

1990s ISSUES IN VOTING RIGHTS

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I. INTRODUCTION

The Voting Rights Act of 1965,¹ together with the Civil Rights Act of 1964,² forms the judicial cornerstone of contemporary race relations in the United States. At the Act's inception, Congress intended to guarantee the full exercise of the franchise to blacks, and later amended it so that it would apply to other minorities as well. Subsequently, the provisions and amendments to the Act have withstood constitutional challenges in the United States Supreme Court. The Court has extended the Act's coverage to virtually all aspects of election organization such as locations of voting booths, redistricting plans, and choice of electoral systems. Thus, the Act now applies to far more than simple denial of the franchise.³

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We are indebted to Dorothy Green and Chau Tran for library assistance. This research was partially supported by a grant from the Ford Foundation, #446740-47007, *The Impact of Redistricting on the Representation of Racial and Ethnic Minorities*, to the first-named author. The views expressed in this paper are solely those of the authors and do not reflect those of the Ford Foundation.

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)).

² Civil Rights Act of 1964, Pub. L. No. 88-52, 78 Stat. 241 (codified as amended at 28 U.S.C. 1447, 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-(6) (1988)).

³ From a policy perspective, the Act had six key components. First, the 1965 provisions abolished literacy tests. Voting Rights Act of 1965 § 4, 42 U.S.C. §§ 1971(a)(2)(c), 1971(c) (1988). Second, the 1965 provisions prohibited the use of any device that would impose unreasonable financial hardships, such as a poll tax, on persons of limited means as a prerequisite to voting. *Id.* § 10. Third, the 1965

As with other areas of Equal Protection, it has taken a long time for the full scope and consequences of the Act to become clear.

Immediately after passage, the more important provisions of the Act were viewed as those dealing with the protection of the rights of blacks in the South to register and to vote. The protective cloak of the federal government was especially important in some areas of the South where black registration was virtually nil and where intimidation of blacks seeking to exercise the franchise was commonplace.⁴

In the 1970s and 1980s, section 5 (the preclearance provision) of the Act was seen as having the greatest impact. In particular, the Department of Justice refused to preclear plans that contained multimember districts with submerged pockets of black populations large enough to form the core of single-member districts.⁵ The Department of Justice also began to

provisions permitted the Justice Department to dispatch federal marshals as observers or registrars in parts of the South to end the denial of the right to vote for blacks. *Id.* § 6. Fourth, the 1965 provisions required jurisdictions covered by section 5 of the Act to submit any proposed changes in their election provisions to the Justice Department for preclearance. *Id.* § 5. Fifth, the 1975 amendments required the use of bilingual ballots in jurisdictions with greater than five percent population whose native language was not English. Voting Rights Act of 1965, Pub. L. No. 94-73, § 301, 89 Stat. 402 (1988) (amended 1975). Finally, the 1982 amendments to section 2 prohibited the use of any electoral device capable of diluting minority voting strength. Voting Rights Act of 1965, Pub. L. No. 97-205, § 2(b), 96 Stat. 131 (1988) (amended 1982).

⁴ See James E. Alt, *The Impact of the Voting Rights Act on Black and White Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH* 351-55 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter Alt, *Black and White Representation*] (discussing institutional barriers designed to deny blacks franchise). Alt illustrated that the designers of the southern voting framework attempted to ensure white candidates' election to office through the use of literacy tests, residence requirements, and poll taxes. *Id.* at 354. Whites employed two other methods, the grandfather clause and the white primary, to disenfranchise blacks further. *Id.* The grandfather clause waived requirements for those whose relatives had registered; the white primary allowed only whites to vote in primary party elections on the basis that these parties constituted private organizations. *Id.* Alt also recognized, though, that these institutional impediments did not exist solely in the South. *Id.* at 353.

⁵ These preclearance denials (or fear thereof) can be shown to be responsible for a dramatic reduction in the number of state legislators elected from multimember districts in the South and a concomitant increase in the number of black majority seats—seats that were very likely to elect black legislators. See

scrutinize closely the fragmentation and the concentration of the black population in single-member district plans, and denied preclearance to districting plans which had the appearance of diluting black voting strength.

After the 1982 amendments to the Act, the new language of section 2 became the basis of most voting rights lawsuits. Although the amended section 2 provisions did not have the prohibitory bite of the section 5 preclearance requirements, the section 2 provisions applied to all jurisdictions and not just covered ones. Furthermore, amended section 2 applied to present plans, not just to changes in election rules. Section 2 challenges have played a central role in ending the discriminatory use of at-large elections at the local level.⁶

The Act continued to have an impact on the 1990s round of redistricting with the Department of Justice taking an aggressive stance regarding standards for section 5 preclearance.⁷ Along with threats of section 2 challenges by

Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION IN THE SOUTH* 335-36 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter Handley & Grofman, *Black Officeholding*] (discussing Act's impact on increase of number of black districts in South); 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, 112 (1991) [hereinafter Grofman & Handley, *Black Representation*] (examining growth of black state legislators since Act's passage); Bernard Grofman & Lisa Handley, *Minority Population Proportion and Black and Hispanic Congressional Success in the 1970s and 1980s*, 17 *AM. POL. Q.* 436, 437 (1989) [hereinafter Grofman & Handley, *Minority Population*] (explaining recent black and Hispanic congressional gains).

⁶ The use of multimember districts violated of section 2 of the Act if: (1) there was a compact contiguous minority population within the multimember district that is large enough to form the basis for at least one majority-minority district if single-member districts were to be drawn; (2) the minority community demonstrated cohesive voting behavior; and, (3) the candidates whom it supported lost with sufficient frequency so as to deny to minority members an equal opportunity to elect candidates of choice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). For a more detailed analysis of each of these requirements, see BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 61-81 (1992) [hereinafter GROFMAN, *MINORITY REPRESENTATION*].

⁷ In our view, the change in the Administration in 1992 did not have much of an impact on the decisions reached by the Voting Rights Section. In fact, the

minority groups and other private litigants,⁸ the Department of Justice's aggressive stance led to the adoption of a record number of new majority-minority districts, most of which elected minorities to office. For example, the number of majority black districts in the South increased from 4 in 1990 to 18 in 1992, and 17 of these new districts elected African-Americans to office. These districts, incidentally, were the only districts in the South to elect African-Americans to Congress.

Triggered by these dramatic gains in black representation and by the peculiar shapes of the majority-minority districts from which these representatives won office, the Act has come under increasing attack.⁹ Furthermore, the relationship be-

Voting Rights Section staff has largely been left free to enforce the Act in accordance with the statutory language and subsequent court decisions regardless of who is president. With the exception of a few key decisions in the 1980s when Bradford Reynolds was Assistant Attorney General for Civil Rights, we believe the Department of Justice has maintained a relatively liberal interpretation of the Act regardless of which party controlled the White House.

⁸ One of the present authors characterized the combination of section 5 and section 2 challenges as a "brooding omnipresence" in the decisionmaking calculus of those involved in the 1990s redistricting. See Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said, "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZA L. REV. 1237, 1264 (1993) [hereinafter Grofman, *Vince Lombardi*] (stating "redistricting decision makers treated voting rights concerns as their first priority").

⁹ Although the Act had been criticized in the 1980s, it had little or no effect on the Act's enforcement in the 1990s round of redistricting. An opponent of the Act, Abigail Thernstrom, recently argued that today's legislators had distorted the framers' intent through the Justice Department's inappropriately rigid and aggressive enforcement of the Act. See ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 18 (1987) (discussing Act's implementation and development).

In general, however, until very recently the Act had been virtually immune to the backlash against other Fourteenth Amendment jurisprudence involving civil rights and affirmative action. In our view, a number of reasons exist for the strong support the Act has enjoyed until now. First and foremost, the basic goal of the Act, minority enfranchisement, had overwhelming public support. Second, the more controversial aspects of the Act, such as its application to issues of minority vote dilution, were not very visible. By and large, redistricting was a matter of concern for politicians, instead of ordinary citizens. Third, unlike situations involving remedies for employment discrimination (where there are whites who feel they are now being punished for sins they did not commit) the remedies for vote dilution involved equal treatment for the members of all groups. Finally, until quite recently, there had been a substantial bipartisan component to the support of the Act.

tween the Act and redistricting moved from an esoteric concern of specialists to become a matter of major concern to political elites and the press. While the intensity of coverage was strongest in conservative publications such as the *Wall Street Journal* and *U.S. News and World Report*,¹⁰ even relatively liberal news magazines like *Newsweek* portrayed some of the more contorted new majority black seats as undesirable racial gerrymandering.

In a number of districting cases since 1992, the Court has echoed this backlash against the Act. These decisions have reopened old questions regarding the interpretation of the Act and have broken new ground on related constitutional issues. Advocates of minority voting rights now fear that the gains in minority representation of the past several decades may be lost. The three most important recent voting rights cases are *Shaw v. Reno*,¹¹ *Miller v. Johnson*,¹² and *League of Latin American Citizens (LULAC) v. Clements*.¹³ In *Shaw*, the Court enunciated a new type of constitutional violation in the area of districting upon a showing by the plaintiff that "the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."¹⁴ In *Miller*, the

¹⁰ See, e.g., John Leo, *Electioneering by Race*, U.S. NEWS & WORLD REPORT, Sept. 28, 1992, at 33 (revealing negative aspects of racial gerrymandering in political process). Leo criticized the suspicious cooperation of the Bush Justice Department, the ACLU, and several Democrats and Republicans in assembling a system of racial gerrymandering. *Id.* Leo asserted, "[t]he only losers are the American people, who will have to cope with an even higher level of racial polarization, now being built into the electoral system in a notably high-minded bipartisan manner." *Id.*

¹¹ 509 U.S. 630, 113 S. Ct. 2816 (1993).

¹² ___ U.S. ___, 115 S. Ct. 2475 (1995).

¹³ 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

¹⁴ *Shaw*, 113 S. Ct. at 2828. The Court further explained, "[i]t is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged." *Id.* The Court clarified that its holding only addressed the facts of the present case; specifically, the Court held that the plaintiffs' claim was sufficient to defeat the state appellees' motion to dismiss. *Id.* The Court refused to decide whether the inten-

Court made good on its threat in *Shaw* to overturn a districting plan, stating that one or more of the minority districts in it reflected race as its preponderant or only motivation.¹⁵ The Court held that the newly created third majority black congressional district in Georgia fell under the *Shaw* proscription.¹⁶ In *LULAC*, a majority of the Fifth Circuit, in an en banc ruling, reinterpreted the definition of racial bloc voting¹⁷ in a fashion that we see as incompatible with the descriptive approach to the presence or absence of racial bloc voting taken in *Thornburg v. Gingles*.¹⁸ The *LULAC* court moved away from the straightforward question of whether or not minority candidates of choice regularly lost because of white bloc voting into a consideration of whether or not other factors, such as straight party-line voting, could account for the racial differences in voting patterns.¹⁹

tional creation of a majority-minority district always created an Equal Protection claim. *Id.*

¹⁵ *Miller*, 115 S. Ct. at 2494. The Court commented that "carving electorates into racial blocs" will not expunge racial discrimination from our society. *Id.*

¹⁶ *Id.* at 2487. Further, the Court stated that a pattern of discrimination was not necessary for an Equal Protection claim. *Id.* The Court noted, though, that a pattern generally facilitated an evidentiary inquiry. *Id.* (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

¹⁷ *LULAC*, 999 F.2d at 850. The majority agreed with the defendants on appeal that "the district court erred in refusing to consider the nonracial causes of voting preferences they offered at trial." *Id.*

¹⁸ 478 U.S. 30 (1986). In *Gingles*, the Court considered the amendments to section 2 of the Act for the first time. *Gingles*, 478 U.S. at 34. Justice Brennan stated that the question in issue was whether the district court's ruling accurately held that the use of multimember districts in several North Carolina districts "violated § 2 by impairing the opportunity of black voters 'to participate in the political process and to elect representatives of their choice.'" *Id.*

Significantly, *LULAC* also broke new ground in upholding the applicability of section 2 of the Act to judges. *LULAC*, 999 F.2d at 893; see also Pamela S. Karlan, *The Application of the Voting Rights Act to Judicial Elections*, in *RACE AND REDISTRICTING IN THE 1990S* (Bernard Grofman ed., forthcoming 1996).

¹⁹ *LULAC*, 999 F.2d at 878. Regarding straight party-line voting, the plaintiffs' expert witness produced data which reflected that 61-77% of whites in one county consistently supported Republicans. *Id.* White voters' support for Republicans did not waiver even when a black Republican challenged a white Democrat. *Id.* Conversely, almost all blacks supported Democrats, even when a white Democrat challenged a black Republican. *Id.* On appeal, the defendants used statistics such as these to support the argument that if party affiliation, instead of race, explained voting behavior then the circuit court should reverse the district court's

Another voting rights case marking a recent retrenchment in voting rights enforcement also merits discussion. In *Presley v. Etowah County Commission*,²⁰ the Court rejected a finding by the Department of Justice that a change in the allocation of responsibilities among city council members was a change subject to section 5 preclearance.²¹ Traditionally, the Justice Department reviewed changes similar to those in issue, authority which the courts had upheld. This reversal of long-standing administrative precedents was particularly troubling because the jurisdictions in question were ones where African-Americans had been elected (or were about to be elected) for the first time.²²

This essay reflects on each of these decisions and their implications for the continuing evolution of voting rights case law. This essay also discusses another recent voting rights case that does not fit into an anti-Act framework. In *Republican Party of North Carolina v. Hunt*,²³ a district court struck down a statewide at-large election plan for superior court judges in North Carolina as a partisan gerrymander,²⁴ and

judgment. *Id.* at 850.

²⁰ 502 U.S. 491 (1991).

²¹ *Presley*, 502 U.S. at 509. Essentially, the Court stated that the allocations concerned the decisionmaking authority and not changes in the rules which governed voting. *Id.* at 507. Expanding the scope of § 5 the Court stated, "§ 5 is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Id.* at 509.

²² Another case, *Holder v. Hall*, 114 S. Ct. 2581 (1994), was important not for its decision, but because the concurring opinion by Justice Thomas, joined by Justice Scalia, completely repudiated decades of voting rights jurisprudence. *Holder*, 114 S. Ct. at 2591-2619 (Thomas, J., concurring). In fact, the Court's holding in *Holder* was relatively narrow: Legislative size was not litigable under the Act. *Id.* at 2588. Justice Thomas's concurrence asserted that earlier decisions were wrong in holding that the Act applied to issues of vote dilution. *Id.* at 2591 (Thomas, J., concurring).

²³ 841 F. Supp. 722 (E.D.N.C. 1994), *aff'd as modified*, *Republican Party of North Carolina v. North Carolina State Bd. of Elections*, No. 94-1057, 1994 WL 263955 (4th Cir. June 17, 1994) (*per curiam*).

²⁴ *Hunt*, 841 F. Supp. at 723. Issuing the preliminary injunction the district court judge stated, "[t]he public interest in conducting fair and equal elections and of having the most qualified judges in office will be protected by the relief granted herein." *Id.* at 733. However, this case is now back on remand following the November 1994 election results in which Republican judges were elected for

the Fourth Circuit refused to stay the order.²⁵ The initial decision in this case marked the first time that *Davis v. Bandemer*,²⁶ which held that partisan gerrymandering was justiciable,²⁷ demonstrated any teeth.

Another central concern of this essay will be the link between jurisprudential issues and empirical facts. Normative concerns are at the heart of the general backlash to affirmative action and the view of voting rights as just another type of quota system.²⁸ Just as one cannot understand the depth of public concern about affirmative action unless we link it to perceptions that it has come to be abused, one cannot understand the nature and magnitude of the present reaction to the Act's enforcement without looking at matters that are less philosophical and more concrete, such as the "ugliness" of certain 1990s district lines.

We will pay particular attention to several recent data-grounded assertions that have been used to provide support for normative claims about the lack of a continued need for the Act, or about the negative consequences of the current

the first time.

²⁵ *Republican Party of North Carolina v. Hunt*, No. 94-1057, 1994 WL 265955, at *3 (4th Cir. June 17, 1994) (per curiam).

²⁶ 478 U.S. 109 (1986).

²⁷ *Bandemer*, 478 U.S. at 143. The majority also concluded that a "threshold showing of discriminatory vote dilution is required for a prima facie case of an equal protection violation." *Id.*

²⁸ The current negative reaction to the Act cannot be understood without taking into account constitutional and normative arguments about ideas concerning equality and competing individualistic and group-oriented conceptions of voting rights. For critics of the Act, such as George Will, the Act has come to embody an idea of tribalistic representation that is incompatible with a commitment to a color-blind society, and thus is incompatible with the "proper" interpretation of the Fourteenth Amendment. As George Will put it:

The creation of "minority-majority" districts expresses the ideology of "identity politics": you are whatever your racial or ethnic group is. But that ideology, promulgated by political entrepreneurs with a stake in the racial and ethnic spoils system, is false regarding the facts of human differences, and bad as an aspiration and an exhortation.

George Will, *The Voting Rights Act at 30: Racial Gerrymandering is One Reason Newt Gingrich is Speaker*, NEWSWEEK, July 10, 1995, at 64. However, we will not devote much attention to the purely normative debate about voting rights in this paper.

implementation of the Act for minority interests. One of these assertions is that white voters have demonstrated a willingness to support suitable minority candidates; hence, the insistence on drawing minority districts is misguided. For example, Carol Swain, in a book published in 1993, observed that in 1991 forty percent of all black members of Congress were elected from districts that were not majority black.²⁹ Another assertion we will discuss is the argument that drawing minority districts is actually counterproductive to minority interests. We will examine the accuracy of these empirical claims, as well as others made by critics of the Act, and the ways in which these claims have been used to buttress the normative argument(s) for which each one has been used as a prop.

II. KEY VOTING RIGHTS CASES OF THE 1990S

A. *Shaw v. Reno* and *Miller v. Johnson*

The peculiar shapes of a number of majority-minority legislative districts (especially some of the majority black congressional districts drawn in the South) have triggered a public, scholarly, and legal backlash against the creation of convoluted majority-minority districts and, more generally, against the judicial and administrative implementation of the Act.

In *Shaw v. Reno*, the Court held that a districting plan will be deemed unconstitutional if the plaintiff shows that the plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."³⁰ The *Shaw* decision has led to a number of plaintiffs challenging the constitutionality

²⁹ See CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS* 193 (1993) (discussing districts of newly elected black representatives to Congress). Swain noted further that black representatives elected in these non-black majority districts "have represented the interests of both blacks and whites," and far from relegating black interests to a secondary level of importance when compared to white policy preferences "seem to represent progressives of all races." *Id.* at 141.

³⁰ *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2828 (1993).

of majority-minority legislative districts based on the shape of the district.³¹ This decision has also led to a greater willingness by jurisdictions covered under section 5 of the Act to challenge Justice Department section 5 preclearance denials on the grounds that no constitutional remedy was possible since any remedy plan would require oddly shaped districts.³² Furthermore, the *Shaw* decision has fostered less willingness on the part of jurisdictions faced with section 2 lawsuits to agree to draw majority-minority districts as part of an out-of-court settlement, since defendant jurisdictions can take refuge in the claim that the remedial district(s) violated *Shaw*.³³

Shaw presented a number of problems, the principal ones being: (1) the opinion was not clear as to how to determine compliance with the test for unconstitutional districting; (2) the decision was overly broad in that it converted a relatively minor problem—bizarrely shaped districts that reach out to pick up isolated black (or Hispanic) populations—into a matter of major constitutional substance by inventing a new constitutional test which all districts must satisfy; (3) *Shaw* was inconsistent in its treatment of district shape in that district lines that would be unproblematic if drawn to assure the reelection of a particular incumbent became impermissible for the much more commendable purpose of enhancing minority representation; and, (4) the Court majority displayed a blissful ignorance of the strength of barriers to minority electoral success from non-minority districts (an ignorance which leads them to ignore completely the probable implications of *Shaw* for diminished minority representation in Congress and state

³¹ See, e.g., *Pac for Middle Am. v. State Bd. of Elections*, No. 95-C-827, 1995 WL 571887, at *1 (N.D. Ill. Sept. 22, 1995) (alleging General Assembly's redistricting plan did not reapportion districts corresponding to 1990 Census); see also *Vera v. Richards*, 861 F. Supp. 1304, 1309 (S.D. Tex. 1994) (questioning whether redistricting criteria other than race can explain congressional districts' boundaries). Through November 1995, six states have challenged congressional districts as violative of *Shaw*, and several states have already had districts struck down either by lower courts or, in Georgia's case, the Supreme Court. *Miller v. Johnson*, 115 S. Ct. 2475, 2494 (1995).

³² The Court has also reiterated that a reapportionment plan may be unconstitutional, even though it satisfied § 5. *Shaw*, 113 S. Ct. at 2831.

³³ *Id.*

legislatures).³⁴

1. *Lack of Clearly Manageable Standards*

There are dramatic differences in how lower courts have interpreted *Shaw*, suggesting that the opinion did not establish clearly manageable standards. For example, on remand the district court sustained the North Carolina 12th congressional district using ill-compactness simply as a flag for a potential violation.³⁵ The court asserted that once a presumption had been established that a majority-minority district would be needed to satisfy the anti-dilution standards of the Act, then the shape of a remedial district is entirely a matter for the legislature to decide.³⁶ In contrast, *Hays v. Louisiana*³⁷ and *Hays II*,³⁸ which both ruled that Louisiana's 4th congressional district was unconstitutional, treated the shape of the district as an overriding concern in its review of whether the plan's use of race was "narrowly tailored" to fulfill the "compelling government interest" requirement that *Shaw* established.³⁹ Indeed, *Hayes II* rejected the legislature's second congressional plan despite the fact that the legislature's second attempt was in a somewhat more aesthetically pleasing shape.⁴⁰

³⁴ *Id.* at 2816-33.

³⁵ *Shaw v. Hunt*, 861 F. Supp. 408, 494 (E.D.N.C. 1994). The court illustrated that terms like "compactness" were not "scientifically ascertainable." *Hunt*, 861 F. Supp. at 494. *But see* *Romero v. City of Pomona*, 883 F.2d 1418, 1424 (9th Cir. 1989) (stating geographical compactness included eligible minority voter population, rather than total minority population).

³⁶ *Hunt*, 861 F. Supp. at 439. Provided, of course, that the legislature created a plan that provided minorities with an equal opportunity to elect candidates of choice and did not submerge non-minority voting strength. *Id.* at 454.

³⁷ 839 F. Supp. 1188 (W.D. La. 1993), *vacated*, 114 S. Ct. 2713 (1994).

³⁸ 862 F. Supp. 119 (W.D. La. 1994), *vacated*, 115 S. Ct. 2431 (1995).

³⁹ *Hays II* specifically stated that "the bizarre and irregular shape of District Four raises the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." *Hays II*, 862 F. Supp. at 121.

⁴⁰ *Id.* at 123. The district court stated that the legislature believed erroneously that the Act demanded the creation of a second majority-minority district. *Id.* To the contrary, the court stated that the Act forbade abridging the right to vote

Increasing the confusion surrounding the importance of shape was the fact that although shape appeared to be a key element of the *Shaw* opinion the Georgia congressional district that *Miller* struck down was not especially ill-compact compared even to other congressional districts in that state, and was quite compact compared to the North Carolina 12th congressional district.⁴¹ Thus, *Miller* has done nothing to clarify how to administer the *Shaw* test.

2. *Jurisprudential Excessiveness*

Shaw was jurisprudentially excessive because it created a new constitutional violation⁴² when it could have addressed the perceived problem, oddly shaped districts, in a more efficient and focused manner merely by correcting misinterpretations of section 2 (and section 5) of the Act. The Court could have achieved the same end with far less travail by simply choosing a different case to send a message to state legislatures (and to lower courts and the Department of Justice) about how to interpret the geographical compactness element of *Gingles's* three-pronged test for section 2 vote dilution and/or the section 5 preclearance denial standard.⁴³

To understand better how to address the problem of contorted districts, one must understand the source of the problem. Why did southern legislatures go to such extreme lengths to draw districts with black majorities, including a number of tortuously shaped ones? In our view, the simple answer was fear on the part of the legislators that a voting rights challenge or a preclearance denial would delay the implementation

because of race or color. *Id.*

⁴¹ *Miller v. Johnson*, 115 S. Ct. 2475, 2508-09 (1995). For a far more favorable view of the North Carolina 12th congressional district by an expert witness in *Shaw v. Hunt*, see J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 625-710 (1995) (discussing partisan warfare and redistricting in the 1990s).

⁴² See *supra* note 14 and accompanying text.

⁴³ *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). The Court stated that the first element that a minority group must show was that "it is sufficiently large and geographically compact to constitute a majority in a single member district." *Gingles*, 478 U.S. at 50.

of the new plan and/or leave open the possibility that a court would completely redraw a plan with unforeseeable consequences for predominately Democratic incumbents. Changing perceptions of what the courts required interacted with the need of Democratically controlled southern legislatures to contend with a rising Republican tide, forcing plan drawers to new heights of cartographic creativity if they wished to hold on to the seats of existing Democratic incumbents while at the same time satisfying black aspirations (and perceived legal requirements) for more majority-minority seats.⁴⁴

But what made the 1990s round of districting so different from that of the 1980s in terms of the expectations of legislatures about what types of plans would pass muster with the Department of Justice and with federal courts? Five factors were especially relevant: (1) the changed legal environment brought about by the 1982 amendments to section 2 of the Act and the way in which the Court interpreted the new section 2 language in *Thornburg v. Gingles*;⁴⁵ (2) a campaign directed by the (then) chief counsel for the Republican National Committee to get Republican legislators to cooperate with black and Hispanic legislators in proposing plans with as many majority-minority seats as possible, regardless of the shapes of the districts;⁴⁶ (3) a perception on the part of southern state

⁴⁴ Moreover, southern black legislators, who are virtually all Democrats, may have been more reluctant in the 1990s than the earlier decades to trade off the goal of more black descriptive representation against the potential cost of net gains by Republicans. See Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169, 170 (1987) (comparing black legislative gains in South to nationwide success of Republicans).

⁴⁵ Grofman, *Vince Lombardi*, *supra* note 8, at 1240. *Gingles* simplified the legal standards for vote dilution and sustained congressional authority to permit vote dilution to be determined on the basis of the effect of a plan regardless of the intent of the plan's framers. *Id.*; see also GROFMAN, *MINORITY REPRESENTATION*, *supra* note 6, at 61-81 (elaborating further on *Gingles* three-pronged test).

⁴⁶ Grofman, *Vince Lombardi*, *supra* note 8, at 1247-56. During the early phases of 1990s redistricting, Benjamin Ginsberg, Chief Counsel of the Republican National Committee, actively sought to organize Republican support for minority-preferred redistricting plans. *Id.* at 1249 n.47. The Republican National Committee and a foundation the Committee helped to establish provided monetary assistance and litigation aid to minority groups in a number of voting rights challeng-

legislatures that, with a Republican president, the Department of Justice would interpret section 5 of the Act so as to force southern legislatures to maximize the number of majority black districts;⁴⁷ (4) the desire of the civil rights bar to see the Act enforced to its fullest possible scope, coupled with the belief of many experienced voting rights litigators that district shape ought to be irrelevant to a voting rights claim; and, (5) the perception by southern legislators drawing plans in 1991 and 1992 that the remarkable success rates of section 2 districting challenges,⁴⁸ and the (then) perfect record of the Department of Justice in defending against section 5 declaratory judgments meant that it was almost impossible to defend successfully against a voting rights challenge.⁴⁹

If the Court had recognized that beliefs about what the Act required drove the crafting of bizarrely shaped minority districts in the 1990s round of districting, then it could easily act to make it unlikely that tortuously shaped minority districts would be drawn in the next round of redistricting by simply reiterating and strengthening the geographic compactness standard laid down in *Gingles*.⁵⁰ There was no need for the Court to resort to creating a new constitutional violation to eliminate strangely shaped minority districts.

es. *Id.* at 1249-50. The most cynical explanation for this support was to attribute to it the perceived political benefits it would have for Republicans (insofar as black and Hispanic majority districts "soak up" large numbers of Democrats, thus "whitening" or "bleaching" the remaining districts), making a Republican victory more likely in these districts. *Id.* at 1248.

⁴⁷ Cf. Grofman, *Vince Lombardi*, *supra* note 8, at 1243-47 (discussing Grofman's view of facts about Justice Department voting rights enforcement.)

⁴⁸ In eight states (the seven states of the deep South plus Texas), well over 90% of the voting rights cases decided between 1982 and 1990 were in favor of the plaintiffs. See QUIET REVOLUTION IN THE SOUTH, *supra* note 4, at 38-298 (examining voting rights cases in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).

⁴⁹ Grofman, *Vince Lombardi*, *supra* note 8, at 1240-41. Moreover, as a result of 1980s and previous voting rights litigation, by 1990 the civil rights bar had built up a sizable corps of experienced litigants and knowledgeable expert witnesses. See Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Law*, in CONTROVERSIES IN MINORITY VOTING 230-60 (Bernard Grofman & Chandler Davidson eds., 1992) (explaining evolution of interest group litigation).

⁵⁰ See *supra* note 43 and accompanying text.

3. *Inconsistent Treatment of the Importance of District Shape*

If ill-compactness really is so troubling, why not attack that problem directly instead of making shape a problem only in conjunction with lines that have racial implications? Currently, the assertion seems peculiar that an “ugly” congressional district drawn to foster the reelection chances of a particular incumbent might be perfectly constitutional, but that same district drawn to remedy 100 years of black exclusion would not be constitutional. Furthermore, if the Court is to insist on a *Shaw*-like test for majority-minority districts, the test should be one that is compatible with the *Gingles* operative of section 2.⁵¹ It would be absurd to prevent with a constitutional test what is a constitutionally permissible standard.⁵²

4. *Empirically Misguided*

Shaw became empirically misguided in its implicit view that the country no longer needed race-conscious districting.⁵³

⁵¹ *Thornburg v. Gingles*, 478 U.S. 30, 73 (1986). The Court stated that “[f]ocusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations.” *Gingles*, 478 U.S. at 73.

⁵² In our view, the best way for the Court to operationalize *Shaw* is not via a mathematical measure of compactness. Rather, we might look at whether or not a district violates contiguity (since, arguably, contiguity is inseparable from the very concept of geographic districting), then we might look to see the extent to which the district satisfied what one of the present authors has called a “[re]cognizability test.” Grofman, *Vince Lombardi*, *supra* note 8, at 1262-63. “Cognizability” referred to the ability of a legislator to define in commonsense terms and based on geographical referents the characteristics of his or her geographic constituency. *Id.* The appropriate test of [re]cognizability was not whether the voters knew the boundaries of the district in which they resided, but whether those boundaries were explained to them in simple commonsense terms. *Id.* “Recognizability” has not been the subject of prior case law, but one can identify egregious violations of the recognizability principle by making use of such standard criteria of districting as violations of natural geographic boundaries, grossly unnecessary splitting of local subunit boundaries, and sundering proximate and contiguous natural communities of interests. See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 77-184 (1985) (discussing various racial effects on districting models).

⁵³ *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2828 (1993). The majority

Legislatures have drawn many more majority black seats in the 1990s than ever before, especially in the South.⁵⁴ As a result, 1992 saw dramatic gains in black legislative representation in the South especially at the congressional level. For example, in the South, the number of black members of Congress went from 4 in 1990 to 17 in 1992 solely as a consequence of the increase in the number of black majority congressional districts (which increased from 4 to 18). Hispanics, also under the Act's protection, have made congressional and legislative gains as well, largely through the creation of districts with Hispanic majorities. As the work done by the present authors, along with co-author Wayne Arden,⁵⁵ has shown, black and Hispanic gains in representation in the 1990s, like minority legislative gains in the 1970s and 1980s,⁵⁶ were attributable almost entirely to the creation of majority black and Hispanic districts.⁵⁷

Shaw was also misguided in its view that an analogy can be made between majority-minority districts and "racial apartheid."⁵⁸ In fact, these districts tend to be the most racially balanced districts in a state. Indeed, majority black state leg-

stated that qualifying voters according to race undermined the integrity of our system of representative democracy. *Shaw*, 113 S. Ct. at 2828. Expanding this proposition further, the majority cited the fact that racial gerrymanders reinforced racial stereotypes, for elected officials came to believe that their candidacy reflected a particular group's interests and not his or her entire constituency. *Id.*

⁵⁴ Grofman, *Vince Lombardi*, *supra* note 8, at 1257.

⁵⁵ See Lisa Handley et al., *Electing Minority Preferred Candidates to Legislative Office: the Relationship between Minority Percentages in Districts and the Election of Minority Candidates*, 5 NAT'L POL. SCI. REV. (forthcoming 1996).

⁵⁶ See Richard Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1359-92 (1995) (discussing generally race and redistricting).

⁵⁷ While some of the gains in minority representation may well be lost as a result of *Shaw*, this need not be inevitable if the Court does not retreat from its resolve that race-conscious districting is permissible to remedy minority vote dilution, and continues to apply the *Gingles* test (as interpreted by pre-*LULAC* courts) as the standard for defining vote dilution under section 2. For further elaboration of this point, see Bernard Grofman, *The Supreme Court, Voting Rights and Minority Representation*, in *AFFIRMATIVE ACTION AND RACIAL REPRESENTATION* (A. Peacock ed., forthcoming 1996).

⁵⁸ *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993). After equating majority-minority districts with racial apartheid, the Court stated that a reapportionment plan could reinforce "impermissible racial stereotypes." *Shaw*, 113 S. Ct. at 2827.

islative and congressional districts that are overwhelming in their minority composition, with black percentages over 80 percent, have received little attention because these districts tend to be relatively compact because they encompass black population concentrations in highly segregated large cities.

Despite our concerns about *Shaw*, we would not want to overstate its importance. We believe that *Shaw* may be limited in its effects. First, in many instances, legislatures can redraw districts subject to *Shaw*-like challenges by employing a "liposuction" remedy; specifically, the legislature could redraw by removing many of the districts' more irregular aspects. This will often be possible without major drops in black voting strength because at least some of the irregularities in the shape of a particular majority-minority district is a reflection of concerns for protecting incumbents in other districts and cannot be characterized as racial in motivation. Second, *Shaw*-like challenges will not be that important in local districtings because with smaller-sized districts it is easier to draw reasonably compact lines that reflect communities of interest, racial and otherwise. Third, it may be possible for defenders of the districts to prevail on the merits by showing that the minority district was needed to remedy minority vote dilution and/or that the lines satisfied standard redistricting criteria to at least as great an extent as most other districts. Lastly, it is also useful to note that the confluence of factors that led to the creation of so many new (and sometimes tortuously shaped) majority black districts in the South over the past two decades will never again be repeated, and that, even more importantly, the potential no longer remains to create a substantial number of additional majority black congressional districts in the South because of the degree of geographic dispersion of the remaining pockets of southern black voters.⁵⁹

⁵⁹ See Bernard Grofman & Lisa Handley, *Black Representation: Making Sense of Electoral Geography at Different Levels of Government*, 14 LEGIS. STUD. Q. 265, 265-79 (1989) (elaborating on link between geographic dispersion and feasibility of creating majority-minority districts).

B. LULAC v. Clements

In *League of Latin American Citizens v. Clements*, the Fifth Circuit moved away from the straightforward question of whether or not minority-preferred candidates regularly lost because of white bloc voting into a consideration of whether or not other factors, such as straight party-line voting, could account for the racial differences in voting patterns.⁶⁰ *LULAC*, in shifting the focus to a determination of whether there are non-racial reasons for the observed racial differences in voting patterns, reintroduced considerations of intent into a section 2 vote dilution challenge.⁶¹ The court shifted its focus despite the fact that the avowed aim of supporters of the 1982 amendments to section 2 of the Act was to provide a pure effects-based standard for the statute after the Court in *City of Mobile v. Bolden*⁶² made purposeful discrimination a required element of unconstitutional vote dilution.⁶³

In a number of recent cases outside the Fifth Circuit, experts for defendant jurisdictions have adopted the approach of defining racial polarization taken by the *LULAC* court.⁶⁴ These experts argued that even though there was compelling evidence that minority voters are much more likely to support minority candidates than are non-minority voters, and even though minority candidates regularly lost, this could not be characterized as racially polarized voting under the Act if the differences in support offered by minority and non-minority voters to minority-preferred candidates could be attributed to the correspondence between the party affiliation of these candidates and their supporters.⁶⁵

⁶⁰ See *supra* note 19 and accompanying text.

⁶¹ *League of United Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). Revisiting the question of intent, the court stated that Congress explicitly intended that proof of discriminatory intent was not necessary to establish a section 2 claim. *LULAC*, 999 F.2d at 849.

⁶² 446 U.S. 55, 75 (1980).

⁶³ *Bolden*, 446 U.S. at 62. The Court ruled that a plaintiff could sustain a claim only by showing a discriminatory purpose. *Id.*

⁶⁴ See, e.g., *Sanchez v. Bond*, 875 F.2d 1488, 1470 (10th Cir. 1989), *cert. denied*, 478 U.S. 937 (1990) (explaining that party affiliation was better indication of voter behavior than race).

⁶⁵ *Sanchez*, 875 F.2d at 1493. Although the defendant's expert testified that

The *LULAC* court's treatment of racially polarized voting was fundamentally flawed. The chief problem with this approach to polarized voting was that it brought intent into the analysis through the back door. Furthermore, in a jurisdiction like Texas, where minorities were predominantly affiliated with the Democratic party, it insidiously shifted the question from the level of minority success to the level of Democratic success.

1. *Resurrection of Intent Standard*

The *LULAC* decision took us away from the effects test standard enunciated in section 2 of the Act and operationalized in *Gingles*. Congress amended section 2 of the Act in 1982 specifically to eliminate any need to prove purposeful discrimination in a vote dilution case.⁶⁶ The 1982 language of section 2 reads (in part) as follows:

(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 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. . .⁶⁷

In *Gingles*, the Court identified a requisite level of racial bloc voting as one of the basic factors in the proof of minority vote dilution for an at-large or multimember district system under the 1982 language of section 2.⁶⁸ Writing for the Court, Justice Brennan stated, "[t]he purpose of inquiring into the existence of racially polarized voting was twofold: to ascertain

party affiliation was the main factor in voting, the court was critical of his analysis. *Id.*

⁶⁶ S. REP. NO. 417, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 204-14.

⁶⁷ 42 U.S.C. § 1973(a) (1988) (emphasis added).

⁶⁸ *Thornburg v. Gingles*, 478 U.S. 30, 55 (1986). The Court further explained, "[b]ecause . . . the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district." *Gingles*, 478 U.S. at 55-56.

whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates."⁶⁹ These two inquiries accounted for two of the three elements of the *Gingles* three-pronged test. Comprising the third element of proof in the *Gingles* section 2 test was the requirement that a plaintiff show that the minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district."⁷⁰

The *LULAC* decision was incompatible with *Gingles* because it moved from a test for racially polarized voting based simply on the presence or absence of differences in the support levels of black and white (or Hispanic and non-Hispanic) voters vis a vis the minority candidate(s) of choice that *Gingles* specified to a test that required consideration of the factors that may have influenced voters to vote as they did.⁷¹ Thus, the *LULAC* test became a question of whether or not the intent lying behind the decision of white/Anglo voters not to support minority-preferred candidates could be regarded as racial in motivation.

LULAC stood for the proposition that even if minority voters support the minority candidate in overwhelming numbers and non-minority voters oppose the minority candidate in

⁶⁹ *Id.* at 56. Justice Brennan also wrote that the issue of "legally significant racially polarized voting" demanded discrete inquiries into voting practices. *Id.* According to Justice Brennan, if a plaintiff showed that a substantial number of minority voters typically supported the same candidates, then they would satisfy the "political cohesiveness" aspect of a vote dilution claim. *Id.* Satisfying the requisite level of "white bloc voting," a plaintiff could establish that the white vote would generally defeat the aggregate strength of minority support. *Id.*

⁷⁰ *Id.* at 50. Significantly, the Court illustrated, "[i]f [the district is not geographically compact], as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates." *Id.*

⁷¹ *League of Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 876 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). The court evaluated the proof of voter dilution on a "totality of the circumstances" basis. *LULAC*, 999 F.2d at 876. As a result of the court's approach, a plaintiff must meet a more substantial threshold at trial when creating a fact issue. *Id.* No less than the *Gingles* preconditions, a party must also show that "they do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *Id.* at 849.

overwhelming numbers, and if one can demonstrate that minority voters supported the minority candidate not because he was black/Hispanic but because he was a Democrat, while non-minority voters opposed that candidate not because he was minority but because he was a Democrat (and not a Republican), then voting was not racially polarized. Writing for the majority, Judge Higginbotham explained that if partisan affiliation, not race, was responsible for the defeat of the minority preferred candidate there can be no finding of racial vote dilution.⁷² Thus, it is in this fashion that *LULAC* sneaks an intent requirement back into section 2 jurisprudence.⁷³ In *Gingles*, the Court made clear that intent was to play no role in the examination of racially polarized voting by accepting the definition offered by plaintiffs' expert witness in that case (Grofman) that voting was polarized when black voters and white voters voted differently.⁷⁴ Footnote twenty-one of *Gingles* asserted

⁷² *Id.* at 880. The court's decision, focusing on the "totality of the circumstances," reflected that the elections involved no racial politics. *Id.*

⁷³ *Id.* The en banc majority in *LULAC* claimed that they were merely applying the standards for judging racially polarized voting laid down by the Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971). *LULAC*, 999 F.2d at 851. In *Whitcomb*, the Court refused to overturn an at-large plan in Marion County, Indiana as unconstitutional under the *Fortson v. Dorsey*, 379 U.S. 433 (1965), effects standard because the success of ghetto blacks could not be attributed to their race but rather to the overall success or failure of Democratic slates in the county. *Whitcomb*, 403 U.S. at 160. Buttressing their interpretation of *Whitcomb*, the *LULAC* majority cited Justice Marshall's dissent in *Mobile v. Bolden*:

In *Whitcomb v. Chavis* we again repeated and applied the *Fortson* [effects] standard, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. The Court stressed that both Democratic and Republican Parties had nominated Negroes and several had been elected. Negro candidates lost only when their entire party slate went down to defeat.

LULAC, 999 F.2d at 853 (citing *Mobile v. Bolden*, 446 U.S. 55, 109 (1970) (Marshall, J., dissenting) (citations omitted)). However, even taking this analysis to be the correct reading of *Whitcomb*, the Court decided *Gingles* fifteen years later and this case therefore should define the governing standards.

⁷⁴ *Thornburg v. Gingles*, 478 U.S. 30, 53-54 (1986). The district court found "racially correlated voting" in the districts. *Gingles*, 478 U.S. at 53. Regarding this correlation, Grofman revealed the relationship between race and voting behavior was "statistically significant," an explanation which the Court accepted. *Id.* n.21.

that "racial polarization" can be established in terms of observed "correlations" between the racial composition of election districts and candidate choices in those units, at least insofar as a correlation between the race of the voter and the way in which the voter voted implies differences in the voting behavior of minority and non-minority voters.⁷⁵ This language was clearly incompatible with the test for bloc voting set forth by the *LULAC* majority.

The *LULAC* court, however, claimed that five Justices in *Gingles* endorsed its definition of "legally significant bloc voting." While Section IIIC of Justice Brennan's opinion in *Gingles* (in which he explicitly rejected the views of the *LULAC* majority about the legal test for racial bloc voting) was only a plurality opinion the quotations above⁷⁶ were not from Section IIIC, but from earlier parts of the opinion which a majority of the Justices, including Justice White, signed.

The *LULAC* court was, of course, correct in noting that Justice White strongly dissented from Section IIIC of Justice Brennan's opinion. But if one suggested that all five Justices who dissented from this section were of a single opinion regarding the definition of racially polarized, then the result would be misleading. Justice O'Connor's views (writing for herself and three other Justices) about how to define racial bloc voting were not synonymous with those Justice White expressed in his concurrence.⁷⁷ The critical quotation from Justice O'Connor's opinion in *Gingles* was as follows:

Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, *I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may*

⁷⁵ *Gingles*, 478 U.S. at 53 n.21.

⁷⁶ See *supra* notes 14, 30, 69 and accompanying text.

⁷⁷ *Gingles*, 478 U.S. at 83 (O'Connor, J., concurring). Of course, Justice O'Connor's opinion directly expressed her agreement with Justice White's demurral from Justice Brennan's view that the race of the candidate was always irrelevant in identifying racially polarized voting, but there were important differences and she partly sided with Justice Brennan on other points of dispute. *Id.* (O'Connor, J., concurring).

be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the Senate Report clearly states that one factor that could have probative value in Section 2 cases was 'whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.' The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on 'intensive racial politics,' on 'racial political considerations,' and on whether 'racial politics . . . dominate the electoral process' as one aspect of the 'racial bloc voting' that Congress deemed relevant to showing a Section 2 violation.⁷⁸

The *LULAC* court, however, quoted from the first part of the above section in an elliptical way, and prefaced the quota-

⁷⁸ *Id.* at 101 (emphasis added) (citations omitted).

tion with language that we believe distorted its true meaning:

Justice O'Connor joined Justice White in maintaining that evidence that white and minority voters generally supported different candidates did not constitute legally significant racial bloc voting where these patterns were attributable to partisan affiliation rather than the race of the candidate. She therefore rejected Justice Brennan's position that 'evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters . . . can never affect the overall vote dilution inquiry.'⁷⁹

Judge Higginbotham's reporting of Justice O'Connor's concurrence (and his framing of quotations from it) suggested a greater degree of disagreement between her views and those of Justice Brennan than we believe was accurate. It is useful to remember that Justice O'Connor was agreeing with Justice Brennan when she said, "I agree that defendants *cannot* rebut this showing [of polarization] by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race."⁸⁰

We view Justice O'Connor's central point in *Gingles* as an insistence on looking at the "totality of the circumstances" in judging vote dilution. In our view, Justice O'Connor separated the question of how to define and measure bloc voting, where she agreed with Justice Brennan, from the question of what evidence the Court can consider in the broader inquiry, in which she preferred to cast a wider net than Justice Brennan.⁸¹ *Gingles*, in our view, stands for the premise that

⁷⁹ *League of United Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 856 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). The *LULAC* court emphasized the division between Justice Brennan's plurality opinion and Justices White's and O'Connor's concurrences. *LULAC*, 999 F.2d at 857. Specifically, all agreed that only "legally significant racial bloc voting" created a claim under section 2, but disagreement existed on the proof necessary to sustain a claim. *Id.*

⁸⁰ *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring) (emphasis added). The words "I agree," and "cannot rebut," as well as other phrases, were omitted in Judge Higginbotham's rendition of Justice O'Connor's concurrence. *LULAC*, 999 F.2d at 856.

⁸¹ *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring). In contrast to Justice

racial polarization is a matter of differences, not of reasons for such differences—even though the reasons might play some role in a totality of the circumstances analysis of vote dilution. Contrary to Judge Higginbotham's contention, no language existed in Justice O'Connor's opinion to suggest that she would always see party-line voting that divided along racial fault lines as not constituting racial bloc voting in the sense of the Act, since in a jurisdiction where one party, that of the white majority, was dominant and voting was strictly along party lines, it would never be true that "another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections."⁸²

The potential implications of Judge Higginbotham's views for the recasting of voting rights case law are considerable, in part for what the opinion says, but even more so for what the next step might be. The opinion confined itself to ruling that racial bloc voting was legally insignificant when one can attribute racial bloc voting to straight-ticket party-line voting. This view, in and of itself, threw down a challenge to previous voting rights decisions. While the vast majority of cases have been at the local level, and most of these involved nonpartisan contests, the most politically consequential section 2 challenges (those to congressional and legislative elections) have involved partisan elections. Blacks have been overwhelmingly Democrat in their party affiliation since 1964, and whites have become increasingly Republican.⁸³ Thus, separating out racial from partisan concerns will not be easy, and forcing plaintiffs to try to do so in order to succeed in proving a section 2 violation in situations involving partisan elections will make it much hard-

Brennan, Justice O'Connor urged that "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters" could sometimes affect the vote dilution inquiry. *Id.* (O'Connor, J., concurring).

⁸² *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring).

⁸³ See EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 138-58 (1989) (discussing changes in partisan affiliation without critical elections). Significantly, the authors asserted that the Democrats' pro-civil rights platform was a major factor in this party polarization. *Id.* at 150-51.

er for plaintiffs to prevail in such challenges, even in situations where minority exclusion was total.

But Judge Higginbotham's opinion has even more serious potential implications which apply to all voting rights cases, and not just to those involving partisan elections. While the *LULAC* majority refused to express a view on "whether *defendants* may attempt to prove that losses by minority-preferred candidates are attributable to non-racial causes other than partisan affiliation,"⁸⁴ it did assert that:

Factors that might legitimately lead white voters to withhold support from particular minority candidates include, for example, limited campaign funds, inexperience, or a reputation besmirched by scandal. Because these additional factors map only imperfectly onto partisan affiliation, detailed multivariate analysis might then be the evidence of choice.⁸⁵

Although Judge Higginbotham then proceeded to note that reasons existed why multivariate analysis would impose unfair burdens on plaintiffs, he concluded that "this argument [for multivariate analysis] possesses considerable force."⁸⁶ If future courts accept Judge Higginbotham's suggestion that multivariate methods are required in a racial bloc voting analysis, then the courts will be in for a statistical nightmare and plaintiffs will be in a legal context where proving racial vote dilution will become virtually impossible. Because one of the present authors had previously written extensively about the pitfalls of multivariate analyses after Judge Higginbotham first expressed his preferences for multivariate bloc voting analysis in his special concurrence in *Jones v. City of Lubbock*⁸⁷ ten years ago,⁸⁸ we will not elaborate further on that point here.⁸⁹

⁸⁴ *League of United Latin Am. Citizens (LULAC) v. Clements*, 999 F.2d 831, 860 n.27 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

⁸⁵ *LULAC*, 888 F.2d at 859. Judge Higginbotham further explained that unless courts made this additional inquiry "courts that confine their scrutiny to partisan voting might well find racial bloc voting in circumstances where the losses of minority-preferred candidates were actually attributable to causes other than race. *Id.* This result, it is urged, might unfairly tip the scales in favor of liability." *Id.* at 859-60.

⁸⁶ *Id.* at 860.

⁸⁷ 730 F.2d 233, 234-36 (5th Cir. 1984) (Higginbotham, J., concurring).

⁸⁸ The Eleventh Circuit cited Judge Higginbotham's views from *Jones* favor-

2. *Shift in Focus from Success of Minority-preferred Candidates to Partisan Success*

According to Judge Higginbotham in *LULAC*, the appropriate question was not whether minority candidates win as often as non-minority candidates but rather, did minority candidates who ran as Republicans win as often as Republican candidates who were not minority members and, alternatively, did minority candidates who ran as Democrats win as often as Democratic candidates who were not minority members. The claim in *LULAC* was that while minority candidates tended to lose the loss rates of minority candidates were no greater than for non-minority candidates of the same party.⁹⁰ However, even if one was to accept the need to control a party in assessing minority electoral success in general elections in the fashion proposed by the *LULAC* majority, it still did not follow from the evidence considered by the *LULAC* court that voting in Texas judicial contests was not racially polarized.

But if one observed that white/Anglo voters were no more likely to vote against Democrats in general elections who were minority members than Democrats who were white, does this mean that racial differences in voting had been “explained away” by differences in partisan attachments/loyalties? The answer to that question is no. Racial differences in partisanship were explained in part by the race-relevant differences in

ably in *NAACP v. City of Opelika*, 748 F.2d 1473, 1484 (11th Cir. 1984), and in *McCord v. City of Fort Lauderdale*, 787 F.2d 1528, 1532-33 (11th Cir. 1986).

⁸⁹ In 1991, one of the present authors wrote that multivariate bloc voting was legally dead. See Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 SOC. SCI. Q. 826, 832 (1991) (arguing that multivariate regression was inaccurate about racial bloc voting and confused courts); see also Bernard Grofman, *Straw Men and Stray Bullets: A Reply to Bullock*, 72 SOC. SCI. Q. 840, 842 (1991) (urging use of bivariate descriptive statistics instead of complex multivariate analyses).

⁹⁰ *LULAC*, 999 F.2d at 865-66. The Court stated: “The black preferred candidate was always the Democratic candidate, while the majority of white voters always supported the Republican candidate The race of the candidate did not affect the pattern. White voters’ support for black Republican candidates was equal to or greater than their support for white Republicans.” *Id.*

the policy positions taken by the political parties.

Judge Higginbotham cavalierly dismissed the importance of this point:

Plaintiffs contend that the Democratic party better represents the political views of black voters in Dallas County. This is doubtlessly the view of black voters, but it is not relevant to whether the minority preferred candidate is defeated on account of race. To the extent that candidates preferred by black voters are consistently defeated because of their substantive political positions, they are the casualties of interest group politics, not racial considerations. This is not the harm against which Section 2 protects. Section 2 protects black voters against defeat on account of race or color, not on account of political platform.⁹¹

According to this view, if whites hostile to black interests form a political party, as long as that party ran a handful of candidates with black faces and its voters supported those candidates to the same degree as the party's other candidates race was not implicated. There was no need to turn to such an extreme case to see the difficulties with the above argument. It can readily be shown that the affiliations of white voters and black voters in the South have fluctuated directly with the nature of the racial policies espoused by the Democratic and Republican parties.⁹² Today, the two major parties clearly stand for very different positions with respect to civil rights, and black voters support the Democratic party in overwhelming percentages, while the majority of white voters support the Republican party.⁹³ Moreover, the political affiliations of white voters in the South can be directly related to the racial context in which they find themselves, with whites in the most heavily black areas having deserted the Democratic party almost en-

⁹¹ *LULAC*, 999 F.2d at 879.

⁹² See *CARMINES & STIMSON*, *supra* note 83, at 46. Starting with Goldwater's presidential candidacy, which garnished only 10 percent of the black vote, blacks overwhelmingly realigned themselves with the Democratic party. *Id.*

⁹³ See *CARMINES & STIMSON*, *supra* note 83, at 115-37. The writers argued that race was central to belief structuring in presidential elections. *Id.* at 126. For instance, one can witness this belief structuring in the "liberal/conservative dimension" in the general electorate. *Id.* at 132.

tirely.⁹⁴ Thus, to say that party-line voting is interest group politics is to miss the point that the Act was intended to protect African-Americans and other racial/ethnic minorities from being put in the position of permanent minorities by particular electoral arrangements that would submerge their voting strength.

3. *Focus on Race of Officeholder Rather Than Dilution of Minority Votes*

LULAC treated an inquiry into dilution of minority voting rights at least in part as if it were an inquiry into employment discrimination against minority officeholders. According to Judge Higginbotham:

Undisputed evidence shows that in all of the counties, the percentage of minority lawyers was much smaller than the percentage of minority voters. In fact, minority lawyers disproportionately serve as judges, when their percentage among all eligible lawyers is considered⁹⁵

The absence of eligible candidates went a long way in explaining the absence of minority judges. Plaintiffs could not emphasize the scarcity of successful minority candidates to support the inference of dilution and simultaneously urged that the number of minorities eligible to run is not relevant.⁹⁶

⁹⁴ See Bernard Grofman & Lisa Handley, *Racial Context, the 1968 Wallace Vote, and Southern Presidential Dealignment: Evidence from North Carolina and Elsewhere*, in SPATIAL AND CONTEXTUAL MODELS IN POLITICAL RESEARCH 151-62 (Monroe Eagles ed., 1995) [hereinafter Grofman, *Wallace Vote*] (discussing 1972 presidential campaign and black vote). Grofman wrote that the Wallace vote began a migration of white voters from the Democratic to the Republican party. *Id.* at 152.

⁹⁵ *LULAC*, 999 F.2d at 865. The court continued to explain, "we have refused 'to preclude vote dilution claims where few or no [minority] candidates have sought offices in the challenged electoral system.'" *Id.* The court stated that "the cold reality is that few minority citizens can run for and be elected to judicial office." *Id.*

⁹⁶ *Id.* at 865-66. The record revealed that during the 1980s the percentage of minority judges was greater than that of minority lawyers who could run for district judge. *Id.* at 865. Further, counties which contained a small number of

Contrary to the implicit arguments in *LULAC*, the group whose rights the Act was intended to protect was not the set of possible minority officeholders, but rather the set of minority voters whose votes may be diluted. Blacks qua blacks (or Hispanics qua Hispanics) have no right to office; the right that the Fourteenth Amendment implicated was that no group had its votes minimized or canceled out. It was particularly ironic that the *LULAC* majority, some of whose members were hostile to the Act because it imposed color-conscious remedies, interpreted the Fourteenth Amendment in the voting rights context as the equivalent of a racial spoils system requiring government jobs for people of a given race, such that if enough of them had such jobs then they could have sustained no discrimination claim.⁹⁷

The right that *LULAC* specifically implicated was the right of voters to be provided a method that offered minority and non-minority voters an equal opportunity to “participate in the political process and elect candidates of choice” in judicial elections.⁹⁸ It was not the right of black lawyers to have jobs as judges in proportion to their numbers among the pool of eligible lawyers. The size of the pool of minority lawyers, and whether or not black lawyers were over-represented as judges (indeed, even a finding that every black lawyer in Texas was already a judge), should have been completely irrelevant to the question of whether the plaintiffs could have sustained a voting rights dilution claim against a challenge to at-large judicial elections.⁹⁹

minority judges had a correspondingly low number of minority lawyers eligible to run for the judiciary. *Id.* at 866. Evaluating this data, the court concluded that a plaintiff could not argue the “sincerity” of minority candidates in the same context as vote dilution at the same time stating that the number of minorities was insignificant. *Id.*

⁹⁷ As the *LULAC* majority stated, “[t]he Voting Rights Act responds to practices that impact *voting*: it is not a panacea addressing social deficiencies.” *Id.* at 866.

⁹⁸ *Id.* at 910 n.9 (King, J., dissenting) (quoting *League of United Latin Am. Citizens (LULAC III) v. Clements*, 986 F.2d 728, 812 n.59 (5th Cir. 1993)).

⁹⁹ However, in fairness to the *LULAC* court, we should also note that Judge Higginbotham’s opinion was quite careful to distinguish in each county the number of black judges elected with white support from the number of black judges

C. Presley v. Etowah County

In *Presley v. Etowah County Commission*, the Court rejected a finding by the Department of Justice that a change in the allocation of responsibilities in Alabama county commissions was a change subject to section 5 preclearance.¹⁰⁰ In one of the counties, the reallocation of responsibilities followed the election of an African-American to office for the first time,¹⁰¹ thus strongly suggesting a racial motivation for the change. Nonetheless, the Court held that the Act simply did not apply to the type of changes at issue.¹⁰²

What made *Presley* a particularly troubling decision for the civil rights community was that it disregarded the fact that the Department of Justice had for nearly two decades reviewed similar intra-governmental transfers of authority in covered jurisdictions under its section 5 authority and had, in fact, refused to preclear a number of such transfers.¹⁰³ Furthermore, *Presley* disregarded federal court decisions sustaining the Department of Justice's authority to review such changes.¹⁰⁴

elected with black support, and was thus faithful to the focus in *Gingles* (and section 2 of the Act) on the ability to elect "candidates of choice." *Id.* at 877-93. It used the success of black Republican judges merely as evidence for the claim that partisanship was more important than race in determining voting patterns. *Id.*

¹⁰⁰ *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508-10 (1972). In one jurisdiction, the change removed fiscal authority from individual council members and placed the authority in the hands of the council as a whole, while in another county the change involved delegation of full authority to the hands of an administrative officer who reported to the council as a whole. *Presley*, 502 U.S. at 495-97.

¹⁰¹ *Id.* at 496-97. The African-American was elected to the council following the adoption of single-member districts created pursuant to a settlement decree in a voting rights challenge levied against the county. *Id.* at 496.

¹⁰² *Id.* at 509. The Court concluded that the Act was limited to changes "with respect to voting" and was not intended to be applicable to changes "with respect to governance." *Id.* at 510.

¹⁰³ *Id.* at 511-12 (Stevens, J., dissenting). For a listing of similar transfers of authority objected to by the Department of Justice, see *id.* at 512 n.3 (Stevens, J., dissenting).

¹⁰⁴ *Id.* at 511-12 (Stevens, J., dissenting). For a listing of federal court decisions agreeing with the Department of Justice interpretation that such changes were subject to review, see *id.* n.28 (Stevens, J., dissenting).

Although the *Presley* decision was not as alarming as the decisions previously discussed,¹⁰⁵ cause for concern still remains. In dismissing the long-standing views of the Attorney General as to how the Court should interpret section 5 language, the Court asserted that the Department's interpretation was, on its face, contrary to the "unambiguous" meaning of the statutory language¹⁰⁶ and thus unworthy of deference under the deference to agency doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁰⁷ It strains credibility to call a statute "unambiguous" when both Republican and Democratic Assistant Attorney Generals for Civil Rights (and some district courts) had for nearly two decades interpreted the statute in a manner directly opposite to the interpretation proposed by the *Presley* majority.¹⁰⁸

We were also concerned because the *Presley* majority took the Department of Justice to task for having not proposed a "workable standard" to define which internal legislative changes should be subject to preclearance.¹⁰⁹ Finally, we were wor-

¹⁰⁵ We believe that the *Presley* majority's opinion that the language of the Act did not cover changes in *internal* legislative procedures, was not an unreasonable one from the perspective of the statute's "clear meaning." *Presley*, 502 U.S. at 510. For instance, the Court stated that the Act was not an "all-purpose discrimination statute." *Id.* at 509. Thus, changes must correlate to voting rights themselves. *Id.* at 510.

¹⁰⁶ *Id.* at 509.

¹⁰⁷ 467 U.S. 837, 842-844 (1984). The Court has long recognized that an executive department's construction of a statutory scheme which it was authorized to administer should be given considerable weight. *Chevron U.S.A., Inc.*, 467 U.S. at 844.

¹⁰⁸ As evidenced by their concurring opinions in *Hall v. Holder*, 114 S. Ct. 2581, 2591-2624 (1994), Justices Scalia and Thomas, both advocates of "plain meaning" tests for statutory construction, were nonetheless capable of some flights of fancy in reading the language of the Act to mean what they thought it ought to mean. In *Holder*, they asserted that the Act did not cover election practices such as districting rules. *Holder*, 114 S. Ct. at 2583, 2602-03. Even if this were true of the 1965 Act, it was certainly not true of the Act as amended in 1982. *Id.* at 2606. Amended section 2 of the Act referred to voters having an equal opportunity "to participate in the electoral process and elect candidates of choice." *Id.* at 2608. Section 2 was meant to reaffirm earlier 14th and 15th Amendment court cases such as *Fortson v. Dorsey*, 379 U.S. 433, *cert. denied*, 379 U.S. 998 (1965), and *White v. Register*, 412 U.S. 755 (1973), both dealing specifically with vote dilution in multimember district elections. *Id.* at 2606 n.22.

¹⁰⁹ *Presley*, 502 U.S. at 504.

ried that the *Presley* decision would encourage legislatures, county boards, and city councils, in covered jurisdictions to make internal changes in authority with a discriminatory purpose and/or effect now that such changes were protected from Department of Justice preclearance scrutiny.¹¹⁰

D. Republican Party of North Carolina v. Hunt

Republican Party of North Carolina v. Hunt was a landmark decision because it marked the first time that a court struck down any districting plan as an unconstitutional partisan gerrymander.¹¹¹ In *Davis v. Bandemer*, the Court held political gerrymandering to be justiciable in principal, but found that the legislative plans under challenge were not egregious enough to hold unconstitutional.¹¹² Thus, prior to *Republican Party v. Hunt*, many scholars (the present authors included) had concluded that *Bandemer* was, for all practical purposes, a dead letter.¹¹³

¹¹⁰ In this context, one should note that the most egregious change made by the Etowah County Commission's white majority (by a 4 to 2 vote, with the two new African-American commissioners in opposition) was one vesting all responsibilities for road maintenance in the hands of the incumbent (white) commissioners. *Id.* at 503. That change was in fact held to require preclearance by the district court—a decision not appealed to the Supreme Court, and thus not one on which they pronounced. *Id.* at 504. In our view, the *Presley* majority would have had a hard time treating such a change as requiring preclearance, however, given their arguments about how people should interpret the statutory language.

There was evidence that Etowah County was not unique in adopting devices that operated (and were almost certainly intended to operate) to minimize or to cancel out the effective influence of newly elected minority officials. See Susan Feeney & Steve McGonigle, *Voting Rights: The Next Generation*, DALLAS MORNING NEWS, Aug. 16, 1994, at A1 (discussing harassment of minority officials in Mississippi).

¹¹¹ *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722, 733 (E.D.N.C. 1994), *aff'd as modified*, *Republican Party of North Carolina v. North Carolina State Bd. of Elections*, No. 94-1057, 1994 WL 263955 (4th Cir. June 17, 1994) (per curiam). The court held that the plaintiffs made a sufficient showing that the current electoral process caused them harm. *Hunt*, 841 F. Supp. at 733.

¹¹² *Davis v. Bandemer*, 478 U.S. 109, 143 (1986). The Court stated that a minimum showing of "discriminatory vote dilution is required for a prima facie case of an equal protection violation." *Davis*, 478 U.S. at 143.

¹¹³ See generally Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to*

In *Hunt*, the plaintiffs challenged the at-large election plan for state superior court judges in North Carolina as a partisan gerrymander.¹¹⁴ The first time the district court considered the suit, it simply dismissed the challenge without trial on the grounds that the plaintiffs had presented no constitutional claim under the test laid down in *Bandemer*.¹¹⁵ On appeal, the Fourth Circuit reversed the lower court on the question of whether or not the plaintiffs had stated a constitutional claim, and remanded the case.¹¹⁶ In its decision, the Fourth Circuit provided guidelines to the lower court for determining if unconstitutional partisan vote dilution was present.¹¹⁷ These guidelines were modifications of the *Gingles* three-pronged test for racial vote dilution, revised to make them applicable to a partisan vote dilution context.¹¹⁸ On remand, the plaintiffs won a unanimous decision from the three-judge panel,¹¹⁹ and the Fourth Circuit declined to stay the order imposing a district-based remedy. However, this case is now (January 1996) back on remand and its fate uncertain.

Even if the present opinion survives, it is very difficult to project the implications of this North Carolina case to other

Partisan Gerrymandering, 21 STETSON L. REV. 733, 816-17 (1992) (discussing *Davis v. Bandemer*, 478 U.S. 109 (1986), and its impact).

¹¹⁴ *Hunt*, 841 F. Supp. at 723. Specifically, the plaintiffs alleged that the electoral process denied the franchise to Republican voters, violating the Fourteenth and First Amendments. *Id.*

¹¹⁵ *Id.* The district court determined that the complaint raised a non-justiciable political question and thus dismissed the action. *Id.*

¹¹⁶ *Republican Party v. Martin*, 980 F.2d 943, 961 (4th Cir. 1992) cited in *Hunt*, 841 F. Supp. at 724-25. The Fourth Circuit found that a viable, justiciable Equal Protection claim of vote dilution was brought about by political gerrymandering. *Martin*, 980 F.2d at 961, cited in *Hunt*, 841 F. Supp. at 724-25.

¹¹⁷ *Martin*, 980 F.2d at 955. The court summarized the elements of a vote dilution claim: First, a plaintiff must allege intentional discrimination against a political group, and this effect must be greater than *de minimis*. *Id.* Second, the plaintiff must allege a history of disproportionate effects "that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.*

¹¹⁸ The court opinion drew in part on ideas proposed by one of the present authors. See Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, in POLITICAL GERRYMANDERING AND THE COURTS 29-63 (Bernard Grofman ed., 1990) (questioning partisan gerrymandering and federal district court interpretations of legislative plans).

¹¹⁹ *Hunt*, 841 F. Supp. at 733.

partisan gerrymandering challenges that involved other types of elections or less unique evidentiary records. Because the plaintiffs challenged partisan judicial elections in this case, it was difficult to determine how—or even if—the same standards would apply to non-partisan elections, or to non-judicial elections. Furthermore, the plan under challenge involved a statewide at-large election and therefore the test was one of vote dilution by submergence. The court did not clarify how it could modify the test to apply to single-member districts, where the issue was vote dilution through dispersal or concentration. Of course, the evolution of voting rights case law as it moved from the context of at-large or multimember district elections (the setting in *Gingles*) to the context of single-member districts (in cases such as *Jeffers v. Clinton*¹²⁰) did suggest some highly probable directions.¹²¹ The Fourth Circuit, in particular, might be inclined to draw ideas from the racial vote dilution literature because it had already borrowed from tests which other racial cases developed.

The evidentiary record in *Hunt* was unusual. First, until 1994, Republicans had been almost totally excluded from superior court elected judgeships (the sole exception being one Republican judge who served between 1988 and 1990).¹²² In contrast, Republican candidates had achieved modest but consistent successes in elections to the state's district court elections which occurred at the district level.¹²³ Second, *Hunt* was also an unusual case for an extensive record of superior court judgeship election results was available for the court to consider. Between the period when the plaintiffs first filed the lawsuit

¹²⁰ 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1990).

¹²¹ See, e.g., Bernard Grofman & Lisa Handley, *Identifying and Remediating Racial Gerrymandering*, 8 J.L. & POL. 345, 345-403 (1992) (discussing legal standards for single- and multimember districting plans). The authors illustrated that a greater number of cases existed challenging multimember plans rather than single-member plans. *Id.* at 348.

¹²² *Hunt*, 841 F. Supp. at 726. The court specifically noted that Republicans might have fared better in these elections if they were conducted on a districtwide basis. *Id.*

¹²³ *Id.* The court stated, “[b]etween 1968 and the inception of this lawsuit [1994], ten Republicans ran for resident superior court judgeships. . . .” *Id.*

and when the circuit court panel remanded it to the trial court, six years had elapsed.¹²⁴ Thus, the trial court had before it not only expert witness predictions of probable results for superior court elections but *actual* results for 60 percent of the ten year redistricting period, which showed a continuing pattern of almost total Republican exclusion in which the Republicans did not repeat their success of 1988 in either of the two subsequent elections.¹²⁵

How courts will respond to records of partisan successes and failures that are not as one-sided or to situations in which the evidence is more disputable as to the predictability of partisan voting patterns presently remains unclear. Moreover, the Republican landslide of 1994 may have an impact on partisan gerrymandering claims because it illustrated the unpredictability of political fortunes and the impossibility of projecting with any accuracy the decade-long impact of any districting scheme. At this point, one cannot discern whether the North Carolina case will become a harbinger of other successful partisan gerrymandering challenges, or a unique instance, or be reversed.

III. FACTS AND VALUES IN VOTING RIGHTS JURISPRUDENCE

As the discussion of the previous cases indicated, with the possible exception of protecting Republican voters in North Carolina, the current climate toward extending and even protecting existing minority voting rights is hostile. The Court has demonstrated an unwillingness to protect minority gains in voting rights, and many interested scholars and media commentators have been very vocal in their opposition to what they perceived as unfair minority voters' advantages. The criticism has focused on the creation of convoluted majority-minority districts as well as the judicial and administrative implementation of the Act.¹²⁶ The tortuous shape of some of these

¹²⁴ *Id.* at 727. This case took a long time to be resolved in part because the district court first dismissed the case. *Id.* at 723.

¹²⁵ *Id.* at 726. Specifically, the plaintiffs argued that the present electoral system diluted Republican voting strength, ensuring Democrats' dominance in future superior court elections. *Id.*

¹²⁶ See John Fund, *Political Pornography*, WALL ST. J., Sept. 9, 1991 at A10.

districts permitted conservatives who opposed the Act's vigorous implementation to pose as defenders of "good government." We believe that the critics were mistaken in much of their criticisms of majority-minority districts, but we close this section with a discussion of the long-term consequences of the Act in general. In conclusion, we determine that the Act has had some important unintentional consequences, particularly for the Democratic party in the South.

A. *Forced Adoption of Contorted Minority Districts*

The Act granted extraordinary power to the Department of Justice.¹²⁷ Since the inception of the Act, debates among scholars have rendered little agreement concerning the Justice Department's role in enforcing the Act; writing about the Act's enforcement in the 1970s and 1980s, liberal critics of the Justice Department's administration of section 5 made such claims as "negotiated compliance" between the Justice Department and covered jurisdictions led the Justice Department to defer unduly to local authorities at the expense of minority voting rights.¹²⁸ In remarkable contrast, conservative critics such as

Wall Street Journal editorial page writer John Fund used the term "political pornography" to refer to districts such as the 12th congressional district in North Carolina, which stretches some 200 miles in a snakelike fashion across the state. *Id.*

¹²⁷ For instance, under section 5 of the Act, the Justice Department has direct authority over local and state statutes and administrative procedures concerned with "any voting qualification or prerequisite to voting, or standard, practice, or procedures with respect to voting. . . ." Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1988). The section 5 preclearance provisions put the burden on covered jurisdictions to demonstrate that changes do not have discriminatory effects or purpose. *See, e.g., Georgia v. United States*, 411 U.S. 526, 537 (1973) (declaring that section 5 shifts burden of proof). Thus, the usual "innocent until proven guilty" standard was seemingly inverted. This remarkable tilt in federal state relations has been likened to a "second Reconstruction" by both proponents and opponents of the Act. *See, e.g., J. Morgan Kousser, The Undermining of the First Reconstruction: Lessons for the Second, in MINORITY VOTE DILUTION 27-46* (Chandler Davidson ed., 1984) (defining four stages in post-Reconstruction Voting rights).

¹²⁸ HOWARD BALL ET AL., *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 194-95* (1982). Ball illustrated that the Justice Department did not deal "positively" with section 5. *Id.* at 194. For instance, Lyndon

Abigail Thernstrom contended that in the 1980s the Justice Department sometimes displayed a "get-the-racist-bastards" approach in its review of preclearance submissions that was inappropriate to its quasi-judicial role.¹²⁹

The role of the Justice Department in voting rights enforcement in the 1990s was equally controversial. For example, in discussing *Miller v. Johnson*, George Will, in an editorial that appeared in *Newsweek*, wrote that "[u]nder pressure from the Justice Department, which was supporting the ACLU's 'Max-Black' plan to produce a third black majority [congressional] district, Georgia's legislature subordinated to racial considerations such traditional race-neutral districting principles as compactness, contiguity, and respect for political divisions and communities defined by actual shared interests."¹³⁰ In *Miller v. Johnson*, Justice Kennedy's majority opinion decried the Justice Department's use of its preclearance authority with regard to congressional districting in Georgia: "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld."¹³¹ Later in the opinion, Justice Kennedy further explained: "[i]t takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."¹³²

Although it was true that the Department of Justice used its preclearance denial threat to compel the creation of many of the new majority-minority districts drawn in covered jurisdic-

Johnson was not interested in implementing section 5 and thus did not pursue the Justice Department to enforce its provisions. *Id.* at 195. Further, Richard Nixon had a "southern strategy" not to enforce section 5. *Id.*

¹²⁹ Thernstrom, *supra* note 9, at 168.

¹³⁰ Will, *supra* note 28, at 64. Will went on to remark rhetorically: "Makes you wonder why it is called [j]ustice." *Id.*

¹³¹ *Miller v. Johnson*, 115 S. Ct. 2475, 2493 (1995).

¹³² *Miller*, 115 S. Ct. at 2494. Justice Kennedy also stated, "[o]nly if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race." *Id.*

tions,¹³³ the Justice Department never suggested specific district configurations, or even specific district locations. In fact, in North Carolina, the Justice Department actually suggested that the legislature draw an additional minority district in one region of the state, but the state chose to draw the district in another region entirely and this plan was precleared. Furthermore, the shape of the North Carolina 12th congressional district was as much a product of protecting incumbent representatives as it was the result of creating a district with a majority black population. In Texas, evidence that the parties presented to the district court made it quite clear that the minority congressional districts in Houston and Dallas have the contorted shapes that they do in order to protect incumbents, and that more compact minority districts, with higher concentrations of minority voters, were possible.¹³⁴

B. Unwarranted Assumptions About Shared Political Interests

In *Shaw v. Reno*, Justice O'Connor opined that non-compact majority-minority districts reinforce the stereotype that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."¹³⁵ Similarly, in *Miller v. Johnson*, Justice Kennedy rejected the Georgia legislature's "offensive and demeaning assumption" that those of a given race have similar interests.¹³⁶

¹³³ Southern legislators drawing districts in the 1990s were well aware of the remarkable success rate enjoyed by plaintiffs in section 2 challenges and the then perfect record of the Justice Department in defending against section 5 declaratory judgments. See Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in QUIET REVOLUTION IN THE SOUTH 21-37 (Chandler Davidson & Bernard Grofman eds., 1994) (discussing vote dilution and creation of majority-minority districts).

¹³⁴ *Vera v. Richards*, 861 F. Supp. 1304, 1321-22 (S.D. Tex. 1994). An expert witness testified to this fact at trial. *Vera*, 861 F. Supp. at 1322.

¹³⁵ *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993). The Court called these "impermissible racial stereotypes." *Shaw*, 113 S. Ct. at 2827.

¹³⁶ *Miller*, 115 S. Ct. at 2486. He also stated that these types of race based assumptions caused all of society harm. *Id.*

George Will emphasized what he saw as a vital distinction between “somewhat trimming a district’s lines to conform to a compact racial or ethnic community,” on the one hand, and drawing race-driven lines to define what he calls “an illusory political community that the ‘organic’ life of society has not created,” on the other.¹³⁷ The view that race-derived commonalities were unrelated to the organic life of a society unless they had perfectly neat geographic boundaries can be characterized as naive at best, and disingenuous at worst. Are not the commonalities caused by the legacy of racism associated with centuries of slavery and Jim Crow law, as “organic” a construct as anything about which Edmund Burke might have discussed?¹³⁸

Neither of the majority opinions in *Shaw* or *Miller* or George Will’s articles reviewed any empirical evidence about the degree to which blacks see themselves as having common interests. In fact, the overwhelming evidence on patterns of racially polarized voting, along with the widening racial cleavage in partisan voting patterns in the South, made the assumption that blacks have similar political interests a realistic one, however unpalatable that may be to those who would wish to see the U.S. as having passed the point where race-conscious remedies are necessary to solve race-rooted problems. Indeed, writing in the minority in *Miller v. Johnson*, Justice Ginsburg, joined by Justices Steven, Breyer and Souter, approvingly cited a number of studies by social scientists which discussed the continuing significance of racial and ethnic divisions in American life.¹³⁹ Although these references were in many instances more than twenty years old, more recent works make the same point. For example, Michael Dawson’s recently published book

¹³⁷ Will, *supra* note 102, at 64.

¹³⁸ If blacks can be said to be unified only if they live together, if some congressional districts include multiple black ghettos and not just one, then why does this matter? See generally DOUGLAS S. MASSEY & NANCY A. DEWTON, AMERICAN APARTHEID 67-74 (1993) (discussing suburbanization and segregation). In our view, the geography of race can be expected to resemble a black and white checkboard built up of racially homogeneous squares, albeit squares of different sizes. If blacks do see themselves as having interests in common, why should not more than one of the squares of a given color on the checkerboard be joined?

¹³⁹ *Miller*, 115 S. Ct. at 2505 (Ginsberg, J., dissenting).

emphasized that for blacks race was more important than class or other factors in defining self-identity or when someone defined it for another.¹⁴⁰ If we looked at the similarities between white and black attitudes on a large variety of issues, from foreign policy to abortion, it would be possible to argue that blacks and whites were really not that different in attitudes. But such a calculation would be quite misleading about things that mattered most. When it came to attitudes and beliefs linked to race, the empirical evidence was overwhelming that the gap between whites and blacks remained huge. Morgan Kousser, an historian noted for his work on southern politics and minority voting rights, summarized the evidence as follows:

[W]hites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and government at all levels should act to remedy this serious plight.¹⁴¹

Creating majority-minority districts guarantees that minority voters will have the opportunity to elect candidates that will represent their interests. These districts are not drawn to guarantee that minorities be elected to office, however. These districts preclude no one running for office because of race or ethnicity, and many majority-minority districts have in fact elected whites to office.¹⁴² Nonetheless, given the history of

¹⁴⁰ See MICHAEL DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 130-58 (1994) (examining blacks' voting decisions from 1964 to 1990s). Dawson showed that blacks voted with consistent solidarity, especially in mayoral elections and in Jesse Jackson's 1988 presidential campaign. *Id.* at 130.

¹⁴¹ J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation* (Feb. 9, 1995) (unpublished manuscript, on file with the author). Kousser drew heavily on national survey research that dealt with racial differences in attitudes on issues such as social welfare and busing, and with racial differences in perceptions of continuing racial discrimination in various domains. *Id.* He also drew on some less well-known survey research, such as a 1993 survey devoted exclusively to probing racial attitudes in North Carolina. *Id.*

¹⁴² In the 1980s, in fact, a far higher percentage of minority districts elected

previous minority exclusion from office, it was not surprising that minority voters often chose to elect African-American and Hispanic representatives to office when given the opportunity. This is not to say that it is desirable for African-American representatives to be confined to majority black districts, or for Latino representatives to come solely from majority Hispanic districts. Minorities should seek to represent white constituencies, liberal or conservative, and whites should seek to represent minority constituencies.

However, although we were very sympathetic to the view that, as one of us put it more than a decade ago, "[t]here is no need for spaghetti to rejoice just because linguinis are elected"¹⁴³ (that is, that the effectiveness of representation is not simply a function of a match-up between the race/ethnicity/religion of the representative and the represented), Carol Swain did not convince us when she argued in *Black Faces, Black Interests* that white representatives with substantial black constituencies represented their black constituents as well as, or better than, African-Americans represented their black constituencies.¹⁴⁴ Swain based her conclusions on insufficient evidence. On the one hand, she based her view that whites in heavily black districts usually represented black interests, even in the South, on an atypical sample of white liberals who represented majority black constituencies that later came to have black representation.¹⁴⁵ She did not con-

whites to legislative office than majority white district elected minorities to office. See Grofman & Handley, *Minority Population*, *supra* note 7, at 335-36. The authors illustrated that "the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority white districts." See Handley & Grofman, *Black Officeholding*, *supra* note 7, at 335.

¹⁴³ BERNARD GROFMAN, REPRESENTATION AND REDISTRICTING ISSUES 97, 99 (Bernard Grofman et al., eds., 1982). The author stated, "that a representative is not representative of those whom he represents does not prevent him from representing them well, and that a representative is representative of those whom he represents does not guarantee that he will represent them well." *Id.*

¹⁴⁴ SWAIN, *supra* note 29, at 211. Swain argued that white representatives can be committed in representing black interests in majority white districts. *Id.* After all, white people were the architects of most civil rights and Great Society programs, enacted during a period with few black politicians. *Id.*

¹⁴⁵ SWAIN, *supra* note 29, at 211. According to Swain's evidence, "[m]any white

sider the broader spectrum of southern districts that had substantial black populations in the 1970s or 1980s but which elected conservative (or, at best, moderate) white representatives who were far more responsive to the white majority than to black interests. On the other hand, her criticism of black representatives from majority black districts¹⁴⁶ as unresponsive to their constituency's concerns seemed to us to be too harsh—filtered through an ideological prism as to what would constitute effective representation and also reflecting a double standard. If, as she claimed, black districts became safe havens for African-American incumbents who lost touch with their primarily black electoral constituencies, why would we expect white incumbents in safe Democratic or Republican seats to be any less likely to lose touch with their (predominantly white) electoral constituencies?¹⁴⁷

C. *Minority Districts are no Longer Necessary*

The two academic authors who, more frequently than most others, propagate the claim that black success in eliciting support from white voters demonstrated that majority-minority districts were no longer necessary and the Act in general has outlived its usefulness were Abigail Thernstrom and Carol Swain. Although each also attacked the implementation of the Act on normative grounds, here we focus on factual assertions each has recently made regarding the ability of non-minority constituencies to elect minorities.¹⁴⁸ For instance, Swain ar-

members of Congress perform as well or better on the indicators used in this book than some black representatives." *Id.* Swain also argued that the white members of the Congressional Black Caucus, who are not allowed to attend the CBC's closed-door meetings, were not the only white people in Congress who wanted to help blacks. *Id.* at 211-12.

¹⁴⁶ See SWAIN, *supra* note 29, at 74-141.

¹⁴⁷ Swain did not look at the behavior of white representatives in so-called safe districts. Therefore, she can draw no comparisons between the behavior of white representatives and African-American representatives in safe white and safe black seats respectively.

¹⁴⁸ Thernstrom also emphasized the lessons to be learned about contemporary Southern politics from elections such as the gubernatorial victory of Douglas Wilder. According to Thernstrom, "Virginia's voters have proved beyond a shadow of a

gued that whites (even southern whites) were now willing to vote for qualified African-American candidates, and that African-Americans could therefore win contests without resorting to majority black constituencies.¹⁴⁹ Of course, she suggested that these candidates needed to be moderate, or even conservative, on issues if they wished to win sufficient white support to achieve office.¹⁵⁰

We have examined the evidence for both legislative office and for jurisdiction-wide offices such as mayor and determined that Thernstrom and Swain were overly optimistic in their view that whites were willing to vote for black candidates in numbers great enough to ensure election. They were also empirically misguided in their view that race-conscious districting was therefore no longer necessary to provide descriptive representation for minorities.¹⁵¹

doubt that blacks can win in majority-white jurisdictions . . . L. Douglas Wilder being the proof of that particular pudding." Abigail M. Thernstrom, *A Republican-Civil Rights Conspiracy: Working Together on Legislative Redistricting*, WASH. POST, Sept. 23, 1991 (Final ed.), at A11. Taking nothing away from Governor Wilder, to regard his election as indicative of a general ability of blacks to get elected to state office from majority white areas in the deep South, or even in Virginia, itself, is to completely disregard the evidence. In Virginia, the only black ever elected to the state legislature from a majority white district was Douglas Wilder—and his election (with a plurality) was made possible only because a half dozen white candidates in the Democratic primary split the white vote, and Virginia does not have a majority vote requirement. Virginia was 19% black according to the 1990 census; yet no black members of Congress have been elected from the state except for the African-American elected in 1992 from the newly created majority black district.

¹⁴⁹ SWAIN, *supra* note 29, at 209. Swain argued that "candidates run as individuals and not as categorical groups." *Id.* Thus, people who may dislike a group could make an exception for certain individuals. *Id.*

¹⁵⁰ SWAIN, *supra* note 29, at 209. Swain stated that most whites believed blacks were liberal, and thus needed a lot of information about the candidate to vote for him or her. *Id.*

¹⁵¹ However, Swain would also argue that substantial concerns for descriptive representation was not normatively desirable. SWAIN, *supra* note 29, at 211. For instance, she stated, "African-Americans . . . may not recognize that they are placing such a high value on descriptive representation that they are ignoring other characteristics of representation that may be in the group's interests, such as age, seniority in Congress, and history of responsiveness." *Id.*

1. Congress and State Legislatures

At least in the South, the evidence did not support Thernstrom's and Swain's claim that white voters were electing blacks to office in any numbers.¹⁵² In the 1980s, in every southern state, the percentage of majority white legislative districts that elected a black to office was either zero or near zero. In fact, one could count on one's fingers the number of black state legislators from minority white districts in the South. (And only one hand—with some missing fingers—would be necessary to count the number of black congressional representatives elected from majority white districts.) This near complete absence of black electoral success in majority white districts occurred despite the fact that, even in the deep South, most blacks lived in majority white districts. And this pattern has *not changed* in the 1990s.

In 1992, dramatic gains occurred in the number of black legislators elected in the South, particularly at the congressional level. However, this increase was due almost solely to the fact that the number of southern congressional districts containing a black population majority increased dramatically. The South moved from four majority black congressional districts as of 1990 to 18 such districts in 1992—17 of which elected black representatives.¹⁵³

Using data from the 1990s districting round, the present authors, along with co-author Wayne Arden,¹⁵⁴ updated earlier work by the present authors on the link between white population percentages and the electoral success of minority candi-

¹⁵² Because the pattern of racial bloc voting and the history of previous discrimination is different in the South than elsewhere in the country, we will focus our comments on the South.

¹⁵³ Hispanics, also under special Voting Rights Act protection, have made congressional and legislative gains as well, largely through the creation of districts with Hispanic majorities. See Grofman & Handley, *Minority Population*, *supra* note 7, at 440. The authors illustrated that Hispanics were generally not elected to Congress in districts with less than a 63% combination of minorities. *Id.*

¹⁵⁴ See Lisa Handley et al., *Electing Minority Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority Preferred Candidates*, 5 NAT'L POL. SCI. REV. (forthcoming 1996).

dates. Previous work had shown that one could attribute black and Hispanic gains in representation in the 1970s and 1980s almost entirely to the creation of majority black and Hispanic districts.¹⁵⁵ In the 23 states, both southern and non-southern, with greatest black and Hispanic population, we found that, once again, most of the black and Hispanic gains in state legislatures—and virtually all the gains in Congress—came from new majority-minority districts. We also found that the probability that a majority black district would elect a black legislator had gone up slightly, while, at least in the South, the likelihood that a legislative or congressional district in which a majority of the voters were white, elected a minority candidate had not increased from the minuscule probability found in previous decades.

But what about Swain's finding that, as of 1990, 40 percent of all black members of Congress were elected from non-majority black districts? According to Swain, this showed that districts where blacks were in the minority could elect black candidates.¹⁵⁶ However, a closer look at the cases where non-majority black districts elected African-Americans to Congress gave us a much more pessimistic picture of the likelihood of black success in white districts than Swain would have one believe. While the 40 percent figure given by Swain was technically correct, it was also fundamentally misleading.

There were 25 black members of Congress elected in 1990. Of the 10 elected from districts that were not majority black, six, in fact, were elected from districts that were majority black plus Hispanic. Therefore, only 4 congressmen were elected from districts where non-Hispanic whites were in the majority. In fact, one of these four, Rep. Jefferson of Louisiana, was elected from a district that was 45 percent black and 49 percent combined minority when it was created in 1980 but was actually 66 percent black (according to the 1990 census) by the time Rep. Jefferson was elected in 1990.¹⁵⁷ Another black member of

¹⁵⁵ See Handley & Grofman, *Black Officeholding*, *supra* note 7, at 345-50; see also Grofman & Handley, *Minority Population*, *supra* note 7, at 439-43.

¹⁵⁶ SWAIN, *supra* note 29, at 216.

¹⁵⁷ According to Swain, however, the voting-age percentage population of blacks

Congress elected from a majority white district was Rep. Franks of Connecticut, a Republican conservative who almost certainly was elected over the opposition of his black constituency.¹⁵⁸ Thus, only two of ten congressional representatives serving in 1990 were minority-preferred candidates elected from majority white districts. One, Rep. Wheat of Missouri, ran with the advantage of incumbency in a district where he won the Democratic primary with only 32 percent of the vote—a primary where he received almost no white support and which he won only because whites divided their vote among seven white candidates.¹⁵⁹ The other, Rep. Dellums of California, was elected from perhaps the most liberal district in the nation which combined blacks in Oakland with the ultra-liberal city of Berkeley.

In short, one of the four African-Americans whom a majority white district elected to Congress in 1990 was really elected from a majority black district using 1990 population figures; one was a black Republican who did not enjoy much black support, and the other two exceptions to the rule that blacks win only in majority-minority districts were very unusual cases that one could not accept as the basis for reasonable expectations for the success of black-endorsed African-American candidates in majority (non-Hispanic) white districts.¹⁶⁰ Moreover,

in Jefferson's district was 52%. SWAIN, *supra* note 29, at 75.

¹⁵⁸ Swain argued that Rep. Franks was an example that "partisanship and region are far more important than race in predicting whether representatives will pursue black interests." SWAIN, *supra* note 29, at 212. Franks was the only black to vote for the Gulf War, against civil rights legislation, and against family leave. *Id.*

¹⁵⁹ For an extensive discussion of the Fifth District of Missouri (Wheat's district), see SWAIN, *supra* note 29, at 116-27.

¹⁶⁰ Swain failed to draw the proper inferences from her facts about the special circumstances under which African-Americans are elected to Congress from non-majority black districts, and how unlikely those circumstances are to be applicable to future black candidates in majority white districts. Swain did provide data on Hispanic population and did discuss these majority-minority districts as a separate category from the other districts where blacks constitute less than half of the population, but her concluding chapter is not sufficiently sensitive to the implications of the importance of the Hispanic population. SWAIN, *supra* note 29, at 213-17. For example, we are as yet unlikely to see many new congressional districts

not a single majority white congressional district in the South elected an African-American to Congress in 1990, including the Mississippi 4th congressional district, which was over 40 percent black according to the 1990 census.

African-American candidates in non-majority black districts fared no better after the 1990s round of redistricting. In 1992 and 1994 majority black districts again elected all black members of Congress from the South.¹⁶¹ The one new African-American not elected from a majority black district was a Republican who won in 1994 without majority black support in a district outside the South.¹⁶²

David Lublin has replicated and extended some of the earlier work of the present authors on the link between minority population percentages and the probability of a minority winning congressional office, and his conclusions are as straightforward as ours—and completely contradictory to those of Swain:

The dramatic increase in African-American and Latino congressional representation has rested entirely on vastly improved access to the ballot combined with the creation of new majority-minority districts. Nonracial demographic variables, such as income and urbanicity, often exhibit a strong bivariate correlation with the race of a representative. Howev-

with a black plurality and a combined black plus Hispanic majority in the South, although changing patterns of immigration make such a scenario much less implausible than it used to be.

¹⁶¹ Swain, writing before the results of the 1990s round of districting were known, observed that creating additional black majority districts could have only limited payoffs for gains in the number of blacks elected to Congress because geographical constraints limit the number of such districts that can be drawn. SWAIN, *supra* note 29, at 211. But if Swain were right in her expectations, then we should have seen black congressional gains primarily in non-majority black districts. Yet, in 1992 there were 13 new black members of Congress—the largest gain in any single redistricting period—and all of these black members were elected from majority black districts. Of course, with blacks becoming a declining share of the total U.S. population, virtually all of the majority black congressional seats that might be drawn have already have been created in the 1990s round of districting. Thus, in the long run, Swain is correct that the election of substantial numbers of new black members of Congress in succeeding decades can come only from majority white districts.

¹⁶² Rep. J.C. Watts was elected to Congress from Oklahoma.

er, the link between these variables and the election of a minority member of Congress rests entirely on the strong relation between the racial composition of the district and other demographic characteristics. African-Americans and Latinos differ substantially from Anglos on a number of demographic measures, so black and Latino majority districts differ as well. If the Supreme Court's decisions in *Shaw v. Reno* and *Miller v. Johnson* result in a reduction in the number of majority-minority districts, the number of African-American and Latino representatives will almost certainly decline as well.¹⁶³

2. Mayors

In a recent piece in *The Public Interest*, Thernstrom asserted that over the last thirty years, 83 percent of all black mayors in cities above 50,000 have been elected from majority white cities, and she cited this figure as evidence for the proposition that blacks can gain sufficient white support to win office in majority white jurisdictions.¹⁶⁴ As we demonstrated below, while this 83 percent figure may have been factually accurate, it was much less impressive when examined in detail than it may seem at first blush. Because Thernstrom reported only a summary percentage and not the data on which it is based, we will refer to a study the present authors conducted, as well as a study done by Thomas Cavanagh to examine this issue in greater depth.

Our analysis, as well as the work of Cavanagh, indicates that: one, the actual number of black mayors is quite small;¹⁶⁵ two, even if the percentage of black mayors elected from majority white cities is high, the percentage of majority white cities that elect black mayors is quite low, especially when compared

¹⁶³ David Lublin, *The Election of African-Americans and Latinos to the U.S House of Representatives, 1972-1994*, 20 (Sept. 15, 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*).

¹⁶⁴ Abigail M. Thernstrom, *Black Republicans?*, 120 *THE PUB. INTEREST* 106, 110 (1995) (book review).

¹⁶⁵ Thomas E. Cavanagh, *Voting Rights in a New Key: Using Seats/Votes Models to Evaluate African-American Representation* 43 (Sept. 19, 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*).

to the percentage of majority black cities that elect black mayors;¹⁶⁶ three, the percentage of majority white cities that elect black mayors is lower in smaller cities and towns than in the larger cities examined by Thernstrom, as well as being lower in the South than in the non-South;¹⁶⁷ and four, even when we create control groups for black population to test the hypothesis that blacks are elected in cities in proportion to the percentage of blacks in the population (the success rate we would expect if voting were color-blind), we find blacks under-represented in white majority cities.¹⁶⁸

Cavanagh looks at black mayoral success in cities with populations above 10,000 that directly elect mayors.¹⁶⁹ Of the 1,425 cities in this category, as of 1987, there were only 37 with a black mayor (7 in the deep South and 30 in the rest of the country).¹⁷⁰ Thus, overall, only 2.6 percent of these cities elected black mayors. More importantly, 19 of the 37 black mayors were elected from the 35 majority black cities included in this category (54.3 percent of the majority black cities examined elected black mayors); and the other 18 black mayors were elected from the 1390 non-majority black cities examined (1.3 percent of the non-majority black cities studied elected black mayors), and only 14 of these 18 mayors were actually elected from majority white cities.¹⁷¹

The present authors also collected and analyzed mayoral data from the 1980s, but for cities that were then either above 150,000 in population or central cities of what was once called SMAs. This data is shown in Table 1.

¹⁶⁶ Cavanagh, *supra* note 165, at 44.

¹⁶⁷ Cavanagh, *supra* note 165, at 44-45. Cavanagh wrote, "[i]n cities where half of the voting age population is black, the final model predicts that black mayors will be elected only 19.2% of the time in the North and only 3.2% of the time in the South." *Id.*

¹⁶⁸ Cavanagh, *supra* note 165, at 45-46.

¹⁶⁹ Cavanagh, *supra* note 165, at 43.

¹⁷⁰ Cavanagh, *supra* note 165, at 44.

¹⁷¹ Cavanagh, *supra* note 165, at 44.

Table 1

**Percentage of Cities Above 150,000
with and without a Black Mayor
for Majority White and Majority Black Cities**

	Majority White Cities	Majority Black Cities
No Black Mayor	94.1%	13.6%
Black Mayor	5.9%	86.4%
(N)	(321)	(22)

The percentages in Table 1 indicate that the election of an African-American mayor from a majority white city is rare. But how would Thernstrom report this data? Well, 19 black mayors are elected from the 321 majority white cities and 19 black mayors are elected from the 22 black majority cities; thus half of all black mayors in very large cities in the 1980s came from majority white cities. But this 50 percent figure is really not that impressive since nearly 94 percent of all cities in the data set are majority white in population. Similarly, Thernstrom's 83 percent figure is not as impressive as it might first appear, since about 95 percent of the cities above 50,000 are majority white.

Moreover, for much of the 30 year time span that Thernstrom was examining there were very few black mayors, even in majority black cities (recall that in 1987 there were only 37 black mayors in cities over 10,000 and Thernstrom included only cities over 50,000 in her calculation). Even occasional black successes in the large pool of majority white cities will constitute a large proportion of all elected black mayors over the 30 year period if many of the majority black cities failed to elect black mayors for much of the period.¹⁷²

¹⁷² For example, if, on average over the 30 year period, one fifth of the majority black cities elected black mayors and a little over 5% of the majority white

In order to test the hypothesis that voting for the office of mayor is color-blind, we can compare the mean black population percentage for any group of cities to the percentage of black mayors in these cities. For example, using our database of cities above 150,000, the mean percentage black of the majority white cities is 14.6 percent. Therefore, if voting is color-blind, we would expect 14.6 percent of the majority white cities to have black mayors. As noted earlier, we found that only 5.9 percent of the majority white cities had black mayors, however. On the other hand, we would expect 65.7 percent of the majority black cities to have black mayors if voting was color-blind since the mean percentage black of this group of cities is 65.7 percent. We found that, in fact, 86.4 percent of the majority black cities had elected black mayors. This analysis leads us to conclude that the color-blind hypothesis does not fit the data.

Table 2 provides a summary display of the expected percentage of cities with black mayors for both hypotheses and the actual percentage of cities with black mayors.¹⁷³

cities did so, then we could obtain the result that 83% of the black mayors elected served majority white cities.

¹⁷³ In order to explore the relationship between the percentage of black in the population and the election of a black mayor further, we divided the sample cities regionally and found that the deviation from color-blind expectations is even greater in the South than in the nation as a whole.

Table 2**Comparison of the Predicted Percentages of the Two Hypotheses to Actual Percentages****Percentage of Cities Above 150,000 with Black Mayors**

	Majority White	Majority Black
Racial Polarization Hypothesis	0.0%	100.0%
Color-Blind Hypothesis	14.6%	65.7%
Actual	5.9%	86.4%

D. Minority Districts Counterproductive to Minority Interests

A number of commentators have argued that creating majority-minority districts is actually counterproductive to minority interests because it diminishes the incentives for cross-racial coalitions and for white representatives to pay attention to the concerns of black voters in their districts. More importantly, according to these critics, creating majority-minority districts makes it more difficult for Democrats to get elected to office and, ultimately, for policies favorable to minority interests to be passed.

1. Decreased Incentives for White Legislators to Consider Minority Interests

The majority-minority districts commentators were objecting to were among the most integrated in the nation, with minority populations not far from 50 percent. Thus, there was a remarkable double standard operating when these commentators argued that a district with, say, a 55 percent black majori-

ty leads to racially divisive politics, while a district with a 55 percent, or even 75 percent, white majority is integrated and conducive to coalition politics. If white representatives in majority white districts were assumed to be interested in building coalitions that include the minority voters in their districts, do we really wish to assume that black representatives in majority black districts have no such interest?

In *Shaw*, Justice O'Connor stated that racially motivated majority-minority districts made it more likely that elected officials would "believe that their primary obligation is to represent only the members of [the predominant] group, rather than their constituency as a whole."¹⁷⁴ She cited no evidence for this proposition. In fact, because most of the southern black congressional districts were only narrowly majority black in voting age population and may not have been majority black in terms of the actual electorate, an argument could be made that the representatives serving these districts would be especially attentive to at least some white voters because some white votes would be needed to win. Moreover, a good argument can be made that representatives most likely to disregard the views of their black constituents were Republicans elected from southern congressional districts. Because it was clear that blacks are unlikely to have voted for the Republican candidate, the Republican representative has no incentive to take black interests into account. Indeed, there is no relationship between the percentage black of a district and support for issues endorsed by blacks among southern Republican House members—southern Republicans in the 1990s are simply uniformly very conservative¹⁷⁵

¹⁷⁴ *Shaw v. Reno*, 113 S.Ct. 2816, 2827 (1993).

¹⁷⁵ See Bernard Grofman et al., *Catastrophe in Congress, Homicide on the Hill: Is the Voting Rights Act Responsible for the Democratic Debacle of 1994?* 22 (unpublished manuscript, on file with the author). Moreover, even the white Democratic representatives of southern congressional districts with 20-30% black populations—a district type that was common in the South in the 1970s and 1980s—were not that liberal because they knew that their black voters were "captives" who had little choice but to vote for the "better of two weevils," that is, the Democrat. *Id.*; see also Bernard Grofman et al., *The Effect of Black Population on Electing Democrats and Liberals to the House of Representatives*, 17 LEGIS. STUD. Q. 365, 379 (1992) [hereinafter Grofman, *Black Population*] (examining

Not only did Justice O'Connor fault majority-minority districts with decreasing the attention white legislators were willing to give to minority interests, she also claims that the creation of these districts "may exacerbate . . . patterns of racial bloc voting."¹⁷⁶ She observed that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."¹⁷⁷ Again, she cited no empirical evidence for these propositions. In fact, a compelling argument could be made that if white voters reside in a district represented by an African-American or an Hispanic, the experience may serve to mitigate rather than exacerbate white racism and reduce rather than increase levels of racially polarized voting. For example, when Rep. Mike Espy first won the 2nd congressional district in Mississippi in 1986, he won with 52 percent of the vote, but he won reelection in 1988 with 65 percent and in 1990 with 84 percent of the vote—carrying 43 percent of the white vote in 1988 and 70 percent of the white vote in 1990.¹⁷⁸

2. *Loss of Democratic Seats in Congress*

A number of commentators have claimed that the creation of majority-minority districts led to the downfall of the Democratic party, particularly in the South. These critics claim that drawing minority districts "bleached" so many surrounding districts that the Republicans were able to gain control of the House of Representatives for the first time in 46 years. For example, according to Will, "[r]acial gerrymandering is one reason Newt Gingrich is Speaker."¹⁷⁹ We believe that this was an overstatement. While the creation of minority districts in the South may have led to some additional Republicans being elected to Congress, the fact is that the Republicans would have gained control of the House regardless, simply because of

relationships between black population and congressional liberalism over three decades).

¹⁷⁶ *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993).

¹⁷⁷ *Shaw*, 113 S. Ct. at 2832.

¹⁷⁸ MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1992 690-91 (Eleanor D. Evans ed., 1991).

¹⁷⁹ Will, *supra* note 28, at 64.

the increase in the number of white voters who cast their ballots for Republican candidates.

In examining this contention, we believe it important to distinguish between three easy to confuse questions. The first is: Did the Democrats suffer greater losses between 1990 and 1994 in the areas of the country where new minority districts were drawn than elsewhere? The second is: If the districting lines in 1990 had been used in 1994, and in 1992, would Democrats have done better; and, the flip side, if the districting lines in 1994 had been used in 1990, would the Democrats have done worse? The third question is: Would the optimal arrangement of black voting strength across congressional districts have permitted the Democrats to hold on to some of the seats they lost? The answers to these different questions need not point in the same direction vis a vis the partisan consequences of districting. The question asked largely determines whether one can conclude that the Voting Rights Act has proved very costly to the Democrats in Congress in the 1990s.

The answer to the first question—whether Democrats suffered greater losses in the areas of the country where new majority black districts were drawn—seems to be no. Looking at this question, historian Allan Lichtman found that in 1994 “in the nine states with new black districts. . . [Democrats] lost 19 percent of the seats they had held; as against 21 percent in the [other 41 states that did not draw new black districts].”¹⁸⁰ Of course, on balance, almost all of the much more limited Republican gains in 1992 occurred in the first set of states; thus looking only at 1994 understates the impact of 1990s districting on Republican gains,¹⁸¹ but even taking these 1992 gains into account does not change the basic result that Republican congressional gains between 1990 and 1994 occurred virtually everywhere. Moreover, although Republican gains

¹⁸⁰ Allan Lichtman, *Quotas Aren't the Issue*, N.Y. TIMES, Dec. 7, 1994, at A23.

¹⁸¹ We have to be very careful in looking at 1992 results. In the South, because of population gains, new congressional seats were added. In a number of seats, the Democrats actually did just as well in 1992 in the South as in 1990, yet Republicans gained 9 seats in the South from 1990 to 1992—thus, the Democratic percentage of southern congressional seats declined even though the number of seats held by Democrats did not.

between 1990 and 1994 were a bit larger in proportional terms in the states that drew new majority black seats in the 1990s than in those that did not, the first set of states also exhibited a somewhat greater decline in mean support for Democratic congressional candidates between 1990 and 1994.

The answer to the second question—whether the changes in lines cost Democrats seats—has been disputed. At one end of the continuum, the NAACP Legal Defense and Educational Fund concluded that Democratic losses in 1994 were due entirely to changes in the preferences of white voters.¹⁸² Indeed, that report goes further to claim that, on balance, new black seats in the South actually helped Democrats: “destroying and fragmenting minority districts would have saved with certainty only one Democratic seat in North Carolina, while probably costing the Democrats seats in Mississippi, Georgia and Texas.”¹⁸³ On the other side of the continuum, Lublin concludes that “the creation of new majority-minority districts assured that the Republicans won solid control of the House in 1994.”¹⁸⁴

Lublin focused on seats decided by relatively small margins which lost substantial black population between 1990 and 1992 and which shifted to the Republicans by 1994.¹⁸⁵ He noted that many of these seats could have remained in Democratic hands if the black population in these districts had been held at their previous levels. Moreover, he observed that redistricting has had a cumulative effect: by adding Republican incum-

¹⁸² Report of the NAACP Legal Defense & Educational Fund, *The Effect of Section 2 of the Voting Rights Act on the 1994 Congressional Elections*, 4 (Nov. 30, 1994) (unpublished manuscript, on file with the *Mississippi Law Journal*). This report is marred by unrealistic assumptions and misleading analysis. See David Lublin, *Racial Redistricting and the New Republican Majority: A Critique of the NAACP Legal Defense Fund Report on the 1994 Congressional Elections*, June 3, 1995) (unpublished manuscript on file with the *Mississippi Law Journal*).

¹⁸³ Report of the NAACP Legal Defense & Educational Fund, *supra* note 182, at 2.

¹⁸⁴ David Lublin, *Racial Redistricting and Public Policy in the U.S. House of Representatives* (June 2, 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*) [hereinafter Lublin, *Racial Redistricting*].

¹⁸⁵ *Id.*

bents in the South in 1992, Republicans had additional incumbency advantages in 1994 and this advantage is lost sight of when we take the Republican vote share in 1994 as exogenously given.

John Petrocik and Scott Desposato come out somewhere in the middle.¹⁸⁶ These authors emphasize that Democrats in the South did a rather good job of redrawing lines given the two severe constraints they faced: the need to draw additional black majority seats lest plans be denied preclearance, and a reduction in both the number of and the loyalty of Democratic party identifiers in the South.¹⁸⁷ In particular, Petrocik and Desposato argued that many of the black voters used to form the new black majority seats were pulled from districts that were already Republican, thus minimizing the costs to Democrats;¹⁸⁸ and that the burden of running in a district with radically redrawn district lines was placed on Republican incumbents to the greatest extent possible.¹⁸⁹ Nonetheless, since there were more Democratic seats to begin with, more 1990 Democratic incumbents were impacted by changes in their old district lines than Republican incumbents. But the real problems faced by Democrats in the South were the decline in black turnout relative to white turnout in the South, especially in 1994, and the major decline in the willingness of white voters to support Democratic congressional candidates, especially in 1994. In Petrocik's and Desposato's view, creating majority-minority districts would not "have defeated many Democratic incumbents if the election tide [in 1994] had been less hostile to the Democrats."¹⁹⁰

The present authors, along with our co-author Richard Griffin, have also addressed the question of whether Democrats

¹⁸⁶ John Petrocik & Scott Desposato, *The Partisan Consequences of Majority-Minority Redistricting in the South, 1992 and 1994* 4-5 (unpublished manuscript, on file with the *Mississippi Law Journal*).

¹⁸⁷ Petrocik & Desposato, *supra* note 186, at 5.

¹⁸⁸ See Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 59 J. POL. 384, 386-87 (1995) (evaluating effects on Republican electoral success).

¹⁸⁹ Petrocik & Desposato, *supra* note 186, at 6-7.

¹⁹⁰ Petrocik & Desposato, *supra* note 186, at 17.

could have done better in 1994 (and in 1992) had the congressional lines in place been those from 1990. Like Petrocik and Desposato, we come out somewhere in between the views of Lublin and those of the NAACP Legal Defense and Educational Fund. Just as the NAACP Legal Defense Fund report neglected some of the negative consequences of creating majority-minority districts (for example, the incumbency advantage enjoyed by Republicans who won office in 1992 and sought reelection in 1994), Lublin neglected the positive side. By focusing only on the seats where black population losses led to Democratic losses, Lublin ignored the increased certainty of Democratic success in the newly created majority black seats.¹⁹¹

Using a methodology that projected vote outcomes from 1994 into 1990s districts and also projected vote outcomes from 1990 into 1994 districts — a methodology that was sensitive to the overall consequences of changes in the distribution of black population for the probability of Democratic success and considered both those districts where black population losses might have led to Democratic losses and those districts where black population gains increased the certainty of Democratic success—we showed that, in net terms, as few as 2 to 5 of the 24 or so southern congressional seats lost by the Democrats between 1990 and 1994 might be a direct result of 1990s redistricting.¹⁹² The rest of the losses are attributable to the fact that Republican congressional candidates across the board got a lot more votes in the South in 1994 than they did in 1992. Indeed, Republicans showed slightly greater vote gains in 1994 in the deep South than in the rest of the count.

However, the present authors also acknowledged Lublin's point that one of the reasons Republicans received more votes in 1994 is that there were somewhat fewer white (southern) Democratic incumbents in 1994 than there otherwise might

¹⁹¹ Lublin, in effect, was selecting on the independent variable, and thus introducing bias into his estimates by focusing only on seats where new minority districts led to Democratic losses. Lublin, *Racial Redistricting*, *supra* note 184, at 6-14.

¹⁹² Hill used a similar approach when he examined 1992 votes in districts with the 1990s distribution of black population shares. Hill, *supra* note 187, at 387.

have been as a result of 1990s line drawing.¹⁹³ Thus, some of the impact of the line drawing on Democratic losses should be seen as indirect. Taking that indirect loss into account would increase the importance of creating new majority black districts as a factor in southern Democratic congressional decline, but the present authors still rejected the claim that drawing majority black seats affected control of the House in 1994.¹⁹⁴ Even if Lublin's method of calculation was used, the present authors found that drawing new majority black seats during the 1990s round of districting cost the Democrats no more than 9 or 10 of the 62 seats they lost between 1990 and 1994 (rather than 13 seats that Lublin claims Democrats lost as a result of redistricting). Thus, our answer to the question of whether the new district lines cost the Democrats seats was yes—but not as many as was sometimes claimed. The present authors also addressed the third question of whether an optimal distribution of black voters across districts could have significantly improved Democratic fortunes. Lublin also addressed this question, although he is somewhat less clear that this was the question he is considering, when he argued that, “[a]lthough Newt Gingrich probably would have been elected the first Republican Speaker of the House in 40 years by a margin of one or two votes even without racial redistricting, the creation of black majority seats assured that Republicans won a firm majority of 26 seats instead of a razor-thin majority.”¹⁹⁵

While we did not, in our work with Griffin, provide an exact estimate of the number of seats that might have changed had the Democrats made near optimal use of black voters to shore up Democratic seats in the South against the Republican tide, we also concluded that optimal (from the standpoint of the Democrats) districting could have made a considerable difference in Democratic losses. Our analysis suggested that even optimal districting could not have saved more than 10 or 11

¹⁹³ Lublin, *Racial Redistricting*, *supra* note 184, at 7.

¹⁹⁴ See Lichtman, *supra* note 144, at A23. “Even if the Democrats had kept every one of their [1992] seats in the nine redistricted states [that drew new black majority seats], losses in the other states would still have cost them their majority in the House.” *Id.*

¹⁹⁵ Lublin, *Racial Redistricting*, *supra* note 184, at 15.

seats in the states where new majority black seats were drawn, however.¹⁹⁶

Moreover, we emphasize that hindsight is the only exact science, that is, what could be shown to be an optimal plan with the hindsight of the 1994 election results in hand would not have looked like an optimal allocation in 1990. In the 1980s, creating southern congressional districts with a 20 to 30 percent black population would have made sense for the Democrats.¹⁹⁷ But, with hindsight, the Democrats in the 1990s round would have been better off drawing districts with a 30 to 40 percent black population. Post-hoc determination leads us to overstate what might have been done had redistricters been more concerned with protecting Democrats and less concerned with drawing new black districts, because it overstates the potential for reasonable foresight. This also neglects the marginal positive impact of the greater electoral security for Democrats in the majority black seats that were created.

3. *Reduced Liberalism in Congress*

Lublin argued that Republican gains made possible by the creation of (additional) black districts, especially those in the South, had the net effect of reducing congressional liberalism, and thus reducing the likelihood that bills supported by black legislators will pass.¹⁹⁸ We believe this claim was largely in-

¹⁹⁶ This estimate of 10 seats is almost certainly an upper bound because, given geographic constraints, it would have been impossible without excessively tortuous lines to convert even as many as half of the previously 20 to 30% black population districts that existed in the 1980s plans into districts with between 30 and 40% black population—the black population percentage that was, as of 1994, optimal for the Democrats' election chances.

¹⁹⁷ See Grofman, *Black Population*, *supra* note 177, at 371. Grofman hypothesized:

In the South, the greater the proportion black in a district, the more likely it is that a Democrat will be elected from their district, except that, in 1971 and thereafter, there may be curvilinearity such that districts are either 20 to 30% black or more than 40% black are more likely to elect Democrats than are districts that are 30 to 40% black.

Id.

¹⁹⁸ Lublin, *Racial Redistricting*, *supra* note 184, at 27.

correct.

Even if we posit that every new black congressional seat in the South led to a net loss of one white Democrat¹⁹⁹ which seems to be unrealistically high, our analysis indicates that creating black seats is essentially a wash as far as mean liberalism in the House. In 1994, the average southern African-American representative had an ADA score of 85; the average southern white Democrat had an ADA score of approximately 46, with only minimal variation as a function of the percentage black of the congressional district (except for a couple of districts in the 40 to 50 percent black population range where the representatives were actually *less liberal* than those from districts with fewer blacks). The average southern Republican had an ADA score of approximately 6 in 1994, and this score was completely independent of the black percentage of the district. Replacing two southern white Democrats with a Republican and a black Democrat would only move the combined ADA scores slightly, from a combined ADA score of 92 to a combined ADA score of 91. Certainly, Republicans are a lot more conservative than white Democrats, but southern white Democrats are equally more conservative than black Democrats elected from majority black seats!

Of course, replacing moderate/conservative white Democrats with conservative Republicans and liberal black Democrats may have other policy implications. For example, the loss of conservative white Democrats "empties out the center," which sharpens partisan conflict. And if enough Republicans win, as in 1994, partisan control of the House can shift. Once partisan control shifts from Democratic to Republican hands, policy liberalism is reduced, because it is the ideological location of the mean of the party controlling the House that usually matters more for what policies are enacted than the ideological location of the overall House mean.²⁰⁰

¹⁹⁹ It is highly implausible that we can blame the new black districts for more than a one for one net loss of Democratic seats. See *supra* notes 184-97 and accompanying text.

²⁰⁰ Relatedly, Eddie Williams observed that, while the number of black state legislators continued to grow in 1994, with a "net increase of 16 (12 Democrats and 4 Republicans), . . . bringing the total to 529," with GOP gains in state leg-

*E. Long Term Consequences of the Voting Rights Act
for the Democratic Party*

When Lyndon Johnson pushed for the passage of the Voting Rights Act of 1965, he did so with the belief that it may well doom the Democratic party's future chances in the South, although he also recognized that without it, the Democratic party in the South was probably doomed anyway.²⁰¹ In fact, the association of the national Democratic party with such civil rights initiatives as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, has led to a dramatic decrease in support for the Democratic party, at least at the presidential level, in the South—the vast majority of white voters in the South simply will not vote for a Democrat for president. This decline in support is greatest in the areas of the South with the highest percentage black population, despite the fact that these voters (some not enfranchised until the late 1960s) vote solidly Democratic.²⁰² This increase in support for Republican presidential candidates in the South has recently begun to filter down to the congressional level.

If we look at the relationship between Democratic vote shares and black percentage in congressional districts in the South, we find that, while it used to be true that Democrats had a better than 50 percent chance of winning even those districts where there was minimal black voting strength, by 1992, it was only in southern districts with more than 10 percent black population that Democrats were able to win more

islatures, "the number of black Democrats in the majority party in state lower houses will decrease from 349 to 257, a drop of 26 percent. Eddie Williams, *Hard Times, Tough Choices*, FOCUS, Jan. 1995, at 1, 4. Conversely, the number serving in the minority party will increase from 22 to 122; black legislators will lose key leadership posts and the access to the clout that the majority party wields." *Id.*

²⁰¹ See MARK STERN, *CALCULATING VISIONS: KENNEDY, JOHNSON, AND CIVIL RIGHTS* 214 (1992). Johnson realized that the southern black vote was crucial to Democratic success in presidential elections. *Id.* As a result, "the white South was abandoning its ties to the Democratic alignment." *Id.*

²⁰² See Grofman, *Wallace Vote*, *supra* note 97, at 153. The authors illustrated that "black support for the Democratic nominee is constant." *Id.* This increase in black support of Democrats, of course, greatly impacted the party's platform. *Id.* at 159.

than half of the seats; and in 1994, it was only in districts with more than 30 percent black population that Democrats could be sure of winning more than half of the seats. The percentage of congressional seats won by Democrats by the percentage black of the congressional district is found in Table 3.

Table 3
Percent Democrats in Congress by Percent Black in
Congressional District, 1990-1994

Year	Percent Black in Congressional District					
	0 - 9.9%	10 - 19.9%	20 - 29.9%	30 - 39.9%	40 - 49.9%	50%+
1990	53.1 (32)	64.5 (31)	74.1% (27)	70.0 (20)	100.0 (2)	100.0 (4)
1992	39.2 (51)	68.8 (32)	66.7 (32)	100.0 (3)	100.0 (1)	100.0 (17)
1994	33.3 (51)	53.1 (32)	33.3 (21)	100.0 (3)	100.0 (1)	100.0 (17)

As black voters become increasingly important to Democratic electoral success, and as Republicans win more and more of the heavily white seats, the character of the Democratic constituency and of Democratic elected officials has begun to change accordingly. Increasingly, in the South, the Republicans have become the party of white voters and the Democratic party has become the party of black voters. In Georgia, for example, as the result of the 1994 elections and a party switch by a Democratic incumbent (in the 9th congressional district), there is not a single white Democrat in the Georgia congressional delegation. This fact has no doubt led other white Democratic politicians in Georgia (and elsewhere in the South) to reassess the benefits of continued allegiance to the Democratic party.

The "blackening" of the Democratic party in the South has precipitated a "chain reaction" effect, making it less and less likely that Democrats will ever regain white support as the center of gravity within the Democratic party in the South

shifts toward black interests,²⁰³ and as the incumbency advantage shifts to the Republicans. Moreover, we can expect a kind of top-down realignment based on “progressive ambition,” in which the potential for Republican success at the congressional level makes it more likely that strong Republican candidates will seek state legislative office as a springboard to higher office. An increase in Republican state legislative strength in the South will provide an increased pool of strong Republican congressional candidates, making it more likely that Republicans will be able to hold on to their recent gains in congressional seats in the South. This realignment will eventually percolate down to the local level in the South.²⁰⁴

Given this scenario, we conclude by noting that although majority-minority districts specifically are not to blame for the rising tide of Republican officeholders in the South, the Voting Rights Act in a much more general sense is indirectly responsible for the massive migration of white voters from the Democratic party.

IV. CONCLUSION

Justice O'Connor's opinion in *Shaw* seeks the moral high ground by attacking the creation of majority black districts as tantamount to apartheid. However, if voting is polarized along racial lines and minority candidates usually lose—preconditions necessary for the Voting Rights Act to apply—then the failure to draw districts in which the majority of voters are minorities perpetuates situations in which, for all practical purposes, minorities will be shut out of office. In a world of race-conscious voting, race-conscious remedies are needed. We must be careful that a zeal to end a supposed over-reliance on racial consider-

²⁰³ See THOMAS EDSALL & MARY EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 4 (1991). The authors argued that race and taxes changed the voting behavior of many people, causing a “chain reaction” that realigned the electorate. *Id.*

²⁰⁴ The possible exceptions to a realignment at the local level are Louisiana, because of its peculiar nonpartisan primary arrangements, and Mississippi, because its very large black population may anchor its state and local Democrats against the white Republican tide.

ations in the districting process does not retard the integration of the halls of our legislatures.

It seems plausible to believe that normative/constitutional judgments are shaped at least in part by views about consequences, and thus by views about social facts. While cases such as *Shaw* would probably have been decided the same way even if the majority of Justices had been persuaded to change their minds about certain important factual claims such as the supposed absence of barriers to minority electoral success from majority white districts, or the view that blacks do not have important political interests in common with one another simply because they are black, or the assertion that drawing majority black districts exacerbates racial tensions, we would like to believe that it is unlikely that the majority would have been quite so fervent in their denunciation of the evils of majority black districts and in their likening of such districts to racial apartheid.²⁰⁵

²⁰⁵ In any case, as social scientists, we are bothered by the remarkably casual way in which the Supreme Court Justices throw out empirical assertions that lack factual grounding as if they were simply so obvious as to not need supporting justification. For example, *Shaw* is misguided in its views that the majority-minority districts that have been created can be analogized to "racial apartheid." See *supra* note 57 and accompanying text. As noted earlier, usually these districts are the most racially balanced districts in a state.