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A Functional Analysis of Potential Voting Rights Act Liability May Demonstrate that the Intentional Creation of Black Remedial Districts Cannot be Justified

Katharine Inglis Butler

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A FUNCTIONAL ANALYSIS OF POTENTIAL VOTING RIGHTS ACT LIABILITY MAY DEMONSTRATE THAT THE INTENTIONAL CREATION OF BLACK REMEDIAL DISTRICTS CANNOT BE JUSTIFIED

KATHARINE INGLIS BUTLER*

Professors Grofman, Handley, and Lublin's observation that under some circumstances black candidates can be elected in districts that are not majority black is unimpeachable, as is their observation that a functional analysis can provide a relatively precise estimate of the percent black a district needs to be to assure a black victory. Manipulating a district's boundaries for the purpose of assuring that black voters will control the electoral outcome therein, however, is constitutional only when done in response to proven, or strongly suspected, racial vote dilution as defined by section 2 of the Voting Rights Act, or in section 5 jurisdictions, to prevent "retrogression" in minorities' ability to exercise their political franchise.

A functional analysis extended to the entire process leading to nomination and election can help distinguish circumstances in which black candidates have suffered ordinary political defeat—for which no "race-based" relief is warranted—from circumstances where black citizens suffer diminished opportunity to participate in the political process on account of race—for which a narrowly tailored race-based remedy is available. The principal authors outline a functional analysis to determine the parameters for a district that, in essence, would serve as a race-based remedy. My Response extends the functional analysis to determine when such a remedy is needed, and is therefore constitutional.

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* Legal Research Professor of Law, University of South Carolina School of Law. B.S., Mississippi State University, 1968; M.Ed., Mississippi State University, 1969; J.D., University of Tennessee, 1974.

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INTRODUCTION

Professors Bernard Grofman, Lisa Handley, and David Lublin demonstrate that today, black candidates often are elected in districts that are not majority black.¹ The factors the authors identify—plus others they do not—clearly impact how black a specific district must be to elect a black candidate predictably. That said, how, if at all, should legislators use this information to inform their redistricting decisions later this year?

The authors treat lightly the legal basis for deliberately creating districts to favor black candidates, which, while understandable, given their focus, implies that minority candidates are entitled to optimal opportunity districts. Thus, legislators must employ the authors' "functional analysis" to provide them. The law is quite to the contrary in that legislators may engage in race-based districting only if necessary to avoid dilution of minority voting strength, or to avoid "retrogression" prohibited by section 5 of the Voting Rights Act.²

Whether manipulation of a district's racial composition to enhance the election of a black candidate can be justified requires a detailed factual inquiry, which may include some of the factors identified by the authors' analysis. However, a similar analysis extended to the entire process leading to election, might well demonstrate that vote dilution is not present and, consequently, that remedial black districts, however defined, cannot be justified.³

While never the only factor, the extent to which black candidates have been elected in a jurisdiction is important to whether a districting plan will be found to dilute minority voting strength. Thus, in light of the focus of the Principal Article, I begin my Response with a brief consideration of the role of black electoral success in the evolution of the vote dilution claim and to the emergence of majority black districts as a remedy therefor.

1. Bernard Grofman, et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1396–99, 1423 (2001).

2. See generally *Shaw v. Reno*, 509 U.S. 630 (1993) and the related series of cases discussed *infra* notes 128–137 and accompanying text (limiting the state's use of race to create districts).

3. A jurisdiction subject to section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1994), the so-called preclearance provision—may be required to engage in race-based districting without regard to whether such action was necessary to avoid racial vote dilution. Compliance with section 5's no retrogression standard is discussed *infra* notes 133–137 and accompanying text. Note, moreover, that majority black districts created in accordance with traditional districting standards require no jurisdiction. However, fine-tuning the racial percentage of a district almost certainly would involve violating those standards.

I. DILUTION, PAST AND PRESENT

A. *The Past: Majority Black Districts, Racial Vote Dilution, and the Sixty-Five Percent Rule*

1. Black Voters' Difficulty Electing Black Candidates Suggested Unequal Political Influence

While clearly not a complete measure, the number of blacks elected to office is a traditional barometer of black political influence. Moreover, under-representation of blacks in the ranks of elected officials no doubt was a powerful impetus to develop a theory to challenge certain election structures. In 1980, fifteen years after the 1965 Voting Rights Act had effectively removed official barriers to blacks' political participation, black elected officials were significantly fewer in number at every level of government than might have been expected, especially in the states of the Deep South.⁴ In light of the history of racial discrimination in the South, it was reasonable to assume some connection between the paucity of black elected officials and racial discrimination, past and present. An examination of steps leading to election from the perspective of a black candidate helps to establish that connection.

In functional terms, any candidate's chance for election depends on his satisfying four conditions: (1) identifying a reliable core pool of voters whose support will put him in striking distance of election; (2) getting his core supporters to the polls; (3) picking up such support as is needed from outside the core group; and (4) doing items (1) through (3) better than his opponents.⁵

Identifying a core group of supporters was probably a potential black candidate's easiest task. Within the black community, a black candidate benefited from his race, which black voters likely viewed as a short-cut to identifying someone who would reflect their interest. Furthermore, because more than one black candidate for the same office would have been rare, merely getting word of his candidacy into the black community very likely produced a core group of

4. According to a 1980 publication of the Joint Center for Political Studies, blacks, who were almost 12% of the nation's population, made up only 1% of the nation's elected officials (this was, however, eighteen times the number serving in 1964). 10 JOINT CENTER FOR POLITICAL STUDIES, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS 1, 9 (1980).

5. Of course, the first step to election is to run. A partial explanation for the paucity of black office holders in 1980 was almost certainly an under-supply of blacks with the resources to support a political campaign.

supporters. Obviously, his core supporter's percentage of the electorate was a critical, often determinative factor, in his election.

Getting her core supporters to the polls presented a greater challenge. The black voting age population otherwise eligible to vote often represented the outside limits of her core supporters.⁶ However, significantly depressed registration and turnout among blacks reduced the candidates' actual core supporters to a percentage of the electorate that was markedly lower than blacks' percentage of voting age population.

Clearly a black candidate's most difficult challenge was to pick up sufficient white votes to be elected. When securing white support was difficult, a key factor for a black candidate's success would have been how much of it he needed. After the black percentage of election day turnout, the most important determinant of the amount of white support a black candidate needed was the jurisdiction's method of election—black candidates were almost always more dependent on white support in at-large, or multi-member, systems than they were in single-member district systems. A single-member district election system is designed to provide for actual representation of neighborhoods, regions, or areas of the governmental entity. In jurisdictions with significant black populations, residential segregation meant that some number of these districts quite naturally would contain majority black populations. Once barriers to black registration and balloting were removed, blacks were able to use their majority status in single-member districts to elect black candidates.⁷

Based on the notion that neighborhood and provincial interests should yield to those of the jurisdiction as a whole, an at-large system generally included no provision for area-specific representation. Consequently, black candidates generally needed considerably more white support for election in at-large systems.

Other structural devices, particularly a majority vote requirement, and to a lesser extent devices that made elections head-

6. Thus non-citizens, prisoners, and persons convicted of disenfranchising crimes had to be subtracted from the voting age population. If these non-voting populations were disproportionately black, the true potential black electorate would be smaller than the jurisdiction's black voting age population.

7. A 1981 study of blacks elected to municipal office revealed that in municipalities in Louisiana, Mississippi, South Carolina, and Alabama, of at least 5,000 districts with black populations from 20–55%, sixty-one of sixty-six (92.4%) ward cities, but only twenty-two of seventy-nine (27.8%) at-large cities, had at least one black elected official. See Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 872–73 (1982).

to-head contests,⁸ further increased the degree of white support needed by a black candidate running in a non-majority black district. The presence of a majority vote requirement, which was practically universal in the Democratic primary, meant that even when cohesive black voters made up a significant segment of the election unit's voters, their votes alone were insufficient for nomination or election. In the days when nomination in the Democratic Primary was tantamount to election, the majority vote requirement deprived black candidates of the major advantage that they otherwise would have enjoyed by virtue of having an easily identified core of loyal supporters.

Theoretically, black votes alone could elect a candidate at-large, even with a majority vote requirement, if black voters employed a carefully orchestrated strategy of single shot voting. The efficacy of this strategy was diminished by staggered terms and was unavailable when elections were conducted from numbered posts or from residency sub-districts.⁹

The bottom line was that if the election structure mandated more votes for election than there were black voters, and if a black candidate could not, or did not, find a means to attract white votes, defeat was inevitable. The consistent defeat of black candidates likely was a major impetus to the development of a theory to challenge election structures that made black electoral success dependent upon white votes.

2. Vote Dilution Litigation Challenged Race-Based Political Inequality

In *Whitcomb v. Chavis*,¹⁰ the Supreme Court dashed hopes that numerical under-representation of blacks among elected officials, alone, would be sufficient to demand a change to an electoral system more favorable to blacks. The Court rejected the lower court's theory that vote dilution existed when a cognizable racial group, with legislative interests not shared by others, was unable to elect a member of the group in a multi-member district, but could do so if

8. A "head-to-head" contest is one in which each seat on a legislative body is separately elected. Single-member district elections are by their nature head-to-head contests. At-large elections may be made so artificially by the imposition of "posts," which divide what would otherwise be an election won by the top vote-getters from a field of candidates, into a series of head-to-head contests.

9. For a full explanation of the impact of various aspects of the election structure on black voter's election strategies, see Butler, *supra* note 7, at 864-68.

10. 403 U.S. 124 (1971).

single-member districts were substituted.¹¹ Rather, the Court indicated that, to prevail on a dilution claim, the plaintiffs must demonstrate that they have less opportunity to participate in the political process and elect candidates of their choice than others in the electorate. It reversed the lower court's decision in favor of the plaintiffs, finding that there was no evidence that they were not permitted to register to vote, to participate in the affairs of their chosen political party, or to be equally represented when the party selected legislative candidates. The plaintiffs—Democrats in a county dominated by Republicans—suffered political, not racial, losses the Court concluded. Their claim of dilution was thus “a mere euphemism for political defeat.”¹²

Having learned from *Whitcomb*, plaintiffs in *White v. Regester*¹³—the next dilution case to reach the Court—stressed not entitlement to a particular election outcome, but rather race-based exclusion from the political process itself. They pointed to the impact of Texas's long history of official racial discrimination on the ability of minorities to participate in the political process; to racial or racist political behavior by whites, such as white control of the Democratic Party slating process, candidates' use of racist campaign tactics, and bloc voting by white voters; to the impact on minority candidates of the state's majority vote requirement, and other devices which increased the percentage of vote needed for election. Evidence that officials elected in the challenged system were unresponsive to the interests of their minority constituents affirmed the minority groups' lack of political influence.¹⁴ The Supreme Court affirmed, stating simply that the facts found by the court were sufficient to support its conclusion that the plaintiffs did not have an equal opportunity to participate in the political process and to elect legislators of their choice.¹⁵

Whitcomb and *White* thus defined the parameters of vote dilution. A disadvantaged minority group could not expect protection from the normal uncertainties of politics, but it was entitled to an equal opportunity to participate in the process. If, considering the totality of the circumstances, a court found that

11. *Id.* at 130–32.

12. *Id.* at 153.

13. 412 U.S. 755 (1973).

14. *Graves v. Barnes*, 343 F. Supp. 704, 727–33 (W.D. Tex. 1972), *aff'd*, *White v. Regester*, 412 U.S. 755 (1973).

15. *White*, 412 U.S. at 766–67.

plaintiffs suffered a diminished opportunity to participate on account of race, a remedy was to be provided.

Just when the "totality of the circumstances" pointed to "race-based," deprivation proved difficult to determine. In the early days, courts reasonably could have resolved ambiguous cases by finding lack of minority political success to be "race-based," rather than merely a reflection of ordinary politics. Given that passage of the Voting Rights Act had been necessary to provide blacks with even the bare essentials for political participation, no leap of logic was necessary to interpret their under-involvement at every stage of the process as a lingering effect of very recent discrimination. Discrimination left the black community with few experienced political leaders, with few obvious candidates, with no background for engaging in biracial politics and with few resources to bridge the gap. A white majority that endorsed, or at least acquiesced in, state sanctioned discrimination likely would not be eager to put officials in office who would owe their election to the black minority. At a minimum, in the first decade following adoption of the Voting Rights Act, plaintiffs should have prevailed in most dilution claims against southern jurisdictions. However, the vague standards for dilution, perhaps when combined with a federal bench still populated by men who were themselves products of the same racially biased society, led to inconsistent outcomes not readily reconcilable on their facts.

3. The Remedy for Dilution—The Origin of the So-Called Sixty-Five Percent Rule

Once a court concluded that racial vote dilution existed, however, the matter of a remedy was considerably easier, even if, as Grofman, Handley, and Lublin point out, the formula for correction proved less than precise. At-large elections were to be dismantled and replaced by single-member districts. Dilutive single-member districts were to be redrawn. In either case, some number of the new districts were to be designed so that the aggrieved group could elect its candidates of choice without white support.

To make sure black voters were at least a potential majority of the turnout on election day, some courts adopted a rule of thumb that a remedial district should be 65% black in population.¹⁶ The courts reasoned that if a district were drawn to contain a 65% black population, then 60% of the district's voting age population would be black, which even with lower black registration rates, would still mean

16. *E.g.*, *De Grandy v. Wetherel*, 815 F. Supp. 1550, 1564 (N.D. Fla. 1992).

55% of the district's registrants would be black, leaving a 5% margin to allow for possible diminished black turnout.¹⁷

The likely, if unarticulated, rationale for selecting single-member districts as the remedy was that this method of election was the virtually universal alternative to at-large elections in this country. Although the two methods of election were based on different notions of the interests to be furthered in elections, both systems had recognized strengths and weaknesses. That blacks could have elected representatives from their own neighborhood in a district system, but could not do so in an at large system, did not distinguish them sufficiently from others in the electorate. It was, after all, a primary objective of the at-large system to avoid having individual officials beholden to any specific segment of the electorate.

However, a finding of dilution theoretically established that the election system impacted blacks differently than it did others in the electorate, including residents of other neighborhoods who also were unable to elect their choices. It seemed a reasonable compromise of the state's right to select the method of election to insist that it select an equally well-established alternative system that would provide electoral benefits to black voters equivalent to those of others in the electorate. When operating as designed, at-large elections did not provide any area with a specific representative, but, nevertheless, all candidates had to satisfy enough of the jurisdiction's voters to be elected. Thus, all areas could expect that their interests would be thrown into the mix when governing decisions were made. A racially malfunctioning at-large system, however, left blacks and their concerns out of the mix. Substituting single-member districts deprived everyone of influence over all officials, but gave everyone the benefits of regional representation.

Although *Whitcomb* and *White* made clear that the injury subject to remediation was race-based diminished political influence, the failure to tie the injury to abridgment of the right to vote made racial dilution appear to be just another "disparate impact" claim. Ultimately, the Supreme Court concluded in *Mobile v. Bolden*¹⁸ that the rules governing other disparate impact cases applied to vote dilution; such claims are actionable only if the state action resulting in the disparate impact—in the case of dilution, the selection or

17. Because black families, on average, have more children than white families, a larger portion of the total black population is made up of persons not old enough to vote. For a general discussion of the Sixty-Five Percent Rule, see *id.*

18. 446 U.S. 55 (1980).

maintenance of the election scheme—was motivated by an intent to discriminate.

Congress quickly came to the rescue in 1982 by amending section 2 of the Voting Rights Act to restore the *Whitcomb-White* totality of the circumstances test. Although the language of section 2 directly tracks the standard set out in these cases and the legislative history indicates that Congress intended a statutory return to the pre-*Bolden* standards, the courts took the amendment to mean that a more lenient standard should apply. Relying largely on a series of “factors” set out in a report prepared by the Senate Judiciary Committee—the so-called “Senate Report Factors”¹⁹—the courts found dilution much more often than they had in the past.²⁰

The Supreme Court’s first construction of amended section 2, *Thornburg v. Gingles*²¹ provided an additional boost to dilution plaintiffs. While the Court recognized that section 2 had specifically incorporated the *Whitcomb-White* standard for dilution²²—a standard that tied relief to discrimination—the most influential part of the opinion described the claim in terms that could be read as supporting a “racial entitlement theory.” The Court explained that the gravamen of a dilution claim was that multi-member districts permitted a numerically superior majority, voting as a bloc, to consistently defeat the minority group’s preferred candidates despite high levels of support from the minority group. A cohesive minority group was in a position to blame the election system for its losses if the group members’ residential patterns would permit it to elect candidates without white support in an alternative election system. Thus, while many factors, including those set out in the Senate Report, were relevant to the ultimate determination, three conditions (the now famous *Gingles* preconditions) were essential: (1) the minority group must be sufficiently large and sufficiently compact to

19. S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177. The committee indicated that a violation of section 2 could be established by a variety of factors and then listed some typical ones gleaned from pre-*Bolden* cases. See discussion of these factors, *infra* text and accompanying notes 56-61.

20. The lower court decision in *Gingles* is a good example of a case where the record of black electoral success was superior to that in most of the pre-*Bolden* cases that plaintiffs lost. See *Gingles v. Edmiston*, 590 F. Supp. 345, 357-60 (E.D.N.C. 1984). Other examples of cases, where, in my opinion, plaintiffs would not have prevailed during the pre-*Bolden* era include: *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir. 1987); *United States v. Marengo County Comm’n*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Major v. Treen*, 547 F. Supp. 325 (E.D. La. 1983).

21. 478 U.S. 30 (1986).

22. *Id.* at 35, 44 n.8; see also *id.* at 97 (O’Connor, J., concurring in the judgment).

constitute a majority in a single-member district; (2) group members must be politically cohesive; and (3) the white majority must vote sufficiently as a bloc to enable it to defeat the minority's preferred candidates.²³

Only the third precondition implied that it was necessary to find some connection between blacks' lack of electoral success and racial discrimination. "Whites voting as a bloc" implies that whites have voted against a black candidate precisely because she was black, rather than because they found her opponent's qualifications or positions on the issues more appealing. A majority of the Court rejected Justice Brennan's definition of the third precondition, which was that a "legally significant white bloc voting" was present when a white bloc vote normally was able to defeat the combined strength of minority support plus white "crossover" votes.²⁴ In the majority's view, this definition did not adequately distinguish between blacks' inability to elect their choices on account of race and ordinary political losses.²⁵ No doubt in part because of the nebulous nature of the totality of the circumstances doctrine and the illusiveness of the distinction between ordinary defeat and race-based losses, most post-*Gingles* decisions turned on the presence of the seemingly more objective and more definable *Gingles* preconditions.²⁶

In contrast to pre-*Bolden* judges, who were reluctant to see racial bias as the underlying explanation for blacks' often glaring lack of political success, in the decade following *Gingles*, judges, initially appeared eager to find that blacks suffered vote dilution when the evidence did little more than demonstrate that black candidates had not been proportionally elected. The functional, intensely local, fact-specific analysis theoretically called for by *Whitcomb-White*'s standard, now incorporated into section 2, was "anything but" in practice. Cohesive black voters were deemed victims of vote dilution when similarly cohesive, similarly numerous, non-racial interest

23. *Id.* at 50–51.

24. *Id.* at 56. Taken literally (as it often was, *see, e.g.,* *McDaniels v. Mehfood*, 702 F. Supp. 588, 592 (E.D.V.A. 1988)), this language implied that if a slight majority of blacks, say 51%, preferred candidate B, who was also preferred by 49% of whites, but B lost because 51% of whites and 49% of blacks preferred candidate W, then a legally significant white bloc voting was present.

25. *Gingles*, 478 U.S. at 83 (White, J., concurring); *see also id.* at 100–01 (O'Connor, J., concurring).

26. *See* *Solomon v. Liberty County*, 899 F.2d 1012, 1016 (11th Cir. 1990) (en banc) (Kravitch, J., concurring) ("[P]roof of the three *Gingles* factors is both necessary and, in this case, sufficient, for a section 2 vote dilution claim."); *Shaw v. Hunt*, 861 F. Supp. 408, 441 n.27 (E.D.N.C. 1994) ("[S]uch proof is sufficient to make out a prima facie case.").

groups would simply have been seen as ordinary losers in the political process.²⁷

Recent cases, however, suggest a return to *Whitcomb-White*'s anti-discrimination principles. First, in *Johnson v. DeGrandy*,²⁸ the Court made clear that plaintiffs must not only demonstrate the existence of the preconditions, but also that the totality of the circumstances established that they had been denied an equal opportunity to participate in the political process and to elect candidates of their choice. Second, *Shaw v. Reno*²⁹ and the Supreme Court's other "affirmative racial gerrymandering" decisions³⁰ revealed a five justice majority firmly in favor of limiting "race-based remedies" to "race-based deprivations," which these justices strongly implied must contain some element of racial discrimination.³¹

Third, a number of circuits articulated new understandings of *Gingles*—understandings more firmly tied to the dilution standard's origins in *Whitcomb* and *White*. The Fifth Circuit has held that section 2's protections only extended to defeats on account of race, so that when divergent voting patterns were best explained by partisan affiliation, there was no vote dilution.³² The Eleventh Circuit has held that to establish vote dilution, the plaintiffs must demonstrate racial bias in the electorate, which the challenged electoral scheme allows to dilute minority voting strength.³³ The First Circuit has concluded that absent racial antagonism in the electorate, the defeat of a minority candidate "does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics (say, failure to . . . reflect the majority's ideological viewpoints)."³⁴ The Seventh Circuit has noted that the Voting Rights Act does not guarantee the election of Democrats, even if black voters support them.³⁵ The Sixth Circuit has observed that minorities should not be entitled to a remedy,

27. See, e.g., *Goosby v. Town of Hempstead*, 180 F.3d 476, *passim* (2d. Cir. 1999). The critical facts of *Goosby* were virtually indistinguishable from those in *Whitcomb*.

28. 512 U.S. 997 (1994).

29. 509 U.S. 630 (1993).

30. See, e.g., *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

31. The five justices are the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas. In *Vera*, the Court (with these five justices constituting the majority) notes that before it employs a race-based remedy, the state must identify specific discrimination, and must have a strong basis in evidence to conclude that a remedy is needed. 517 U.S. at 1962-63.

32. *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc).

33. *Nipper v. Smith*, 39 F.3d 1494, 1497 (11th Cir. 1994).

34. *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995).

35. *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992).

which is unavailable to other supporters of defeated candidates.³⁶ These cases signal a return to racial discrimination as the underlying theory for vote dilution, thus emphasizing that when blacks' preferred candidates win and lose on the same basis as candidates generally, race-based remedial districts cannot be justified.

B. The Present: Black Voters Increasingly Resemble Other Political Interest Groups

Despite occasional rhetoric to the contrary, times have changed. The most significant change is simply that much time has passed since the days of state-imposed segregation and state-sanctioned disenfranchisement. The further removed the nation is from historic official discrimination, the more difficult it becomes to distinguish black voters from other political interest groups, and the less supportable the assumption becomes that, when black candidates lose, it is because of race.

Aside from the growing distance from historic discrimination, the change most directly helpful to the election of black candidates has been a significant replacement of at-large and multi-member district election systems with single-member districts—a change prompted by legal pressure from section 2 and political pressure from minority groups. These districts now must be redrawn to comply with the Constitution's so-called “one-person, one vote” requirement. Because the black electorate continues to provide overwhelming support to black Democrats, a district's racial composition obviously will be a key factor in a black candidate's success. However, the degree to which the legislature lawfully may manipulate the racial composition of districts will depend upon the existence of a variety of factors that affect section 2 liability.³⁷ A major factor is the degree to which black candidates are unable to achieve electoral success because of their race. Below I reexamine the steps to electoral success in light of today's racial and political climate.

36. *Clark v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994).

37. Majority black districts created in accordance with traditional districting criteria—such as by recognizing a geographically-definable community of interest—require no justification. Moreover, section 5 jurisdictions must use race to create districts, if necessary to avoid retrogression. See discussion, *infra* text and accompanying notes 80–92.

1. Steps to Electoral Success Today

a. Core Supporters

Black support for Democratic candidates in general and black Democrats in particular, remains high. However, two important changes affect the dynamics a black candidate faces in generating and retaining core supporters. The first is the emergence of a genuine two party system in the South and the second is that a black candidate today is likely to have black opposition.

Because a majority of whites prefer the Republican Party, blacks now constitute a significantly larger segment of the Democratic primary electorate than of the overall electorate, particularly in the South. In many districts, blacks will constitute a majority of those voting in the Democratic primary, but not in the general election. In these districts, black cohesiveness should propel a single black candidate to a primary victory over his white opponents. When multiple black candidates seek the Democratic Party nomination, which is especially likely when there is no incumbent, none automatically can count on black voter support. All must expend greater effort and resources to define and generate their core supporters. In this effort, they face all the same issues as candidates generally: gaining name recognition, securing the support of influential people, obtaining financial backing, and in general putting together a campaign that attracts sufficient votes to win.

Today in majority black districts, black voters have the luxury enjoyed by white voters when they are in the majority. They can split their vote among multiple black candidates, but, if they choose, still defeat a white candidate who makes the run-off election. Similar to black candidates in the past, a prospective white candidate may look at the election math and conclude that the odds against his prevailing are too great. Moreover, the white electorate may conclude that its vote is more wisely spent influencing which of the black contenders will be elected, even if a white candidate runs. If the election becomes a contest between two black candidates, the party nominee obviously will be black, but may be determined by the white minority.³⁸ The degree to which this phenomenon occurs is obviously a function of the extent to which the contest is characterized by issues that, or candidates who, polarize the electorate along racial lines.

38. In majority white districts, a cohesive black minority likewise is able to deliver the outcome determinative vote when whites split their vote among competing candidates.

Because the presence of competing black candidates means that race no longer provides one of them with instant supporters, a candidate who sees black voters as his primary source of core support may be tempted to sell himself as the “true” advocate of black interests. As a result, he may pick up the lion’s share of the black vote, but ultimately lose the nomination to a candidate who attracted white support by focusing on issues that do not divide along racial lines. If blacks are not a majority of the Democratic primary electorate in a district, multiple black candidates significantly increase the odds that the party nominee will be white, particularly if the black candidates devote their energies to competing for the black vote. The white candidate meanwhile can focus his campaign on the white majority, making just enough token appeals to avoid alienating black voters, whose support he will need in the general election.³⁹

Winning the Democratic primary may turn out to be less than half the battle in a genuine two party system. Unless a bitter primary battle motivates supporters of the loser not to vote in the general election, or, worse still, to support the Republican, the possibility that a black nominee from the Democratic party will win the general election is highly dependent upon the party’s strength in the district. The party label now produces “core supporters” for the black nominee in the form of the party faithful. If this group is not likely to be a majority of the general election turnout, the nominee must pick up additional support from independents. Unlike the primary, however, the nominee now has the financial and organization support of the party.

b. Supporters to the Polls

Candidates who expect to find their primary support among black voters no longer face racism-driven diminished registration and turnout. Indeed, the National Voter Registration Act of 1993⁴⁰ (the so called “Motor Voter Law”) makes registration effortless, indeed, almost involuntary. Thirty-six years after passage of the Voting Rights Act, it is hard to argue that “continuing effects” of past discrimination keep blacks from registering or from turning out.

39. When there is no black candidate in the primary, white candidates may actually devote a disproportionate part of their campaign resources toward attracting black voters. Blacks are the most easily identified segment of the primary electorate. They often are the most accessible voters because of well-established channels within the black community to promote political participation. They often vote reasonably cohesively, even when all candidates for nomination are white.

40. Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 42 U.S.C.A. § 1973gg (1994 & Supp. V 1999)).

Making this connection is particularly difficult in light of evidence that older blacks—who might actually have faced discriminatory registration practices—participate at much higher rates than younger blacks.⁴¹

Today, those in need of black support face mobilization issues similar to those faced by other candidates. Their would-be supporters usually are on the registration rolls. The candidate must inspire them to get out to vote, and perhaps help them to get to the polls. When a black candidate faces only white opposition, the disadvantage of having a large number of supporters who may have difficulty getting to the polls is arguably offset by the greater ease of physically locating one's core supporters and being able to take advantage of long-established networks in the black community for turning out the vote. Mobilization is a larger problem for black candidates in the primary because party resources are not available to help.

c. Support Beyond the Core

In the general election, a black nominee of the Democratic party can expect to count most Democrats (not just black ones) as part of his core support. If the district is majority white, but dominated by Democrats, support beyond the core is less critical and perhaps even unnecessary. If it is dominated by Republicans, any Democrat's chances will be slim. Only when neither party dominates the district is the outcome likely to depend on which candidate can attract swing voters. For the most part, these voters are likely to be whites without a strong affinity for either party.

As is true with generating core support, attracting voters from outside the candidate's core group is likely to be more complicated in the Democratic primary. If a candidate faces competition for his core supporters, he must balance winning those votes and attracting others from outside the group. Too strong a pitch to black voters may result in the loss of white votes. Too weak a pitch may result in losing his core to a black competitor. His task, however, is not markedly different from that of candidates generally. Moreover, in districts where neither party dominates, all candidates must avoid taking

41. See, e.g., *NAACP v. City of Columbia*, 850 F. Supp. 404, 423 (D.S.C. 1993) (explaining that a study of city's voters found that 85% of blacks age fifty or older were active registrants, whereas only 66% of blacks between twenty-five and thirty-four were active registrants). When black registration and turnout lag behind that of whites, the explanation is likely differences in the age structure of the two populations, rather than past discrimination. Older people, regardless of race, register and vote at much higher levels than younger ones. Blacks of voting age are younger overall than whites of voting age.

stands that win them votes in the primary but destroy their chances for attracting sufficient swing votes to prevail in the general election.

Obviously, specific combinations of opponents and a district's partisan leanings will determine the balance a successful candidate must strike to put together a winning combination of core supporters and others. Unless a district is so overwhelmingly black as to make the white vote largely irrelevant in both the primary and general elections, however, most black candidates will at some stage need white votes. Furthermore, the existence of vote dilution—a circumstance necessary to justify the deliberate creation of black districts—turns in part on white voters' response to black candidates.

2. A Further Look at Black Candidates and White Voters

Everyone recognizes that many candidates easily elected in Boston would easily be defeated in Wyoming. It is common knowledge that a candidate who might defeat his opponent when both are first-time candidates may have little chance against a popular incumbent, even if the electorate is exactly the same. Yet, in the context of vote dilution litigation, the critical determination of whether black candidates lose "on account of race" is often made as if the ordinary rules of politics do not apply to black candidates. If one is to employ a functional analysis to determine why black candidates lose, that analysis must recognize that specifics do matter in politics for all candidates, including black ones. Neither white voters, black candidates, their political opponents, nor the circumstances of individual elections are fungible. An analysis that lumps white support for Jesse Jackson for President together with white support for a well-known black principal for the local school board to arrive at "average" white support for black candidates is hardly a common sense means to determine likely white support for a black candidate for local office.

a. White Voters

In terms of their response to a black candidate's race, white voters might be seen as falling more or less into the following categories, which in turn provide some measure of the degree to which the collective decisions of the white electorate are influenced by racial bias: (1) voters for whom a black candidate's race is a positive factor; (2) liberal-leaning voters for whom race is a positive factor because they view "black" as short-hand for liberal; (3) conservative-leaning voters for whom race is a negative because they view "black" as short-hand for liberal; (4) voters for whom race is a

negative factor because of their stereotypical belief that any black candidate is less able than any white candidate;⁴² and (5) voters who are so consumed by racial prejudice as to refuse to vote for any black candidate.

For the final, sixth, category of voters, a candidate's race is neither a positive nor a negative. Many of these race-neutral voters will respond, however, to the candidate's partisan label. Whites who prefer Republicans are not likely to vote for many black candidates because few are likely to run as Republicans, but those who prefer Democrats will support a black Democrat on the same basis as they would support a white one. To gain the support of voters in this category who lack either a positive or a default preference for her party, or to gain their votes in the primary, a black candidate must compete with all others.

A black candidate who needs white votes to win should employ the same strategy, regardless of the actual mix of white voters in his district—a fact he is unlikely to know anyway. He must attract category six voters. If his personal qualities, position on the issues, and projected viability will not gain the votes of this group, he likely will lose, as would a similarly situated white candidate. As the portion of the jurisdiction's white voters in categories three, four, and five increases, a black candidate's chance for success obviously decreases. When voters in these categories remain in the Democratic Party, they are the voters least likely to support the party's nominee in the general election if the nominee is black. As the portion of the white electorate that falls into categories four and five goes up, the more it appears that race, not politics, is responsible for losses suffered by black candidates. Conversely, when most white voters fall into category six—as well as one and two—the more difficult it should be to establish that a black candidate has lost for racial reasons.⁴³

42. These white voters might change their minds if a black candidate overcomes their presumption of incompetence.

43. If, as most courts seem now to recognize, white voters' reasons for not supporting black candidates are important, one party in vote dilution litigation must be assigned the responsibility of distinguishing "racial reasons" from "political ones." In regions of the country where the Democratic Party once dominated all elections, it may be very difficult to determine the degree to which blacks' ascendancy in that party is responsible for whites' gravitation to the Republican Party. The correlation between these two events appears to be obvious, but both events are equally associated with southern Democrats becoming more liberal and Republicans becoming more conservative nationally. I leave for another day questions of how to decide whether a white Republican falls into categories three (conservatives who see blacks as liberals) or six (voters who see race as neutral), rather than four (voters with stereotypical, but rebuttable, views about blacks) or five (racists).

b. Black Candidates and Their Opposition

The average person likely would say that he selects a candidate in large part because of the candidate's personal qualities versus those of others in the race. However, dilution plaintiffs—and political scientists looking for objective factors to quantify—downplay the impact of individual black candidates' personal qualities on the degree of white support forthcoming. They argue that these candidates had qualities that generated overwhelming support from black voters—thus suggesting that if this does not translate into white support, race must be the reason. It is just as logical, however, to argue that a black voter votes for a black candidate because of the message the candidate's race conveys to him. Perhaps many black voters are motivated to support a black candidate out of a perceived commonality of interests and sense of community pride, and less motivated by their perceptions of the candidate's background, qualifications, and character. For example, such factors may have motivated black voters to vote overwhelmingly for Alcee Hastings, despite his removal from the federal bench, and for Marion Berry despite his trouble with the law.⁴⁴

Few white voters are likely to support a black candidate solely because they perceive a positive political message from his race. More will be needed. Their failure to support candidates with obvious political liabilities should not be seen as evidence of the degree of support white voters would provide a black candidate without similar liabilities.

Most voters consider a candidate's political viability when deciding to support him. For a variety of reasons, however, black voters may be more willing than white ones to cast a symbolic vote. An example might be their overwhelming support of Jesse Jackson in his various attempts to secure the Democratic nomination for President, even though few, perhaps including Jackson himself, saw him as a viable candidate. That whites were unwilling to trade influence for symbolism cannot be equated with racial bias. Moreover, it would be untenable for a savvy political advisor to counsel a black candidate for, say, the state legislature, to see very low white voter support for Jackson as a barometer of the support he could expect.

44. Moreover, some blacks may have seen Hastings's and Berry's difficulties as a product of a racially discriminatory justice system—a view most whites would not have shared. Hastings's impeachment by Congress was later overturned by a federal judge. He subsequently was elected to Congress from a majority black district.

Her opponent is obviously an important factor affecting the degree of support any candidate can expect. Yet, when it comes to evaluating white support for black candidates in vote dilution litigation, the actual identity of the opponent is downplayed and often totally ignored. When a long-term white incumbent has routinely soundly beaten all white opponents, it simply defies logic to conclude anything "racial" about a black candidate's suffering a similar fate. Similar observations can be made about whites' support of white first-time candidates, if whites reasonably could have seen these candidates as having more attractive personal attributes, qualifications for office, and positions on the issues than their black opponents.

c. Contest-specific Factors

Factors beyond the personal characteristics of the candidates also influence election outcomes. All Democrats may benefit, or be undermined, by the popularity of the top of the ticket. Other elections involving the district's voters may impact turnout, or may dictate the amount of the party's resources to be devoted to a black candidate's specific election contest. Off-year elections often are characterized by lower voter turnout and non-partisan local elections and special elections even more so. Incidents unrelated to a contest per se may influence the outcome, including matters as simple as the impact of weather on turnout and as complex as the community's response to some highly publicized, overtly racist act. Election dynamics are also office specific. Candidates for city council and candidates for governor must implement very different campaign strategies. Friends and neighbors may be critical supporters in local elections, but virtually immaterial in congressional ones.

To summarize, a common sense inquiry into the causes for black candidates' losses requires an examination of all factors that influence electoral outcomes, including the backgrounds, qualifications, and political views of black candidates and those of their opponents, as well as the partisan and ideological leaning of the electorate. An "equal opportunity" for election should be seen as existing for a black candidate when her opportunity is the same as that of a white candidate sharing the black candidate's pertinent personal and political qualities. Otherwise, the Voting Rights Act, which was enacted as a shield against racial discrimination, becomes instead a sword for the advancement of interest group politics.

II. SUGGESTIONS FOR A FUNCTIONAL ANALYSIS OF VOTE DILUTION LIABILITY⁴⁵

Congress indicated that “abridgment of the right to vote on account of race” was the injury to be remedied by section 2, its statutory substitute for *Whitcomb* and *White*’s constitutional dilution claim. Ultimately, to prevail on a section 2 claim, plaintiffs must demonstrate that, based on the totality of the circumstances, their opportunity to participate in the political process and to elect candidates of their choice is sufficiently unequal to abridge the right to vote, and that the inequality is on account of race. A functional analysis of the totality of the circumstances should be designed to define inequality and to distinguish race-based inequality from standard political losses.

A. *A Functional Analysis in a Litigation Setting*

An individual is an equal participant in the political process if he has the opportunity to register, to cast a ballot, to associate with and participate in the political party of his choice, to join with like-minded others to support candidates or issues, to seek elected and appointed political office, and to have his vote be given equal weight when elections are decided. To be an equal participant does not mean, as all of us who vote know, the right to have one’s candidates elected or one’s views prevail.

For a group, an equal opportunity to participate means that its collective votes should have the same weight in the political process as the collective votes of other groups similarly situated. Like the individual voter, a group has no right to have its candidates or policies prevail in a majoritarian system. Many purely political groups never experience electoral or policy success, and any notion that as a general proposition, whites qua whites have elected all their choices if all the candidates elected are white, is patently untenable.⁴⁶ True,

45. Despite giving lip service to a “functional analysis” of the political process, courts rarely actually perform one. Rather, a court’s analysis more often appears to be a mechanical “checking off” of the *Gingles* preconditions and the Senate Report factors, with little consideration given as to why these factors do or do not indicate lack of equal opportunity to participate in the political process on account of race. In this section, I provide suggestions for how a functional analysis should take place. Hopefully it will be obvious to the reader that my views, which are based on twenty-five years of thinking about the issue of racial vote dilution, are not necessarily shared by the courts.

46. There was a time in much of the South when the overarching political concern of most white voters was indeed addressed merely by the fact that all successful candidates were white. Ordinary political and interest divisions within the white electorate were secondary to racial concerns. First, the white primary and then massive black

blacks are different from other groups whose members share common interests in that many of their interests can be traced to a shared history of discrimination—a discrimination maintained by depriving them of political influence. But the appropriate compensation is to protect group members' political participation from the majority's hostility when that hostility is directed toward their race.⁴⁷ The protection should extend only to putting them on equal footing with others similarly situated, if indeed they are not on equal footing already.

That said, however, a cohesive bloc of voters should have some demonstrable influence on the political process, so long as members of the group have the same representation concerns, broadly speaking, as others in the electorate.⁴⁸ How much influence and how often that influence should include electing its first choice candidates depends—as it would for any group—on the group's size, cohesiveness, and its particular political agenda.

After some measure of expected influence is defined, the group's actual influence must be measured. If there is a disparity between expected and actual influence, the remaining question is whether the disparity is "race-based." Below I examine how the factors the Supreme Court has identified as relevant to proof of a section 2 violation might contribute to a functional analysis designed to answer these questions.

disfranchisement permitted divisions within the white electorate to be expressed without fear that one faction or another would seek an advantage by forming an alliance with black voters. After the Voting Rights Act gave blacks unfettered access to the ballot, forgoing black support was a viable political option only if to seek it would lose a candidate more white votes than he would gain in black votes. Today, a vote dilution claim easily should be won against a jurisdiction where intra-white political competition remains suppressed by concerns about black influence or where political divisions within the white electorate remain secondary to racial concerns.

47. Indeed, it is the fact that group members were victims of historic *official* discrimination affecting the right to vote that justifies protecting them from their irrational unpopularity with the majority. The law does not protect others in the electorate who might, because of an immutable characteristic, also be victims of the electorate's bias. One might note that women were disfranchised even longer than blacks and argue that they, too, should receive special protection. Assuming that a constitutional basis for relief could be found, the brief response is that to state a claim, women would have to demonstrate that their opportunities *today* are unequal, that an alternative well-recognized electoral system would provide a remedy and women would be sufficiently unified in their political interests to benefit from its adoption.

48. By this I simply mean that they are interested in the ordinary concerns addressed by government policies, such as health, education, common welfare, and the like, and in services the government provides. They are not identified primarily with an agenda inconsistent with the interests of most citizens, support for which is a litmus test for their votes.

1. The *Gingles* Preconditions

- a. A Minority Group Sufficiently Large and Geographically Compact to Constitute a Majority of a Single-Member District

The most obvious purpose of this requirement is to make certain that if dilution is established, an alternative, standard method of election is available as a remedy. In *Thornburg v. Gingles*, the Court explained the compactness requirement as essential to the group's ability to benefit from a single-member district,⁴⁹ but did not actually explain why the remedy should be single-member districts. Other electoral schemes, such as limited voting and cumulative voting, would permit a politically cohesive group to elect its choice, even if it were not geographically compact. By including a reference to single-member districts as an essential element of the claim, however, the Court implies that the group's interest in an undiluted vote must be balanced against the state's interest in selecting its method of election. The state will not be forced to adopt an election system not common in this country.⁵⁰

As the Principal Article demonstrates, blacks do not always have to constitute an actual majority of the voters to elect their choices from a single-member district.⁵¹ I disagree, however, as to whether something less than a majority of the voters will suffice to satisfy the first precondition. The very essence of a dilution claim is that a racial minority needs a single-member district to insulate its votes from the majority's racial bias. This claim is inconsistent with the assertion that some majority voters can be relied upon to vote with the group. Moreover, if federal law is to supplant local control over the method of election, it is reasonable to insist that it only do so when the remedy puts some number of electoral outcomes strictly in the hands of the aggrieved group.⁵²

49. 478 U.S. 30, 50 n.17 (1985).

50. Perhaps the Court was concerned that imposing a non-geographically based representation scheme on the states would infringe so drastically on matters left to the states as to raise federalism concerns. All of these systems provide some form of proportional representation that promotes direct representation of groups, political and otherwise—representation which is not available in the geographically based representational systems almost universally adopted in this country. Thus, their imposition on the states would change not merely the method of election, but the very definition of the underlying interest represented.

51. Grofman et al., *supra* note 1, at 1396–99, 1423.

52. A change in the method of election, or even in the district lines, may produce a change in voter and candidate behavior. Unless the minority is a majority of the district, it

b. A Politically Cohesive Minority Group

The purpose of this precondition is to establish that group members have common political goals that they see as capable of furtherance by the political process. Moreover, the group will not benefit from a single-member district if it is not politically cohesive. Standing alone, group members' routine support for Democrats does not establish that they have interests that distinguish them from other voters who generally favor the nominees of the Democratic party. The inquiry should be two-fold. First, does the group overwhelmingly identify with one party when the elections at issue are partisan contests?⁵³ If not, there is insufficient internal support for a political agenda to support the existence of unique "black" interests. Second, is the group coherent without regard to the Democratic label? If not, the group looks like just one more subset of Democrats.

c. A Bloc Voting White Majority

This precondition is the means by which the white majority prevents the election of candidates favored by blacks. To establish this precondition, plaintiffs should be required to demonstrate that there is in fact a "bloc" of whites that votes "as whites" against blacks "as blacks." This condition should not be satisfied by evidence that Republicans (most of whom are white) vote against Democrats (some of whom are black). It may be satisfied, however, if white Democrats vote as a bloc against the choices of cohesively voting black Democrats, and both "bloc" and "against" are defined so that when a "white bloc" is present, the defeat of black choices can reasonably be attributed to racial bias.⁵⁴ It may also be satisfied when, within the

cannot be assured of the opportunity to control the election outcome. Moreover, insisting upon the existence of a group that can by its numbers alone control elections in a district provides a bright-line element in an otherwise highly subjective standard.

53. Tentatively, I would define "overwhelmingly" as in excess of 80%, which would mean that in most places, blacks would clearly satisfy the first hurdle.

54. The term "white bloc" implies something more than simply the race of the persons voting. It would be nonsensical to describe some segment of the electorate as a "white bloc" in an all white town. "White" is a relevant description only in relation to some non-white group. The term implies that a significant portion of whites consistently votes together "as whites" and against "blacks," or black interests. The term further implies that it is race to which the bloc responds with its collective votes, and not some other characteristic of the candidates. For example, if in a general election the Democratic nominee is black and the Republican nominee is white, an analysis of voting preferences by race might show that 90% of blacks, but only 35% of whites had supported the black candidate. If, however, only 35% of whites in the district on average support white Democratic nominees, it is not accurate to see whites as bloc voting against the black candidates. The more accurate description is that Republicans are voting against Democrats. Of course, as the percentage of whites who are Republicans goes up, the

same electorate, black Democratic nominees lose in the general election when similarly situated white nominees do not. The district, candidate, and contest specific variables discussed earlier should also be relevant considerations on the issue of whether racial bias in the white electorate is responsible for the defeat of candidates preferred by the black community.⁵⁵

2. The Senate Report Factors

The Senate Report lists a hodge-podge of factors, gleaned from the pre-*Bolden* vote dilution cases, which were to guide the courts in their quest to determine if a challenged election structure resulted in dilution of a minority's voting strength.⁵⁶ The Report, however, provides little guidance as to how these factors are to aid the inquiry and rarely have courts explained how the presence or absence of these factors aided their ultimate conclusions. Below I propose a role for each factor as part of a function analysis to answer the questions that underlie racial vote dilution: Is minority political participation unequal?; Is racial bias the reason?; and Does a remedy exist?

One Senate Report factor, "racial polarization," is essential to a finding of dilution because it is the primary basis for determining the existence of a politically cohesive minority and a bloc-voting majority. A second factor, a history of official racial discrimination affecting the right to vote, also should be essential because it is the condition that justifies protecting racial minorities from their irrational, race-based unpopularity with the majority, when equivalent protection is not

white bloc and Republican bloc will look increasingly similar. Other evidence must be examined to determine whether "white" or "Republican" best characterizes the "bloc" and whether "black" or "Democrat" best describes that which the bloc votes against.

55. Despite our focus on the election of black candidates, the courts are not in agreement as to how much importance to attach to the race of a candidate when deciding whether the "choices of the minority" are usually defeated by racial bias. The common sense answer should be that white voters' response to a black candidate is some evidence of their racial attitudes, but just how probative it is depends upon the candidate's non-racial characteristics, and those of his opponent, that legitimately influence political popularity. A related issue in dilution litigation is whether white candidates can count as black voters' candidates of choice.

56. The factors include: a past history of discrimination affecting voting; the presence of racially polarized elections; the use of election devices that enhance the opportunities for discrimination against minorities; denial of minority access to a candidate slating process, if one existed in the jurisdiction; the degree to which minorities still bear the effects of discrimination that hinder their participation in the political process; the presence of racial appeals in campaigns, and the extent to which minorities have been elected to public office in the jurisdiction. S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.A.N. 177. Unresponsiveness of elected officials to minority concerns and the presence of unusually large election districts could, in some circumstances, be relevant. *Id.*

provided for other unpopular groups. Both factors make additional contributions to functional analysis.

The Senate Report factors relevant to the existence of present day racial bias in the electorate include the following: the presence of racially polarized voting; a past history of official and private discrimination affecting voting and otherwise; racial appeals in campaigns; exclusion of blacks from a slating process; a dramatic underrepresentation of blacks among elected officials; significant lack of responsiveness of elected officials to the particularized needs of the minority, and a tenuous policy behind adoption or maintenance of the challenged election system.

A common sense analysis must be applied to determine whether these factors contribute to a finding of present day bias. For example, blatantly discriminatory laws of the 19th century say little about the views of the present electorate. A plaintiff alleging racial appeals should demonstrate that the remarks alleged to be an appeal to racism were clearly viewed as such by the electorate,⁵⁷ and actually attracted more white votes than it lost. The degree of underrepresentation of blacks among elected officials should be substantially below expectations before it raises an inference that something is amiss.⁵⁸

Those Senate Report factors that are relevant to the degree of white support that black voters need to elect those candidates of choice help determine whether their opportunity will be unequal. These factors are the presence of a majority vote requirement, anti-single shot provisions, and other devices that increase the portion of the total vote needed for election.⁵⁹

The Senate Report Factor, "the extent to which group members bear the effects of discrimination in education, employment and health, which hinder their ability participate in the process," is relevant to establish a connection between racial discrimination and present depressed political participation. Plaintiffs should be

57. If it takes an expert on racial appeals to explain to a local federal judge why an appeal is racial, the voters probably did not see it as such.

58. Factors such as the group's relative and absolute size are important when evaluating legitimate expectations that a member group should be elected. The inquiry concerning minorities elected to office in the jurisdiction should be broader than the office elected by the system under challenge. The group's more politically viable candidates may have chosen to seek offices other than those involved in the challenge. For example, if a county's black population is concentrated within a city, black candidates may have been far more interested in city offices than county ones if, as is typical, county government has little day-to-day impact on residents of incorporated areas.

59. See earlier discussion, *supra* notes 8-9 and accompanying text.

required to demonstrate that participation—in the form of registration and turnout—is in fact depressed, that the jurisdiction did in fact discriminate in these areas, and a rational basis to infer a connection between the two exists.⁶⁰

The Senate Report factors relevant to tangible indications of the group's influence, or lack thereof, on the political process at issue provide evidence of inequality. These factors are the extent to which members of the group have been elected to office and significant lack of responsiveness to the particularized needs of the group. Voters see a tangible result from their political participation when candidates they have supported are elected and when their past support, or promised future support, of elected officials brings about government action on matters of concern to them. These factors should be measured against expectations, and for this purpose the inquiry should be specific to the office in question.⁶¹

The Senate Report factors do not exhaust the information possibly relevant to the analysis. Note, for example, that neither the preconditions nor the Senate Report factors address the question of the degree of influence a group reasonably should expect to have. Frequently the courts ignore the reality that politics is a game of numbers.⁶² Any legitimate expectations of influence should take into account the group's absolute numbers, relative size, and demonstrated cohesiveness in *the election system challenged*.⁶³ For

60. See discussion, *supra* note 41, concerning the impact of age on political participation as an alternative explanation for racial difference in registration and turnout.

61. The courts have tended to downplay "responsiveness" of elected officials, perhaps because it is so much in the eye of the beholder. It can, however, be powerful evidence of access, or lack of access, to the ultimate fruits of political participation. The following questions should be addressed: What does this governmental entity do as an elected body? If it establishes policy, are minority interests considered and do they prevail as often as should be expected, given the group's size, its needs, and those of the jurisdiction as a whole? If the elected body provides services, does the group receive equal access to them?

62. Many simply assume that proportional representation is the measure of a group's expected influence, despite the fact that there is absolutely no evidence that other groups—including, typically, voters who support the state's minority political party—are proportionally represented. If it is not abnormal for there to be no Republicans on an at-large city council when Republicans make up only 20% of a city's electorate, the same conclusion should be reached about a similarly situated minority group—as, for example, when blacks make up only 20% of the Democratic primary electorate.

63. In *Gingles*, Justice O'Connor implied that the measure of undiluted voting strength is the influence the group could expect to have in a single-member district system. 478 U.S. at 91, 99 (O'Connor, J., concurring). However, while comparing the group's influence in the challenged system to its potential influence in a single-member district system tells us whether this remedy will be effective, it tells us nothing about whether the challenged at-large system has resulted in unequal treatment for minorities. An at-large

example, any group making up 40% of the electorate legitimately should expect to elect some of its first choices routinely in an at-large system. A group constituting only 10% of the electorate, however, must expect to make its influence felt by forming coalitions with others and cannot realistically expect routinely to find sufficient help to elect its first choices. The group's absolute size is also important. A group constituting 10% of a rural county with a total population of only 5,000 may be quite different in terms of its supply of politically viable candidates from a group constituting 10% of a city of 500,000.

Ultimately, to be provided a race-based remedial district, plaintiffs must prove that, considering the totality of the historical, social, and political circumstances, they have less opportunity than others in the electorate to participate in the political process and to elect candidates of their choice.

*B. Legislators and the Creation of Majority Black Districts*⁶⁴

I began my Response to the Principal Article with the observation that the Constitution strictly limits the degree to which legislators may engage in race-based districting. In *Shaw v. Reno*⁶⁵ and its progeny,⁶⁶ the Supreme Court held that "race for race's sake" is not a legitimate basis upon which to assign citizens to districts. Nothing, however, prevents a jurisdiction from deliberately creating majority-minority districts that otherwise conform to traditional districting criteria—such as by recognizing geographically definable communities of interest that are black. Legislators also may use race to create districts to avoid retrogression as prohibited by section 5 of

system, by design, has a different impact than single-member districts on the electoral opportunities for all voters. If, as has always been true, at-large systems are rational and constitutional, why should minorities, and only minorities, be deemed to be "unequally affected" by an at-large system when they fail to achieve the electoral success that would be possible in a *different system*?

64. The format here does not permit a full exploration of the issues legislators must resolve in order to employ race to construct districts. I explore this and other issues surrounding redistricting, as well as provide concrete line-drawing advice in Katherine Butler, *Redistricting in the Post-Shaw Era: A Small Treatise, Accompanied by Districting Guidelines, for Legislators, Litigants, and Courts* (Sept. 25, 2001) (unpublished, on file with North Carolina Law Review).

65. 509 U.S. 630 (1993).

66. *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995). The Court split five to four in all of these cases. The Chief Justice and Justices O'Connor, Scalia, Kennedy and Thomas voted against the state's position in all cases except *Cromartie*. In *Cromartie*, Justice O'Connor joined the dissenting Justices from the earlier cases in concluding that race was not the predominant factor producing North Carolina's redrawn Twelfth Congressional District.

the Voting Rights Act, or to avoid potential liability for racial vote dilution under section 2 of the Act.

1. "Standard" Districts That Are Majority Black Do Not Raise *Shaw* Problems

A key issue of immediate concern to legislators facing redistricting is one controlled by Justice O'Connor's position in *Bush v. Vera*,⁶⁷ a *Shaw* progeny decision for which there was no majority opinion.⁶⁸ This key issue is whether any circumstances exist in which the legislature may use race to create districts *without* triggering strict scrutiny. According to Justice O'Connor, strict scrutiny is triggered only when traditional districting criteria have been subordinated to race.⁶⁹ Thus, strict scrutiny will not apply if traditional districting criteria are actually *followed*, even if race is a major basis for construction of the district. Moreover, if traditional districting criteria were violated for *some reason other than race*—most likely incumbency protection and partisan advancement—strict scrutiny would not be triggered.⁷⁰

It is possible to read Justice O'Connor's opinion as permitting legislators to begin their districting process by using race to create as many compact minority districts as feasible, even if they would as a

67. 517 U.S. 952 (1996).

68. Justice O'Connor's position in *Vera* controls on a number of issues because she occupies the middle ground between the remaining *Shaw* majority justices and Justices Stevens, Souter, Ginsburg, and Breyer.

69. *Vera*, 517 U.S. at 959.

70. In an ironic turn of events, as a result of the *Shaw* line of decisions, incumbency protection and partisan advantage-seeking have acquired an aura of respectability. North Carolina, for example, escaped strict scrutiny of its redrawn Twelfth Congressional District by convincing Justice O'Connor that partisan politics, rather than race, explained its deviation from traditional districting criteria. See *Cromartie*, 121 S. Ct. at 1466, where Justice O'Connor voted with the Court's more liberal Justices to reject the district court's finding that race, rather than politics, was the predominant factor in the district's creation. Justice Breyer, author of the opinion, went so far as to describe the State as having "articulated a legitimate political explanation for its districting decision." *Id.* at 1458. (The only explanation offered was partisan advancement.) Texas went even further when it, in effect, argued in *Vera* that partisan advancement and incumbency protection were its *only* districting standards. (It asserted that it did not have any traditional districting standards and described incumbency protection as a state interest.) *Vera v. Richards*, 861 F. Supp. 1304, 1333 (S.D. Tex. 1994), *aff'd* *Bush v. Vera*, 517 U.S. 952 (1996). To be sure, gerrymandering for incumbency protection and partisan advancement has always been a practice, but surely not a districting principle. Indeed one purpose for developing districting principles was to *curb* the tendency of incumbents and partisans to seek advantage over their opponents. *Shaw* and its progeny's observation that there is no constitutional prohibition against these practices is not, of course, an endorsement. Moreover, in some jurisdictions violations of traditional districting standards for personal and partisan advancement may give rise to state law claims.

consequence thereof then be forced to ignore standard districting criteria to accommodate the jurisdictions' remaining representational interests.⁷¹ However, there are several arguments against this reading. First, it elevates form over substance. While assigning voters to distorted districts on the basis of their race heightens the constitutional injury,⁷² racial assignment to "neat" districts nevertheless constitutes a racial assignment. If a compact minority district can be created only by violating traditional districting standards in other districts, race has in fact caused the violation. Second, compactness is just one traditional districting criterion. A compact district that violates other criteria for racial reasons is still one in which racial concerns dominate. Finally, if state law mandates compliance with traditional districting criteria, distorted non-minority districts may be subject to challenge on state grounds.

A more sensible, and perhaps more plausible, interpretation of Justice O'Connor's position is that, when race corresponds to some race-neutral basis upon which districts are traditionally created—most typically a geographically identifiable "community of interest"—there obviously is no problem with following traditional districting criteria, even when the result is a deliberately created majority black district. In light of the ambiguity in Justice O'Connor's position, a legislature's safer course of action is to resist any suggestion that it start its line-drawing process by creating compact black districts before considering any of its other redistricting goals.

Indeed, the wiser course of action would be for a legislature to turn *off* the racial identification information in its computer redistricting program, then create the first draft of its plan using population, political, and other non-racial data. Communities of interest should be identified in ways that such communities are identified when racial data is not relevant—distinct parts of political subdivisions, neighborhoods, economic communities, and the like.⁷³

71. See *Vera*, 517 U.S. at 958.

72. As noted in *Vera*,

[s]ignificant deviations from traditional districting principles . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. For example [a district boundary that cuts] across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.

Id. at 980–81 (plurality opinion).

73. There is substantial evidence, including their documented political cohesiveness, that blacks view themselves as sharing many common interests, without regard to

Even incumbency protection for black incumbents can be accomplished without specifically looking at race.⁷⁴ Legislatures can build districts favorable to incumbents by looking at how voters have actually voted, not by making assumptions about how they will vote based on their race. If the political party in control pushes for partisan advantage, or if the major parties agree to recognize each other's existing strength, the better route is not to use black voters as a short-cut to finding sure Democratic votes. Precinct-level election data is more time consuming to use, but it is a more accurate indication of future voter behavior and does not raise constitutional problems.⁷⁵ If race-neutral criteria determine the first draft of a districting plan, legislators will have an easier time determining the race-conscious adjustments they *may* make to accommodate genuine interest-based communities, which are black, but which were unwittingly divided in the draft, as well as the race-conscious adjustments they *must* make to accommodate the Voting Rights Act.⁷⁶

2. Race-based Adjustments to Comply with Section 2 of the Voting Rights Act

Much of the discussion here has focused on racial vote dilution, which is actionable under section 2 of the Voting Rights Act. In the

geographic proximity to one another. Probably similar evidence exists for union members and conservative Christians. However, when line drawers take communities of interest into account, they generally do so only when the community can be defined geographically, without consulting the census, and otherwise can fit comfortably within a sensible district. Thus, to follow standard districting criteria, a black population concentration should be seen as a candidate for a community of interest district only if the district is one that might have been created if the population concentration were a non-racial interest group.

74. A more supportable principle upon which to protect incumbents indirectly is "constituency consistency," which merely recognizes that voters have an interest in remaining in their existing districts. Their interests include such matters as being able to benefit from keeping a "responsive" incumbent in office (or throwing the rascal out, as the case may be) to not having district political organizations and alliances disrupted by drastic changes in the make-up of the district's electorate. Moreover, often constituency consistency can be maintained without producing seriously distorted districts.

75. Apparently, it was North Carolina's use of precinct-level voting behavior—albeit, voting behavior that correlated very heavily with the racial make up of the precincts—to construct districts that saved the State's Twelfth Congressional District from strict scrutiny. *See* *Hunt v. Cromartie*, 121 S. Ct. 1452, 1466 (2001).

76. If the legislative body produces a first draft of its plan and makes as many political adjustments as necessary without using racial information, any remaining adjustments thought to be necessary to satisfy the Voting Rights Act can be clearly separate from the remainder of the plan. If a court later disagrees with the state's justification for using race, or its narrow tailoring, these adjustments can be made with minimal disruption to the remainder of the plan.

last round of redistrictings, an unfounded interpretation of section 2 encouraged by civil rights groups and the Voting Section of the U.S. Department of Justice led many of the nation's legislative bodies to engage in rampant race-based districting in contravention of their own guidelines. This round, similar pressure may be backed by an equally unfounded claim that section 2 requires jurisdictions to adopt districts for every geographically compact minority. A correct statement of the law is that, if the legislature chooses, it may adopt race-based districts—if it uses race only to the extent necessary to avoid a violation of section 2, for which there is a strong basis in evidence to believe otherwise would exist.⁷⁷

To determine potential section 2 liability is no small feat. Regardless of whether the courts apply a checklist approach or a functional analysis to determine dilution, the inquiry is fact-intensive and often requires days of expert and lay testimony for even a small municipality. No doubt in light of the impracticality of such an undertaking for legislators and others engaged in redistricting, the Supreme Court has indicated that a full totality of the circumstances analysis is not required. It is sufficient to protect the jurisdiction from *Shaw* claims if its creation of race-based districts to avoid section 2 liability is based on strong evidence that the three *Gingles* preconditions are present. While the jurisdiction must be correct in its interpretation of the law, it need only be reasonable as to the factual predicate for its action.

An evaluation for possible section 2 liability should begin with the first precondition, the one which is most objective and most easily applied. If, in fact, the state's draft plan already had made routine accommodations for black incumbents, and if subsequent adjustments were made as feasible to accommodate black communities of interest, it is unlikely that there would be many additional compact minority groups not already contained within districts where they can elect candidates of their choice.

If there are such groups, and if different districts can be drawn to accommodate them, while still respecting the state's traditional districting standards, the state may make the change with little risk that "strict scrutiny" will be triggered thereby.⁷⁸ The risk of a

77. The Court "assumed without deciding" that section 2 would supply a compelling state interest. *Vera*, 517 U.S. at 977. Justice O'Connor and the four more liberal justices would hold that it in fact is a compelling state interest. *Id.* at 990-993 (O'Connor, J., concurring); see also *id.* at 1003 (Stevens, J., dissenting).

78. "May make" is the correct description of the state's option. There is no requirement that a jurisdiction create majority-minority districts, even if it can do so

constitutional challenge increases, however, if race is the only basis for concluding that the group constitutes a community of interest, and if drawing a district for the group violates other traditional districting criteria.⁷⁹ If the legislature is inclined to draw a race-based district for a geographically compact minority that, under the circumstances, will violate standard districting criteria, the legislature should look for substantial evidence of the remaining two preconditions before proceeding.

3. Race-based Adjustments to Comply with Section 5 of the Voting Rights Act

a. The Retrogression Standard

For those jurisdictions subject to its provisions (covered jurisdictions), section 5 provides the most compelling basis for creating race-based districts. The burden imposed by section 5 is, in most circumstances, seemingly relatively slight—the jurisdiction must not adopt a new districting plan that, when compared to the plan it replaces, is “retrogressive” of minorities’ ability to effectively exercise the electoral franchise.⁸⁰ In simple terms, to avoid retrogression, there must be as many districts in which blacks can elect candidates of their choice in the new districting plan as there were in the old plan, absent unusual circumstances. A covered jurisdiction is thus permitted to employ “race for race’s sake” in order to create black districts *if* necessary to avoid retrogression.

Obviously a critical question for covered jurisdictions is what constitutes a “black district” for purposes of measuring retrogression? Unfortunately, the Supreme Court has not provided a clear definition. Moreover, support for various definitions can be found in the Court’s decisions. In *Beer v. United States*, the origin of the retrogression standard, the Court spoke in terms of blacks being a

without violating standard districting criteria. Whether it would be *wise* to create the district prophylactically, even if other legitimate representational interests will suffer, requires further analysis. If creating a majority-minority district will be very disruptive of other representational interests, the jurisdiction should take a harder look at its potential liability under section 2, perhaps looking beyond the preconditions to the totality of the circumstances.

79. For example, it is a stretch of the community of interest concept to argue that black residents of a rural county and black residents of an urban neighborhood in a different county constitute a single community of interest, even if they reside in contiguous areas and are plausibly viewed as geographically compact.

80. *Beer v. United States*, 425 U.S. 130, 141 (1976).

"clear majority of a district's registered voters,"⁸¹ and also of blacks as "a majority of a district's population" in the plan that had been submitted for preclearance. Because the prior "benchmark" plan in *Beer* did not have any district satisfying either of these conditions, the Court found the new plan, which did, to be "ameliorative."⁸² In *Abrams v. Johnson*, the Court implied that a black district was one in which blacks constitute an actual majority of the population.⁸³ Dictum in *Vera*, however, can be read as supporting a conclusion that a black district is one in which a black candidate has in fact been elected.⁸⁴

As a practical matter, the important definition is the one the Justice Department—the entity to which a covered jurisdiction must submit its redistricting plan to obtain administrative preclearance—employs. Clearly, the Department is bound to follow the law as defined by the Supreme Court, but in the arguable absence of a clear judicial definition of a minority district, the Department may be emboldened to select any plausible measure that will permit it to find retrogression.⁸⁵ One commentator has observed that the Department's new terminology is the nebulous "black opportunity district"⁸⁶ a concept encompassing at least all alternatives mentioned above. It is entirely possible that the Department will, when it suits its purposes, use the "functional analysis" suggested by Grofman, Handley, and Lublin to define a black district.

When the Supreme Court is actually faced with defining a "black district" for purposes of measuring retrogression, I predict that it will adopt a "bright-line test"—perhaps concluding that a black district is any district in which blacks are the majority of the voting age population and any specific district in which a black support black

81. *Id.* at 141–42.

82. *Id.* at 141.

83. *Abrams v. Johnson*, 521 U.S. 74, 97–98 (1997).

84. *Bush v. Vera*, 517 U.S. 952, 983 (1996).

85. Some of the courts hearing affirmative racial gerrymandering cases were openly critical of the Department's coercing covered jurisdictions into creating majority-minority districts when there was no feasible argument that these districts were necessary to avoid retrogression. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 924–25 (1995); *Smith v. Beasley*, 946 F. Supp. 1174, 1188 (D.S.C. 1996); *Johnson v. Mortham*, 926 F. Supp. 1460, 1484 n.43 (N.D. Fla. 1996). See generally MAURICE CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST (2001) (providing exhaustive documentation of the Department's pushing jurisdictions to "maximize" the number of majority black districts in the redistricting following the 1990 census).

86. CUNNINGHAM, *supra* note 85, at 88. My personal prediction is that, consistent with its prior practices, the Department will look for any means to find retrogression if in the opinion of its analysts the jurisdiction feasibly can draw a plan more favorable to election of black candidates than the one submitted.

candidate has been elected, regardless of the actual percentage of the district's population that is black. Such a test would preserve both potential black control and demonstrated black influence. A more open-ended definition, such as one based on the district-by-district functional analysis suggested by the principal authors, provides virtually no guidance to covered jurisdictions, leaving them more than ever at the mercy of the Justice Department.⁸⁷

b. Must Retrogression Be Avoided at All Cost?

If, as is likely, the past decade of prosperity has resulted in substantial numbers of minorities moving away from historically black neighborhoods, jurisdictions may have genuine difficulty maintaining their existing number of black districts. Moreover, jurisdictions operating under post-1990 districts that were wildly gerrymandered to make them majority black could face even greater difficulty. The Supreme Court has not indicated whether these jurisdictions must ignore, or further ignore, their standard districting criteria to avoid retrogression.⁸⁸ The *Shaw* line of cases recognized "compliance with section 5" as a justification for the use of race. The cases hold, however, that to survive "strict scrutiny," race based actions undertaken to comply with section 5 must be based on a correct understanding of the preclearance requirements.⁸⁹ The

87. A test that recognizes a district where black voters have actually elected a black candidate as a "black district"—with the consequence that the existing black percentage of the district itself would have to be preserved—is quite different from a test that defines a "black district" as every district which an open-ended functional analysis suggests *might* someday elect a black. Using this latter test, a jurisdiction with, say, two 48% black voting age population districts, and two 45% black voting age population districts (none of which had actually elected a black candidate, but *might*, according to a "functional analysis"), would be required to produce four districts with similar black populations, but these new districts would not necessarily have to be modifications of the old districts.

88. The Justice Department has provided its answer, however. In guidelines concerning redistricting and retrogression, released January 18, 2001, the Justice Department indicates that, unless the existing districting plan actually has been found to be unconstitutional under the principles of *Shaw v. Reno*, it will evaluate the new redistricting plan by comparing it to the existing plan, without considering the possible unconstitutionality of the existing plan. Moreover, a retrogressive plan will not be precleared if a less retrogressive plan can be created, even if the less retrogressive plan has total deviations from population equality of up to 10%, and even if the jurisdiction must depart from some of its districting standards to accomplish non-retrogression. Moreover, incumbency protection and preservation of partisan balance must also yield. See 66 Fed. Reg. 5412 (Jan. 18, 2001). It remains to be seen whether the Department's position will accomplish its apparent goal of freezing in place a number of minority districts that were created only because it used its preclearance authority to coerce covered jurisdictions to engaged in unconstitutional gerrymandering. See the discussion of the courts' condemnation of this practice, *supra* note 85.

89. See *Miller*, 515 U.S. at 922.

Supreme Court has not had an occasion to decide whether section 5 in fact requires any and all manner of gerrymandering to create black districts if retrogression cannot otherwise be avoided.⁹⁰

Grofman, Handley, and Lublin's "functionally effective black district" is perhaps more attractive as a substitute for an actual black majority district when the jurisdiction faces retrogression that is unavoidable because of population shifts over the past decade. Unlike section 2, section 5's anti-retrogression mandate is not dependent upon proof that white bloc voting prevents the election of candidates favored by the minority. Rather, section 5 affects a prophylactic freezing in place of the minority's existing ability to control electoral outcomes, perchance a lessening of its control might result in loss of influence. But when loss of influence (as measured by the number of black districts) appears inevitable, substituting a greater number of districts in which blacks are not a majority, but nevertheless retain their ability to elect candidates of their choice, better advances the freezing principle than would retaining a lesser number of actual black majority districts.

A covered jurisdiction faces an obvious dilemma if it is unable to satisfy the Department's requirements for preclearance without engaging in significant racial gerrymandering. There is no appeal from the Department's decision denying preclearance. A covered jurisdiction's statutory alternative to administrative preclearance is a declaratory judgment action in the United States District Court for the District of Columbia,⁹¹ a time-consuming, expensive, and often

90. Language in two of the Supreme Court's post-*Shaw* decisions suggests that the non-retrogression standard may have to be modified in situations where the existing number of minority districts cannot be maintained without extreme gerrymandering. In *Bush v. Vera*, 517 U.S. 952 (1996), Texas attempted to justify its non-standard majority African-American district as necessary to avoid retrogression because the group's portion of the electorate had declined since the last census. The Court rejected the district for other reasons, but noted in response to this particular argument that "[n]on retrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's opportunity to elect representative of its choice not be diminished, directly or indirectly, by the State's action." *Id.* at 1963. Further support comes from similar comments (also dicta) in *Abrams v. Johnson*, 521 U.S. 74 (1997). *Abrams* involved a court-drawn congressional districting plan for Georgia, which contained only one majority black district. The lower court failed to include a second such district because it was not possible to do so without subjugation of the state's other districting criteria to race. *Id.* at 91. The Supreme Court upheld the lower court's plan, but in a manner which made it unnecessary actually to decide whether gerrymandering was permissible in order to avoid retrogression. *Id.* at 90. The Court did, however, voice approval of the lower court's conclusion that a second African-American district could not be created consistent with the constitution. *Id.* at 91.

91. Voting Rights Act of 1965, § 5, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973c (1994)).

politically difficult choice. One alternative is to do nothing, which ultimately will lead to a local federal court's imposition of its own plan on the jurisdiction. Finally, it can acquiesce in the Department's demands to engage in further race-based districting, but in so doing, create the risk that the precleared plan will subsequently be invalidated on *Shaw* grounds.

The ultimate solution to this problem is for the Justice Department not to adopt an unreasonable interpretation of the Supreme Court's preclearance standards. Perhaps with a new administration, policy-makers in the Justice Department will reconsider the propriety of the nation's law enforcement agency avoiding the mandates of the Supreme Court, arguably disingenuously.⁹² In the meantime, after the financially and politically expensive experiences of jurisdictions such as North Carolina, Georgia, and Texas, which elected to acquiesce, covered jurisdictions may want to reevaluate the option of judicial preclearance.

CONCLUSION

Grofman, Handley, and Lublin's exploration of the factors that impact how black a district must be to elect a black candidate predictably is an important step toward a more politically functional analysis of this issue. Ultimately, however, the first question is not the optimal, or even minimal, circumstances for electing black candidates, but rather is whether black candidates lose on account of race. On this point, much of the principal authors' analysis suggests that black candidates often win and lose for reasons that are consistent with the normal operation of the political process. In my Response, I have argued that a more qualitative analysis might reveal that losing for political reasons, rather than racial ones, is the norm for black candidates today—a distinction that is critical when courts consider racial vote dilution claims and legislators contemplate using race to create districts.

The reader should be cautioned not to be misled by the fact that the Principal Article and my Response focused on the election of

92. Note, however, the Department adopted the "maximization of black districts" principle during the last Bush administration. Maurice Cunningham opines that the Department's Voting Section is much demoralized after a decade of defeats at the hand of the Supreme Court's conservative majority. Indeed, he is concerned that the Voting Section's lawyers may be too cautious in the future in doing their jobs. CUNNINGHAM, *supra* note 85, at 155. On this point, I must disagree. The Department's recent notice concerning guidance for redistricting suggests to me that the Voting Section will continue to pressure jurisdictions to "maximize" black electoral opportunities. See *supra* note 88. It will just do so less blatantly, probably by creatively defining "retrogression."

black candidates. Before the last round of redistrictings, legislators were told that the Voting Rights Act required them to create as many majority black districts as physically possible. That advice was incorrect and resulted in endless, expensive, and divisive litigation. I see in the Principal Article the seeds of yet another round of bad advice. This time legislators will be advised that the Voting Rights Act requires jurisdictions to create as many districts as feasible that can be counted on to elect a black candidate. The Constitution, however, imposes strict limits on the states' intentional assignment of citizens to districts on the basis of race, no matter what percentage of the districts' electorate those so assigned constitute.

The states' safer course of action is to create districts using race neutral criteria—criteria that are sufficiently flexible to permit each jurisdiction to achieve most of its interests, including preserving black incumbents and providing black communities with a chance to elect candidates of their choice. Only then should it consider whether some use of race is necessary to avoid potential liability under the Voting Rights Act.