

WOULD VINCE LOMBARDI HAVE BEEN RIGHT
IF HE HAD SAID: "WHEN IT COMES TO
REDISTRICTING, RACE ISN'T
EVERYTHING, IT'S THE *ONLY*
THING"?*

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INTRODUCTION

The focus of this Article is three puzzles: (1) Why is voting rights litigation more common twenty-five years after passage of the Voting Rights Act¹ than it was when the Act was instituted? (2) Why have the courts, Congress, and the United States Department of Justice ("DOJ") generally been so favorable to tough voting rights enforcement? (3) Why, after so many years of relative consensus, are we now seeing what appears to be a substantial scholarly and public backlash against the Voting Rights Act? To address these questions, part I of this Article reviews the differences between voting rights case law and other areas of equal protection, and argues that the Voting Rights Act of 1965—as amended in 1982—lacks most if not all of the attributes commonly attributed to affirmative action programs. Part II also considers the evidence for recent claims that, under the guise of creating majority-minority districts, the Voting Rights Act is being manipulated for partisan gain by both parties, and that districts drawn by legislatures—ostensibly to satisfy voting rights concerns—have grown so convoluted and violative of geographically defined communities of interest that the aim of the Voting Rights Act, to provide equal protection to minority voters, has been perverted beyond recognition. Part III illustrates a number of points raised in this Article with respect to the 1991 districting of New York City under a new city charter that provided for a fifty-one-member city council, and

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¹ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

with respect to other plans of which I have firsthand knowledge.²

I. THREE PUZZLES ABOUT VOTING RIGHTS

A. *Why Is Voting Rights Litigation More Common 25 Years After Passage of the Voting Rights Act Than It Was When the Act Was Instituted?*

It might appear that, by now, the Voting Rights Act should have achieved its intended aims of enfranchising minorities, and should be mostly a dead letter except in that handful of jurisdictions that have not yet gotten the message that discriminating against minorities is illegal.³ Yet, arguably, the Voting Rights Act is playing a greater role in the 1990s round of redistricting than in any previous round.⁴ There are a number of reasons why the Voting Rights Act appears more important than ever.⁵

First and foremost, the 1982 amendments to section 2 of the Act⁶

² I served as a consultant to the New York City Districting Commission in 1990-91. I have been involved as an expert witness or consultant in nearly two dozen voting rights cases over the past decade, including *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part & rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

³ As Samuel Issacharoff of the University of Texas School of Law compellingly phrases the issue:

Why isn't voting rights litigation obsolete? A quarter century of federal policing of the electoral processes has markedly transformed the political landscape. Gone are the poll taxes, the literacy tests, and the other overt barriers to voter registration. Gone as well under the impact of one-person, one-vote is the artificial numerical inflation of the voting strength of one community at the expense of another. Yet, despite these changes, voting rights claims continue to mount. For the past decade, changes in the substantive law governing voting rights claims have enhanced the efficacy of legal protections of the right to vote, clearing the way for greater judicial supervision of the electoral process.

Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1833-34 (1992) (footnotes omitted).

⁴ See RACE AND REDISTRICTING IN THE 1990S (Bernard Grofman ed., forthcoming 1993) (discussing in detail the role of voting rights related issues in state and legislative redistricting litigation in the 1990s as compared to the 1980s).

⁵ See generally Issacharoff, *supra* note 3, from which the discussion below benefits.

⁶ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973 (1988)). In June 1982, the Voting Rights Act of 1965 was amended for the third time. The 1982 amendment altered the Act in a number of ways, but the key change was in section 2. Congress amended section 2 of the Voting Rights Act so as to provide that a violation of equal protection could be found by a federal court if an election practice had the effect of denying to any protected group an equal opportunity to "participate in the political process" and to "elect representatives of their choice," even if no intentional discrimination was found. The section 2 standard applies to all jurisdictions, but it requires litigation by an affected party or by the DOJ to call it into play. The amended 1982 language of section 2 reads in relevant part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a

extended its direct application to all jurisdictions, not just those covered under section 5 of the Act.⁷ Other than preclearance denials by the DOJ under section 5 of the Act, virtually all challenges to election practices as racially discriminatory are now brought under section 2, rather than under the Constitution directly. Thus, the scope of the Act in the 1990s round of redistricting is considerably greater than in the past. Jurisdictions that were previously beyond its reach are now coming under challenge and the prospect of such challenge is dramatically affecting the choices made by redistricting decision makers. Moreover, while the early voting rights cases were very largely centered in the Southwest and South, now jurisdictions in the Midwest and Northeast are also involved in redistricting related litigation.⁸ Also, the DOJ now incorporates a section 2 test into its section 5 enforcement.⁹

manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

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

Id.

⁷ Voting Rights Act § 5, 42 U.S.C. § 1971 (1988). The number of states covered in whole or in part under the section 5 provisions has varied from the original seven to as many as twenty-two. At present, sixteen states are covered in whole or in part under the Act, since some states with clean records have taken advantage of the "bail-out" provisions. See Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *MINORITY VOTE DILUTION* 167, 174-76 (Chandler Davidson ed., 1984).

⁸ See, e.g., *Latino Political Action Committee, Inc. v. Boston*, 609 F. Supp. 739 (D. Mass. 1985) (the Boston City Council), *aff'd*, 784 F.2d 409 (1st Cir. 1986); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984) (the Chicago City Council), *cert. denied*, 471 U.S. 1135 (1985).

⁹ There is dispute among scholars as to what extent DOJ section 5 enforcement already incorporated something very close to the section 2 standard even prior to the official changes in Department regulations in the 1980s. While *Beer v. U.S.*, 425 U.S. 130, 141 (1976) established a non-"retrogression" test as the section 5 effects standard, the requirement that jurisdictions affirmatively demonstrate that their plans did not intentionally dilute minority voting strength provided the Voting Rights department of the DOJ a weapon that allowed them to reject plans whose foreseeable consequences were arguably detrimental to minority electoral success, even if those plans were not retrogressive. See Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 192-93 (1983).

Section 5 preclearance provisions will have a strong deterrent effect on plans that give even the appearance of being dilutive, since the jurisdiction must bear the costs of contesting a preclearance denial. For further discussion of the role of the DOJ preclearance decisions on 1980s and 1990s redistricting, see Bernard Grofman, *Evaluating the Voting Rights Enforcement of the United States Department of Justice*, Remarks at the Annual Meeting of the

Second, the nature of districting litigation has shifted. Until quite recently, almost all challenges under the Voting Rights Act were to at-large elections. Now, a very high proportion of challenges are directed against the way that lines are drawn within a single-member district plan. In many ways, the success of the Act in the 1980s in eliminating the use of at-large elections has created a new set of issues in the 1990s; the numerous jurisdictions that shifted from at-large or multimember district elections to single-member districts must now redistrict.¹⁰ Thus, the fact that a jurisdiction has previously been the subject of a lawsuit or a section 5 preclearance denial is no bar to further litigation. Indeed, to the contrary, litigation can be expected after each decade's decennial reapportionment.¹¹

Third, the evidentiary standard under section 2 is more straightforward than the "totality of circumstances" test¹² that was the standard prior to *Thornburg v. Gingles*,¹³ the landmark case decided in 1986 that continues to define how the 1982 amended language of section 2 of the Act is to be interpreted. The section 2 standard is also a somewhat easier evidentiary hurdle than that now found under a direct constitutional test.¹⁴ Thus, not only has the scope of the Act been widened in terms of which jurisdictions are potentially affected,

American Political Science Association (August 1992). In this respect, section 5's inversion of the usual burden of proof was thus especially important in the pre-*Thornburg* period.

¹⁰ See THE QUIET REVOLUTION: MINORITY VOTING RIGHTS AND REPRESENTATION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., forthcoming 1993) [hereinafter THE QUIET REVOLUTION] (collection of chapters enumerating the cities in the deep South that have eliminated at-large elections and the consequences for minority representation due to those changes). One advantage of at-large elections is that redistricting is unnecessary.

¹¹ Of course, whether that litigation is likely to be successful will be a function of the choices made by redistricting decision makers. Nonetheless, given the innumerable plans that might be drawn, there will usually be some feature of a plan that might be improved upon from the perspective of a minority community or particular minority candidates.

¹² *White v. Regester*, 412 U.S. 755, 769 (1973). In *Zimmer v. McKeithen*, 485 F.2d 1297, 1305-08 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976), the Fifth Circuit applied the standards laid down by the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973), for when racial vote dilution in the context of an at-large or multimember district election rose to the level of a constitutional violation. The *Zimmer* analysis looked at a lengthy set of factors and evaluated these factors in the "aggregate" or in *White v. Regester*'s "totality of the circumstances" to see whether unconstitutional vote dilution had occurred. *Id.* The *Zimmer* factors, as they came to be called, were "relied upon in the vast majority of nearly two dozen reported [vote] dilution cases" decided between 1976 and 1980. SENATE COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. DOC. NO. 417, 97th Cong., 2d Sess. 23 (1982).

¹³ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

¹⁴ In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court plurality replaced the *Zimmer* factors with an "intent" test that appeared to require direct evidence of discriminatory purpose before an unconstitutional violation of the Fourteenth Amendment's Equal Protection Clause could be found. *Id.* at 72-74. However, in *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court effectively permitted intent to be inferred from a preponderance of

but the test for a voting rights violation has been redefined in a way that makes it more likely that plaintiffs will prevail. For challenges to at-large elections, the *Thornburg* test requires plaintiffs to show: (1) that a single-member district remedy is feasible; (2) that the minority community is politically cohesive; and (3) that minority candidates usually can be expected to lose as a result of their submergence in a racially polarized electorate.¹⁵ For challenges to single-member districts, the standards closely parallel those set forth in *Thornburg*.¹⁶ The *Thornburg* test offers a small and clearly operational set of factors, albeit in almost all instances proof of *each* of these factors is necessary for plaintiffs to prevail.¹⁷

Fourth, as a result of the 1970 changes to the Act, groups other than blacks were placed under its special protections, including those of "Spanish heritage," Asian Americans, and Native Americans.¹⁸

the aggregate of the evidence, namely, from the *Zimmer* criteria and related aspects of the totality of the circumstances. *Id.* at 618-21.

In amending section 2 of the Voting Rights Act, Congress was reacting to the decision in *City of Mobile*. The specific motivation behind the amended language in section 2 was to allow plaintiffs to establish a statutory violation by showing discriminatory effect without proving any kind of discriminatory purpose. It is important to remember that Congress acted to amend the Voting Rights Act at a time when *City of Mobile* defined the constitutional standard, before the Supreme Court's change of tack in *Rogers*.

¹⁵ *Thornburg*, 478 U.S. at 50-51. To date, the Supreme Court has either refused to hear cases involving disputes about the proper interpretation of the *Thornburg* three-pronged test that have been brought to it on appeal, or has summarily affirmed lower court findings in such cases. The *Thornburg* test (also frequently referred to as the *Gingles* test) has affected the outcomes of scores of voting rights cases, including many which have never gone to trial. In January 1991, for example, two important voting rights cases, *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991), and *Solomon v. Liberty County, Fla.*, 899 F.2d 1012 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 670 (1991), were denied certiorari, and another perhaps even more important case, *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 111 S. Ct. 662 (1991) was summarily affirmed. The denial of certiorari in *Garza* let stand a finding for Hispanic plaintiffs of intentional discrimination; the denial of certiorari in *Solomon* let stand the remand of the case to a district court with no guidance other than a divided appellate en banc panel opinion and *Thornburg* itself. The summarily affirmed *Jeffers* decision dramatically reshaped the map of the Arkansas Legislature so as to create what may have been the maximum or close to the maximum number of black majority districts possible—albeit still falling considerably short of proportional representation.

¹⁶ See Bernard Grofman & Lisa Handley, *Identifying and Remediating Racial Gerrymandering*, 8 J.L. & POL. 345, 359-65 (1992).

¹⁷ See Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 197, 225-27 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter Grofman, *Expert Witness Testimony*]. A violation can also be found even if all three of the prongs of *Thornburg* are not satisfied, if there has been intentional discrimination. See BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 114 (1992) [hereinafter GROFMAN ET AL., *QUEST FOR VOTING EQUALITY*].

¹⁸ See, e.g., Chandler Davidson, *The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE*, *supra* note 17, at 7,

For Hispanics, there has been a good deal of litigation under the Act already, especially in Texas,¹⁹ but the dramatic and continuing growth of the Hispanic population and its spread to new areas of the United States suggests an increasing likelihood that districting will impact on Hispanic voting rights. For Asian Americans, also a rapidly growing population, but one for whom the Voting Rights Act has as yet had few consequences due to the group's relative size and geographic dispersion, the Act should achieve its greatest importance at the turn of the century as patterns of Asian American political participation change and as a new "third" generation of Asian American political leaders born in the United States rises to the fore.

Last, but far from least, there is strong evidence for continuing patterns of racially polarized voting for both blacks and Hispanics. Such continuing polarization makes it likely that minorities will feel the need to sue to protect their voting rights, and such polarization increases the likelihood that minorities will be successful in the lawsuits that they bring. Successful lawsuits will further enhance the likelihood of litigation. Unfortunately, most of the evidence on racial polarization is buried in court records,²⁰ but James Loewen, a sociologist at the University of Vermont who has been an expert witness in many cases in the South and elsewhere, has compiled a useful review of data from elections in South Carolina that provides stark testimony about the levels of polarization in that state which suggests little or no change in polarization over the course of a decade.²¹ In the deep South, despite the much ballyhooed success of a few black politicians who have been elected from districts that are heavily white, the number of black state legislators elected from white districts is minuscule; the percentage of such districts that elect blacks has not been

34-36 ("[Section 5] coverage would occur if more than 5 percent of the voting-age citizens in the jurisdiction belonged to one language-minority group (defined as Asian Americans, American Indians, Alaskan natives, and persons of Spanish heritage).").

¹⁹ See Robert Brischetto et al., *Texas*, in *THE QUIET REVOLUTION*, *supra* note 10.

²⁰ See, e.g., *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990) (discussing local and legislative elections in Los Angeles County involving Hispanic candidates), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part & rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) (reviewing data on racially polarized voting in North Carolina legislative elections involving black versus white contests).

²¹ See James W. Loewen, *Racial Bloc Voting and Political Mobilization in South Carolina*, 19 *THE REVIEW OF BLACK POLITICAL ECONOMY* 23, 25-26 (1990); see also Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 *LEGIS. STUD. Q.* 111 (1991) [hereinafter Grofman & Handley, *Black Representation*] (examining the relationship between minority population proportion in legislative districts and the likelihood of minority electoral success producing indirect but nonetheless compelling evidence of polarization).

rising.²² Even in many states outside the South, black legislative success essentially occurs only in districts where blacks constitute a substantial proportion of the electorate.²³ While the pattern for Hispanics is not quite as stark, it is similar.²⁴

B. *Why Have the Courts, Congress, and the DOJ Generally Been So Favorable to Tough Voting Rights Enforcement?*

To understand why the DOJ is so tough on voting rights enforcement (at least as compared to its stance in most other areas of civil rights enforcement);²⁵ why congressional support for strong voting rights enforcement has been so persistent since 1965;²⁶ and why most federal courts have continued rigorous enforcement of the Voting Rights Act despite a Republican-appointed bench,²⁷ it is useful to

²² See THE QUIET REVOLUTION, *supra* note 10 (compiling data for cities in eight Southern states).

²³ See Grofman & Handley, *Black Representation*, *supra* note 21, at 113-15; Lisa Handley et al., Black Population Percentages and Minority Representation in State Legislatures, Remarks at the Annual Meeting of the Western Political Science Association (March 1992).

²⁴ See Brischetto et al., *supra* note 19; Bernard Grofman & Lisa Handley, *Preconditions for Black and Hispanic Congressional Success, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES* 31 (Wilma Rule & Joseph F. Zimmerman eds., 1992) (analyzing the relationship between both black and Hispanic population proportions in Congressional Districts and the likelihood of minority electoral success); Robert Brischetto & Bernard Grofman, The Voting Rights Act and Minority Representation in Texas School Boards, Remarks at the Annual Meeting of the American Political Science Association (August 1989) (similar data for Texas school boards).

²⁵ Few would disagree with the assertion that the DOJ generally takes a tough line on voting rights, especially section 5 preclearance, and has done so with reasonable consistency—with the possible partial exception of Bradford Reynold's stint in office—under both Democratic and Republican presidents. The disagreements among scholars are about the *motivations* underlying DOJ actions, about the *efficiency* of the DOJ's administrative machinery, and about whether its actions provide a *long-run benefit* to minority interests and to the broader democratic process. See, e.g., HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT (1982); FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990); ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987); Drew S. Days III, *Section 5 Enforcement and the Department of Justice*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 17, at 52; Grofman, *Expert Witness Testimony*, *supra* note 17; Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 17, at 85; James P. Turner, *A Case-Specific Approach to Implementing the Voting Rights Act*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 17, at 296.

²⁶ For example, in 1970, Congress extended the coverage of the Voting Rights Act of 1965 to include additional minority groups. See Davidson, *supra* note 18, at 35. In 1982, by amending section 2 of the Act to specify a statutory effects-based test for vote dilution, Congress effectively bypassed the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that made proof of discriminatory intent necessary for a showing of constitutional voting rights violation. See *supra* note 14.

²⁷ For example, although *City of Mobile* was a voting rights decision by the United States

contrast voting rights with other areas of Fourteenth Amendment jurisprudence.

While voting rights, like other Fourteenth Amendment concerns, has developed a view of "group" rights and "group" remedies, at least five important differences exist between voting rights and other types of rights protected under the Fourteenth Amendment and under statutes that derive their authority from that Amendment.²⁸

First, voting has a special status; legal scholars have argued that the right to vote is "fundamental."²⁹ Moreover, as the Supreme Court stated in *Reynolds v. Sims*,³⁰ achieving "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."³¹

Second, virtually all current voting rights jurisprudence involving racial or ethnic minorities is Voting Rights Act jurisprudence. Voting rights jurisprudence has developed almost entirely independently from other areas of Fourteenth Amendment Equal Protection case law. Although the Court, in *City of Mobile v. Bolden*,³² drew on Fourteenth Amendment discrimination cases such as *Arlington*

Supreme Court that the civil rights bar found greatly disheartening, *Rogers v. Lodge*, 458 U.S. 613 (1982), decided only two years later, came very close to restoring the pre-*Mobile* constitutional standard in all but name. See, e.g., THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION CONFERENCE (Rockefeller Foundation ed., 1981); Joaquin G. Avila, *Mobile Evidentiary Requirements*, in THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION CONFERENCE, *supra*, at 125; cf. Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in CONTROVERSIES IN MINORITY REPRESENTATION: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 17, at 66. Even more importantly, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court extended the earlier case law in defining the statutory effects-based standard for vote dilution in an at-large plan in a fashion that made it easier for plaintiffs to prevail because the amount of lower court discretion was reduced by precisely specifying the necessary conditions for a violation to be found. See GROFMAN ET AL., QUEST FOR VOTING EQUALITY, *supra* note 17, at 47-60.

At the appellate and district court level, the pattern of voting rights decisions is somewhat more mixed, but it is worth noting that leading conservative judges, such as Judge Kozinski of the Ninth Circuit, have on occasion been remarkably outspoken in their support of minority voting rights. See *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring & dissenting in part), *cert. denied*, 111 S. Ct. 681 (1991). *Garza* is perhaps the most important case involving Hispanic voting rights in the Southwest decided to date.

²⁸ Thus, I part company with some other participants in the 1992 Benjamin N. Cardozo School of Law conference on "Redistricting in the 1990s: The New York Example," as well as with most other civil rights specialists, when I assert that, in most ways, it is a mistake to think of the Voting Rights Act as just another form of affirmative action. Of course, it is an even greater mistake to think of it as requiring racial quotas. See *infra* note 46 and accompanying text.

²⁹ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1460-61 (2d ed. 1988).

³⁰ *Reynolds v. Sims*, 377 U.S. 533 (1964).

³¹ *Id.* at 565-66.

³² *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

*Heights v. Metropolitan Housing Development Corp.*³³ for the proposition that, under the Constitution, discrimination must be intentional to be unlawful, that intent standard was short-lived.³⁴ With the passage of the 1982 language in section 2 of the Voting Rights Act, Congress bypassed *Mobile*—and a directly constitutional standard of voting rights equal protection—by creating a statutory-based effects test that is closely tied to the language of the Act and is thus largely idiosyncratic to it.³⁵

Section 5 of the Voting Rights Act has also generated its own unique body of case law. Section 5 applies only to those jurisdictions which Congress has found to have unclean hands. In section 5 cases the burden of proof automatically shifts so as to require covered jurisdictions to convince the DOJ (or the Federal District Court of the District of Columbia) that proposed redistricting changes or changes in other electoral practices have neither the intent nor the effect of “minimizing or canceling out” minority voting strength.³⁶ This automatic shifting of the burden of proof is not found in other equal protection areas, where a *prima facie* evidentiary threshold must usually be surmounted before the burden of proof shifts to defendants.³⁷

Third, in most instances, the nature of voting rights remedies is more straightforward than in other areas of racial discrimination. If minorities are found to be *submerged* under an at-large or multimember district plan, then the remedy is to draw single-member districts based on territory where minorities are found in substantial numbers. Indeed, for challenges to at-large or multimember district elections, one aspect of the three-pronged *Thornburg* test is that minority populations be “large” enough and “geographically compact” enough to form the “majority” within a single-member district.³⁸ If minority population concentrations are found to be *fragmented* or *packed*, then

³³ *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

³⁴ See *supra* note 14.

³⁵ See *supra* note 6. That test is, however, directly rooted in earlier decisions based on constitutional claims. See *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976); see also GROFMAN ET AL., *QUEST FOR VOTING EQUALITY*, *supra* note 17, at 47-60; McDonald, *supra* note 27, at 67-69; Bernard Grofman et al., *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 LAW & POL'Y 199, 200 (1985).

³⁶ See *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). As noted *supra* note 9 and accompanying text, since the late 1980s the DOJ has incorporated section 2 standards into its section 5 preclearance test.

³⁷ This reversal of the initial burden of proof seems to have permitted the DOJ—and perhaps also the D.C. Court—to take a tough stance on voting rights challenges brought under section 5 with less chance of a reversal.

³⁸ See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

the remedy is to draw a single-member district plan that ends that fragmentation or packing by creating districts in which minorities have a realistic opportunity to elect candidates of choice.³⁹

Fourth, unlike the situation in many other areas of equal protection, the nature of the remedy for minority vote dilution is *directed solely to those whose rights have previously been injured*, and capable of *immediate implementation*. Single-member districts in which members of the minority group have a realistic opportunity to elect representatives of choice directly benefit that substantial proportion of the minority community (even if not always a majority) who reside in the minority opportunity districts that have been created, and such districts may arguably indirectly benefit *all* members of the minority class in the affected areas, even those not residing in the minority opportunity district.⁴⁰

Fifth, the nature of the remedy for minority vote dilution *does not require injury to innocent parties* as is the case, for example, in those situations where the future job prospects of whites may be threatened as a result of having been hired by a firm which is found to have been discriminating against blacks. The only possible losers when minority districts are created are the white *incumbents* whose districts will be severely reconfigured since those districts included pockets of submerged or fragmented black populations—and these white incumbent legislators have no “right” to their seats. As the majority cannot be said to have a right to elect *all* the candidates, white *voters* are being denied no entitlement when minority vote dilution is remedied, and white voters’ rights to elect candidates of choice remain unimpaired.⁴¹

³⁹ See Grofman & Handley, *supra* note 16, at 384-86. While alternative remedies that do not require the creation of single-member districts, such as limited voting, have been proposed, courts have so far refused to order such remedies. See, e.g., *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988). However, courts have approved consent agreements between the parties that make use of alternative remedies such as limited voting or cumulative voting. See Richard L. Engstrom & Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 SOC. SCI. Q. 388, 389 (1991); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 221-36 (1989); Edward Still, *Limited Voting and Cumulative Voting as Remedies for Minority Vote Dilution in Judicial Election*, Remarks at the Annual Meeting of the American Political Science Association (August 1989); Edward Still, *Cumulative and Limited Voting in Alabama*, Remarks at the Conference on Representation, Reapportionment, and Minority Empowerment (March 1990).

⁴⁰ To seek access to the political system, members of the minority community may approach minority legislators elected from other constituencies. This is especially common among minority groups that are alienated from the political process or those who have many members for whom English is not a native language.

⁴¹ There are other differences as well. For example, the voting rights arena has developed an analogue to the “disparate impact” statistical test of employment discrimination case law in

Thus, if "affirmative action" means, as it often has come to mean, not just *equal* treatment, but that the claims of minorities are given *more* weight than those of identically situated whites, then it is clearly inaccurate to characterize voting rights remedies as affirmative action.

As a consequence of the factors enumerated above, both Congress and the federal courts have generally been more sympathetic to voting rights claims than to other types of equal protection.⁴² Moreover, for many of these same reasons, at least until quite recently, there has not been the sort of widespread *public* backlash to voting rights claims that there has been to other areas of what has been called affirmative action. Thus, Congress and the courts could deal with voting rights concerns without fear of the sort of widespread public reaction that occurred with respect to decisions about busing or minority employment set-asides.

C. *Why, After So Many Years of Relative Consensus, Are We Now Seeing What Appears to Be a Substantial Public and Scholarly Backlash Against the Voting Rights Act?*

While one can overestimate the extent to which voting rights has been a noncontroversial area from the standpoint of public attention, certainly it has been far less controversial than other civil rights areas. Moreover, until the mid-1980s, scholarly views of the Voting Rights Act were almost uniformly positive.⁴³ The Voting Rights Act was frequently described as the most successful civil rights legislation of the century. But there can be little doubt that, since the mid-1980s, there has been a backlash against the Voting Rights Act. The most prominent manifestation of this backlash has been work by Abigail Thernstrom and others who argue that the Act has led to the "resegregation" of American politics and has led us away from "colorblind" notions of equality that are fundamental to the American political process.⁴⁴ The basis of this claim is the observation that

the form of the third prong of *Thornburg*, which requires that there be evidence supporting a finding that minority candidates "usually lose" as a "result of white bloc voting." However, the most important statistical analysis found in voting rights cases is considerably different in kind from the "disparate impact" test in that it is an analysis of whether or not voting is polarized along racial lines. See Grofman, *Expert Witness Testimony*, *supra* note 17, at 209-17.

⁴² See Bernard Grofman & Chandler Davidson, *Postscript: What Is the Best Way to a Color-Blind Society?*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE*, *supra* note 17, at 300, 315 [hereinafter Grofman & Davidson, *Postscript*].

⁴³ To the extent that there were complaints, most had to do with claims of inadequate enforcement. See, e.g., BALL ET AL., *supra* note 25.

⁴⁴ See Abigail Thernstrom, "Voting Rights" Trap, *THE NEW REPUBLIC*, Sept. 2, 1985, at

race-conscious remedies result from voting rights litigation, and that inevitably those remedies include districts that are substantially or overwhelmingly minority in their character.

Recently the attack on the Voting Rights Act has intensified as a result of two additional claims both of which appear plausible on their face. First, commentators in national news journals, editorials, and op-ed articles have claimed that the Voting Rights Act—as enforced by the DOJ—is a “Republican conspiracy” to siphon off black voters into heavily black districts in order to “whiten” the remaining districts so as to make it more likely that Republicans will be elected.⁴⁵ Second, others claim that the Voting Rights Act has been used to maximize the number of seats in which a minority candidate will virtually be assured of election, and thus has become a kind of quota system.⁴⁶

The spread of the anti-voting rights backlash—from a small academic fringe to the wider political marketplace—is the result less of growing public awareness of an abstract debate over principles of democratic theory, than it is due to some highly visible features of post-*Thornburg* redistricting, two of which have particular importance. First, considerable attention has been paid in newspaper and magazine articles to the extensive effort devoted by the Republican National Committee (“RNC”) and groups affiliated with the RNC to use Voting Rights Act related litigation as a tool to end—or at least significantly reduce—Democratic dominance of state legislatures by forcing major changes in existing legislative lines in the 1990s round of legislative redistricting.⁴⁷ Second, the belief that the legislative-

21, 21; THERNSTROM, *supra* note 25, at 237-43; *see also* Hugh D. Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE*, *supra* note 17, at 177, 193-94; O'Rourke, *supra* note 25, at 107-08; Katherine I. Butler, *Reapportionment, the Courts and the Voting Rights Act: A Resegregation of the Political Process?*, 56 U. COLO. L. REV. 1, 58-65 (1984).

⁴⁵ *See, e.g.*, Abigail M. Thernstrom, *A Republican Civil Rights Conspiracy*, WASH. POST, Sept. 23, 1991, at A11. *Contra* Bernie Grofman, *Race and Redistricting: No One is Using the Voting Rights Act to "Whiten" Majority Districts*, WASH. POST, Oct. 21, 1991, at A19.

⁴⁶ *See* Ronald Brownstein, *Minority Quotas in Elections?: Redrawing Districts to Favor the Selection of Blacks, Latinos and Others Has Touched Off a Fresh Debate Over Racial Entitlements*, L.A. TIMES, Aug. 28, 1991, at A1; Editorial, *Dekalb College's Transfer is Not a Voting Rights Issue*, ATLANTA J. & CONST., Oct. 9, 1991, at A10.

While largely endorsing the claim that the Voting Rights Act has been used to create safe minority seats, Linda Chavez, a prominent Hispanic Republican, has claimed that the packing of Hispanics tends to place Hispanic Republicans into the same districts as Hispanic Democrats, thus making it unlikely that Hispanic Republicans will be elected to office. As most Mexican Americans and most Puerto Ricans are affiliated with the Democratic party, these districts, at least outside of Florida, will be won by Democrats. *See* Linda Chavez, *Party Lines*, THE NEW REPUBLIC, June 24, 1991, at 14.

⁴⁷ *See, e.g.*, John Dillin, *GOP Maps Strategy to Win House in '90s*, CHRISTIAN SCI. MONI-

drawn districts have become increasingly convoluted to satisfy voting rights concerns has been fostered by the prominent display of maps with districts—such as the new 30th Congressional District in Dallas, Texas and the new 12th Congressional District in North Carolina—whose configurations defy description, and almost defy belief.⁴⁸

II. ARE THE ORIGINAL GOALS OF THE VOTING RIGHTS ACT BEING BETRAYED?

A. *Is the Voting Rights Act (a) A Republican Plot; (b) A Smoke Screen for Incumbency Protection and Partisan Gain; (c) Sometimes the One, Sometimes the Other; (d) None of the Above?*

It cannot be disputed that the RNC has provided extensive financial support to Republican state organizations either seeking to challenge legislative and congressional plans drawn by Democrats, or seeking to promote Republican preferred plans in situations where the legislature and the governor have been unable to agree on a plan. The RNC has been far better organized than the Democratic National Committee (“DNC”) in this respect, although the DNC does have a small redistricting operation of its own.⁴⁹ The RNC has (directly or indirectly) helped establish and fund organizations in a large number

TOR, June 3, 1988, at 3; *GOP, Minorities Share Redistricting Agenda*, CHI. TRIB., Apr. 25, 1991, at C32. Democrats control roughly twice as many state legislatures as do Republicans. Republicans see control of state legislatures not just as an end in itself but also as their key to eventually regaining control of the House of Representatives. The present Chief Counsel of the RNC, Benjamin Ginsberg, has made explicit his view that Republican failure to control Congress, despite the many voters who choose to vote Republican for president, is caused in large part by skilled Democratic gerrymandering of congressional lines in the states where Democrats control the legislature. Similar views have been expressed by recent Chairmen of the RNC. See Barget Hornblower, *Political Musical Chairs Face Discord; Census a Deadly Game for Cities*, WASH. POST, Apr. 20, 1980, at A10 (Bill Brock, Republican National Committee Chairman, stating: “The Republicans got pretty badly kicked. We’ve consistently gotten 10 percent more popular votes than we have seats, both at the state and congressional levels. That’s what a gerrymander does. You lose the close ones because the Democrats draw the close districts to be marginally Democratic.”).

⁴⁸ See Wright Aff. at app., *Pope v. Blue*, No. 3-92 Cv71-P (W.D.N.C. Apr. 15, 1992), *aff’d*, 113 S. Ct. 30 (1992) (illustrative reactions by political commentators in North Carolina to the North Carolina congressional plan).

⁴⁹ It is almost a cliché that, on any matter one can name, the RNC is better organized to provide services to members of its party than is the DNC, which used to be fondly known to political scientists as the “Disorganized/Disunited National Committee,” but the disparity between the two parties in resources allocated to redistricting is especially great. Democrats have relied on their greater control of legislatures and governorships to counter Republican computer sophistication and a Republican pool of experienced attorneys who have been involving themselves in redistricting litigation in more than one state. As argued *infra* text accompanying notes 50-60, this strategy has been somewhat effective, although it has had its downside.

of states to litigate redistricting issues from a Republican point of view, and has provided these groups access to attorneys experienced in voting rights litigation.⁵⁰ In many states, these groups have brought lawsuits which raise minority voting rights issues in addition to claims regarding partisan gerrymandering or alleged violations of state law or one person, one vote.⁵¹ A Republican-sponsored group also developed PC-based computer software specifically for redistricting use, making it available at relatively low cost not just to Republicans, but also to minority groups.⁵²

Judging by recent events, the Republican strategy for the 1990s round of state and legislative redistricting was to put litigation as its chief priority both in states not under complete Republican control and in states where there was divided party rule. This included states with a Democratic legislature and a Republican governor, a Republican legislature and a Democratic governor, or states where the two branches of the legislature were controlled by different parties—states where, in principle, Republicans and Democrats could seek to reach accommodation (presumably through an incumbency preservation “sweetheart” deal).⁵³ Central to this litigation-oriented strategy was

⁵⁰ Michael Hess, Deputy Counsel of the RNC, has served in that post for well over a decade and has been involved in numerous important redistricting cases, either directly or in the drafting of amicus briefs for the United States Supreme Court. Mark Braden, former Chief Counsel of the RNC, and Michael Carvin, a high level political appointee in the Civil Rights Division of the DOJ during Ronald Reagan's presidency, are other experienced litigators now in private practice who have been working in more than one state on redistricting litigation on behalf of Republican plaintiffs. Carvin, for example, has developed a pool of knowledgeable expert witnesses whom he has used repeatedly. Such methodological sophistication can be particularly important in voting rights litigation. It is well recognized in law and society literature that “repeat-players” develop advantages based on their familiarity with the issues. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974).

⁵¹ See, e.g., *Prosser v. Elections Board*, 793 F. Supp. 859 (W.D. Wis. 1992) (lawsuit brought by Republicans in a “beauty contest” situation where partisan divisions between the governor and the legislature left it to a federal court to choose which plan would be adopted for the state's legislative districts). In addition to commissioning expert witness testimony from two political scientists, Richard Niemi, from the University of Rochester, and John Bibby, from the University of Wisconsin, on the partisan fairness of the various proposed plans, I was brought in by the plaintiffs as an expert on minority vote dilution to evaluate the various plans from that perspective.

⁵² See Clayton Yeutter, *Incumbents Will Stop at Nothing!*, WASH. POST, May 9, 1991, at A21.

⁵³ In states with divided party control, it is not clear which party—or which branch of government—is to blame if a redistricting plan is not passed by the legislature and signed by the governor; there is usually enough blame to go around. While I do believe that the RNC had been urging state leaders in divided government states to take their chances in court, the intransigences of Democratic leaders are also relevant. For example, in California, a state with a Democratically controlled legislature but a Republican governor, the State Assembly Speaker, Willie Brown insisted that the Assembly, State Senate, and House plans would be

the belief that the Voting Rights Act could, in many states, be used to force the acceptance of plans that would benefit Republicans.⁵⁴

In the 1990s round of redistricting, Republicans appear to have operated on the belief that what will benefit minorities will almost inevitably involve a disruption in the existing district lines, and thus can be expected, *ceteris paribus*, to benefit Republicans by interfering with incumbency advantages that are disproportionately held by Democratic legislators. Some Republicans at the RNC apparently believe that creating heavily minority districts will almost inevitably pack Democrats in a fashion that cannot hurt Republicans, and has a good chance to benefit Republicans in that the remaining districts will, on the average, have fewer Democratic voters.⁵⁵ Both of these expectations are, on their face, quite plausible. Yet, as my colleagues and I have argued, based on analyses of legislative redistricting during

bundled; namely, that the governor could not accept one plan and veto the others. It is possible that a bipartisan agreement might have been reached were it not for the way in which Assembly lines had been drawn. These were apparently the major sticking points from the perspective of Republicans. In California, the redistricting situation which faced the governor was also complicated by the fact that the legislature gave the governor three different sets of Assembly, Senate, and House plans to choose from, each with consequences somewhat different for particular incumbent Republicans and Democrats. To further complicate the situation, California's governor had appointed his own commission to draw plans for the state in what was to be a neutral and nonpartisan manner. See Vlae Kershner & Greg Lucas, *Wilson Keeping Secret His Panel's Remap Plan*, S.F. CHRON., Sept. 25, 1991, at A1.

⁵⁴ Also underlying the Republicans' strategic thinking about the potential gains from a litigation-oriented strategy was the view that court-drawn plans, drawn with no partisan orientation, would nonetheless tend to favor Republicans simply by undoing the 1980s lines—lines which, in many instances, Republicans saw as reflecting carefully crafted strategies enacted by Democratic legislatures so as to enhance the Democratic party's legislative dominance. I should emphasize, however, that this calculation is seen from the standpoint of the Republican party as a whole. Court-ordered plans infrequently recognize the status of incumbents, and thus often create situations where many incumbents (of both parties) are paired—albeit the party with the most incumbents can expect to experience a proportionally higher number of pairings. Since pairings are anathema to incumbents, there may be a divergence between what is in the interests of a minority party's legislative incumbents and what is in the long-term interests of the party. See Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 POL. GEOGRAPHY Q. 5, 13-14 (1988).

⁵⁵ An even more cynical view regarding the reasons Republicans are so interested in advancing minority voting rights is that since additional minority seats can be expected to come out of the hides of white Democrats (*ceteris paribus*, or at least Republicans used to think), a focus on voting rights concerns will sow dissension between the white/Anglo and the minority members of the Democratic electoral coalition; in the longer run, the visibility to the public of greater numbers (and higher proportions) of minority Democratic elected officials will be conducive to further white flight from the Democratic party. Space does not permit an exploration of my views regarding the long-run future of racial divisions in American party politics. See Bernard Grofman et al., *Race and the Defection of Southern Whites from the Democratic National Ticket* (Jan. 16, 1992) (unpublished manuscript, on file with the *Cardozo Law Review*); Amihai Glazer et al., *A Formal Model of Group-Oriented Voting* (Oct. 15, 1992) (unpublished manuscript, on file with the *Cardozo Law Review*).

the 1980s, helping blacks—or other heavily Democratic minorities—by creating additional minority districts does not necessarily benefit Republicans when it is the Democrats who are doing the line-drawing, or in situations where there simply are not enough Republican voters proximate to the new seats to affect the number of districts that might elect Republicans.⁵⁶

The 1990s round of legislative redistricting has provided clear evidence to support the view that any claim that minority advantage goes hand in hand with Republican advantage should be viewed with skepticism. The redistricting in Virginia, a state with a Democratically controlled legislature and a Democratic governor, provides an example. Although there were sizeable gains in the number of black majority districts that were created in the Virginia House, the possible Republican gains resulting from this increase were severely limited because, in the final plan,⁵⁷ the Democrats paired fourteen Republican incumbents in seven districts and extensively redrew Republican seats. Indeed, the new plan arguably prevented the Republicans from controlling the House.⁵⁸ Similarly, in North Carolina, another state under Democratic control, the final congressional plan succeeded in protecting all of the nonretiring Democratic incumbents, while still drawing a second black majority House district.⁵⁹ What is especially significant about the North Carolina situation is that the second black majority House district drawn by the Democrats was not the same one that was proposed in the plans preferred by the Republicans. The Democratic plan included a district which ran along Interstate 85 in the central portion of the state (Congressional District 12), while the Republican plan proposed a district in the southeastern portion of the state.⁶⁰ The final Democratic plan carefully crafted the bizarre configuration of the two black majority House districts so as to avoid

⁵⁶ See Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169, 174-81 (1987).

⁵⁷ This plan was adopted after a preclearance denial to the state's first proposal. It included one additional black majority district. Letter from John R. Dunne, Assistant Attorney General, United States Department of Justice, to K. Marshall Cook, Deputy Attorney General, Virginia (July 16, 1991) (on file with the *Cardozo Law Review*).

⁵⁸ Telephone Interview with Gary King, Department of Government, Harvard University (May 1992); see also *Republican Party of Va. v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991). This view of the plan is disputed by Allan Lichtman who testified in *Wilder* for the plaintiffs. Telephone Interview with Allan Lichtman, Department of Government, American University (June 1992).

⁵⁹ Like the assembly plan in Virginia, the congressional plan had to be revised after a preclearance denial to the state's first proposal. Letter from John R. Dunne, Assistant Attorney General, United States Department of Justice, to Tiare B. Smiley, Special Deputy Attorney General, North Carolina (Dec. 18, 1991) (on file with the *Cardozo Law Review*).

⁶⁰ That plan also combined blacks and Lumbee Indians.

negative consequences—such as pairings—for the white Democratic incumbents.

It has sometimes been argued that the reason Republicans are seeking to litigate redistricting cases rather than seeking compromise with Democrats, as was common in the 1980s round of redistricting,⁶¹ is that a Republican bench can be expected to favor Republican plans over Democratic ones.⁶² Certainly, some political actors and the attorneys who represent them, often act in the belief that the partisan affiliations of judges are relevant in estimating how those judges decide redistricting cases. Therefore, a fair amount of judge and forum shopping occurs, with Democratic legislators usually preferring state courts and Republican legislators and governors usually preferring federal courts.⁶³

Evaluating the truth about claims of judicial bias is not quite as simple as it might initially appear. Although some evidence suggests that knowing which President appointed each judge on the three-judge panels that hear legislative and congressional redistricting cases helps to predict how those judges will vote, it may be that the cases that seem to exemplify partisan bias on the part of federal judges are not representative.⁶⁴ To date, an exhaustive study examining judicial

⁶¹ Most plans of the 1980s round of legislative and congressional redistricting can fairly be characterized as predominantly incumbency preservation-oriented, rather than as partisan gerrymanders designed to achieve partisan gains. See, e.g., Richard Morrill, *A Geographer's Perspective*, in *POLITICAL GERRYMANDERING AND THE COURTS* 212, 226 (Bernard Grofman ed., 1990). That is not to say, of course, that drawing plans that effectively freeze the minority party at a given proportion of the legislature is devoid of partisan consequences.

⁶² The present federal bench is largely Republican; the 1980s federal bench was disproportionately Democratic. See E.J. Dionne, Jr., *After 12 Years of Conservatism, a New Era Emerges*, *WASH. POST*, Nov. 4, 1992, at A27.

⁶³ Determining which party wants which forum requires careful analysis. For example, when the California Supreme Court was controlled by liberal Democrats during the 1980s, Republicans trying to overturn the congressional plan passed by a Democratic legislature, and signed, as his last act, by an outgoing Democratic governor, eventually sought to confine their litigation to federal court, attacking the plan as an unconstitutional partisan gerrymander. See *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988) (dismissed for failure to state a federal claim), *aff'd*, 488 U.S. 1024 (1989). In contrast, the Democrats preferred keeping the congressional redistricting litigation in state court. Initially, the Republicans had also raised state law issues in state court. By the 1990s, when the issue was that of a court-judged "beauty contest" as a result of gubernatorial vetoes of the plans proposed by the Democratically controlled legislature, the California Supreme Court had come under Republican control; it was the Democrats who now preferred litigating in federal, rather than state court.

⁶⁴ One such case has attracted a great deal of attention. See *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991) (a three-judge court's redrawing of State Senate lines in Texas from what had been proposed by the Democratic legislature, widely regarded as having favored Republicans). Moreover, the Fifth Circuit recently investigated a complaint against a United States District Judge (N.D. Tex) for *ex parte* conversations with Dallas Mayor Annette Strauss during the course of a bitterly disputed redistricting suit. The complaint was eventually dismissed. See *Second Buchmeyer Complaint Dismissed*, *TEX. LAWYER*, May 27, 1991, at 7.

bias in redistricting decisions has yet to be conducted.⁶⁵ Moreover, as noted previously, in many states, there is some reason to believe that court-drawn plans drawn with no partisan intent may nonetheless tend to help Republicans simply by undoing the 1980 district lines drawn by Democratic legislatures.⁶⁶ Indeed, the extent to which this Republican advantage is believed explains why Republicans have been so litigation prone in the 1990s, even in situations where compromises across the aisle might have been reached.⁶⁷

Whatever may be the truth about the claim that some Republican-appointed judges will advance Republican aims—when this can be done covertly under the guise of satisfying other criteria such as one person, one vote, or avoiding minority vote dilution—the claim that a Republican-controlled DOJ has been enforcing the Voting Rights Act in a selective and partisan manner is simply not supported by the evidence from 1990s redistricting.

Perhaps the strongest evidence against the claim that the DOJ is using the Voting Rights Act to benefit Republicans is the behavior of the Department in *Garza v. County of Los Angeles*.⁶⁸ First, the DOJ

⁶⁵ Such a study is, however, about to be undertaken by Lisa Handley. Telephone Interview with Lisa Handley, Senior Research Analyst, Election Data Services (Sept. 4, 1992).

⁶⁶ In 1992, the California state constitution mandated intervention by the California Supreme Court because the legislature and the governor were unable to agree on a plan. The legislative and congressional plans drawn by the court-appointed Special Masters were widely at variance with the district configurations of the 1980s Democrat-drawn plans, especially those of the congressional plan. As a result, many incumbents, primarily Democrats, found themselves paired with other incumbents or with homes in districts that had little overlap with their previous districts.

⁶⁷ Similarly, in states like Illinois—which have divided party control and a tie-breaker mechanism (involving a lottery that chooses between a Democratic and a Republican nominee) for resolving deadlock in the redistricting commission (set up to redistrict the state when the legislature is unable to act)—the fact that the 1980s legislative plan was favorable to Democrats meant that the Republicans saw themselves as having little to lose by gambling that the 1990s tie breaker would be a Republican. In 1992 they won this gamble. More generally, we may model the decision to litigate or to accept political compromise as a bargaining game where there is considerable asymmetry between the expected payoffs to the in-party and those to the out-party. Because Republicans often preferred litigation to compromise in the 1990s round of legislative and congressional districting (because they saw themselves as having little to lose in most states and much to gain), and because nearly half of all states have divided party control, the 1990s have seen a rather high proportion of what I refer to as “beauty contest” cases; namely, cases where a court must choose among competing plans—or draw one of its own—because the legislature and the governor have been unable to agree on a plan. It is my impression that there are considerably more such beauty contest situations in the 1990s than there were in the 1980s. See Bernard Grofman, *Legislative and Congressional Redistricting in the 1990s*, in RACE AND REDISTRICTING (Bernard Grofman ed., forthcoming 1993) (identifying “beauty contest” situations). Still, there are many situations where a sweetheart deal was reached; these situations tend to attract little media attention.

⁶⁸ *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd*, 981 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

chose to bring a section 2 lawsuit against the County of Los Angeles Board of Supervisors,⁶⁹ despite the fact that the county's five-member board was controlled 3-2 by conservative Republicans.⁷⁰ Creating an Hispanic majority district would almost certainly result in electing a liberal Democrat to the board and jeopardizing, if not eliminating, Republican control of the board.⁷¹ Second, the complaint alleged that there had been purposeful discrimination against Hispanics by the Republican majority on the board—a charge sure to upset Southern California Republicans. Third, the DOJ's department devoted tremendous resources to the lawsuit; it played to win and made this case its highest priority.⁷² Moreover, at a point when a voting rights violation had already been found by the trial court, the Republican majority offered a proposed remedy plan that created a clear Hispanic majority seat, but placed a white liberal incumbent's residence in the district—thus avoiding any pairing of Democratic and Republican incumbents. Instead of accepting this plan, one which might have permitted continuing Republican control of the board, the DOJ's attorneys attacked it as an inappropriate remedy for the violation that

⁶⁹ That lawsuit, *United States v. County of Los Angeles*, was consolidated with *Garza*. As in *Garza*, the complaint alleged fragmentation of the Hispanic population in the county (dispersal among three districts) which had the effect of diluting minority voting strength; the complaint also alleged that there had been purposeful discrimination against Hispanics in the drawing of lines. While Hispanics filed *Garza* before the DOJ filed its parallel lawsuit against the county, preparations for the lawsuit had been underway for nearly two years. The line attorneys in the Voting Rights department of the DOJ are experienced, first-rate, and hyper-cautious litigators. The DOJ's voting rights lawsuits are usually exhaustively researched before being filed. As a consequence, the DOJ tends to be relatively slow to file.

⁷⁰ While elections to the County of Los Angeles Board of Supervisors are nonpartisan, the partisan affiliations of board members would be known to observers with even the smallest modicum of sophistication.

⁷¹ While reconfiguring the districts did not guarantee that Republican dominance would be ended, given the nature of the partisan balance in the county and the fact that one of the other districts was certain to remain a black majority seat (presently a white liberal), it was certain that Republican prospects would be greatly harmed if the fragmentation of the Hispanic community among three districts was eliminated.

⁷² Namely, this was not sham litigation designed to support an illusion of partisan impartiality with respect to the choice of targets of section 2 litigation. Indeed, as an expert witness for the DOJ in the case, I believe that without the DOJ's presence and its resources, especially in terms of data base expertise, the case would have been lost. Attorneys for the minority plaintiffs and the expert witnesses whom they retained were absolutely first-rate, but the county spent six million dollars defending the case, and the minority litigants simply did not have the resources to cope with the mounds of paper, computer printouts, and expert witness affidavits that this money bought. See generally Bernard Grofman, *Statistics Without Substance: A Critique of Freedman et al. and Clark and Morrison*, 15 EVALUATION REV. 746 (1991) [hereinafter Grofman, *Statistics Without Substance*]; Allan J. Lichtman, *Passing the Test: Ecological Regression Analysis in the Los Angeles County Case and Beyond*, 15 EVALUATION REV. 770 (1991); William O'Hare, *The Use of Demographic Data in Voting Rights Litigation*, 15 EVALUATION REV. 729 (1991).

had been found.⁷³

The DOJ's behavior in a number of the 1990s section 5 preclearance decisions further supports the view that the Department's motivation is to enforce the Act and the Act's prescription against minority vote dilution; the fate of Republicans is effectively irrelevant.⁷⁴ For example, in Virginia, the final 1990s State House plan drawn by the Democrats had seven pairings of Republican incumbents, but no pairings of Democratic incumbents. The plan was attacked by Republican plaintiffs as a partisan gerrymander,⁷⁵ yet it was still precleared by DOJ.⁷⁶ Similarly, in North Carolina's 1990s congressional districting, the final Democratic-drawn plan was precleared by the DOJ even though the second black majority seat which it created was very different from the one in the Republican favored congressional plan, and even though it was not a plan that Republicans liked—indeed, Republicans brought an unsuccessful lawsuit in federal court to block implementation of the plan.⁷⁷

The view that Republicans are *seeking to use* the Voting Rights Act for partisan gain—a view that is accurate—must not be confused with the much stronger claim that the Republicans have actually been *able to use* the Voting Rights Act in that way. In particular, the assertion that the 1990s has seen partisan manipulation of the DOJ's preclearance and litigation decisions on behalf of the Republican party is largely unsupported.⁷⁸

⁷³ The new Hispanic majority district proposed by the county traveled for a long distance in a narrow corridor over non-Hispanic neighborhoods to pick up a pocket of Hispanic concentration which was noncontiguous to the central Hispanic core, and which continued to fragment that core. It also had a very narrow "finger" that went up over a mountain range for no reason other than to pick up the white incumbent Democrat's home. That incumbent had already raised a nearly one million dollar war chest for his next campaign. The plan also had some features affecting the preponderantly black supervisorial district that made little or no sense from a community of interest perspective. See *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990) (trial testimony of Bernard Grofman), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

⁷⁴ That is not to say, however, that the view of many influential Republicans that, in the long run, tough Voting Rights Act enforcement benefits the Republican party has not played a role in the ability of the Voting Rights department to have operated so apparently free from political intervention under the Bush Administration.

⁷⁵ See *Republican Party of Va. v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991) (motion for preliminary injunction denied).

⁷⁶ An earlier plan, with one less black majority seat, was not precleared. See Letter from John R. Dunne to K. Marshall Cook, *supra* note 57. In my view, Abigail Thernstrom completely misinterprets the lessons to be drawn from the DOJ's Virginia preclearance decisions. See Thernstrom, *supra* note 45. *Contra* Grofman, *supra* note 45.

⁷⁷ See *Pope v. Blue*, No. 3-92 Cv71-P (W.D.N.C. Apr. 15, 1992), *aff'd*, 113 S. Ct. 30 (1992).

⁷⁸ In the 1980s, however, there is some evidence of political motivations affecting voting rights enforcement—such as reversals by political appointees of decisions recommended by

B. Have Districts Drawn By Legislatures Ostensibly to Satisfy Voting Rights Concerns Grown So Convoluted and Violative of Geographically Defined Communities of Interest That the Aim of the Voting Rights Act to Provide Equal Protection to Minority Voters Has Been Perverted Beyond Recognition?

Certain districts drawn in the 1990s have stirred public outrage and disgust. For example, the new black majority Dallas area Congressional District (Texas, Congressional District 30) looks like an amoeba trying to conquer the universe,⁷⁹ while the 12th Congressional District in North Carolina, which slithers along much of Interstate 85⁸⁰ gobbling up small noncontiguous pockets of black voters as it goes, resembles a very slender worm with unsightly bulges.⁸¹ In both cases, those who drew the districts defended the configurations as necessary to satisfy the Voting Rights Act. But, neither district can be fully justified in terms of voting rights concerns since alternative configurations exist that are less grotesque and that do less violence to neighborhoods, communities of interest, and political subunit boundaries.⁸²

Care must be taken so as not to confuse what is undisputable—that some minority districts in the 1990s round of districting are quite bizarrely shaped⁸³—with what is far more problematic; namely, the

line attorneys in the Voting Rights department. See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 133 (1985) [hereinafter Grofman, *Criteria for Districting*]; see also Days, *supra* note 25, at 60-61; Turner, *supra* note 25, at 298-99. Moreover, it is premature to reach a final judgment on the 1990s reenforcement of the Voting Rights Act by the DOJ, and there is some impressionistic evidence that suggests partisan involvement in some decisions taken by the Voting Rights department of the DOJ in the 1990s.

⁷⁹ It has also been referred to as a bug splattered on a windshield, as well as by numerous other unflattering labels. See, e.g., Kaye Northcott, *Dallas' New District Seeks to Maximize Black Turnout*, HOUSTON CHRON., Dec. 16, 1991, at A17 (State Senator Eddie Bernie Johnson quoted as describing the 30th District as looking like a "bacteria growing").

⁸⁰ If a similarly shaped district were located in New Jersey (running along the New Jersey turnpike rather than I-85), it could capture the Turnpike Rest stop named in honor of the late, great Vince Lombardi that is located near his birthplace—the one containing a replica of Green Bay Stadium. Telephone Interview with Pamela Karlan, Associate Professor of Law, University of Virginia School of Law (May 27, 1992).

⁸¹ This district may not even satisfy contiguity, or if it does, it does so only by allowing contiguity to be achieved by running one district along the *northbound* lanes of a road while allowing an intersecting district to be contiguous along the *southbound* lanes of that same road! See Grofman Aff. at 2-3, Pope v. Blue, No. 3-92 Cv71-P (W.D.N.C. Apr. 15, 1992), *aff'd*, 113 S. Ct. 30 (1992).

⁸² See Grofman Aff. at 9, Pope (No. 3-92 Cv71-P).

⁸³ Ill-compactness is not, per se, undesirable except where there are state laws that mandate that districts be as compact as practicable given the other criteria to be satisfied. Ill-compactness is a potential indicator of gerrymandering. See Grofman, *Criteria for Districting*, *supra* note 78, at 89-93. However, ill-compactness may simply reflect the way in which a contiguous minority population is distributed, the boundaries of historically defined communi-

claim that all the peculiar characteristics of such districts were *necessitated* by voting rights concerns.⁸⁴ For example, regarding both the 12th and 30th Congressional Districts, understanding why the configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act. It is also useful to remember that many of the more peculiarly shaped districts in the 1990s round of districting are not minority districts; in most cases claims that the peculiar configuration of a given non-minority district was required—as a consequence of the ways in which minority districts had to be configured—ring hollow.

There is, however, an important issue that must be confronted: To what extent should lines be drawn in order to make it feasible for minorities to elect candidates of choice? Here, I would distinguish two questions: (1) What does the Voting Rights Act require?; and (2) For a district not required by the Voting Rights Act, as long as a plausible argument can be made that such a district's configuration enhances minority influence on the electoral process, however marginally, and as long as there is no violation of one person, one vote, is it ever possible for a district to be so bizarre and so violative of the usual districting criteria that a legislature can be forbidden from adopting it?

Turning first to the question of what the Voting Rights Act requires,⁸⁵ my view encompasses the following eight positions: (1) Voting Rights Act remedies are contingent ones that, in general, apply

ties, or natural geographic features such as a coastline. How to interpret ill-compactness is a matter of case specific investigation. *See, e.g.,* Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155 (1990) [hereinafter Niemi et al., *Test for Partisan Gerrymandering*]. For example, if we look at the Hispanic majority district that was adopted as part of the remedy plan by the trial court in *Garza* we find a strange crab-like shape, but the basis of that district is a contiguous set of Hispanic majority census tracts that includes well over a million people. Indeed, most of the district consists of contiguous Hispanic majority cities or neighborhoods in the City of Los Angeles. Moreover, many of the seeming irregularities in the district are due to the configuration of some of the Hispanic majority cities that comprise the edges of the district, such as Santa Fe Springs.

⁸⁴ There may be situations where it is accurate to characterize an ill-compact configuration as effectively necessitated by the Voting Rights Act. In my view, there really was a "natural" configuration to many Hispanic majority supervisorial districts that might be drawn as part of a five district plan for the County of Los Angeles in 1990. The configuration of the actual Hispanic majority district that was adopted in *Garza*, drawn for the Hispanic plaintiffs by the UCLA demographer Leobardo Estrada, was virtually identical to that of an earlier plan that I had drawn for the DOJ.

⁸⁵ This Article shall not provide an exhaustive answer to that question since I have written extensively on that topic elsewhere. *See, e.g.,* GROFMAN ET AL., *QUEST FOR VOTING EQUALITY*, *supra* note 17, at 109-24; Grofman & Handley, *supra* note 16, at 345-72.

only if plaintiffs meet the stiff evidentiary hurdle of satisfying the three prongs of the *Thornburg* test, or something very much like them.⁸⁶ (2) As argued above, the Voting Rights Act should not be thought of as the usual type of affirmative action. (3) Given present case law, except where otherwise agreed to by the parties, a remedy to a voting rights violation will normally be in the form of a “fairly drawn” single-member district plan.⁸⁷ (4) Such a plan requires, at minimum, that minority population concentrations be neither fragmented nor packed; this requirement—as is the case with one person, one vote—can overrule competing state law claims, such as preserving political subunit boundaries. (5) Color-driven problems require color-conscious remedies.⁸⁸ (6) Insofar as the remedy for a voting rights violation is the drawing of districts that neither fragments nor packs the voting strength of *any* group, we can talk about the Voting Rights Act as acting in a race-conscious but also race-neutral fashion; when a plan goes beyond non-fragmentation and non-packing to create a minority district that meanders across most of a state, surgically plucking up minority population concentrations in a number of different cities as well as various small and otherwise noncontiguous minority pockets, the plan may be going beyond what the Voting Rights Act requires. Nonetheless, claims that particular minority districts cannot be drawn because they are unduly ill-compact or violate communities of interest should be laughed out of court when it is apparent that—either in the present plan, or historically—districts drawn for *political* reasons are (or have been) drawn with shapes or other features comparable to those of the minority districts to which objections are currently being made. What a jurisdiction was willing to provide when it served the interests of incumbency protection or partisan advantage cannot then be denied when it would serve the cause of minority voting rights. (7) Even so, there often will be marginal changes

⁸⁶ The question of “influence” claims, left open by *Thornburg*, has yet to be decided by the Supreme Court, but most federal courts have rejected such claims. See Grofman & Handley, *supra* note 16, at 365 (“*Thornburg* left open the question of whether minority groups not able to demonstrate a potential to elect candidates of their choice under an alternative configuration may nonetheless make out a showing of liability if they can demonstrate that their opportunity to influence election outcomes has been reduced.”).

⁸⁷ See *McGhee v. Granville County, N.C.*, 860 F.2d 110, 113 (4th Cir. 1988); *Dillard v. Crenshaw County*, 649 F. Supp. 289, 292-93 (M.D. Ala. 1986), *aff’d in part & remanded in part*, 831 F.2d 246 (11th Cir. 1987); see also Grofman & Handley, *supra* note 16, at 359-65; Karlan, *supra* note 39, at 213-48 (discussing alternative remedies); Edward Still, Cumulative and Limited Voting in Alabama, Remarks at the Conference on Representation, Reapportionment and Minority Empowerment (March 1990).

⁸⁸ I part company here with some critics of Voting Rights Act enforcement who argue that color-conscious remedies are never or almost never appropriate, at least given contemporary racial mores. See, e.g., O’Rourke, *supra* note 25, at 87-89, 107-13.

in configurations that might marginally benefit minorities which could not be *compelled* under section 2 of the Voting Rights Act, at least under the section 2 effects test.⁸⁹ (8) In general, there will be many different plans that can satisfy section 2 (or section 5) of the Voting Rights Act.

The second question asks whether there is anything that a body empowered to enact a plan might do to enhance minority voting rights, but in a fashion not *compelled* by the Voting Rights Act, that a court could overturn on the basis of considerations distinct from one person, one vote, such as preserving political subunit boundaries or communities of interest. The only clear response to this question is that it is clear that a definitive legal answer has not yet been given. For example, in a case involving the Ohio legislative plans,⁹⁰ Judge Peck, in a 2-1 decision, appeared to argue that unless the *Thornburg* test was satisfied, the legislature did not have the right to draw districts that were majority-minority in character.⁹¹ However, this is a confusing decision, and it is difficult to determine its central holding. In marked contrast, in the North Carolina congressional case, the court rejected the plaintiffs' claims of gerrymandering, finding that they did not rise to the level of a constitutional violation, even if the allegations made were true.⁹² The court also rejected as legally unfounded plaintiffs' attacks on the peculiarly shaped 12th Congressional District, holding that there was no constitutional right to live in a non-tortuous district.⁹³

My own views as to whether there are any limits to color-conscious districting are still evolving. Certainly, I do not wish to reduce the protections now afforded minorities by the Voting Rights Act. Also, I do not believe that the Act is, on balance, neither no longer

⁸⁹ In a section 5 case, the DOJ might be able to successfully require even quite marginal changes in a plan absent clear and incontrovertible evidence that the failure to choose alternative configurations had neither the effect nor the intent of diluting minority voting strength. Also, recent directions in case law suggests that there may be situations where evidence of intent to discriminate can compel the choice of configurations that might not be required under the *Thornburg* effects standard. See, e.g., *Garza v. County of Los Angeles*, 918 F.2d 763, 772-77 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); see also *supra* note 86 (discussing "influence" claims).

⁹⁰ See *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992), *cert. granted*, 113 S. Ct. 43 (1992) (scheduled for oral argument).

⁹¹ *Id.* at 698-701.

⁹² *Pope v. Blue*, No. 3-92 Cv71-P, slip op. at 10-11 (W.D.N.C. Apr. 15, 1992), *aff'd*, 113 S. Ct. 30 (1992). However, I should emphasize that the decision involved a motion to dismiss for failure to state a claim and thus was not definitive on the merits of the claims advanced.

⁹³ *Id.* slip op. at 11.

needed nor actually counterproductive for minorities.⁹⁴ In general, legislatures should have very broad discretion to enhance minority voting strength.⁹⁵ Still, I believe that it is undesirable to draw districts that run helter-skelter the course of a state, picking up noncontiguous pockets of minorities, cutting up cities as with a scalpel, in the fashion of North Carolina's 12th Congressional District;⁹⁶ there may even be circumstances where such districts violate due process or equal protection. In the North Carolina congressional case,⁹⁷ I filed an affidavit⁹⁸ asserting that the proposed 12th Congressional District should be rejected on the grounds that it was noncontiguous⁹⁹ and was, what I called, non-"cognizable."¹⁰⁰ In that affidavit, I also characterized the North Carolina congressional plan as a "crazy-quilt" lacking "rational state purpose."¹⁰¹

⁹⁴ See, e.g., GROFMAN ET AL., QUEST FOR VOTING EQUALITY, *supra* note 17, at 129-37; Grofman & Davidson, *Postscript*, *supra* note 42, at 306-14.

⁹⁵ Thus, I am troubled by *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992), to the extent it suggests that color-conscious districting is never permitted by a legislature except when evidence sufficient to show a section 2 violation has been established. *Id.* at 700-01. However, as noted *supra* notes 90-91 and accompanying text, exactly what proposition *Voinovich* stands for is not clear. The legislative plan rejected in *Voinovich* may have packed minorities—at least to the extent that minority percentages were set in a number of districts at a level higher than what had in previous elections been enough to elect minority candidates, but no section 2 violation was found.

In partisan elections for legislative office, Ohio is one of the states with the highest level of white crossover voting for black Democratic nominees. Lisa Handley et al., *Black Population Percentages and Minority Representation in State Legislatures*, Remarks at the Annual Meeting of the Western Political Science Association (March 18-21, 1992).

⁹⁶ A Wuffle characterized the lines drawn in North Carolina in terms of a pastiche of a famous John Donne poem: "Ask not for whom the line is drawn; it is drawn to avoid thee." Interview with A Wuffle, Assistant to Professor, School of Social Sciences, University of California (Apr. 30, 1992).

⁹⁷ *Pope v. Blue*, No. 3-92 Cv71-P (W.D.N.C. Apr. 15, 1992), *aff'd*, 113 S. Ct. 30 (1992).

⁹⁸ Grofman Aff., *Pope* (No. 3-92 Cv71-P).

⁹⁹ *Id.* at 1-3. Absent such special circumstance as where a political jurisdiction itself is noncontiguous (as is true for many California cities as a result of annexations for such purposes as locating garbage dumps or graveyards), as long as district-based systems of representation are used, I believe that contiguity should be a requirement. As I argued in my affidavit in *Pope*, "[c]ontiguity is fundamental to any notion of districting based on geography." *Id.* at 2. After having reviewed the maps made available to me by counsel for plaintiffs in *Pope* and reproduced in their complaint, filed on February 28, 1992, I asserted in my affidavit that either Congressional District 12 splits Congressional District 6 into two discontinuous pieces or Congressional District 6 splits Congressional District 12 into two discontinuous pieces (or both). From the map, Congressional District 12 appears to pass through one side of District 6 and emerge from out the other side. If that does not result in District 6 being bisected into discontinuous pieces, the State of North Carolina would appear to be exercising skills superior to those of the late Houdini's famous 'sawing a woman in half' trick.

Id. at 2.

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 2.

The idea of non-cognizability is not yet fully developed, and cognizability, *per se*, has not been the subject of previous case law. Nonetheless, my attempt to define this concept is worth briefly outlining, since I wish to argue that districts can be so far from cognizable that they violate what we might think of as a due process component of equal protection by damaging the potential for "fair and effective representation."¹⁰² By "cognizability," I mean the ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the district in commonsense terms based on geographical referents. Since I do not yet have a clear operational test for non-cognizability—especially since cognizability can best be thought of as a continuum—one way to operationalize the concept is in terms of a thought experiment. Imagine a hundred citizens, all of whom reside in a given, general geographic area. How much information would it take to figure out in which district they had been placed? Would county (or city) of residence suffice for most? Could the district be characterized in terms of major streets, or prominent geographic features? Would information on the specific neighborhoods people lived in be enough to identify district assignments? Or, for a significant number of voters, would we have to rely on actual street addresses to pin down district assignments because the district boundaries were so irregular?

Central to American politics is the notion that representation should be based on geographically defined districts. The link between a representative and his or her constituents is facilitated by a candidate's ability to campaign in geographically defined areas, where door-to-door campaigning is possible, and where access to constituents via media channels—newspapers, radio, and television stations—is made easier by the existence of common sources of information. Even more importantly, in geographically defined districts, the ability of voters to organize and mobilize on behalf of candidates and to collectively organize to influence their current representatives on behalf of policy changes is facilitated by the prospects for door-to-door organization and information campaigns conducted through use of common media. Moreover, the cognizability of district boundaries that results when boundaries can be clearly identified in terms of proximate geography, facilitates voter identification of and with the

¹⁰² See *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) ("[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."). The Supreme Court's fundamental motivation in entering what was being characterized as the "political thicket" of reapportionment and redistricting cannot be understood except in terms of a concern for rights to fair and effective representation.

district.¹⁰³ Permitting the construction of districts, whose boundaries are simply not definable in commonsense terms, vitiates the principle that representatives are to be elected from geographically defined districts and vitiates the advantages of such districts as the basis of electoral choice. Also, when districts are not cognizable, it is especially hard to dislodge incumbents; there is no straightforward geographical basis of electoral organization for change, and the costs of campaigning are increased.

Egregious violations of the cognizability principle can be identified by making use of standard criteria of districting, such as violation of natural geographic boundaries, grossly unnecessary splittings of local subunit boundaries (such as city and county lines), and Sunderings of proximate and contiguous natural communities of interests.¹⁰⁴ I should emphasize, however, that non-cognizability is not at all the same thing as ill-compactness. Some districts may appear ill-compact because they follow natural geographic boundaries (such as coastlines), or use as building blocks whole cities (or whole units of census geography) that are themselves not especially compact, and yet are still readily cognizable to their voters and to their legislators.¹⁰⁵ In addition, even if a court were to find support for a cognizability test in either state or federal law, only an extreme situation, like a "crazy quilt," would be sufficient for a court to interfere with legitimate legislation discretion, especially if that discretion were exercised with the aim of benefiting disadvantaged groups. I view the 12th Congressional District in North Carolina as a particularly unusual (and virtually unique) case.¹⁰⁶

C. *The Voting Rights Act as a "Brooding Omnipresence"*

One would get a totally misleading impression of the importance

¹⁰³ My present view, however, is that the appropriate test of cognizability is not whether the voters know the boundaries of the district in which they reside, but whether those boundaries could, in principle, be explained to them in simple commonsense terms.

¹⁰⁴ See Grofman, *Criteria for Districting*, *supra* note 78, at 86-88; *cf.* Wright Aff. at app., *Pope* (No. 3-92 Cv71-P).

¹⁰⁵ See Niemi et al., *Test for Partisan Gerrymandering*, *supra* note 83, at 1158-67 (discussing the concept of compactness and three distinguishable components of that concept: area-based compactness measures, perimeter-based compactness measures, and population-based compactness measures). The majority Hispanic district drawn as a remedy in *Garza* did not appear that compact, but, as it was based largely on whole cities and whole neighborhoods in the City of Los Angeles, it was readily cognizable.

¹⁰⁶ When I showed undergraduate students in my course on "Representation and Redistricting" a map of North Carolina's Congressional Districts, one of my students thought that the 12th District, which I had shaded in black, was a river. This district is not only bizarre, it is arguably noncontiguous, or contiguous only in ways that vitiate a representative's ability actually to travel from one part of the district to another without leaving the district.

of section 5 of the Voting Rights Act by only looking at the difference between the initial plans submitted to the DOJ for preclearance and those eventually given preclearance by the Department. Similarly, one would get a totally misleading impression of the importance of section 2 of the Voting Rights Act by only looking at the proportion of plans challenged in court that were overturned and how dramatic the proposed remedial changes were. In the 1990s round of districting, the effects of the Voting Rights Act have often been the most important when they have been the most invisible! To understand the importance of the Voting Rights Act on 1990s redistricting we must understand the law of anticipated reactions.

The Voting Rights Act has been what I shall call a “brooding omnipresence” in *all* redistricting decision making since *Thornburg* was decided by the Supreme Court in 1986. In the 1990s round of districting, it is difficult to overstate the importance of voting rights considerations in jurisdictions where there are substantial black or Hispanic populations. In such jurisdictions, many—if not all—of those creating plans began the process of line-drawing by specifying the shapes of the proposed majority-minority districts and any other districts with substantial minority populations, and then, having fixed those districts, drew the rest of the districts around them. In other words, redistricting decision makers treated voting rights concerns as their first priority—one that established constraints within which they would have to work. Only one person, one vote considerations took precedence over voting rights-related issues in most jurisdictions. Even if decision makers eventually made choices that they believed might be overturned by courts or by the failure of the DOJ to preclear a plan, their decision-making calculus was heavily influenced by calculations as to whether a plan would or would not pass muster under section 5 or section 2.

The costs to decision makers of section 5 preclearance denial are relatively high; if they delay too long in passing a plan that can be precleared, they run the risk that redistricting lines will be drawn by a court—a very high-risk situation, especially for incumbents.¹⁰⁷ The threat of a section 2 lawsuit is not as grave, since the press of impending elections and a court’s reluctance to overturn legislative acts may persuade courts to permit an election to proceed under the jurisdiction’s proposed lines, and delay resolution of a lawsuit until after the election. Nevertheless, the potential for a court to reject the legislative plan and then to draw one of its own too quickly to allow the

¹⁰⁷ This is essentially what happened in Texas, although the actual legal situation there is too complicated to describe within the space of this Article.

legislature a second chance (due to petition filing, preclearance, or other deadlines) is quite threatening to most legislators. It is fair to say that legislators do not like uncertainty about their electoral fates, and therefore particularly dread courts drawing plans with little or no regard for old district lines.¹⁰⁸

Section 5 lawsuits to reverse DOJ preclearance denials do not have a track record of success, and most jurisdictions do not choose that route.¹⁰⁹ The mirror image of these failed attempts to reverse the DOJ's preclearance denials by suing the DOJ in federal court has been the remarkable success rate of section 2 challenges by plaintiffs seeking to overturn plans as dilutive.¹¹⁰ Thus, the DOJ and section 2 plaintiffs have generally been able to exercise credible threats on jurisdictions.

D. *DOJ Preclearance Scrutiny Has Been Strict, but Not Unreasonable*

In the jurisdictions covered by section 5, the DOJ has exercised a very close scrutiny of plans. For example, in Georgia, North Carolina, and Virginia, the DOJ initially denied preclearance to either the state's legislative or congressional plan, or both.¹¹¹ After the first preclearance denial in Georgia, the state's revised submission was also rejected.¹¹² It was not until the second revised state plan was submitted that the DOJ was satisfied that its contours were nondiscriminatory.¹¹³ However, contrary to what is often claimed, the DOJ has not insisted on maximizing the number of minority seats or minority in-

¹⁰⁸ I would emphasize the potential for conflicts of interest between fostering the overall success of the legislator's party and the legislator's concern with his or her personal chance of reelection.

¹⁰⁹ See Grofman, *Criteria for Districting*, *supra* note 78, at 94 n.72 (briefly discussing some of the relatively few preclearance suits brought in the Federal District Court of the District of Columbia in the 1970s and 1980s).

¹¹⁰ For the seven states originally covered by the Act (plus Texas), see the data on section 2 litigation at the local level reported in the various state chapters in *THE QUIET REVOLUTION*, *supra* note 10. Virtually all of the lawsuits reported on in that volume are challenges to at-large elections. I should note that the success rate of section 2 litigation appears to be much greater in suits involving at-large elections than in suits involving challenges to single-member districts.

¹¹¹ Letter from John R. Dunne, Assistant Attorney General, United States Department of Justice, to Mark H. Cohen, Senior Attorney General, Georgia (Jan. 21, 1992) (on file with the *Cardozo Law Review*); Letter from John R. Dunne to Tiare B. Smiley, *supra* note 59; Letter from John R. Dunne to K. Marshall Cook, *supra* note 57.

¹¹² Letter from John R. Dunne, Assistant Attorney General, United States Department of Justice, to Mark H. Cohen, Senior Assistant Attorney General, Georgia (March 20, 1992) (*reprinted in U.S. NEWSWIRE*, March 20, 1992).

¹¹³ See Susan B. Glasser, *Redistricting Limping to Conclusion at Last with Eight More States, 96 Seats Left to Go*, *ROLL CALL*, Apr. 9, 1992.

fluence districts. Rather, it has insisted, at a minimum, on non-fragmentation and non-packing. In California, the DOJ precleared a congressional plan opposed by the Mexican American Legal Defense and Educational Fund ("MALDEF") that had been drawn by the Special Masters appointed by the California State Supreme Court.¹¹⁴ MALDEF had proposed an alternative configuration that included a district that split fifteen cities in the northern part of the state to obtain the Hispanic population needed to create an additional district with a bare Hispanic population majority. In Virginia, while the DOJ insisted that the state draw an additional black majority seat in the state house, it did not insist on the creation of a second additional black district along the rather convoluted lines proposed in a Republican-drafted plan.¹¹⁵ In New York City, the DOJ did not insist that the Districting Commission adopt a cross-borough district proposed by one minority group that would have connected a pocket of minority population in Staten Island to a black area in Brooklyn via a link that ran across the Coney Island boardwalk.¹¹⁶

While it is certainly true that the Voting Rights department of the DOJ has more than once prompted jurisdictions to draw rather convoluted majority-minority districts as the price of preclearance, that has generally occurred in situations where the demanded treatment involved providing the same degree of responsiveness to minority claims as the jurisdiction had already shown itself willing to give to other less constitutionally weighty concerns, such as incumbency protection. The DOJ's general aim has been the appropriate one of requiring nondiscriminatory treatment—albeit within the context of a race-conscious drawing of lines.

In some instances, jurisdictions have independently chosen to go beyond what the DOJ would have required. In North Carolina, while the Department did compel the state to draw a second black majority congressional district,¹¹⁷ the DOJ cannot be blamed for the peculiar configuration of the 12th Congressional District that was actually drawn since the second black majority district first contemplated by the Department was located largely in a different part of the state.

¹¹⁴ Letter from John R. Dunne, Assistant Attorney General, United States Department of Justice, to Daniel E. Lungren, Attorney General & Caren Daniels-Meade, Chief, Elections Division, Office of Secretary of State, California (Feb. 28, 1992) (*reprinted in* U.S. NEWSWIRE, Feb. 28, 1992).

¹¹⁵ Letter from John R. Dunne to K. Marshall Cook, *supra* note 57.

¹¹⁶ See Felicia R. Lee, *Districting Panel to Offer Options*, N.Y. TIMES, Apr. 30, 1991, at B4; Sam Roberts, *Redistricting Oddities Reflect Racial and Ethnic Politics*, N.Y. TIMES, May 7, 1991, at B1.

¹¹⁷ See *supra* text accompanying note 59.

Moreover, once a second black majority district had been drawn by the state, the DOJ had little choice but to accept it, since the *only* criteria used by the DOJ in its preclearance review is whether or not the plan has either the effect or purpose of diluting minority voting strength.¹¹⁸ The Hispanic majority seat in Chicago and the black majority congressional seat in the Dallas area took on peculiar configurations because of incumbency protection concerns. Nonetheless, in section 5 preclearance, the uncertainty about what the DOJ will demand and tight time constraints may lead jurisdictions to go beyond what the DOJ would actually have required in order to reduce the possibility that the DOJ will hold up elections in the state, or by refusing preclearance, place the legislature in a bad light.

III. MISCELLANEOUS REFLECTIONS ON REDISTRICTING IN GENERAL, AND NEW YORK CITY DISTRICTING IN PARTICULAR

A. *The Redistricting Debate as a Three-Cornered Hat*

All policy conflicts in the United States may be thought of as having three different components: a debate about democratic theory, a debate about constitutional law and/or statutory interpretation, and a consideration of *cui bono* and whose ox is being gored.¹¹⁹ Controversy about voting rights is a paradigmatic example of that principle. On the one hand, there is a very abstract philosophical debate about to what extent, if any, color-conscious policies can be justified. On the other hand, there are interpretative debates about the meaning of the Fourteenth Amendment, the intent of Congress when it enacted the Voting Rights Act of 1965, and whether the 1982 Amendments to the Act have been misinterpreted by the Supreme Court. Finally, there is a third debate about what the actual consequences of the Voting Rights Act have been and will be. For example, have minority gains in office-holding been primarily attributable to the elimination of pure at-large systems and the redrawing of district lines brought about by preclearance denials or litigation under the Act (or threat thereof), or can the growth in the number of minority elected officials be primarily attributed to changes in white attitudes that suggest that the Act has now largely outlived its usefulness? Has minority office-holding led to

¹¹⁸ In June 1992, a black candidate won the Democratic primary in North Carolina's 12th Congressional District. However, there will be a runoff in the Democratic primary for the other black majority Congressional District in the state—between a black candidate and a white candidate.

¹¹⁹ See BERNARD GROFMAN, VOTING RIGHTS, VOTING WRONGS: THE LEGACY OF *Baker v. Carr* 17-34 (1990).

policy changes that benefit the minority community? Or, has the creation of heavily minority districts isolated minorities and reduced the potential for establishing the cross-racial political coalitions needed to effectuate political and economic change? Has creating districts with substantial minority populations helped Republicans by "whitening" the remaining districts and/or by "darkening" the image of the Democratic party in a fashion that will exacerbate white flight from the party?¹²⁰

While these three aspects of controversy regarding voting rights are conceptually distinct, I strongly believe that debate about democratic theory that confines itself to theorizing without any real evidence about the likely consequences of different methods of structuring political choice is of limited value. It is for this reason that in my own work I try to deal with empirical issues about race and politics in America and not confine myself simply to issues of constitutional or statutory interpretation or of abstract democratic theory.¹²¹ Just as Plato wished to distinguish the "ideal" republic¹²²

¹²⁰ As additional representation is achieved for a group such as blacks, it is highly unlikely that this will occur in a fashion in which black representatives will constitute the same proportion of Republican as Democratic elected officials. If, for example, 90% of the black vote went to Democratic candidates, and only 50% of the white vote did, then the proportion of black office holders among Democrats could be expected to be at least nine times the proportion of black office holders among Republicans. Such proportions are close to what is now observed; each party elected legislators of a given race proportionate to the proportion of members of that race who support the party. Because black office holding in this scenario comes disproportionately in the form of Democratic office holders, it is also important to understand that, if proportional representation for blacks were to be obtained in the form of black office holders, with blacks as 10% of the voters, and if Democrats had 54% of the seats (in Congress), then roughly 17% of the Democrats (1/6), but only a little over 2% of the Republicans would be black (1/46). Thus, under these assumptions, proportional representation would mean that black legislators would constitute a considerably higher proportion of Democratic legislators than they do of voters, and a dramatically lower proportion of Republican legislators than they do of Republican voters, because they constitute a much higher proportion of Democratic voters than they do of Republican voters. Hence, black legislators would be highly visible in the Democratic party and virtually invisible in the Republican party. Of course, proportional representation for blacks or other minorities will not be achieved under a single-member district system that exaggerates the success of the majority bloc of voters, which suggests that the above hypothetical is farfetched. See generally Bernard Grofman, *For Single-Member Districts Random Is Not Equal*, in REPRESENTATION AND REDISTRICTING ISSUES 55 (Bernard Grofman et al. eds., 1982); Rein Taagepera, *Reformulating the Cube Law for Proportional Representation Elections*, 80 AM. POL. SCI. REV. 489 (1986); Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540 (1973); cf. Grofman & Davidson, *Postscript*, *supra* note 42, at 306-10. Nonetheless, if we look at black representation among delegates to the Republican and Democratic National Conventions, where proportionality norms *within the party* are in force, we find that in 1988 blacks made up well over 20% of the delegates to the Democratic National Convention and only 2% of the delegates to the Republican National Convention. Telephone Interview with Michael Hess, Deputy Counsel, Republican National Committee (March 1991).

¹²¹ I have contributed to all three debates in earlier writings. See, e.g., GROFMAN ET AL.,

from the “best” republic that might be realizable given a world in which one cannot expect to find philosopher kings who can resist the lure of power,¹²³ so I wish to distinguish the “ideal” Voting Rights Act from the Act that is “required” given a world in which racial divisions are all too real.¹²⁴ The former would presumably be color-blind; the latter cannot be.¹²⁵

QUEST FOR VOTING EQUALITY, *supra* note 17; THE QUIET REVOLUTION, *supra* note 10 (considering data on changes in minority representation in the city council elections in Texas and to what extent those changes can be attributed to Voting Rights Act related actions); Grofman & Davidson, *Postscript*, *supra* note 42 (discussing the origins of the Voting Rights Act, the 1982 amendments, and issues in democratic theory raised by the Act’s requirement of remedies that create heavily minority districts in situations where the three-pronged *Thornburg* test has been satisfied or where there is evidence of intentional discrimination); Brace et al., *supra* note 56 (considering empirical evidence bearing on the claim that drawing districts to provide blacks a realistic opportunity to elect candidates of choice also benefits Republicans in their quest for office); Grofman & Handley, *Black Representation*, *supra* note 21; (considering data on changes in minority representation in Southern state legislatures and to what extent those changes can be attributed to Voting Rights Act-related actions); Bernard Grofman et al., *The Effect of Black Population on Electing Democrats and Liberals To the House of Representatives*, 7 LEG. STUD. Q. 365 (1992) (examining the claim that concentrating black population in majority black districts reduces mean congressional liberalism by contributing to the election of conservatives—including, but not exclusively, conservative Republicans—in the districts which now have fewer blacks); Robert Brischetto & Bernard Grofman, *The Voting Rights Act and Minority Representation in Texas School Boards*, Remarks at the Annual Meeting of the American Political Science Association (August 30-September 2, 1989); *see also* Grofman, *Expert Witness Testimony*, *supra* note 17, and in many of the various other articles I have written with Lisa Handley, Chandler Davidson, Robert Brischetto, or Amihai Glazer, as well as in my expert witness testimony in numerous voting rights cases over the past decade or so.

¹²² PLATO, *THE REPUBLIC* 164 (Richard W. Sterling & William C. Scott trans., W.W. Norton & Co. 1985).

¹²³ PLATO, *THE LAWS* 58-88 (Thomas L. Pangle trans., Basic Books 1980).

¹²⁴ I was reminded of the importance of the distinction between the views expressed by Plato in *THE REPUBLIC* as compared to those in *THE LAWS* by Professor David Cohen. David Cohen, *Classical Conceptions of the ‘Rule of Law,’ Remarks at the National Endowment for Humanities’ ‘Workshop on Athenian Democracy,’* University of California, Santa Cruz (July 10, 1992). I am grateful for NEH support to attend that six-week workshop.

¹²⁵ I have emphasized in recent works that in fashioning constitutional theory and statutory interpretation, we must address ourselves to a “realistic” jurisprudence of the “second best.” *See* GROFMAN ET AL., *QUEST FOR VOTING EQUALITY*, *supra* note 17, at 136; Grofman & Davidson, *Postscript*, *supra* note 42, at 316; *infra* p. 1275.

In like manner, I believe that democratic theory that is based on a hypothetical social contract between reasoning and reflective individuals who will reach consensus on notions of the public good by contemplating the future through a thick “veil of ignorance” that denies them knowledge of who they are or who they will be, is of only limited value in understanding democratic politics or in aiding us to think about viable constitutional designs or public policy choices. I am presently working on developing a model of the liberal democratic social contract that is based on what I call (only partly tongue-in-cheek) “the partly open venetian blind.” My approach will be analogous in many ways to the theory of realistic jurisprudence of the “second best” that I have been advocating with respect to voting rights and other Fourteenth Amendment issues.

B. *Infinitely Many Options, but Only a Few Real Choices*

For all but the smallest jurisdictions, it is well known that there are often thousands (or hundreds of thousands) of redistricting plans that can be drawn, each involving districts that are contiguous and that possess some reasonable degree of population equality. While attempts to preserve political subunit or neighborhood boundaries may constrain the number of feasible plans, as would a desire to be very exact in achieving population equality across districts, or other various types of considerations, there still will normally be many possible variations. Nonetheless, when considering the actual process of districting, usually the choices being confronted can initially be characterized in terms of what might be called "meta-questions": Should we try, where possible, to separate out blacks and Hispanics so that one or the other group predominates in any given district with substantial combined minority population, or should we try to create districts with high combined minority populations with little concern for the relative balance among minority populations?; then in terms of the more specific, but still very general questions such as: (1) Should we draw six majority-minority districts in the Bronx, or should we draw only five?; (2) Should we draw a Manhattan-Brooklyn district, or a Manhattan-Bronx district, or should we not draw any districts that cross over from Manhattan to other boroughs?; and (3) Should we place Chinatown with Loisaído or with Battery Park? The number of such "real" choices will be relatively few in number. Once a fundamental choice is made, particular district lines can be fine-tuned, but, except for redistricting junkies, the important choices lie not in the fine-tuning brush strokes but in the broad sweep of the canvas and the picture it paints. With respect to redistricting, I would generally give considerable weight to claims of the "clearly reasonable" as against the "arguably best."¹²⁶

C. *Looking at Minorities Under the Voting Rights Act*

Blacks and Hispanics (i.e., those of "Spanish heritage") are separately identified as groups to be protected under the Voting Rights Act, as are other groups such as Asian Americans and Native Americans. There are five important redistricting issues tied to racial or ethnic identification. First, how do we operationally determine the

¹²⁶ Of course, that does not help us very much in the "beauty contest" cases that were the most important cases of the 1990s round of legislative redistricting. In a beauty contest situation there is no state-passed plan before a court, and the court must choose among numerous plans with claims to "reasonableness," or draw a plan of its own. Not surprisingly, courts in the 1990 beauty contest situations have so far chosen the latter option in almost all instances.

size and location of the various groups identified under the Act? Second, are there any circumstances in which the Voting Rights Act requires that groups which are separately enumerated in the Act be treated as a "combined" minority for purposes of redistricting—with respect to, for example, a test of non-fragmentation, or the question of whether the *Thornburg* population threshold standard has been satisfied?¹²⁷ Third, under what circumstance, if any, does it make sense to put different racial and ethnic minorities together in the same district, regardless of whether this is legally required? Fourth, is it ever legally required to distinguish racial and ethnic subgroups that are lumped together in a single category under the Voting Rights Acts; namely, to distinguish Dominicans from other Latinos, or "Caribbean" blacks from other blacks, and to give each a "district of its own"? Fifth, under what circumstance, if any, does it make sense to separately treat racial or ethnic minorities, which the Voting Rights Act groups together, regardless of whether or not this is legally required?

1. *How Can We Identify and Locate the Racial and Ethnic Groupings Identified Under the Voting Rights Act?*¹²⁸

In my view, persons of Spanish heritage—the category mentioned in the Voting Rights Act—should be interpreted as synonymous with persons of Spanish origin as *self-identified* on the census, rather than in terms of country of birth, country of parental origin, or any other designation. Similarly, I would use census *self-identification* to define the other groupings identified in the census, including Native Americans.¹²⁹ When I refer to Hispanic or Latino, I use both these terms as a shorthand for the category of census self-identified persons of Spanish origin, recognizing that others may assign these

¹²⁷ Whether there is ever a valid claim under the Voting Rights Act that a group be given an "influence" district in a situation where its population is not sufficient to enable it to constitute a majority of a district or even to constitute a sufficiently large proportion of the district so as to have a realistic potential to elect a candidate of its choice, is a matter that I have discussed elsewhere. See Grofman & Handley, *supra* note 16, at 365-72. The same aims sought to be achieved by pressing claims for so-called "influence" districts can, in my view, be better achieved via a test based on unnecessary or inequitable fragmentation of racial and ethnic population concentrations. Influence simply is a rather murky notion.

¹²⁸ Because I have previously written extensively on this question, this Article will only briefly comment on this topic. See, e.g., GROFMAN ET AL., *QUEST FOR VOTING EQUALITY*, *supra* note 17, at 61-105; Grofman, *Expert Witness Testimony*, *supra* note 17, at 218; Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 *LAW & POL'Y* 43 (1988).

¹²⁹ This is not merely my view. I believe it to be the view taken by virtually all federal courts. See, e.g., *Garza v. County of Los Angeles*, 756 F. Supp. 1299 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

terms slightly different meanings.¹³⁰ There are well-defined methodologies to match census populations to the units of electoral geography, although of course care must be taken in doing so.¹³¹

2. *Is There Ever a Legal Requirement That Racially or Ethnically Distinct Minorities Be Combined?*

The only time that it appears legally necessary to treat categories of racial and ethnic groupings listed separately in the Voting Rights Act as if they were a combined minority is when those groups request to be so treated, and when there is clear evidence that the groups are mutually cohesive in their voting patterns; namely, that voters of each group generally prefer candidates of the other group to white/Anglo candidates in two-way contests. For example, for blacks and Hispanics to be cohesive, it would be required that blacks generally support Hispanic candidates over white/Anglo candidates in Hispanic versus white/Anglo contests, and that Hispanics generally support black candidates over white/Anglo candidates in black versus white/Anglo contests.¹³²

3. *When Is It Desirable to Combine Racially or Ethnically Distinct Minorities?*

When there are two or more minority groups whose combined population is large enough that it is possible to create more than one "majority-minority" district, absent very special circumstances it is preferable to draw district boundaries which assign to each group districts in which that group has a clear preponderance of the probable electorate,¹³³ rather than drawing districts in which different minority groups can be expected to be highly competitive with one another vis-

¹³⁰ In practical terms, in estimating Hispanic registration or turnout, the Spanish surname list prepared by the Census Bureau is basically reliable in identifying areas with greater or lesser Hispanic population, despite the problems caused by the presence of both Type I and Type II errors that may vary with the independent variable. See Grofman, *Expert Witness Testimony*, *supra* note 17, at 206; O'Hare, *supra* note 72, at 734-36.

¹³¹ See, e.g., O'Hare, *supra* note 72, at 734-36 (comparing Los Angeles County's Population Estimates and System [PEPS] to those of Census Bureau reports).

¹³² In *three-way* contests, that voters of each minority group prefer candidates of their own group to candidates of the other minority group, as well as to white/Anglo candidates, ought to be irrelevant in determining whether the two minority groups should be regarded as politically cohesive. Also, care must be taken so that the minority candidates are also candidates of choice of their own minority community. For further elaboration, as well as a discussion of the relevant case law, see GROFMAN ET AL., *QUEST FOR VOTING EQUALITY*, *supra* note 17, at 99-104.

¹³³ I emphasize "of the probable electorate," since Hispanics and Asians will often be a far lower proportion of the probable electorate than they are of the population, or even of the voting age population.

a-vis control of the district. Thus, I suggest opting against situations in which minority groups will be pitted against one another, and recognizing that creating combined minority districts in which neither group is a clear majority will more often lead to intergroup rivalry than to intergroup coalition and consensus building.¹³⁴

However, when the minority population is so limited in size that the choice is between parceling out each of two minority groups to its "own" district in which it would not have a realistic chance to elect a candidate of choice, versus creating a single combined minority district in which it is reasonably clear that a candidate preferred by one of the minority groups would be chosen (albeit, it is not clear *which* minority group will get the candidate of its choice), then, in general, it is not unreasonable to combine, even when it is not legally required to do so. In a situation with multiple minorities and plurality based elections, the presence of one minority group may aid the likelihood of success of another minority group, even though the two minority groups are not in political coalition with one another!¹³⁵ This can occur because, in effect, the presence of the second minority group splits the opposition.

Also, in partisan primaries, the presence of black voters can aid, for example, the election of an Hispanic candidate in the general election, and the presence of Hispanic voters can aid in the election of a black candidate in the general election, even if blacks and Hispanics tend to vote against each other's candidates in the primaries, since voters of both groups tend to support the winner of the Democratic primary. Nonetheless, it is important to know whether the different groups wish to be combined, just as it is certainly relevant whether there is any evidence of political cohesion in the general election, even if such cohesion does not exist in the primary.

4. *Is It Ever Legally Required to Distinguish Racial and Ethnic Subgroups That Are Lumped Together in a Single Category Under the Voting Rights Act?*

To my knowledge, the DOJ has never explicitly *rejected* the assertion that minority subgroups, that are only components of the minority groups identified in the Voting Rights Act, could press their own legal claims under the Voting Rights Act that would require that their members be disaggregated from the larger group of which they

¹³⁴ Here, as I have elsewhere in this Article and in my writings, I advocate a realistic rather than an idealistic view of redistricting and its political consequences. See *supra* notes 122-25 and accompanying text.

¹³⁵ See, e.g., Brischetto et al., *supra* note 19.

are a part. But again, as far as I am aware, the DOJ has also never *recognized* such a claim by a minority subgroup, such as Caribbean blacks or Dominicans, even though at various times it has been urged to do so by minority spokespersons. Courts interpreting the Voting Rights Act have also shied away from any notion of group rights that went beyond the racial and ethnic categories enumerated in the Voting Rights Act.¹³⁶ My own strongly held view is that this is the correct policy, both legally and from the standpoint of the realistic politics of Fourteenth Amendment jurisprudence of the "second best."¹³⁷

The Constitution (and statutes which rest upon its authority) should aim at color-blind treatment, unless there are compelling reasons to the contrary. In this context, I also believe by and large that for all of its limitations, Congress is the appropriate body to make a determination as to when and under what circumstances a realistic view of politics requires a deviation from color-blind decision making. In line with this belief, it is Congress which should determine which groups, if any, deserve special recognition under the Voting Rights Act, or other civil rights legislation. Congress should decide such questions in terms of a sophisticated historical understanding of discriminatory practices coupled with a recognition that distinctions that cannot be made by those *doing* the discriminating are probably not distinctions that should be written into law.¹³⁸ More generally, Congress should follow an "Ockham's razor" of categorization and not multiply racial or other categories unnecessarily.¹³⁹

¹³⁶ See, e.g., *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (Hasidic Jews, in effect, denied any right under the Voting Rights Act to special respect for the preservation of their population concentrations within a single district). In *Garza*, the County of Los Angeles asserted that Cubans and others should not be counted as members of the plaintiff class because their country of origin was different from the Mexican Americans who made up the bulk of the county's Hispanic population, and because Cubans and other Hispanics were alleged to vote differently from Mexican Americans in non-partisan elections to the County Board of Supervisors. No credible evidence was presented that the various Hispanic groups in fact voted differently in Supervisorial elections, and country of origin was not accepted by the trial court as an appropriate demarcator for purposes of redistricting. See Grofman, *Statistics Without Substance*, *supra* note 72, at 747-49; O'Hare, *supra* note 72, at 738-39.

¹³⁷ See *supra* note 125.

¹³⁸ For example, can most non-Hispanics readily distinguish between, say, Cubans, Dominicans, and Mexican Americans on the basis of appearance, clothing, or speech? Probably not.

¹³⁹ To paraphrase a recent speech, I hold the view that, in politics, the fewer categories of "them" that are written into law, the easier it is for the United States to stay "us." But, to repeat the obvious, the world we live in is perforce not the world we would all like it to be.

5. *When Is It Desirable to Distinguish Racial or Ethnic Subgroups That Are Lumped Together in a Single Category Under the Voting Rights Act?*

My general, if rather flip, answer to this question is, "whenever it's practical to do so." That certain distinctions cannot be compelled to be made as a matter of law does not mean that it is inappropriate for redistricting agencies to make them. For example, in New York City, Dominicans do apparently wish to differentiate themselves from other Hispanics, at least with respect to carving out districts that keep Dominican populations intact. To the extent that this is possible without interfering with rights of other minorities or with other legitimate state concerns, why not do so?¹⁴⁰ I remind the reader, however, of my observations in the preceding paragraph. What is desirable is not the same as what can be legally required. Moreover, what is desirable in the abstract is usually *very far* from what is practical to achieve given the realistic constraints of redistricting time lines and the innumerable groups of all sorts competing for recognition of their mutually incompatible demands.

IV. CONCLUSION: IS RACE THE ONLY THING THAT MATTERS IN REDISTRICTING?

Minority voting rights jurisprudence, like other Fourteenth Amendment jurisprudence, is torn between two competing moral imperatives: the need to protect the weak against the strong and the few against the many, and the claim that, absent extraordinary circumstances, and perhaps not even then, the law must be color-blind. Both views have deep constitutional roots. Steering a course between these two views requires careful case-specific, fact-specific analysis, in addition to well crafted legal theory. I believe that what is appropriate in the voting rights arena are evidentiary standards that offer what I have identified as the "realistic" jurisprudence of the "second best";¹⁴¹ namely, legal theory that recognizes that race-related problems may require race-conscious remedies, but which does so only in the context of fact-contingent claims as to the continuing relevance of race, and with the presupposition that the goal is the development of a color-blind society. In such a jurisprudence, the legal importance as-

¹⁴⁰ The same argument also applies to, say, the various sects of Hasidic Jews and to numerous other groups of all types. Yes, they do not possess special protection as groups named by the Voting Rights Act, but that does not mean that a redistricting agency concerned with communities of interest should not try to keep such groups intact where possible given the constraints and priorities set by constitutional and statutory mandates.

¹⁴¹ See *supra* note 125.

signed to race-conscious districting is not a constant, but rather is a function of the extent to which it can be shown that electoral choices are tied to the race of the candidates, or that districting choices have been made with an eye to advantaging or disadvantaging particular groups. Thus, Vince Lombardi would have been wrong if he had said: "With respect to redistricting, race isn't everything, it's the *only* thing."