Republican can allow for minority influence—a fundamentally empirical and context-specific question. A minority population of, say, 25% may be politically influential or not influential all. In an essay in this journal describing his own research on voting patterns in the Georgia legislature, David Canon (2008: 15, emphasis added) says "The [Georgia legislative] data presented in Table 2 show a huge gulf between the support scores for Republicans and white Democrats and smaller but statistically significant differences between the votes of white Democrats and African American senators. *These data should put to rest the argument that a district with greater than 25% BVAP can be an influence district if it is represented by a Republican*."

In large part because of the *Georgia v. Ashcroft* majority's failure to be clear about what constitutes minority influence, I have argued that the Supreme Court majority was also factually wrong in treating the question of whether the 2001 Georgia legislative plan was retrogressive in terms of minority influence as essentially an open and shut question to which the correct answer was an obvious *no*. Despite the *Georgia v. Ashcroft* majority's strong hint that the case might be an easy win for the State of Georgia under the new retrogression standard laid down by Justice O'Connor, I believe that the issues would actually have been close at best had there actually been a remand trial. Indeed, my own preliminary answer to the question of whether the 2001 Georgia Senate plan is retrogressive is yes, in that with respect to each of the three prongs of our proposed test we have tentatively answered questions 1(a) yes, and 1(b) and 1(c) no; 2(a) yes but 2(b) no; and 3(a) no and 3(b) no.

Nonetheless, I would emphasize that my evaluations of each of the questions in my flowchart was based on the limited evidence available to me, and might, at least in principle, have been decided otherwise based on new evidence presented at the remand trial. While the analysis I give above provides strong support for the view that even under the new *Georgia v. Ashcroft* standard, the State of Georgia had very much the weaker case, I do not wish to prejudge how an actual trial would have gone, since there are fac-

[49] While the State identified more minority influence districts in the 2001 plan (seventeen) than under the 1997 benchmark (twelve), Georgia's claims about what constituted a minority influence district were simply not empirically credible, in that three of the seventeen districts they identify as minority influence districts under the 2001 plan elected Republicans in both 2000 and 2002 and another four are districts where the Democrat elected in 2002 shifted his party allegiance to the Republican Party. The U.S. Department of Justice noticed this simple but important point and pointed it out to the district court in 2003 (in oral argument).

tual issues that I have been unable to fully address given the limitations of the evidence I had available to me. Indeed, I believe that had the remand trial taken place, the outcome in it would have turned more on questions of fact then on questions of law.

As I hope to have made clear in the discussion in the body of the article, there are many specific empirical questions which the remand trial court would have had to address. For example, the remand court would have needed to consider evidence about the black proportion of the electorate and of the support coalition of the winning candidate in various districts; e.g., expert witness evidence about whether districts 6, 11, and 16, and districts 4, 13, 23, and 29 are indeed, minority influence districts, as the State of Georgia was claiming; and about whether district 22 remained an opportunity to elect district.[50] I also believe that the trial court would have had to address what I have labeled as questions 2(b) and 3(b), about whether alternative plans that did not diminish the minority's realistic opportunity to elect candidates of choice could have been crafted that also maintained minority influence at the district level comparable to what was found in the 2001 plan, while at the same time maintaining a likelihood of Democratic control of the Georgia Senate comparable to what was found in the 2001 plan.[51] Having now acknowledged my own uncertainties, however, had there actually been a remand trial, I believe that the failure of the 2002 plan to maintain either black representation in the Georgia Senate at its 2000 level *or* Democratic representation in the Georgia Senate at its 2000 level would have made it hard for the State of Georgia to successfully argue that its 2001 plan was not retrogressive either in terms of diminishing the realistic opportunity of the African-American community to elect candidates of choice[52] *or* in terms of failing to maintain overall minority influence.[53]

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[50] In this context, on the basis of new evidence (and a new legal standard), the district court might also have chosen to revisit its findings of lack of retrogression in realistic opportunity to elect candidates of choice in district 22, even though that issue was not really before them.

[51] On the other hand, the discussion in the previous section of this article suggests that most districts are non-problematic with respect to minority influence and that it might be possible to stipulate to the character of all districts but those shaded and those circled in Table 12, except possibly for districts 5, 40, and 41. In particular, while the question of whether certain Democrat-held districts such as 3, 8, 14, 20, 25, and 33 are truly influence districts is of academic interest, whatever judgment is made about that question could not have affected the outcome of the remand trial—since these districts are the same or essentially the same in demography in both the 1997 plan and the 2001 plan. Similarly, there does not seem to be any reason to have wasted a remand trial court's time with analyses of districts in the NN category, since the State of Georgia is not claiming that any of these 26 districts in Table 10 reflects any minority influence. The districts that are identified as falling into the CC category in Table 10 seem equally non-problematic since they, too, do not affect any calculation of *change* in minority influence at the district level between the 2001 plan and the benchmark, since they remain control districts in both plans. Moreover, even the four districts (4, 13, 23, and 29) where the Democratic party switchers are to be found may not be relevant for the Section 5 inquiry if it can be shown that the switching cannot be attributed to differences in these districts between the 1997 plan and the 2001 plan, since, on balance, the demography in these districts does not change much between the two plans.

[52] Even were one to look at the case for retrogression in the Georgia Senate solely under the lens of *Beer*, as that case was interpreted prior to the Supreme Court's new approach in 2003, I also believe that the district court judgment in *Georgia v. Ashcroft* might have gone either way. Deciding whether Georgia's 2001 plan was retrogressive under *Beer* (as the *Beer* standard had most commonly been interpreted) was not an easy question for the D.C. Court to answer and led all members of that Court to a very fact-specific review about exactly what black proportions in particular districts could preserve black opportunity to elect candidates of choice. In my view, the trial court judges, both the majority and the minority, deserve to be complimented for their considerable attention to the factual evidence and for careful concern for evaluating comparisons in the context of the plan as a whole. Given the very limited scope of the expert witness trial record (reflecting failings on both the part of the State of Georgia and the U.S. Department of Justice in their trial strategies) and given that the Court majority was interpreting the legal meaning of retrogression in the then standard way, I believe the majority decision was the correct one, *under the circumstances*. Having said that, I find myself quite sympathetic to the views of the dissenting judge in the first trial before the D.C. panel. Judge Oberdorfer's views were, not at all unreasonably, shaped by the considerable weight he gave to the views of the leading black politicians in Georgia that the Senate plan was not retrogressive with respect to the representation of the interests of African-Americans. Judge Oberdorfer also asserted that the Department of Justice had failed to demonstrate that the level of racially polarized voting in the three challenged districts was high enough that minority candidates of choice could not be expected to win despite the polarization. In the initial district court trial decision in *Georgia v. Ashcroft* the legal burden was on the submitting jurisdiction, and the case might well have been decided otherwise had the burden of proof been reversed.

[53] Relatedly, the claim that racially polarized voting has substantially declined from previous levels is, in my view, much overstated. Minority success is still largely due to concentrated minority population in either majority minority districts or districts where the minority population is enough to control the Democratic primary and there is sufficient reliable cross-over voting by white Democrats to allow minority Democrats to win a general election. (See Lublin et al., 2009).

One last point about the case: I should declare the extent to which I have been previously involved in the litigation discussed above. First and most importantly, I was not a participant in the original *Georgia v. Ashcroft* litigation. However, I was a putative consultant to the U.S. Department of Justice on the remand phase of the case—the phase that never happened, and then I became an actual consultant to the *Larios v. Cox*, 306 F. Supp. 2d 1214 (D. Georgia 2004); 305 F. Supp. 2d 1335 (D. Georgia. 2004), three judge court on issues involving evaluating realistic opportunity to elect in the plans that court was drawing. I do not regard these latter involvements as biasing in any way the political science judgments offered above on minority political influence in the 2001 Georgia plan.

Now let me turn to some more general issues about the future of voting rights and about political science approaches to the study of minority power. I believe that the "road map" outlined in this article (and in more conceptual detail in Grofman, 2006) offers, at minimum, a simple but clear way to think about the concept of "realistic opportunity to elect" in the legal context and a way to address, in a structured and logically consistent fashion, the kinds of questions that any Court (or any expert witness) must answer if the concept of "minority influence" were to be seen as legally relevant to VRA jurisprudence. By looking at these questions in a very concrete and fact-specific setting, realistically mimicking what could have been presented at a remand trial (within the limits of the evidence I had available to me), I hope to have shown how useful this "road map" can be. Personally, despite my own efforts at clarification, I remain skeptical about whether the concept of minority political influence can be defined in a way that is both operationally manageable in a trial setting *and* legally relevant, and the above discussion should make clear that the concept of minority influence is almost certainly more complex than many other concepts commonly the subject of expert witness testimony in voting rights cases, e.g., realistic opportunity to elect candidates of choice, or geographic compactness, or racially polarized voting. Nonetheless, whether inside or outside the plan drawing and litigation context, I believe that the approach outlined here is informative for any lawyer, legislator, judge, social scientist, or ordinary citizen who wants to think seriously about the very slippery concept of minority influence.[54]

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[54] Of course, I recognize that the flow-chart approach outlined in this and my 2006 paper was unlikely to be adopted exactly as I have proposed it, even if it had not been made potentially legally irrelevant by the revised language of the 2006 Voting Rights Act extension. But that caveat does not imply that devising the flow chart is unavailing, since it might emerge in somewhat altered form in legal decisions in the future, or simply be used to structure future empirical political science research. In this context, I might note that while in my expert witness testimony in the district court trial of what became *Thornburg v. Gingles* I did propose what have since become the first two prongs of what is commonly called the *Thornburg* three-pronged test, the third prong of that test, dealing with when polarization became *legally* significant, was added by the *Gingles* trial court.

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